

No Apology Until Abolition: Redressing The Ongoing Atrocity of Slavery

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I. INTRODUCTION

“There is one kind of prison where the man is behind bars, and everything that he desires is outside; and there is another kind where the things are behind the bars, and the man is outside.”

— UPTON SINCLAIR, *The Jungle*¹

There are currently more Black adults under correctional control than there were enslaved at the height of slavery.² Despite Black Americans making up only 12% of the domestic population, states imprison them at more than five times the rate of White Americans.³ In California, the ratio is even higher: the “Black/white disparity [is] larger than 9:1.”⁴ Although many White Americans are also imprisoned, Michelle Alexander in *The New Jim Crow* argues that these White prisoners are “collateral damage” to mask a racialized prison-industrial complex (PIC)—with mass incarceration as the main feature.⁵

In 1865, after decades of activism by the abolitionist movement, the United States ratified the Thirteenth Amendment abolishing slavery “except as a punishment for a crime.”⁶ While the PIC is not as overtly brutal as slavery nor as conspicuous as Jim Crow—in part because it is largely concealed from the public, especially with many prisons, even in California, located in remote, rural areas⁷—it is arguably a continuation of both atrocities.

Law enforcement has been used as a tool to control Black Americans long before emancipation. The South mythologized Black violence and organized “slave patrols” to catch runaway enslaved people and to terrorize free Black residents.⁸ Today, the mythology of Black lawlessness, which

1. UPTON SINCLAIR, *THE JUNGLE* 337 (1906).

2. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 180 (rev. ed. 2012) (including prison, jail, probation, and parole under correctional control).

3. See John Gramlich, *Black Imprisonment Rate in the U.S. has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> [https://perma.cc/D4RC-XU75]. These are the recent figures after a 34% decline since 2006. *Id.*

4. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT’G PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/> [https://perma.cc/9RTU-L8LW].

5. ALEXANDER, *supra* note 2, at 205.

6. U.S. CONST. amend. XIII, § 1.

7. See, e.g., ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 14 (2003) (citing Ruth Wilson Gilmore, *Globalisation and US Prison Growth: From Military Keynesianism to Post-Keynesian Militarism*, 40 RACE & CLASS, Mar. 1999, at 171, 184).

8. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 20–21 (2019) (citations omitted).

politicians have used to stoke fear and rage among White Americans,⁹ has led to an unprecedented rate of Black incarceration.¹⁰

The Interim Report issued by the California Task Force to Study and Develop Reparation Proposals for African Americans (Task Force) has a section on the criminal system.¹¹ Unfortunately, the proposed reparations are vague and non-transformative, such as “eliminat[ing] both implicit and explicit bias in the criminal justice system.”¹² These reparations would require *more* funding for law enforcement, criminal system administrators, and oversight groups,¹³ further enriching corporations that already benefit from mass incarceration.¹⁴ While the report notably does request more funding for mental healthcare and community services,¹⁵ it largely ignores the profit and social control motives behind mass incarceration, police militarization, and other conditions that sustain the PIC.¹⁶ The criminal system as we know it cannot be reformed; it must be abolished so that we may create something new—a system of care that renders the current punishment system obsolete. Abolition would eliminate police brutality, felony disenfranchisement, and capital punishment. This, in turn, would increase funding for community support initiatives and, ultimately, the *opportunity* to achieve racial equity for the very first time in this country.

Part II of this Article demonstrates that mass incarceration is Jim Crow by another name.¹⁷ It addresses the contention that incarcerated Black Americans are not innocent like the enslaved or the victims of Jim Crow. Part III explains how racism gave rise to the PIC, a system that not only incarcerates Black Americans at disproportionate rates but also exploits prison labor to boost billion-dollar industries that rely on such labor.

9. See Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER’S MAG., Apr. 2016, at 22, 22.

10. *United States Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html> [<https://perma.cc/QMJ7-FNQN>].

11. See CAL. TASK FORCE TO STUDY & DEV. REPARATION PROPOSALS FOR AFR. AMS., INTERIM REPORT 23 (2022) [hereinafter INTERIM REPORT].

12. *Id.*

13. See *id.*

14. See DAVIS, *supra* note 7, at 16 (“[C]orporations associated with the punishment industry reap profits from the system that manages prisoners and acquire a clear stake in the continued growth of prison populations.”).

15. INTERIM REPORT, *supra* note 11, at 23–24.

16. See *id.*

17. See generally ALEXANDER, *supra* note 2, at 2 (“As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.”).

Many formerly incarcerated individuals—again, disproportionately Black—are stripped of their freedom to vote, receive public benefits, and pursue economic security in the job market—a deprivation of resources that leads to our high rates of recidivism compared to the rest of the world.¹⁸ Black recidivism is predictably higher than White recidivism in the United States.¹⁹ Many conservatives point to internal factors as the cause of racial disparities like these.²⁰ However, this claim is undercut by the fact that “post-release employment and level of education were the two most influential predictors to recidivism among ex-prisoners, regardless of race.”²¹

A major principle of reparative discourse is that the atrocity must end before reparations, or any other form of redress, are paid.²² Part IV explores ending the PIC atrocity through abolition. Part IV details what abolition might look like, keeping in mind that there is no single unified vision of abolition. There is no tension between fighting for abolition and not knowing what exactly the result will look like, for each local community has different needs and priorities. As abolitionist icon Angela Davis often emphasizes, abolition requires a complete reframing of our social organization—instead of relying on law enforcement and punitive systems, prioritizing community resources and care.²³ Abolition must end prior to or at the same time reparations are issued. Part V discusses why. Lastly, Part VI illustrates the kinds of reparations that could ultimately lead to racial equity.

18. Liz Benecchi, *Recidivism Imprisons American Progress*, HARV. POL. REV. (Aug. 8, 2021), <https://harvardpolitics.com/recidivism-american-progress/> [<https://perma.cc/8MV5-6Z4P>] (“America’s recidivism crisis is far more alarming than any other democratic country in a similar economic bracket.”).

19. Susan Klinker Lockwood et al., *Racial Disparities and Similarities in Post-Release Recidivism and Employment Among Ex-Prisoners with a Different Level of Education*, 2 J. PRISON EDUC. & REENTRY 16, 17 (2015).

20. See, e.g., *id.* (“African American ex-prisoners would likely have a higher recidivism rate than Caucasian ex-prisoners because they would often return to neighborhoods saturated with poverty, high unemployment, and crime.”); Larry Alexander, *Michael Perry and Disproportionate Racial Impact*, 23 J. CONTEMP. LEGAL ISSUES 469, 483 (2022) (“The real impediment to the advancement of poor blacks—and everyone knows this, regardless of whether they admit it—is the cultural factors that have produced family disintegration, which in turn portends poor educational achievement, crime, and poverty.”).

21. *Id.* at 16.

22. See Roy L. Brooks, *Postconflict Justice in the Aftermath of Modern Slavery*, 46 GEO. WASH. INT’L L. REV. 243, 252 (2014) (explaining that criminal and civil redress provide “redress efforts in the aftermath of an atrocity”).

23. See DAVIS, *supra* note 7, at 105–15 (discussing alternatives to the United States’ current system of incarceration).

II. MYTHOLOGIZING BLACK CRIMINALITY

"The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and Black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."

— JOHN EHRLICHMAN, Domestic Policy Chief
to President Richard Nixon²⁴

By the time President Nixon took office in 1969, the Civil Rights Movement had accomplished numerous victories in the fight for racial equality—notably the Civil Rights Act of 1964 and the Voting Rights Act of 1967.²⁵ However, 1968 had been a tumultuous year for the country, especially for racial and economic justice activists: Martin Luther King Jr. was assassinated in April, progressive candidate Robert F. Kennedy was assassinated in June, and the Vietnam conflict and draft had further divided the country even past racial lines.²⁶ In response to the violent clashes between police and civilians leading up to the 1968 Presidential Election, President Lyndon B. Johnson launched the “War on Crime.” The Democratic administration deployed militarized police forces into predominantly Black neighborhoods and formed the Kerner Commission, which was tasked with combating the “disorder”—otherwise known as protests, largely prevalent in poor and majority-minority communities—and preventing such “riots” in the future.²⁷ President Nixon carried the torch and ran on a campaign of “law and order”—now a known racist dog

24. Baum, *supra* note 9 (statement of John Ehrlichman).

25. *Milestones of the Civil Rights Movement*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/eyesontheprize-milestones-civil-rights-movement/> [https://perma.cc/CB4P-46Z7].

26. See Richard D. Kahlenberg, *The Inclusive Populism of Robert F. Kennedy*, CENTURY FOUND. (Mar. 16, 2018), <https://tcf.org/content/report/inclusive-populism-robert-f-kennedy/> [https://perma.cc/A3EG-L7HK].

27. Katrina Feldkamp & S. Rebecca Neusteter, *The Little Known, Racist History of the 911 Emergency Call System*, IN THESE TIMES (Jan. 26, 2021), <https://inthesetimes.com/article/911-emergency-service-racist-history-civil-rights> [https://perma.cc/3KUL-6JMG].

whistle²⁸—despite much of the violence occurring as a direct result of police brutality.

President Nixon’s administration figured out a more effective way to disrupt both civil rights and anti-war organizers: The infamous War on Drugs. *Terry v. Ohio* had already made stop-and-frisk permissible with “articulable suspicion” even without probable cause,²⁹ thus opening the door to racist police practices with little accountability or oversight.³⁰ *Schneckloth v. Bustamonte* and *Atwater v. City of Lago Vista* further expanded police authority to target Black folks for incarceration by broadening the scope of “voluntary” consent to search and permitting warrantless arrests for minor offenses.³¹ Today, evidence shows that Black Americans are targeted more than White Americans: even though the two groups use and sell drugs at similar rates,³² Black Americans are up to four times more likely to be arrested for it—depending on the state.³³

28. Beth Schwartzapfel, *What Trump Really Means When He Tweets “LAW & ORDER!!!,”* THE MARSHALL PROJECT (Oct. 7, 2020, 4:40 PM), <https://www.themarshallproject.org/2020/10/07/what-trump-really-means-when-he-tweets-law-order> [<https://perma.cc/G4R7-2W2Z>] (“At the apex of the civil rights movement, as White voters saw the familiar social order attacked and upended, Goldwater and other conservative politicians needed a way to tap into these voters’ fears without appearing to talk about race, say political scientists and historians. ‘Law and order’ was ‘a strategy for reaching suburban voters without having to say the ugly part out loud,’ says Leah Wright-Rigueur, a political historian and public policy professor at Harvard University.”).

