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## Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration

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**FEEDING THE MACHINE: THE COMMODIFICATION OF  
BLACK BODIES FROM SLAVERY TO MASS  
INCARCERATION**

**Professor Cecil J. Hunt, II\***

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*Not everything that is faced can be changed;  
but nothing can be changed until it is faced.*  
-James Baldwin<sup>1</sup>

## I. INTRODUCTION

Today the United States stands astride the world as an economic and political colossus.<sup>2</sup> It heralds itself as the “land of the free”<sup>3</sup> and the “land of opportunity.”<sup>4</sup> But for many generations of people of color, America has never been either of those things.<sup>5</sup> Since before America was even America, from the arrival of the first African slaves in British North America in 1619,<sup>6</sup> and right up to today’s era of mass incarceration,<sup>7</sup> millions of black and brown bodies have been commodified and “treated as . . . ordinary article[s] of merchandise,”<sup>8</sup> in a capitalist economy, and have served as the fuel that feeds America’s great economic profit machine.<sup>9</sup>

Until recently, traditional historical narratives of the creation of American global dominance have emphasized the ingenuity, creative genius, perseverance, and grit of the white Europeans that settled this

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1. James Baldwin, *As Much Truth as One Can Bear: To Speak Out About the World as It Is, Says James Baldwin, Is the Writer’s Job*, N.Y. TIMES, Jan. 14, 1962, at BR11.
2. See Sven Beckert & Seth Rockman, *Introduction*, in *SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* 13 (Sven Beckert & Seth Rockman eds., 2016) [hereinafter *SLAVERY’S CAPITALISM*].
3. Francis Scott Key, *American National Anthem*, LYRICS, <https://www.lyrics.com/sublyric/4172/> [<https://perma.cc/R6L4-HER9>] (last visited Apr. 6, 2020).
4. Beckert & Rockman, *supra* note 2, at 13.
5. See *infra* notes 41–51 and accompanying text.
6. See *infra* notes 41–51 and accompanying text.
7. See *infra* Part IV.
8. See *Scott v. Sanford*, 60 U.S. 393, 407 (1857).
9. See LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* 20, 70 (2018); see also KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA*, at xiv (2019) (ebook) (observing that, since the arrival of the first Africans in Colonial British America, “black bodies have been used for white wealth creation”). The overarching theme of this paper is that this exploitation of “black bodies . . . for white wealth creation,” is fundamental to the creation and development of the modern American state. MUHAMMAD, *supra*. This foundation began with Black chattel slavery, continued on after the formal constitutional elimination of slavery in the Thirteenth Amendment, in the form of convict leasing, and then continued through mass incarceration, up to the present day profiteering of private prisons and detention centers. See *infra* Parts I–V.

country as the key elements that gave rise to the modern American state.<sup>10</sup> The story of the “legal enslavement of a substantial segment of its population has rarely figured in accounts of its rise to economic dominance.”<sup>11</sup>

Since the late summer of 1619, the commodification of black bodies has always been in the service of creating massive wealth and a booming national and global economy for private white profit.<sup>12</sup> This exploitation has been propelled by white racism, white supremacy, white privilege, and social, political, and economic dominance by institutional white power structures.<sup>13</sup> In the past, from slavery through the end of Jim Crow, these power structures and dynamics were systemic, blatant, socially acceptable, and normalized to almost all white Americans.<sup>14</sup> While the same power dynamics are still strong and systemic in American culture today, they have become more subtle over the past sixty years, since the beginning of the Civil Rights era.<sup>15</sup> But, they are still here.<sup>16</sup> The social, political, cultural, and economic benefits from this centuries-old exploitation have been massive and global in scope.<sup>17</sup> As many scholars have demonstrated, these exploitations essentially built the modern capitalist system and laid the foundations for the vast disparities in economic, educational, social, and political distance that has existed between white and black people in America for the

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10. Beckert & Rockman, *supra* note 2, at 5.

11. *Id.* at 9–10, 13 (“Historians of capitalism have also made slavery foundational to the history of finance . . . [S]lavery became central to and perhaps even constitutive of a particular moment in the history of capitalism, and how slavery helped constitute capitalist modernity . . .”).

12. *See infra* notes 41–51 and accompanying text.