29. *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring).

30. ALEXANDER, *supra* note 2, at 63. Although many attribute “tough-on-crime” tactics like stop-and-frisk, or *Terry* stops, to the overall decrease in crime we have enjoyed since the new millennium, the National Academy of Sciences concluded that “higher incarceration rates had a ‘modest’ effect on the decline [of crime].” Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, THE ATLANTIC (Apr. 15, 2016), <https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/> [<https://perma.cc/X3EX-JA3R>]. The Brennan Center for Justice found “a ‘modest, downward effect on crime in the 1990s, likely 0 to 10 percent’ from increased hiring of police officers.” *Id.*

31. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973) (“Implicit . . . is the recognition that knowledge of a right to refuse is not a prerequisite of a voluntary consent.”); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”).

32. *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, HAMILTON PROJECT (Oct. 21, 2016), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice [<https://perma.cc/XP6A-EUZZ>].

33. See ALEXANDER, *supra* note 2, at 98 (citing HUM. RTS. WATCH, RACIAL DISPARITIES IN THE WAR ON DRUGS (2000), https://www.hrw.org/reports/2000/usa/Rce_drg00-04.htm#P284_59547 [<https://perma.cc/Y79Y-C977>] (“[T]he disparity in the rates at which black and white men over the age of eighteen are sent to prison on drug charges is nothing short of a national scandal. The drug offender admissions rate for black men ranges from 60 to a breathtaking 1,146 per 100,000 black men. The white rate, in contrast, begins at 6 and rises no higher than 139 per 100,000 white men.”)).

New strategies for lawful stops and arrests were further bolstered by the significant increase in funding for local police departments. For example, President Ronald Reagan “cut in half the number of specialists assigned to identify and prosecute white-collar criminals and . . . shift[ed] [law enforcement’s] attention to street crime, especially drug-law enforcement.”³⁴ President Reagan also increased federal law enforcement agencies’ budgets,³⁵ reduced the National Institute on Drug Abuse’s budget,³⁶ and strengthened the Byrne program, which gave—and still gives—grants to state and local police departments specifically for narcotics task forces.³⁷ Respectively, these initiatives bolstered law enforcement at the federal level, decreased funding for drug addiction treatment and prevention,³⁸ and monetarily incentivized police departments to focus on drug crimes, even nonviolent ones, over other crimes.³⁹

President George H.W. Bush continued his predecessors’ legacy of racist policing and incarceration through the Pentagon’s weaponry program—the militarization of the police—which began in large cities of 100,000 or more but has proliferated throughout the entire country since.⁴⁰ According to Michelle Alexander, “Each arrest, in theory, would net a given city or county about \$153 in state and federal funding. Non-drug-related policing brought no federal dollars, even for violent crime.”⁴¹ State and local police departments were thus impelled to target nonviolent drug offenders over persons committing violent crimes.⁴² Although the implementation of this grant resulted in a significantly higher increase in White arrests for drug sales than Black arrests, according to estimates, “for

34. *Id.* at 49 (citing KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 47 (1999)).

35. *Id.* (citing BECKETT, *supra* note 34, at 53).

36. *Id.* at 50 (citing BECKETT, *supra* note 34, at 53).

37. *Id.* at 73.

38. *See id.* at 50.

39. *Id.* at 73.

40. RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 168, 308 (2014) (“By the late 1980s . . . [n]early every city with a population of 100,000 or more either had a SWAT team or was well on its way to getting one.”) (“Value of surplus military gear received by Johnston, Rhode Island, from the Pentagon in 2010–2011: \$4.1 million. Population of Johnston, Rhode Island, in 2010: 28,769.”).

41. ALEXANDER, *supra* note 2, at 78.

42. *See id.* at 73 (“Participation in the drug war required a diversion of resources away from more serious crimes, such as murder, rape, grand theft, and violent assault—all of which were of far greater concern to most communities than illegal drug use.”).

every \$100 increase in Byrne Grant funding, arrests for drug trafficking increased by roughly 22 per 100,000 white residents and by 101 arrests per 100,000 black residents.”⁴³ In other words, Black residents were five times more likely to be arrested for drugs than White residents despite being outnumbered by White Americans four-to-one.

As it did during slavery, the federal government placed a monetary value on each body it apprehended during the War on Drugs.⁴⁴ While some of those bodies were White, they have been disproportionately Black.⁴⁵ Continuing in the tradition of the bipartisan effort to increase incarceration, President Bill Clinton’s “three strikes” law expanded state prisons and police forces, leading to the “largest increases in federal and state prison inmates of any president in American history.”⁴⁶ Similarly, today, many modern conservative commentators tend to attribute the disproportionate arrests and subsequent incarceration of Black Americans to inferior cultural values.⁴⁷

Much of this racialized law enforcement was predicated on the mythology that Black Americans commit more crimes than White Americans.⁴⁸ Black and White Americans use drugs at similar rates,⁴⁹ yet “traffic stops are . . . more frequent in the predominantly Black and poor sections of the city, [and] they also last longer, with a greater likelihood of removal from the vehicle, search, questioning and arrest.”⁵⁰ While the intentional over-

43. Robynn Cox & Jamein P. Cunningham, *Financing the War on Drugs: The Impact of Law Enforcement Grants on Racial Disparities in Drug Arrests* 24 (Univ. of S. Cal. Ctr. for Econ. & Soc. Rsch.-Schaeffer, Working Paper No. 2017-005, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035640 [<https://perma.cc/QLD9-ABLS>].

44. See Roberts, *supra* note 8, at 78 (“Each arrest, in theory, would net a given city or county \$153 in state and federal funding.”).

45. See ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 7–10, 17 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf [<https://perma.cc/R8SJ-K3M3>] (“Blacks are 3.73 times more likely than whites to be arrested for marijuana possession.”). In 2010, “nationwide the white arrest rate was 192 per 100,000 whites, and the black arrest was 716 per 100,000 blacks” for marijuana possession. *Id.* at 17.

46. ALEXANDER, *supra* note 2, at 56 (citing Just. Pol’y Inst., *Clinton Crime Agenda Ignores Proven Methods for Reducing Crime*, NOVEMBER COAL. (Apr. 14, 2008), <https://november.org/stayinfo/breaking08/ClintonCrime.html> [<https://perma.cc/5H53-FVCU>]).

47. See *supra* note 20.

48. See Roberts, *supra* note 8, at 27.

49. See *Rates of Drug Use and Sales, by Race*, *supra* note 32.

50. OKLA. ADVISORY COMM. TO THE U.S. COMM’N ON HUM. RTS., *RACIAL DISPARITIES IN POLICING* 6 (2021), <https://www.usccr.gov/files/2021/05-26-OK-SAC-Advisory-Memorandum-Racial-Disparities-in-Policing.pdf> [<https://perma.cc/ZWF4-P5NE>] (citing Brian Root, *Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma*, HUM. RTS. WATCH, <https://www.hrw.org/video-photos/interactive/2019/09/11/policing-poverty-and-racial-inequality-tulsa-oklahoma> [<https://perma.cc/RS7N-ZCZ6>]).

policing of poorer neighborhoods and under-policing of wealthier neighborhoods can partly explain this inconsistency:

Racial disparities in marijuana possession arrests exist regardless of county household income levels, and are greater in middle income and more affluent counties. In the counties with the 15 highest median household incomes (between \$85K–\$115K), Black[] [Americans] are two to eight times more likely to be arrested for marijuana possession than whites.⁵¹

A recent report from Catalyst California and the ACLU SoCal found that “sheriff patrols spend the vast majority of their time on-duty conducting racially based traffic stops. Particularly in the counties of [Los Angeles], San Diego, Riverside, and Sacramento, law enforcement spent almost 90% of their time targeting Black [Californians] during pretextual stops,” and “Black drivers were 4.7 times more likely to be stopped by sheriff’s deputies than White drivers.”⁵²

The federal government has gone even further than arresting and incarcerating Black Americans at higher rates than their White peers: civil asset forfeiture is essentially legalized theft by police of civilian property—whether they have even been charged with a crime or not.⁵³ The practice was legalized in 1970 with the Comprehensive Drug Abuse Prevention and Control Act, which permitted law enforcement to seize illegal drugs, including equipment and transport vehicles used for the purpose of carrying out a drug crime.⁵⁴ However, in 1984, Congress amended the statute to include “any and all” property in connection with a drug crime, and law enforcement could retain 80% of the assets’ value.⁵⁵ The Civil Asset Forfeiture Reform Act was passed in 2000, but because an innocent person not charged with a crime is not entitled to counsel, unlike a person who has been charged and is so entitled under the Sixth Amendment,⁵⁶ “up to 90% of forfeiture cases in some jurisdictions are not challenged.”⁵⁷ In fact, from 2000 to 2020, “states and the federal government have

51. ACLU, *supra* note 45, at 17.

52. Always Film the Police (@alwaysfilmthepolice), INSTAGRAM (Nov. 14, 2022), <https://www.instagram.com/p/Ck8f3O0JiTC/?igshid=NTU1Mzc3ZGM%3D> [<https://perma.cc/628L-PR5R>].

53. See Mary Murphy, Note, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. ON C.L. & C.R. 77, 79 (2010).

54. ALEXANDER, *supra* note 2, at 78.

55. *Id.* at 78–79.

56. U.S. CONST. amend. VI.

57. ALEXANDER, *supra* note 2, at 83.

[seized] at least \$68.8 billion Not all states provided full data, so this figure drastically undercounts property taken from people through forfeiture.”⁵⁸

While there are both constitutional and corruption arguments against civil asset forfeiture—that essentially “the property is charged with a crime,” the standard of proof is low, and the potential for abuse is high⁵⁹—there is also the concern that racial disparities exist in its application. Although on its face, civil asset forfeiture seems to impact more White communities than minority-majority communities, at least in terms of dollars,⁶⁰ a Black victim of this tactic is statistically less likely to regain their assets than a White victim because of the barriers to representation.⁶¹ While reforms that heighten the burden of proof would help address the constitutionality of civil asset forfeiture, these reforms would likely do little to protect Black Americans generally because they are already convicted of crimes disproportionately and given longer sentences than White Americans.⁶² Both political parties enacted the policies discussed above in response to the alleged end to Jim Crow and subsequent urge to maintain White hegemony.

58. J. Justin Wilson, *New Report Finds Civil Forfeiture Rakes in Billions Each Year, Does Not Fight Crime*, INST. FOR JUST. (Dec. 15, 2020), <https://ij.org/press-release/new-report-finds-civil-forfeiture-rakes-in-billions-each-year-does-not-fight-crime-2/> [https://perma.cc/58YP-UXNH].

59. Murphy, *supra* note 53, at 88.

60. *See id.* at 93–94 (citing Ronald Helms & S.E. Costanza, *Race, Politics and Drug Law Enforcement: An Analysis of Civil Asset Forfeiture Patterns Across U.S. Counties*, 19 POLICING & SOC’Y 1, 13 (2009)) (“[A 2009] study found that in areas of large Black populations, the amount of forfeiture dollars gathered by law enforcement agencies per drug arrest is smaller than in areas of fewer minority residents. The study pointed to theories that law enforcement agencies use a ‘more formal and punitive approach in communities with larger [B]lack populations’ than an ‘alternative mechanism’ such as civil asset forfeiture.” (second alteration in original)).

61. *Id.* at 96 (“Racial minorities may have more difficulty effectively petitioning for their property after it has been seized by highway police officers because they may be less likely than whites to have access to defense attorneys.”).

62. *See* Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, WASH. POST (Nov. 16, 2017, 1:33 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/> [https://perma.cc/BQZ6-8ZW4].

III. THE PRISON-INDUSTRIAL COMPLEX

“[A]t the height of Southern Redemption, the court put to rest any notion that convicts were legally distinguishable from slaves: ‘For a time, during his service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being a slave of the State. He is civiliter mortuus; and his estate, if he has any, is administered like that of a dead man.’”

— MICHELLE ALEXANDER⁶³

A. *The Origin of the Penitentiary*

The penitentiary was originally formulated by eighteenth-century Quakers as the humane response to capital and corporal punishment; they emphasized rehabilitation and—literally—penance for crimes.⁶⁴ While the penitentiary was presented as a progressive reform, Charles Dickens described his observations of the Eastern Penitentiary in 1842:

In its intention I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing.⁶⁵

And while the penitentiary may have been conceptualized without racist enforcement in mind, following the Civil War, it seamlessly transformed into a racist tool of oppression.⁶⁶ Much like the disproportionately increased police and carceral response to the success of the Civil Rights Movement observed in Part II, the racist backlash to the abolition of chattel slavery was swift and expansive. Prior to emancipation, for example, “ninety-nine percent of prisoners in Alabama’s penitentiaries were white . . . [but]

63. ALEXANDER, *supra* note 2, at 31 (quoting *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871)).

64. See DAVIS, *supra* note 7, at 22, 26 (quoting ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 84 (1992)).

65. *Id.* at 48 (quoting CHARLES DICKENS, 27 *THE WORKS OF CHARLES DICKENS, AMERICAN NOTES* 119–20 (1900)).

66. See *id.* at 29 (“In the immediate aftermath of slavery, the southern states hastened to develop a criminal justice system that could legally restrict the possibilities of freedom for newly released slaves.”).

within a short period of time, the overwhelming majority of Alabama's convicts were black."⁶⁷

Adam Hirsch has extensively compared the glaring similarities between chattel slavery and what the penitentiary came to be, particularly when considering the Slave Codes, which "proscribed a range of actions—such as vagrancy, absence from work, breach of job contracts, the possession of firearms, and insulting gestures or acts—[which] were criminalized only when the person charged was black."⁶⁸ Douglas Blackmon attributes the period between the Civil War and World War II, or "slavery by another name," to these Codes, which "tr[ie]d to put African Americans back into a position as close to slavery as they possibly could."⁶⁹ This was the beginning of the construction of the modern PIC. It began with a convict lease system and county chain gangs—in which the government could maintain its control over Black labor⁷⁰ in part due to White Americans' hesitancy to pay for labor that was previously free⁷¹ and desire for "political revenge" and "racial retribution."⁷²

B. The Prison-Industrial Complex Today

Today, incarcerated people generate \$2 billion in goods and \$9 billion in prison maintenance services every year despite being paid pennies on the dollar.⁷³ Prison labor is essential to California's wildfire efforts—comprising approximately one-third of California's entire firefighting force—although these incarcerated firefighters earn less than the federal hourly minimum wage per day, and most are prohibited from obtaining work at fire departments post-incarceration.⁷⁴ The ties between corporations and

67. *Id.* (citing MARY ANN CURTIN, *BLACK PRISONERS AND THEIR WORLD, ALABAMA, 1865-1900*, at 6 (2000)).

68. *Id.* at 28 (citing HIRSCH, *supra* note 64, at 74–75).

69. *Slavery By Another Name* (PBS television broadcast Feb. 12, 2012); *see also* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II*, at 10 (2008) ("The slavery that survived long past emancipation was an offense permitted by the nation, perpetrated across an enormous region over many years and involving thousands of extraordinary characters.").

70. *See* DAVIS, *supra* note 7, at 31.

71. *Slavery by Another Name*, *supra* note 69.

72. DAVIS, *supra* note 7, at 34 (quoting CURTIN, *supra* note 67, at 44).

73. ACLU & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS* 6 (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf [<https://perma.cc/K5XX-2ZVQ>].

74. *See* Francine Uenuma, *The History of California's Inmate Firefighter Program*, SMITHSONIAN MAG. (Sept. 1, 2022), <https://www.smithsonianmag.com/history/the-history-of-californias-inmate-firefighter-program-180980662/#:~:text=The%20all%2Dinmate%20>

the prison industry tightened even further following World War II, when “medical experimentation on captive populations helped to hasten the development of the pharmaceutical industry.”⁷⁵ There is a paucity of industries that have not benefited from the increasing supply of prison labor or the bodies that have been discarded by the criminal system.⁷⁶ Civil Rights lawyer and Civil Rights Corps founder Alec Karakatsanis argues that the reason this integration between capitalism and exploitation in the criminal system goes largely unnoticed by the general public is “it is easier to police and prosecute populations whose pain and inconvenience are not part of the social conscience and who lack economic capital”⁷⁷—that is, Black Americans.

Cash bail constitutes another arm of the profitable criminal system; the United States spends \$38 million each day to imprison legally innocent people pretrial.⁷⁸ There are facilities dedicated almost exclusively to the pretrial detention of millions of people each year.⁷⁹ For instance, the facilities on Rikers Island hold approximately 5,500 people, over 90% of whom are Black or Brown, and about 90% of whom have not been convicted

crews%20live,when%20actively%20fighting%20a%20fire [https://perma.cc/5W5Q-L97M]; Bob Egelko, *Appeals Court Upholds California Rules Preventing Many Former Inmates from Becoming Firefighters*, S.F. CHRON. (June 12, 2022, 3:51 PM), https://www.sfchronicle.com/bayarea/article/Appeals-court-upholds-California-rules-preventing-17231868.php [https://perma.cc/4DER-VNCU].

75. DAVIS, *supra* note 7, at 89 (citing ALLEN M. HORNBLUM, *ACRES OF SKIN: HUMAN EXPERIMENTS AT HOLMESBURG PRISON* xvi (1998)).

76. See ACLU & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 73, at 41–46 (enumerating corporations across agriculture, manufacturing, textiles, recreation, transportation, and electronics which “contract[ed] with correctional institutions to employ prison workers”).

77. ALEC KARAKATSANIS, *USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM* 64 (2019) (citing Nicholas K. Peart, Opinion, *Why is the N.Y.P.D. After Me?*, N.Y. TIMES (Dec. 17, 2011), https://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html [https://perma.cc/76DQ-FR7M]).

78. *Facts on Money Bail*, CIV. RTS. CORPS, https://civilrightscorps.org/wp-content/uploads/2021/10/9i2UrGPoQJeM6uCmG5VZ.pdf [https://perma.cc/X6N3-LFR8] (citing Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/4LCH-WVP4]).

79. See *id.* (citing TODD D. MINTON & ZHEN ZENG, *JAIL INMATES AT MIDYEAR 2014*, at 1 (2015), https://bjs.ojp.gov/content/pub/pdf/jim14.pdf [https://perma.cc/NE3D-5RXG]) (“Since 2000, pretrial detention has driven 95% of growth in the United States jail population.”).

of a crime—many simply cannot afford their bail.⁸⁰ The Campaign to Close Rikers has called for reducing the population to 3,300—something that would save taxpayers \$1.8 billion per year.⁸¹ Although former mayor, Bill de Blasio’s administration promised to comply with this demand by 2027, the plan has been repeatedly delayed.⁸² City officials do not want to save \$1.8 billion per year, nor does they want to detain 2,200 fewer people—which would dramatically mitigate the dire health and sanitary conditions that have marred Rikers Island for years, resulting in multiple deaths annually.⁸³ Instead, the city wants to continue to imprison Black Americans, who are on the margins of society and are therefore “dispensable,” exploit their prison labor to reap far more profit than it costs to imprison them, and maintain the mythology of Black criminality.⁸⁴

Perhaps the most persuasive argument against cash bail is that it perpetuates the two-tiered justice system: those who can afford bail and those who cannot, regardless of guilt or innocence. Those who cannot pay risk losing their jobs, housing, and even their children.⁸⁵ When the government detains defendants pretrial, Black families are torn apart, Black children are forced into the foster system, which increases their

80. See *One Year Later on Rikers*, CTR. FOR JUST. INNOVATION (July 29, 2021), <https://www.innovatingjustice.org/about/announcements/one-year-later-rikers#:~:text=About%20nine%20out%20of%2010,conditions%20as%20they%20await%20trial> [https://perma.cc/UYX6-EXSC] (Olayemi Olurin, Opinion, *Why is Rikers Island Still Open and Why Won't NYC Mayor Eric Adams Accept the Help He Needs?*, NEWSONE (Sept. 27, 2022), <https://newsone.com/4417432/why-is-rikers-island-still-open/> [https://perma.cc/ZTN7-AMB3]).