13. *See infra* Part II.

14. *See infra* Part III.

15. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (rev. ed. 2012) (“In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don’t. Rather than rely on race, we use our criminal justice system to label people of color ‘criminals’ . . .”).

16. *Id.*

17. *See* Beckert & Rockman, *supra* note 2, at 5; *see generally* DAINA RAMEY BERRY, *THE PRICE FOR THEIR POUND OF FLESH THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION* 2–3 (2017) (revealing the scope of this exploitation by examining the personal experiences of people treated as a commodity).

past 400 years.<sup>18</sup> But, in moral terms, the question is: at what cost has this plunder of black economic wealth been extracted?<sup>19</sup> And, what is its legacy on the soul of modern America and the lives of its citizens?<sup>20</sup> Ta-Nehisi Coates has written elegantly about this legacy:

[T]he line dividing black and white America was neither phenotypical, nor cultural, nor even genetic. In fact, there was no line at all, no necessary division of any kind. We were not two sides of a coin. We were not the photonegative of each other. To be black in America was to be plundered. To be white was to benefit from, and at times directly execute, this plunder. No national conversation, no invocations to love, no moral appeals, no pleas for “sensitivity” and “diversity,” no lamenting of “race relations” could make this right. Racism was banditry, pure and simple. And the banditry was not incidental to America, it was essential to it.<sup>21</sup>

From a historical perspective, there have been three distinct and recurring eras of this racialized profiteering of black bodies—this “banditry.”<sup>22</sup> The first era was black chattel slavery.<sup>23</sup> The second era started during Reconstruction in 1868 with the Black Codes and convict leasing.<sup>24</sup> The third era, which is upon us now, is the age of racialized mass incarceration and its symbiotic offspring—the racialized industry of for-profit private prisons.<sup>25</sup>

This article examines the historic scaffolding that was conceived of and deployed to exploit and control black bodies for white profit: from slavery,<sup>26</sup> through convict leasing,<sup>27</sup> and then to mass

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18. See generally EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* 421 (2016) (arguing that there exists a clear relationship between African-American suffering and economic growth).

19. See TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY* 222 (2017) (“A problem—the problem of the color line—that I had not understood had clarified for me. The answer was plunder.”).

20. See generally *id.* at 180–82 (arguing that the success of capitalist America came at the expense of African-American lives).

21. *Id.* at 211–12.

22. See generally *id.* (arguing that “[r]acism was banditry, pure and simple. And the banditry was not incidental to America, it was essential to it”).

23. See *infra* Part II.

24. See *infra* Part III.

25. See *infra* Part IV.

26. See *infra* Part II.

27. See *infra* Section III.C.

incarceration and private prisons.<sup>28</sup> This linear structure helps to expose and contextualize the profit machine that continues to be hidden through this day by political and societal shadows, even as it churns out massive private profits for whites.<sup>29</sup> Black bodies initially provided the compelled free labor source that was fundamental to building the foundation for the modern American capitalist state.<sup>30</sup> This foundation gave rise to new and sophisticated management techniques created by slave owners to regulate, manage, account, measure, finance, prepare, and export vast amounts of cotton that were planted, tended to, and harvested by an army of slaves.<sup>31</sup> These techniques were created and popularized by slave holders to maximize profits not only for the southern planter class, but also for a worldwide interconnected network of transportation, business, financial, and insurance institutions, as well as manufacturing, distribution, and consumption chains.<sup>32</sup> Economic historians have pointed out that many of these business and management practices are still widely used today.<sup>33</sup>

This paper is organized into five parts. Part I, the Introduction, presented a brief preview of the topics discussed in the body of this paper.<sup>34</sup> Part II examines the history of slavery in America from its humble beginnings in 1619; to the massive national and international dominance of American cotton in the nineteenth century; to the development of the American slavocracy of the late 1790s up to the end of the Civil War in 1865.<sup>35</sup> Part III analyzes the brutal and widespread impact of the Black Codes and its symbiotic offspring convict leasing,<sup>36</sup> which former slaves described as “worse than slavery.”<sup>37</sup> Part IV examines the centrality of mass incarceration to the entire law enforcement system and the corrosive effects of the commodification of black bodies on every aspect of life in black inner-city communities.<sup>38</sup> Part V examines the symbiotic rise of the

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28. *See infra* Parts IV, V.