81. *Id.*

82. See Kimberly Gonzalez, Sara Dorn & Sahalie Donaldson, *A Timeline on the Closure of Rikers Island* (Mar. 14, 2023), <https://www.cityandstateny.com/politics/2023/03/timeline-closure-rikers-island/376662/> [https://perma.cc/5RVZ-KHJM] (“Even amid renewed calls by New York City Council leaders to see Rikers Island shuttered by 2027, signs from Mayor Eric Adams’ administration cast some doubt on the likelihood of that happening on time.”).

83. See Olurin, *supra* note 80. After public backlash and growing support to close the facilities on Rikers Island, the New York City Department of Correction has decided to stop publicly reporting inmate deaths. See Ayana Harry, *NYC Department of Correction to No Longer Report Rikers Island Inmate Deaths to Public*, PIX 11 (June 2, 2023, 10:06 AM), [https://pix11.com/news/local-news/nyc-department-of-correction-to-no-longer-report-rikers-island-inmate-deaths-to-public/#:~:text=a%20search%20term=,NYC%20Department%20of%20Correction%20to%20no%20longer,Island%20inmate%20deaths%20to%20public&text=NEW%20YORK%20\(PIX11\)%20%E2%80%94%20New,their%20custody%20on%20Rikers%20Island](https://pix11.com/news/local-news/nyc-department-of-correction-to-no-longer-report-rikers-island-inmate-deaths-to-public/#:~:text=a%20search%20term=,NYC%20Department%20of%20Correction%20to%20no%20longer,Island%20inmate%20deaths%20to%20public&text=NEW%20YORK%20(PIX11)%20%E2%80%94%20New,their%20custody%20on%20Rikers%20Island) [perma.cc/FX4A-6G3E].

84. See generally DAVIS, *supra* note 7, at 84 (“[P]rison construction and the attendant drive to fill these new structures with human bodies have been driven by ideologies of racism and the pursuit of profit.”).

85. See *Facts on Money Bail*, *supra* note 78.

chances of poverty and homelessness,⁸⁶ and assets like homes and cars are seized, perhaps indefinitely.⁸⁷ Not only does this prevent Black families from accumulating generational wealth, but the societal costs are also significant: “[T]hree to four years post-bail hearing, pretrial detainees are 9.4% *less* likely to be formally employed”⁸⁸ versus the tens of thousands of dollars of net benefit per defendant released pretrial.⁸⁹ That means more taxpayer dollars are spent on unemployment benefits and welfare programs for individuals never convicted of a crime. When governments detain poor people pretrial, it costs people money, lives, and any semblance of morality.

Prosecutorial and judicial discretion also play an essential role in perpetuating the disparate rates of pretrial incarceration: not only are prosecutors “free to dismiss a case for any reason or no reason at all,”⁹⁰ they often have a monetary incentive to charge or overcharge individuals with fewer resources who usually take a plea bargain to avoid pretrial detention.⁹¹ In Virginia, for example, “[t]he more people a prosecutor charges with a felony and the more sentences they secure, the more state money their office receives.”⁹² And when self-proclaimed “progressive prosecutors” attempt to balance the scales, “they are [] in tension with the rest of their office and the institution.”⁹³ Nationwide, 97% of federal felony convictions

86. *Foster Care Facts*, CHILDS. L. CTR. OF CAL., <https://www.clccal.org/resources/foster-care-facts> [<https://perma.cc/XA4J-CZZV>].

87. See ALEXANDER, *supra* note 2, at 78–79.

88. *Facts on Money Bail*, *supra* note 78 (citing Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 204 (2018)).

89. See Dobbie, Golden & Yang, *supra* note 88, at 237.

90. ALEXANDER, *supra* note 2, at 87.

91. See Sam McCann, *In Virginia, Money—Not Justice—Drives Prosecution*, VERA (June 14, 2022), <https://www.vera.org/news/in-virginia-money-not-justice-drives-prosecution> [<https://perma.cc/7TX5-TRQ9>].

92. *Id.*

93. Olayemi Olurin, N.Y.C. Pub. Def., Speaker Event at the University of San Diego School of Law (Jan. 17, 2023), <https://drive.google.com/file/d/1kZt39YeXSL0zmsEUMkOIUIG7GrpCgxCX/view?usp=sharing> [<https://perma.cc/6YMK-3HU3>]. “The Federal Rules of Criminal Procedure and all their state counterpartys permit prosecutors to charge multiple offenses—officially known as “charge joinder”—by joining multiple counts of a crime upon a single defendant.” *Stacked: Where Criminal Charge Stacking Happens—And Where it Doesn’t*, 136 HARV. L. REV. 1390, 1392 (2023) (first citing FED. R. CRIM. P. 8(a); then citing Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1318 fig. I, n. 45; and then citing *id.* at 1309) (“The rules enable prosecutors to charge a criminal defendant by overlapping or duplicating offenses and then, after pressure

and 94% of state felony convictions are obtained through plea deals.⁹⁴ Because plea deals are quick and do not rely on a jury trial, it is easier for prosecutors to stack felony convictions.⁹⁵ Although “white-collar” crimes are often more serious and impactful than street crimes⁹⁶—for example, prosecutors rarely pursue wage-theft crimes that cost Americans billions of dollars every year⁹⁷—it is much more difficult for prosecutors to convict a powerful entity than it is a single mom who accidentally committed voter fraud.⁹⁸

Judicial discretion has also expanded through various means, including “an increase in the types of alternatives” in sentencing, an increase in the ways those alternatives can be combined, and more choices within certain sentencing alternatives.⁹⁹ In response to the racial disparities in sentencing, Congress passed the Sentencing Reform Act in 1984, which created mandatory sentencing guidelines.¹⁰⁰ However those guidelines were struck down in *United States v. Booker*, which granted federal judges more discretion in sentencing and led to greater sentencing disparities between Black and White defendants.¹⁰¹

on the defendant looms, agree to reduce the charges in number or in severity in exchange for a guilty plea.”).

94. Clark Neily, *Prisons are Packed Because Prosecutors are Coercing Plea Deals. And, Yes, It's Totally Legal*, CATO INST. (Aug. 8, 2019), <https://www.cato.org/commentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-totally-legal> [<https://perma.cc/WG6F-GKU9>].

95. *See id.*

96. *See generally* Pamela H. Bucy, *White Collar Crime and the Role of Defense Counsel*, 50 ALA. LAW. 226, 226–28 (1989) (noting the nature and increased severity of white-collar crime compared to that of street crime).

97. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 886 (2019).

98. For example, in 2020, Crystal Mason was convicted of voter fraud and received a five-year sentence even though her probation officer had not warned her that it was illegal for her to vote and had testified that it was not part of standard procedure to give her such a warning. *See* Amrit Cheng, *Crystal Mason Thought She Had the Right to Vote. Texas Sentenced Her to Five Years for Trying*, ACLU, <https://www.aclu.org/issues/voting-rights/fighting-voter-suppression/crystal-mason-thought-she-had-right-vote-texas> [<https://perma.cc/894S-5SBH>].

99. *See* Robert H. Vasoli, *Growth and Consequences of Judicial Discretion in Sentencing*, 40 NOTRE DAME L. REV. 404, 406 (1965).

100. Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 76 (2015).

101. *United States v. Booker*, 543 U.S. 220, 223 (2005) (“[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”); *see also* Ingraham, *supra* note 62 (“[G]iving judges more discretion in sentencing, as the *Booker* decision did in 2005, allows more racial bias to seep into the process. . . . A 2014 University of Michigan Law School study, for instance, found that all other factors being equal, black offenders were 75 percent more likely to face a charge carrying a mandatory

Prison gerrymandering is another tool in the toolbox of the PIC: in most states, incarcerated people are counted as residents of the county or city they are held in rather than where they reside outside of prison.¹⁰² The lines redrawn by the census each decade then favor mostly White, rural communities wherein those prison facilities are located rather than the more racially diverse communities from which those incarcerated came.¹⁰³ Not only does this allocate more resources to predominantly White conservative communities, but it also grants more Congressional representation to them, subsequently depriving regions with more Black and Brown residents of the democratic representation and public funding they deserve.¹⁰⁴

*C. Broader Consequences of Mass Incarceration and
How It Continues the Atrocity*

One in thirteen Black Americans has lost their voting rights due to felony disenfranchisement.¹⁰⁵ The rate of felony disenfranchisement of Black Americans is almost four times that of non-Black Americans, with the total of Americans disenfranchised by felony convictions exceeding 5 million.¹⁰⁶ Not only does felony disenfranchisement legally deprive hundreds of thousands of Black Americans of their ability to participate in democracy post-conviction, but also, in states like Florida, they must literally buy back their voting rights.¹⁰⁷ This policy rings back directly to poll taxes and literacy tests prevalent during Jim Crow.

minimum sentence than a white offender who committed the same crime.”); Yang, *supra* note 100.

102. See Garrett Fisher, Taylor King & Gabriella Limón, *Prison Gerrymandering Undermines Our Democracy*, BRENNAN CTR. FOR JUST. (Oct. 22, 2021), <https://www.brennancenter.org/our-work/research-reports/prison-gerrymandering-undermines-our-democracy> [https://perma.cc/4U3C-HVL3].

103. *Id.*

104. *Id.*

105. Jonathan Ben-Menachem, *Policing Can’t End Violence in the U.S., But Reparations Might*, CURRENT AFFS. (July 28, 2020), <https://www.currentaffairs.org/2020/07/policing-cant-end-violence-in-the-us-but-reparations-might> [https://perma.cc/5EXF-DKDP].

106. CHRISTOPHER UGGEN ET AL., LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 4, 8 (2020), <https://www.sentencingproject.org/app/uploads/2022/08/Locked-Out-2020.pdf> [https://perma.cc/A4L5-PJ7R].

107. See *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (Feb. 14, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida> [https://perma.cc/MDG2-JGTU] (“[I]n June 2019, Gov. Ron DeSantis signed Senate Bill 7066 into law, prohibiting returning citizens from voting

Additionally, the federal government imposes a “lifetime ban on eligibility for welfare and food stamps for anyone convicted of a felony drug offense—including simple possession of marijuana”—thanks to President Clinton’s Personal Responsibility and Work Opportunity Reconciliation Act.¹⁰⁸ As if the loss of job opportunities and governmental benefits do not set convicted felons back far enough, President Clinton “also made it easier for federally assisted public housing projects to exclude anyone with a criminal history.”¹⁰⁹

Without access to substantial resources—which Black Americans are statistically less likely to have than their White peers—Black Americans are more likely to be stopped by police, convicted of a crime, prevented from accessing basic needs post-incarceration, deprived of their right to vote after re-entry, and sent back to prison.¹¹⁰ But this disparate treatment at every level of the criminal system cannot be attributed to coincidence or to “Black culture”—which translates to inherent criminality or immorality in racist dog whistle terms.¹¹¹ Historically, the government has used law enforcement and incarceration in reaction to the fear that both our White hegemonic institutions as well as the majority-White general American public face each time Black people inch one step closer to racial equality.¹¹²

Since emancipation, this system of punishment has been used as a tool of Black oppression. Although its initial conception was virtuous, at best, the penitentiary was only ever seen as an alternative to the harshest corporal punishment imaginable—the death penalty, which is still carried out in many states. For these reasons, the “criminal injustice system,” as Karakatsanis calls it,¹¹³ cannot be reformed—the system *as we currently know it* must be abolished.

unless they pay off certain legal financial obligations (LFOs) imposed by a court pursuant to a felony conviction.”).

108. ALEXANDER, *supra* note 2, at 56–57.

109. *Id.* at 57. Although President Biden’s new federal marijuana conviction pardons appear likely to mitigate this, the majority of marijuana convictions are carried out by the state, not the federal government, and “no one is in federal prison solely for a marijuana conviction.” Lauren Egan, *Biden to Pardon Thousands Convicted of Marijuana Possession*, NBC NEWS (Oct. 6, 2022, 1:12 PM), <https://www.nbcnews.com/politics/biden-pardon-prior-federal-offenses-simple-marijuana-possession-rcna51088> [<https://perma.cc/DEQ7-586Q>].

110. *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> [<https://perma.cc/EZU7-ZQWH>].

111. See MICHAEL ERIC DYSON, REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM xiii (1993) (“[T]here exists an unfailing precedent to cast black culture in a distorted light and to view it through the prisms of racist stereotype or racial essentialism.”).

112. See *supra* Part II.

113. See KARAKATSANIS, *supra* note 77.

IV. ABOLITION

“When people, especially white people, consider a world without the police, they envision a society as violent as our current one, merely without law enforcement—and they shudder. As a society, we have been so indoctrinated with the idea that we solve problems by policing and caging people that many cannot imagine anything other than prisons and the police as solutions to violence and harm.”

— MARIAME KABA¹¹⁴

“Just as we hear calls today for more humane policing, people then called for a more humane slavery.”

— ANGELA DAVIS¹¹⁵

Contrary to arguments against it, abolition is not synonymous with “the purge”¹¹⁶—an anarchist, criminal free-for-all. The most commonly asked question in response to the proposition of abolition is: What does it look like? Before addressing that question, this Part will posit and examine a much more important question: Why abolition?

The United States incarcerates more people per capita than any other country.¹¹⁷ At \$81 billion per year, the United States outspends all others when it comes to incarceration.¹¹⁸ Despite these inflated police and prison budgets, the United States is nowhere near the safest country in the world.¹¹⁹ In fact, the countries with the lowest crime rates—generally Nordic and

114. Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/8D8V-JSTM>].

115. Angela Y. Davis, *Why Arguments Against Abolition Inevitably Fail*, MEDIUM (Oct. 6, 2020), <https://level.medium.com/why-arguments-against-abolition-inevitably-fail-991342b8d042> [<https://perma.cc/TJ7K-7TQF>].

116. See Noah Asimow & Pascal Sabino, *No, There Is No ‘Purge Law’ in Illinois. Here Are the Facts About Ending Cash Bail*, BLOCK CLUB CHI. (Sept. 14, 2022, 9:00 AM), <https://blockclubchicago.org/2022/09/14/no-there-is-no-purge-law-in-illinois-here-are-the-facts-about-ending-cash-bail/> [<https://perma.cc/5VDP-FATD>].

117. *United States Profile*, *supra* note 10.

118. Casey Kuhn, *The U.S. Spends Billions to Lock People Up, But Very Little to Help Them Once They’re Released*, PBS (Apr. 7, 2021, 5:18 PM), <https://www.pbs.org/newshour/economy/the-u-s-spends-billions-to-lock-people-up-but-very-little-to-help-them-once-theyre-released> [<https://perma.cc/8FPT-B4QT>]. Baltimore alone spends half a billion dollars per year on policing. *What Policing Costs*, VERA INST., <https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities> [<https://perma.cc/WQ3J-PTGA>].

119. See INST. FOR ECON. & PEACE, GLOBAL PEACE INDEX 2022: MEASURING PEACE IN A COMPLEX WORLD 92, 93 (2022), <https://www.economicsandpeace.org/wp-content/uploads/2022/06/GPI-2022-web.pdf> [<https://perma.cc/JV4Q-57GF>].

Western European nations—tend to have the lowest incarceration rates as well.¹²⁰ Any positive correlation between safety and incarceration has not yet been supported with evidence. Angela Davis has argued that there may exist a negative correlation between the two, stating, “Mass imprisonment generates profits as it devours social wealth, and thus it tends to reproduce the very conditions that lead people to prison.”¹²¹

Thus is the clear paradox of incarceration for safety: Prisons perpetuate more violence than they prevent.¹²² In addition to the aforementioned consequences of imprisonment on both individuals and families, particularly Black ones, the prison itself is a prosperous environment for violence.¹²³ Although distinct in many ways from chattel slavery, the “badges and incidents” of slavery¹²⁴ are abundantly clear in the imagery we have of modern prisons: sexual abuse of inmates of all genders—by both guards and other inmates—is rampant and usually committed with no consequence;¹²⁵ pregnant people are often shackled to their hospital bed while giving birth, after which their babies are promptly separated from them;¹²⁶ sick people are regularly denied essential, life-saving healthcare;¹²⁷ corrections officers torture and torment people;¹²⁸ suicide rates are high as even more people

120. See *id.* at 93; see also Doran Larson, *Why Scandinavian Prisons Are Superior*, THE ATLANTIC (Sept. 24, 2013), <https://www.theatlantic.com/international/archive/2013/09/why-scandinavian-prisons-are-superior/279949/> [<https://perma.cc/L7M8-PWBG>].

121. DAVIS, *supra* note 7, at 16–17.

122. See *id.* at 12 (“[T]he practice of mass incarceration . . . had little or no effect on official crime rates. In fact, the most obvious pattern was that larger prison populations led not to safer communities, but, rather, to even larger prison populations.”).

123. Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe> [<https://perma.cc/FB3P-4WEJ>].

124. The Civil Rights Cases, 109 U.S. 3, 21 (1883).

125. See DAVIS, *supra* note 7, at 77–83 (discussing the prevalence of sexual abuse in prisons); Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORR. 58, HEALTH CARE (2009) (discussing the impact of physical and sexual assault on male inmates).

126. See Jenn G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 VIRTUAL MENTOR 779, 781 (2013) (“After giving birth, most incarcerated mothers are allowed only 24 hours with their newborns in the hospital . . . and the mothers are returned to prison or jail.”).

127. Clifford Farrar, who had Type 1 diabetes, pleaded for insulin supplies and, according to the family’s report, was repeatedly denied, which resulted in Clifford’s death last year. Felix Sitthivong & Sam Levin, *‘I Don’t Have the Funds’: A Diabetic Prisoner Pleaded for Insulin Supplies Before His Death*, THE GUARDIAN (Nov. 15, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/nov/15/prison-healthcare-washington-diabetes-death-clifford-farrar#:~:text=This%20time%20around%2C%20though%2C%20word,blood%20sugar%20was%20dangerously%20low> [<https://perma.cc/CYF5-TRAR>].

128. See Derek Hawkins, *An Inmate Died After Being Locked in a Scalding Shower for Two Hours. His Guards Won’t be Charged*, WASH. POST (Mar. 20, 2017, 6:29 AM),

die by suicide in local jails than in federal or state prisons;¹²⁹ and drug and alcohol deaths have skyrocketed at similar rates to those that occur outside of prison since the start of the opioid epidemic.¹³⁰

Black incarcerated people outnumber their White counterparts by the tens of thousands,¹³¹ despite being outnumbered by White people five-to-one in terms of the general U.S. population.¹³² Those who deny that the carceral system serves to oppress Black people perform exhausting mental gymnastics. To perpetuate the myth of Black people's inherent criminality is to project onto Black people the moral depravity committed by the first White Americans that kidnapped, tortured, raped, murdered, and enslaved them to build power and wealth for themselves. Not only are the repercussions of this continued atrocity still present in the wealth disparities between White and Black Americans today, but the atrocity of racist law enforcement and mass incarceration continues as long as the current system exists.

Just as Black people were innocent victims of slavery and Jim Crow, so are those Black victims of the criminal system. Although they may not be legally innocent, their culpability may not have been proven in trial because of plea deals, and the legal circumstances of their detention or imprisonment provide no certainty that many have actually committed the crime for which they have been punished. Public defenders are notoriously underpaid, overworked, and unsupported by the legal system—a position

<https://www.washingtonpost.com/news/morning-mix/wp/2017/03/20/an-inmate-died-after-being-locked-in-a-scalding-shower-for-two-hours-his-guards-wont-be-charged/> [https://perma.cc/SDF7-4PQB].