29. *See supra* Parts II–V.

30. *See* CAITLIN ROSENTHAL, ACCOUNTING FOR SLAVERY: MASTERS AND MANAGEMENT 1–2 (2018).

31. *See id.* at 4–5.

32. *See id.* at 6–7.

33. *See infra* Section IV.A.

34. *See supra* notes 1–33 and accompanying text.

35. *See infra* Part II.

36. *See infra* Part III.

37. *See generally* DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997).

38. *See infra* Part IV.

multi-billion dollar private prison industry and its connection to the financial heart and soul of the modern American industrialized and commercialized state.<sup>39</sup> Finally, Part VI offers some conclusionary remarks.<sup>40</sup>

## II. SLAVERY: THE FIRST ERA OF BLACK COMMODIFICATION

Black chattel slavery in British North America marked the first era of the commodification of black bodies for private white profit; it represented perhaps the most extreme example and most profitable commodification of human beings in world history.<sup>41</sup> As scholar Daina Ramey Berry observed, “Whether alive or dead, enslaved bodies were commodified.”<sup>42</sup> While alive, slaves were valued for their bodies as laborers and breeders, and after death they were valued for their bodies as cadavers for medical research; this after-death value was coined by Daina Ramey Berry as “ghost values.”<sup>43</sup> However, Berry pointed out that there was one important part of the black body that could not be commodified or controlled by enslavers: slaves’ “‘soul values’ . . . [where] enslaved people clung to humanity, dignity, decency, and freedom” by their own internal sense of self-worth, which was all they had left.<sup>44</sup>

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39. See *infra* Part V.

40. See *infra* Part VI.

41. See Beckert & Rockman, *supra* note 2, at 14. “[T]he slave plantation [was] a site of modernity, the Second Slavery paradigm urges scholars to rethink the fundamental processes of nineteenth-century history—industrialization, bureaucratization, mass migration, nationalism, and imperialism, for example—‘through the prism of slavery.’” *Id.* at 12; see also GENE DATTEL, COTTON AND RACE IN THE MAKING OF AMERICA: THE HUMAN COSTS OF ECONOMIC POWER 27, 50 (2009); see also DALE W. TOMICH, THROUGH THE PRISM OF SLAVERY: LABOR, CAPITAL, AND WORLD ECONOMY 61, 305 (2004) (“The ‘Second Slavery’ model finds a place for the United States in this history, in contrast to the very compelling model put forward in Philip D. Curtin, *The Rise and Fall of the Plantation Complex: Essays in Atlantic History* (New York: Cambridge University Press, 1990).”); see generally Sven Beckert, *History of American Capitalism*, in AMERICAN HISTORY NOW 314, 314–15 (Eric Foner & Lisa McGirr eds., 2011).

42. BERRY, *supra* note 17, at 53.

43. *Id.* at 7 (“*Ghost value* is my term for the price tag affixed to deceased enslaved bodies in post-mortem legal contestations or as they circulated through the domestic cadaver trade. Once an enslaved person died, whether buried or not, they were given a ghost value. Some were then sold or transported for sale to medical schools throughout the United States. Ghost values were also assigned for legal and insurance purposes, as indicated by state-sponsored executions, court disputes, and personal insurance policies.”).

44. *Id.* at 206.

In the quest for maximum profit, black chattel slavery in America was a crime against humanity that was pursued viciously and inhumanely by white American capitalists in both the north and south and white European industrialists throughout the western world.<sup>45</sup> As one scholar noted, “The cotton region was a massive sink of collateral in the form of commodified human beings who generated massive revenues. Creditors around the Western world liked to lend money with slaves as collateral.”<sup>46</sup> The plantation slave labor system “sustained a political economy that predicated liberal capitalism’s unrivaled opportunities on the unforgiving oppression of chattel slavery.”<sup>47</sup> This profit-seeking juggernaut spread quickly beyond national boundaries and became global in scope because “[a]s the primary supplier of cotton, the commodity at the heart of the first Industrial Revolution, the United States occupied a distinctive position in the global economy.”<sup>48</sup>

However, despite the facts, for the last 400 years there has been an intentional effort to downplay the centrality, significance, and global reach of black chattel slavery in building the economic colossus that is the United States today.<sup>49</sup> False narratives have taken hold in the American imagination.<sup>50</sup> These narratives portray the origins of slavery in America as historically accidental, marginal, relatively innocent, and a relic of a long-forgotten past that has little or no relevance to modern contemporary capitalist and industrialized America.<sup>51</sup>

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45. See generally SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* 119 (2014).

46. Edward E. Baptist, *Toward a Political Economy of Slave Labor: Hands, Whipping-Machines, and Modern Power*, in *SLAVERY’S CAPITALISM*, *supra* note 2, at 31, 35.

47. Beckert & Rockman, *supra* note 2, at 5.

48. *Id.*

49. See, e.g., Joe Heim, *Teaching America’s Truth*, WASH. POST (Aug. 28, 2019), <https://www.washingtonpost.com/education/2019/08/28/teaching-slavery-schools/?arc404=true> [<https://perma.cc/Q7Z3-ZTK2>].

50. Cf. Rebecca Onion, *Is the Greatest Collection of Slave Narratives Tainted by Racism?*, SLATE (July 6, 2016, 5:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/history/2016/07/can\\_wpa\\_slave\\_narratives\\_be\\_trusted\\_or\\_are\\_they\\_tainted\\_by\\_depression\\_era.html](http://www.slate.com/articles/news_and_politics/history/2016/07/can_wpa_slave_narratives_be_trusted_or_are_they_tainted_by_depression_era.html) [<https://perma.cc/V2F5-JARB>].

51. Cf. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTRUCTION* 159 (2019) (explaining that “[a]cceptance of the reality of racial inequality . . . must be the foundation for any stable social order in the South”).



A. *Traditional Defense of Slavery*

Many of slavery's traditional defenders have justified slavery's existence, its brutality, and its profit-seeking-character by denying its obvious profitability.<sup>52</sup> For many proslavery defenders, "white supremacy was just and necessary," and many "insisted that slavery was a premodern institution that was not committed to profit-seeking."<sup>53</sup> Some argue that the slave master was not even taking advantage of his slaves, rather, the master had a "human obligation to care for his bondsman. 'Fed, clothed, protected,' the slave was far better off . . . than the northern factory worker whose employer had no interest in his health or even his survival. 'Free but in name,' northern laborers had liberty only to starve."<sup>54</sup>

Another proslavery argument claims a historic naturalness of slavery by suggesting that "there existed 'some form of slavery in all ages and countries.' It was always necessary . . . 'that one portion of mankind shall live upon the labor of another portion.'"<sup>55</sup> Moreover, believers of this idea argue slavery was a universal feature of all great societies by suggesting that "[e]very civilization needed . . . a 'mud-sill' class to do the menial labor of the society."<sup>56</sup> In the Southern mind, slavery was a moral and Christian imperative to save black people from the un-Christian barbarities of African life only to be replaced by the savageries of plantation life.<sup>57</sup> They argued, modestly, that unlike the northern "Yankees[, who] cared only about the wealth that their operatives might produce, southerners accepted costly responsibility for the human beings whom God had 'entrusted' to them."<sup>58</sup>

The South's moralizing of its duty to perpetuate slavery was based on a fundamental belief in the inherent superiority of whiteness and the corresponding inferiority of blackness.<sup>59</sup> "[T]he South[,]" one slavery supporter counseled, "must acknowledge her commitment to

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52. See Harold D. Woodman, *The Profitability of Slavery: A Historical Perennial*, 29 J.S. HIST. 303, 303 (1963), <https://www.jstor.org/stable/pdf/2204234.pdf?refreqid=excelsior%3A4ddce02d9ed419336be05cac08dccbfc> [<https://perma.cc/9DTC-K9LH>].

53. BAPTIST, *supra* note 18, at xviii.

54. THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860, at 12 (Drew Gilpin Faust ed., 1981) [hereinafter THE IDEOLOGY OF SLAVERY].

55. *Id.* at 12-13.

56. *Id.* at 13.

57. *The Southern Argument for Slavery*, U.S. HIST., <https://www.ushistory.org/us/27f.asp> [<https://perma.cc/J278-L9Z9>] (last visited Apr. 6, 2020).