129. *Nearly a Fifth of State and Federal Prisons and a Tenth of Local Jails Had at Least One Suicide in 2019*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS (Oct. 7, 2021), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/pressreleases/2021/nearly-fifth-state-and-federal-prisons-had-least-one-suicide-2019#:~:text=More%20than%20half%20of%20the,holding%202%2C500%20or%20more%20person> [https://perma.cc/HN73-YDDE].

130. Beth Schwartzapfel & Jimmy Jenkins, *Inside the Nation's Overdose Crisis in Prisons and Jails*, THE MARSHALL PROJECT (July 15, 2021, 6:00 AM), <https://www.the-marshallproject.org/2021/07/15/inside-the-nation-s-overdose-crisis-in-prisons-and-jails> [https://perma.cc/V4R9-3LWU].

131. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/> [https://perma.cc/BUG3-TKWE].

132. *Id.*

antithetical to prosecutors.¹³³ Due to this and the pretrial risks described in Part III, 90% of those charged with federal crimes pled guilty in 2018.¹³⁴ Even when a Black defendant is able or willing to take their case to trial, “all other factors being equal, black offenders were 75 percent more likely to face a charge carrying a mandatory minimum sentence than a white offender who committed the same crime.”¹³⁵ Even when White Americans are charged with a crime, their sentencing is, on average, almost 20% shorter than their non-White counterparts.¹³⁶

When a Black defendant is actually guilty of a crime, they are still, in fact, the victim of a racist system that treats Black and White offenders differently—at the very least in terms of outcomes. There are incarcerated Black Americans who committed the crimes for which they are being punished; however, there are countless White Americans sitting comfortably at home despite having committed those same crimes.¹³⁷ In addition to the disparate conviction rates and sentencing periods demonstrated by the criminal system, racist law enforcement tendencies are often the first stop on a Black American’s journey, often beginning in school.¹³⁸ And while many deniers of our racist criminal system claim without context that Black Americans reportedly commit more crime than White Americans, “[s]tudies have shown that joblessness—not race or black culture—explains the high rates of violent crime in poor black communities. When researchers have controlled for joblessness, differences in violent crime rates between young black and white men disappear.”¹³⁹ In other words, the correlation between Black men and criminality is actually caused by poverty—not Black culture.

133. TCR Staff, *NYC Public Defenders Quitting Over Workload, Low Pay*, THE CRIME REP. (June 9, 2022), <https://thecrimereport.org/2022/06/09/nyc-public-defenders-quitting-over-workload-low-pay/> [https://perma.cc/KDK6-BKEX].

134. *Trials are Rare in the Federal Criminal Justice System, and When They Happen, Most End in Convictions*, PEW RSCH. CTR. (June 10, 2019), https://www.pewresearch.org/ft_19-06-11_trialsandguiltypleas-featuredimage/ [https://perma.cc/KV9E-JHVJ].

135. See Ingraham, *supra* note 62.

136. U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 6 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf [https://perma.cc/5XZ3-XFUV].

137. See Ingraham, *supra* note 62.

138. See Patrick Cremin, *School Policing was Designed to Criminalize Black Students. We Must Follow Black Voices Calling for its Abolition*, HARV. C.R.-C.L. L. REV. (July 8, 2020), <https://harvardcrcl.org/school-policing-was-designed-to-criminalize-black-students-we-must-follow-black-voices-calling-for-its-abolition/> [https://perma.cc/WAX7-JLCZ].

139. ALEXANDER, *supra* note 2, at 210 (citing WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 22 (1996)).

What does abolition look like? The 2020 Black Lives Matter demonstrations opened up mainstream discourse about such abolitionist ideals as “Defund the Police,” “Abolish the Police,” and “Abolish Prisons.”¹⁴⁰ Those without any prior knowledge of the modern abolitionist movement were quick to criticize these proposals as “radical” or, even if they agreed with the general sentiment, at the very least, framed improperly.¹⁴¹ The notion of abolishing slavery was equally radical in antebellum United States¹⁴²—there was an actual war waged over it. But abolitionists have been advocating for them for years—even decades.¹⁴³ Much like the phrase “Black Lives Matter” was narrowly construed by bad-faith actors, so too was “Defund the Police.” The latter slogan has always intended to mean that we should stop increasing local police budgets—which every major police department does every single year—and invest those funds into the community to prevent the need for police intervention in the first place.¹⁴⁴

As Angela Davis has emphasized since the Civil Rights Movement:

Defunding the police is not simply about withdrawing funding for law enforcement and doing nothing else. . . . It’s about shifting public funds to new services and new institutions—mental health counselors, who can respond to people who are

140. See ALEX VITALE, *THE END OF POLICING* 229 (2021); Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [https://perma.cc/RHC9-6DRW].

141. Known progressive and founder of The Young Turks, Cenk Uygur initially came out in opposition to “Defund the Police” by criticizing its framing before later renouncing the criticism. See Cenk Uygur (@cenkuygur), TWITTER (June 25, 2020, 8:10 PM), <https://twitter.com/cenkuygur/status/1276352165691322369?s=20> [https://perma.cc/8ZKP-8XAW].

142. Slavery, lynching, and segregation are certainly compelling examples of Social institutions that, like the prison, were once considered to be as everlasting as the sun. Yet, in the case of all three examples, we can point to movements that assumed the radical stance of announcing the obsolescence of these institutions. DAVIS, *supra* note 7, at 24.

143. See *id.* at 11 (noting participation in “antiprison activism” since the late 1960s); see also Mariame Kaba, *So You’re Thinking About Becoming an Abolitionist*, in *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 18–19 (Tamara K. Nopper ed., 2021) (noting early occurrences of “investigation[s] into police misconduct” as early as 1894 and continuing into the twentieth century).

144. See VITALE, *supra* note 140, at 230.

in crisis without arms. It's about shifting funding to education, to housing, to recreation. All of these things help to create security and safety.¹⁴⁵

Abolition is about building, not destroying.¹⁴⁶ As such, the question of what abolition looks like should be framed in terms of what we can *add* or *create* rather than what will be missing.¹⁴⁷ Funds allocated to police departments should instead be redistributed to initiatives like universal healthcare, non-police mental health emergency interventions, job guarantee programs, free public college, and local organizations that understand their community's needs more than any larger non-profit or federal or state agency.

Although building should continue to be emphasized over destroying certain aspects of the criminal system, abolition also means doing away with the death penalty, which is “disproportionately imposed on people of color;”¹⁴⁸ charging young children with crimes either as juveniles or adults; imprisoning people for life for nonviolent crimes; and putting people in solitary confinement, which is disproportionately imposed on Black and Hispanic people¹⁴⁹ and considered a form of psychological torture by the United Nations.¹⁵⁰ Most of the United States' peer countries implemented these reforms years ago¹⁵¹—not only has all but one European

145. *Freedom Struggle: Angela Davis on Calls to Defund Police, Racism & Capitalism, and the 2020 Election*, DEMOCRACY NOW! (Sept. 7, 2020), https://www.democracynow.org/2020/9/7/freedom_struggle_angela_davis_on_calls [<https://perma.cc/6K5E-N36S>].

146. See Kaba, *supra* note 143, at 18.

147. See *id.*

148. Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing, *Hearing on Reports of Racism in the Justice System of the United States*, Inter-Am. Comm'n H.R., 153d Sess. 6–7 (Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf [<https://perma.cc/RDY2-FS94>] (citing U.S. DEP'T OF STATE, FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶ 155 (2011), <https://2009-2017.state.gov/j/drl/rls/179781.htm#art6>).

149. Tiana Herring, *The Research is Clear: Solitary Confinement Causes Long-Lasting Harm*, PRISON POL'Y INITIATIVE (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium/#:~:text=Solitary%20confinement%20goes%20by%20many,alone%20in%20a%20small%20cell [<https://perma.cc/63SL-EPLB>].

150. *United States: Prolonged Solitary Confinement Amounts to Psychological Torture, Says UN Expert*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R (Feb. 28, 2020), <https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture> [<https://perma.cc/76QZ-BWCJ>].

151. Crime & Just. Rsch. All., *Juvenile Justice Practices in Europe Can Inform Practices in the US*, PHYS.ORG (July 31, 2018), <https://phys.org/news/2018-07-juvenile-justice-europe.html> [<https://perma.cc/UU2Y-SGVG>] (discussing unique procedures and laws governing juvenile justice in many European countries, such as not imposing incarceration as a sanction for criminal behavior).

country abolished the death penalty, all but one South American country has as well.¹⁵²

The last consideration regarding abolition that this Article will analyze pertains to people's emotional response to crime and how it obstructs abolition. The initial desire to harm those who have harmed us is normal, but "crime and harm are not synonymous. All that is criminalized isn't harmful, and all harm isn't necessarily criminalized."¹⁵³ Embracing abolition means both deprogramming from pro-punishment conditioning as well as seeing past feelings of revenge to realize that the current punishment system "does nothing to change a culture that makes this harm imaginable, to hold the individual perpetrator accountable, to support their transformation, or to meet the needs of the survivors."¹⁵⁴ Not only does mass incarceration perpetuate violence against individuals in the ways outlined above, but it also preserves the systemic oppression of Black people that has gone on for centuries. Without abolishing this system, and thus ending the atrocity, reparations to Black Americans will not have nearly as substantial an impact as envisioned.

V. ABOLITION MUST COME BEFORE OR WITH REPARATIONS

"Freedom is much more than the absence of bondage; it requires the tools, the capacities, and opportunities that make independent human action possible."

— KATHERINE FRANK¹⁵⁵

Even antebellum abolitionists understood that abolishing slavery could not be done without

a thorough reorganization of U.S. society—economically, politically, and socially—in order to guarantee the incorporation of formerly enslaved Black people into a new democratic order. That process never occurred, and we are facing issues of systemic and structural racism [now] . . . that should have been addressed more than 100 years ago.¹⁵⁶

152. See Marium Ali, *Infographic: Which Countries Still Have the Death Penalty?*, AL JAZEERA (Oct. 10, 2022), <https://www.aljazeera.com/news/2022/10/10/infographic-which-countries-still-have-the-death-penalty-2> [<https://perma.cc/PJY7-986P>] (displaying that all but one country in both Europe and South America have abolished the death penalty).

153. See Kaba, *supra* note 143, at 18.

154. *Id.* at 19.

155. KATHERINE FRANK, REPAIR: REDEEMING THE PROMISE OF ABOLITION 136 (2019).

156. Davis, *supra* note 115.

One of the primary reasons that emancipation failed Black people in the nineteenth century was not because abolitionists did not have a specific plan; rather, there was no process by which formerly enslaved people could acquire capital—even if there had been cash dispersed to all of them, the federal and state governments quickly adapted the criminal system to address, or oppress, the sudden influx of free Black Americans.¹⁵⁷ For example, the carceral system in Alabama went from almost exclusively imprisoning White people to mostly imprisoning Black people as swiftly as President Lincoln signed his name on the Emancipation Proclamation.¹⁵⁸ If the penal system could react to social and political pressure so quickly 150 years ago, Why can it not do so today?

While reparations to Black Americans are long overdue, and postponing their disbursement creates even more tension and space for bad-faith actors to mount their opposition, compensatory reparations will not have the intended impact without abolition. Giving Black Americans cash with the current racist systems still in place will inevitably funnel money back to the government through civil asset forfeiture, cash bail, and the for-profit prison system, which will be further recycled into more funding for these same oppressive systems. These systems have helped maintain racial subordination.¹⁵⁹ Similarly, any apology given before abolition will ring hollow.

Imagine making the argument during chattel slavery that reparations should be paid while slavery was still ongoing: “Yes, slavery is bad. But we can make it ‘better’ by treating enslaved people more humanely, enslaving White and Black people equally, giving enslaved people better healthcare, or shortening the amount of time they must spend enslaved.” Chattel slavery and mass incarceration are not the same, but there are more Black adults under correctional control today than were enslaved at the height of slavery in the United States.¹⁶⁰ Although incarcerated people today are treated “better” than enslaved people—and not every single Black person is incarcerated—so too were Black Americans treated better during Jim Crow than during slavery. Furthermore, the presence of White Americans in prisons does not undercut the point that the PIC is performing

157. See RASHAWN RAY & ANDRE PERRY, WHY WE NEED REPARATIONS FOR BLACK AMERICANS 2 (2020), https://www.brookings.edu/wp-content/uploads/2020/04/BigIdeas_Ray_Perry_Reparations-1.pdf [<https://perma.cc/EKU5-7UQW>].

158. See DAVIS, *supra* note 7, at 29 (citing CURTIN, *supra* note 67, at 6, 42).

159. The government is materially benefitting more from prison labor now than it did from slave labor then. See ACLU & UNIV. OF CHI. L. SCH GLOB. HUM. RTS. CLINIC, *supra* note 73, at 37–41 (2022).

160. See ALEXANDER, *supra* note 2.

its duty to oppress Black people. Some White people were also “enslaved,”¹⁶¹ but that does not negate slavery’s racism.¹⁶²

VI. REPARATIONS

“Liberation requires societal restructuring, community support, and reparation to ensure no one lives as a second-class citizen.”

— ANITA YANDLE¹⁶³

Abolition ends what remains of the slavery and Jim Crow atrocity—the PIC—creating the conditions for a rational consideration of redress. However, waiting for abolition before commencing redress would unduly delay redress. Hence, abolition should take place alongside reparations.

The purpose of redress should be racial reconciliation. The Interim Report states, “The final report will include the Task Force’s final recommendations, following further hearings, community engagements, and consultations with experts, regarding potential forms that an apology and reparations should take.”¹⁶⁴ Under the Atonement Model of reparations, any apology must be “genuine,” meaning that it must confess the deed, admit that the deed was an injustice, express remorse, and ask for forgiveness.¹⁶⁵ Reparations are compensatory or rehabilitative, restricted or nonrestricted cash or noncash, prudential, or transformative.¹⁶⁶ Both compensatory reparations, including unrestricted cash, and rehabilitative reparations, restricted monetary and nonmonetary, are the best ways to redress mass incarceration.

161. See MICHAEL A. HOFFMAN II, *THEY WERE WHITE AND THEY WERE SLAVES* 4 (1993); see also DON JORDAN & MICHAEL WALSH, *WHITE CARGO: THE FORGOTTEN HISTORY OF BRITAIN’S WHITE SLAVES IN AMERICA* 14 (2008).

162. Furthermore, as discussed in Part III, the prison system was the reform—a more humane response to the capital and corporal punishment exercised for years throughout Europe and the colonies until the government created the penitentiary. See *supra* Part II. The fact that many considered it a radical reform because it did not carry out corporal punishment speaks to how little the United States has progressed since.

163. Anita Yandle, *Future, Justice, and Reparations*, COLUM. CTR. FOR CONTEMP. CRITICAL THOUGHT: ABOLITION DEMOCRACY 13/13 (Apr. 21, 2021), https://blogs.law.columbia.edu/abolition1313/anita-yandle-future-justice-and-reparations/#_ftnref20 [https://perma.cc/55E7-27F3].

164. INTERIM REPORT, *supra* note 11, at 37 (citation omitted).

165. See ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* 144 (2004).

166. See Roy L. Brooks, *Black Boarding Academies as a Prudential Reparation: Finis Origine Pendet*, 13 COLUM. J. RACE & L. 790, 798–800 (2023).

A. Unrestricted Compensatory Cash Reparations

Descendants of enslaved Black people should receive cash reparations. One threshold question often raised is how to pay for such reparations. Yet that question is rarely asked about other types of government spending, including tax cuts that benefit the wealthy or government subsidies.¹⁶⁷ However, the answer is rather easy: the cost of not paying reparations is far greater than maintaining the status quo.¹⁶⁸ For example, “the wealth gap between American whites and Blacks is projected to cost the US economy between \$1 trillion and \$1.5 trillion in lost consumption and investment between 2019 and 2028. This translates to a projected GDP penalty of 4 to 6 percent in 2028.”¹⁶⁹ Although recovering this lost consumption and investment alone may not be sufficient to fund reparations for every descendant of enslaved Black persons currently living in California, the funds generated by abolition—the funds diverted from policing, for-profit prisons, and general administrative costs in running our current criminal system as well as the productivity and consumption lost by keeping

167. For example, the 2017 Tax Cuts and Jobs Act (TCJA), also known as the Trump Tax Cuts, “lowered the corporate income tax rate from 35% to 21% and cut other business taxes. The law ‘cost’ about \$1.9 trillion, which means that’s the amount budget analysts estimated it would add to the national debt during the decade after it went into effect.” Rick Newman, *3 Myths About the Trump Tax Cuts*, YAHOO!FINANCE (Nov. 17, 2022), https://money.yahoo.com/3-myths-about-the-trump-tax-cuts-155801290.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce_referrer_sig=AQAAAACeKuEevxiC0hSmf8hthsqvRk2235abeeFY42ELYIODr_yjRXzFlob-DkHoSZQg2vsboCNhQJ_5OxSJUnGDUkue3t1IFFhx9t6retFveEHw6rwwiMu5zDLdOqQci-o8W405JEotV-EffkSrkKc5BYYY1kVa70pGmaOgVVnxLB-x [https://perma.cc/7WL9-GXE3]. The tax cuts did not pay for themselves, “which means tax savings for individuals and businesses were mostly financed by additional federal borrowing.” *Id.*

168. The answer to the question, “How can the country we afford universal health care?” is similar. A recent study regarding single-payer healthcare financing in the United States

yielded economic analyses of the cost of 22 single-payer plans over the past 30 years. Exclusions were due to inadequate technical data or assuming a substantial ongoing role for private insurers. [Researchers] found that 19 (86%) of the analyses predicted net savings (median net result was a savings of 3.46% of total costs) in the first year of program operation and 20 (91%) predicted savings over several years; anticipated growth rates would result in long-term net savings for all plans.

Christopher Cai et al., *Projected Costs of Single-Payer Healthcare Financing in the United States: A Systematic Review of Economic Analyses*, PLOS MED., Jan. 15, 2020, at 1, 1.

169. Joseph Losavio, *What Racism Costs Us All*, INT’L MONETARY FUND: FIN. & DEV., Sept. 2020, at 33, 35 (citing NICK NOEL ET AL., THE ECONOMIC IMPACT OF CLOSING THE RACIAL WEALTH GAP 5–6 (2019), <https://www.mckinsey.com/~/media/mckinsey/industries/public%20and%20social%20sector/our%20insights/the%20economic%20impact%20of%20closing%20the%20racial%20wealth%20gap/the-economic-impact-of-closing-the-racial-wealth-gap-final.pdf> [https://perma.cc/8K42-EU8N]).

2 million incarcerated people sequestered from the rest of society—would certainly help to finance reparations.¹⁷⁰

Compensatory cash reparations, mostly unrestricted, can provide effective redress for mass incarceration. The Interim Report mentions several restricted compensatory cash reparations that would be appropriate, including “funding for free tuition to California colleges and universities.”¹⁷¹ This education reparation is transformative for mass incarceration. It changes the financial norms for higher education that disincentivize the descendants of enslaved Black people from staying in school or envisioning themselves on a path to high-paying jobs.¹⁷²

Transformative, free college tuition is not unprecedented. Prior to the 1960s, public college in California—and many parts of the United States—was already free.¹⁷³ It was not until Governor Ronald Reagan eliminated this program that residents were forced to pay for college—another strategy to suppress anti-war sentiments on college campuses and to further subjugate Black Americans.¹⁷⁴ Soon after, other states followed suit, and the student debt crisis we know today was born.¹⁷⁵ Black graduates now borrow at a rate almost 20% higher than White graduates and “have average loan balances more than twice of their White counterparts.”¹⁷⁶ Reverting to a system of free public college, which these institutions could afford prior to their defunding, would help close the racial wealth gap.

170. *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures> [perma.cc/5H76-7RL2].

171. INTERIM REPORT, *supra* note 11, at 20.

172. See Kendra Bozarth, *If You're Black in America, You'll Pay More for College and Get Less*, ROOSEVELT INST. (Sept. 9, 2019), <https://rooseveltinstitute.org/2019/09/09/if-youre-black-in-america-youll-pay-more-for-college-and-get-less/> [https://perma.cc/N2JG-KGZC].