58. THE IDEOLOGY OF SLAVERY, *supra* note 54, at 13.

59. See *id.* at 7.

her way of life and come out firmly on the proslavery side; the South must recognize that her superficial flirtation with the Revolutionary ideology of liberty and equality could be no more than just that.”<sup>60</sup>

*B. Slavery as a Profit Machine*

Notwithstanding historical claims to the contrary, the practice of slavery in America was all about profit for white people at the expense of black people.<sup>61</sup> As a consequence of the exploitation of the black chattel slave labor systems on southern plantations, cotton became the “world’s most widely traded commodity and its most crucial industrial raw material.”<sup>62</sup> In fact, because of this plantation labor system, “cotton was the most valuable thing made in America.”<sup>63</sup> Slaves not only picked cotton, cleared forests, and drained swamps as cheap labor,<sup>64</sup> they also formed the beginning of capitalist modernity:

[S]laves were repackaged as consumer goods and sold on terms of credit that linked aspiring planters to banks and bondholders thousands of miles away. The domestic slave trade witnessed some of the crassest entrepreneurship anywhere in the nineteenth century and helped transform slavery into something more than a labor system: a property regime in which wealth could be stored, transferred, leveraged, collateralized, and bequeathed through black men, women, and children held under legal title.<sup>65</sup>

Moreover, the planters who produced the cotton became fabulously wealthy using slaves to produce the “commodity most desired by the world’s industrial regimes.”<sup>66</sup> The importance of cotton to the world economy was well understood by the southern planter class; in fact,

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60. *Id.* at 9.

61. *See* discussion *supra* Section II.A.

62. Baptist, *supra* note 46, at 35.

63. Beckert & Rockman, *supra* note 2, at 13.

64. *Id.* at 13–14 (“Enslaved African Americans were the pioneers who felled trees, leveled fields, and transformed conquered Indian lands into the fertile plantations in Alabama and Mississippi. The ever-expanding demand for forced labor on this cotton frontier launched an internal slave trade that would ultimately relocate a million black men, women, and children from their birthplaces on the eastern seaboard to the new states of what was then considered the American southwest.”).

65. *Id.* at 14.

66. *Id.* at 13.

they described the power of their position as “the lever that wields the destiny of modern civilization.”<sup>67</sup>

Regarding the unimaginable wealth of the planter class, Edward Baptist observed that:

[B]y 1860, five of the six states in the Union with the highest average white income were in the belt that cotton entrepreneurs wrapped across the South. The region would have been among the world’s ten largest economies, and by one accounting its fourth most prosperous one. The three million white people in the cotton states were per capita the richest people in the United States, and probably the richest group of people of that size in the world.<sup>68</sup>

### C. *New Scholarship*

As we experience the 400th anniversary of the beginning of slavery in America, recent scholarship by historians, economists, and others has focused on rethinking the critical role of black chattel slavery in the development of the modern American capitalist society.<sup>69</sup> As historians Beckert and Rockman noted, “the present moment seems particularly auspicious for rethinking American economic history through the lens of slavery . . . [and] posit[s] the inseparability of racism and capitalism as social formations.”<sup>70</sup>

One theme of this scholarship emphasizes that the business of slavery formed the foundation for the modern capitalist state.<sup>71</sup> Like any modern business owner, planters were motivated to maximize their profits and minimize costs by making the production of cotton increasingly more efficient.<sup>72</sup> For example, the invention of the cotton gin accelerated the separation of cotton fibers from the seeds.<sup>73</sup> However, before the cotton could be processed and cleaned, it first had to be picked in the fields by an army of slaves.<sup>74</sup> One scholar noted that “[o]ne of the most astounding productivity

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67. BECKERT, *supra* note 45, at 119 (“As *The American Cotton Planter* put it in 1853, ‘The slave-labor of the United States, has hitherto conferred and is still conferring inappreciable blessings on mankind.’”).