173. See Michael Stone, *What Happened When American States Tried Providing Tuition-Free College*, TIME (Apr. 4, 2016, 11:00 AM), <https://time.com/4276222/free-college/> [https://perma.cc/2CZ5-PUXZ].

174. Jamal Rich, *Free College Was Once the Norm All Over America*, PEOPLE'S WORLD (Sept. 11, 2020, 10:24 AM), <https://www.peoplesworld.org/article/free-college-was-once-the-norm-all-over-america/> [perma.cc/2MGA-DK62] (“In his words, this was to ‘get rid of undesirables . . . those who are there to carry signs and not to study might think twice to carry picket signs.’ His was a campaign to maintain white supremacy by making public colleges and universities cost money.”).

175. See *id.*

176. *Id.*

Cash reparations without any restrictions on how the money can be spent are more transformative than restricted compensatory cash reparations. Some might argue that issuing unrestricted compensatory cash reparations would be a mistake because Black Americans will spend their money frivolously or be subject to scams or undue influence from friends or relatives.¹⁷⁷ However, Japanese Americans received \$20,000 cash from the U.S. government as reparations for their illegal internment during World War II, with few questions raised about their financial maturity.¹⁷⁸ More importantly, cash is an effective way to uplift individuals and households. In her book *Give People Money*, Annie Lowrey points to data on universal income programs, noting, “Two researchers at the World Bank recently looked at nineteen studies of cash-transfer programs from around the world. There was no evidence that people who received cash consumed more vice products.”¹⁷⁹ But even if the money is not squandered on drugs, alcohol, and luxury items, May it be wasted in other unproductive ways? Lowrey again points to studies that were conducted on the poorest people in the world, which say no:

The Overseas Development Institute conducted a sweeping review of the literature on cash transfers, aggregating data from millions of recipients around the world. The results were clear. Improved school attendance. Greater ownership of productive assets, like cows and farming equipment. A drop in malnutrition. An increase in savings. Less child labor.¹⁸⁰

This data is consistent with recent findings on government spending during the COVID pandemic: the child tax credit “cut . . . child poverty by roughly

177. Sheryl Nance-Nash, *4 Ways the US Can Pay Reparations for Slavery That Aren't Direct Cash Payments*, BUS. INSIDER (May 27, 2021, 8:36 AM), <https://www.businessinsider.com/personal-finance/ways-pay-reparations-for-slavery-2021-5> [perma.cc/Z33N-767K].

178. What was most important to the victims was not the cash per se but what cash reparations meant symbolically:

The redress campaign wasn't just about trying to gain monetary compensation. I mean, you figure three years of imprisonment and the [thirty] years of guilt and shame we lived with, \$20,000 wasn't going to abrogate all of that. But the money was part of the message. The American public didn't give a damn until the minute we started demanding compensation.

Isabella Rosario, *The Unlikely Story Behind Japanese Americans' Campaign for Reparations*, NPR (Mar. 24, 2020, 6:40 AM), <https://www.npr.org/sections/codeswitch/2020/03/24/820181127/the-unlikely-story-behind-japanese-americans-campaign-for-reparations> [perma.cc/GK5K-SQEQ].

179. ANNIE LOWREY, *GIVE PEOPLE MONEY: HOW A UNIVERSAL BASIC INCOME WOULD END POVERTY, REVOLUTIONIZE WORK, AND REMAKE THE WORLD* 78 (2018).

180. *Id.* at 78–79.

30%” before the government let it expire, at which point these children sank back into poverty.¹⁸¹

Not only do these observations demonstrate the effectiveness of cash in improving living conditions, but they also highlight the importance of autonomous decision-making by those who receive it. Those with acknowledged needs are most knowledgeable about their needs and are therefore best suited to decide for themselves how to use the cash.¹⁸² Furthermore, the sense of dignity and self-worth achieved through this new sense of freedom is invaluable and life-changing.¹⁸³ To give cash reparations to Black Americans unconditionally would cement the U.S. government’s apology as rooted in earnest trust rather than in an attitude of “we know what’s best for you better than you do.”

B. Rehabilitative Reparations

The cost of unrestricted compensatory cash reparations could be mitigated by using rehabilitative reparations, restricted monetary and nonmonetary, in the reparative program. Investments in infrastructure in predominantly Black communities are an example of an appropriate restricted rehabilitative cash reparation identified by the Interim Report.¹⁸⁴ Infrastructure investments should be bold if they are to be transformative. They should be supportive of Black communities by bringing in employment opportunities that provide financial alternatives to resorting to illicit sources of income, providing subsidies for public transportation disproportionately used by Black Americans, offering tax incentives for major grocery stores that open their doors in Black communities, and repairing roads and sidewalks.

Also, rehabilitative noncash reparations could target voting and other civil rights. Even with the successful abolition of the criminal system as we know it, the issue of felony disenfranchisement and barriers to voting

181. Cory Turner, *The Expanded Child Tax Credit Briefly Slashed Child Poverty. Here’s What Else it Did*, NPR (Jan. 27, 2022, 5:00 AM), <https://www.npr.org/2022/01/27/1075299510/the-expanded-child-tax-credit-briefly-slashed-child-poverty-heres-what-else-it-d> [perma.cc/XF5G-TPCM].

182. See LOWREY, *supra* note 179, at 79.

183. See RAY & PERRY, *supra* note 157 (describing the correlation between wealth and access to vital resources that Black Americans have been deprived of because of “racial wealth disparities”).

184. INTERIM REPORT, *supra* note 11, at 21.

remain.¹⁸⁵ Almost 5 million Americans are currently prohibited from voting in elections.¹⁸⁶ Almost 2 million of those are Black.¹⁸⁷

In California, only those currently serving a state or federal prison term for the conviction of a felony face felony disenfranchisement—prior to and following their sentence, Californians are free to vote.¹⁸⁸ However, previously incarcerated people can only serve on a jury if they are not currently on parole or probation.¹⁸⁹ This is certainly an improvement—before this law passed in 2020, former felons were prohibited from serving on juries indefinitely—but it still withholds civil rights from Californians who tend to be disproportionately Black.¹⁹⁰

But the felony disenfranchisement problem is truly a national issue. Many states have passed voter suppression laws in response to President Biden’s 2020 election win, which drew the largest voter turnout in over a century.¹⁹¹ However, several states passed laws making it easier for Americans to vote, especially in the wake of the pandemic.¹⁹² Both the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act would make the protections passed by states like California federally mandated.¹⁹³ Congress should also make mail-in voting available for all Americans, regardless of the state in which they reside. Enfranchising the millions of Americans who are currently barred from voting and making

185. See CHRISTOPHER UGGEN ET AL., LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 2 (2022), <https://www.sentencingproject.org/app/uploads/2022/10/Locked-Out-2022-Estimates-of-People-Denied-Voting.pdf> [<https://perma.cc/WQ9B-RN8K>].

186. *Id.*

187. See *id.* (“One in 19 African Americans of voting age is disenfranchised . . .”).

188. *Voting Rights: Persons with a Criminal History*, CAL. SEC’Y OF STATE, <https://www.sos.ca.gov/elections/voting-resources/voting-california/who-can-vote-california/voting-rights-californians> [<https://perma.cc/7DLB-JACW>].

189. Erik Ortiz, *Most Former Felons in California Are Now Eligible for a New Role: Jury Duty*, NBC NEWS (Jan. 1, 2020, 1:33 AM), <https://www.nbcnews.com/news/us-news/most-former-felons-california-are-now-eligible-new-role-jury-n1108726> [<https://perma.cc/P86C-RVSV>].

190. JESSE JANNETTA ET. AL, EXAMINING RACIAL AND ETHNIC DISPARITIES IN PROBATION REVOCATION: SUMMARY FINDINGS AND IMPLICATIONS FROM A MULTISITE STUDY 1 (2014), <https://www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF> [<https://perma.cc/C4CT-JVC8>] (citations omitted). When it comes to gun rights, Second Amendment enthusiasts should be outraged that any Californian with a felony record faces a lifetime ban on firearm possession. See CAL. PENAL CODE § 29800 (West 2021). This right can only be restored with a governor pardon or ten years after a misdemeanor conviction, subject to certain conditions. *Id.* § 4852.17.

191. See *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/NVS5-J3EP>].

192. *Id.*

193. *Id.*; see *supra* notes 188–90 and accompanying text.

it easier for them to vote would promote the reallocation of resources to those communities—a government mechanism already in place and fully funded.

VII. CONCLUSION

“Liberation requires societal restructuring, community support, and reparation to ensure no one lives as a second-class citizen.”

— ANITA YANDLE¹⁹⁴

Abolition is an essential element of redress for the centuries-old atrocity still being perpetrated against Black Americans by the government. Though the penitentiary was created as a progressive reform and an alternative to corporal punishment, it evolved into a tool of racialized oppression that has perpetuated White hegemony, exploitation of free labor, and a profit-producing White capitalist venture. The PIC was an oppressive tool created in response to the formal end of Jim Crow laws, just as Jim Crow was an oppressive tool created in response to emancipation. Each time the American public pushes for a “reform” to this institution, the government easily evades granting true liberation by finding a legal loophole.¹⁹⁵ This is precisely why prison reform will never end this atrocity—abolition is the only way.

It is essential that compensatory and institutional reparations—in addition to an apology—must be doled out by the government to Black Americans. But under the principles of reparative justice, the atrocity must end before it can be redressed. Redress without a path toward abolition will continue the same pattern of oppression that occurred during the Reconstruction era. It took 100 years following emancipation to provide truly meaningful opportunities for Black Americans to prosper in this country. The government must not waste another century by doling out reparations without properly ending the atrocity this time. The government must abolish slavery in all its forms—mass incarceration included.

194. Yandle, *supra* note 163.

195. See ALEXANDER, *supra* note 2, at 8 (“The stark and sobering reality, is that, for reasons largely unrelated to actual crime trends, the American penal system has emerged as a system of social control unparalleled in world history.”).