68. Baptist, *supra* note 46, at 36.

69. See *infra* notes 70–81 and accompanying text.

70. Beckert & Rockman, *supra* note 2, at 8.

71. See *infra* notes 70–81 and accompanying text.

72. See Joan Brodsky Schur, *Eli Whitney’s Patent for the Cotton Gin*, NAT’L ARCHIVES, <https://www.archives.gov/education/lessons/cotton-gin-patent> [<https://perma.cc/W2UB-AHUW>] (last visited Apr. 6, 2020).

73. *Id.*

74. *Id.*

improvements during the nineteenth century had nothing to do with machinery but rather with the human capacity to perform agricultural labor with one's hands."<sup>75</sup>

The noted scholar Edward Baptist put it more plainly when he wrote, "The whip made cotton. And whip-made increases in the efficiency of picking [cotton] had global significance."<sup>76</sup> Baptist's analysis shows that the increase in cotton production from the eighteenth to nineteenth centuries was not simply due to an increase in slave population; rather, it was driven by the inducement of the lash and other coercive techniques.<sup>77</sup> For example,

Between 1790 and 1860 . . . the innovative violence [of the whip] . . . made possible a vast increase in the number of cotton plants being tended in the United States. The amount of cotton produced in the United States grew from 20 million pounds around 1805 . . . to over two billion pounds of cotton in 1860, an increase of 10,000 percent (in the same time, the number of slaves in cotton-specializing areas grew from about 50,000 to two million, or by 4,000 percent. By the 1820s, the United States had achieved dominance over a rapidly expanding international market, controlling about 80 percent of the world's most widely traded commodity in its most important markets. It rose from irrelevance in the world cotton market to a dominant position.<sup>78</sup>

Baptist also points out that the dramatic increase in the amount of cotton produced between 1801 and 1846 was largely driven by the increase in the amount of cotton that each slave picked per day.<sup>79</sup> Such an astounding increase from millions to billions of pounds owes much to the disciplinary technologies of torture and the whip.<sup>80</sup> Each slave had a personal daily quota of the number of pounds of cotton that they were expected to pick each day:

The amount of cotton enslaved people harvested increased dramatically over time. In 1801, 28 pounds per day per picker was the average in the South Carolina labor camps . . . In 1846, the hands [(slaves)] on a Mississippi labor camp

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75. Beckert & Rockman, *supra* note 2, at 14.

76. Baptist, *supra* note 46, at 52.

77. *See id.* at 40.

78. *Id.* at 40–41.

79. *See id.* at 40.

80. *Cf. id.*

averaged 341 pounds each on a good day, and in the next decade averages climbed higher still.<sup>81</sup>

D. *Dred Scott*

To bolster the South's justification for slavery, the seminal case of *Dred Scott v. Sanford* established the constitutionality of slavery and defined slaves as commodities.<sup>82</sup> In his majority opinion, Chief Justice Taney ruled that slavery was not only legal throughout America, but that it was entirely consistent with the intent of the Constitutional framers.<sup>83</sup> In support of this conclusion he wrote that:

[African-Americans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an *ordinary article of merchandise* and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.<sup>84</sup>

Chief Justice Taney made it clear in 1857 that black people did not deserve any rights or respect from whites and “that [they] might justly and lawfully be reduced to slavery for their own benefit . . . [and] bought and sold and treated as an *ordinary article of merchandise*.”<sup>85</sup> Thus, under the law as articulated by Chief Justice Taney, the black body was an economic commodity and not even a

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81. *Id.* at 42 (discussing the “crucial shift in planter-directed [technology]” and the “new varieties of short-staple cotton seeds” which “adapted for heavy growth and ‘pickability’” and were “responsible for transforming the efficiency of cotton harvesting”). However, “their argument cannot explain all the available facts. The inadequacies . . . emerge as soon as one begins to look at the very cotton record books on which the claim for pickability is based. These records measure nothing about seeds and everything about the performance of individual laborers.” *Id.* at 42–43. Historians have also noted that “[i]n this discourse, planters . . . completely obscur[ed] the reality that forced labor performed the work. The . . . journals hide the fact that in real life, enslavers were measuring not the output of seeds, but the output of enslaved human beings laboring under threat of violence.” *Id.* at 314 n.35.

82. *Dred Scott v. Sandford*, 60 U.S. 393, 451 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

83. *See id.* at 407.

84. *Id.* (emphasis added).

85. *Id.* (emphasis added).

human being.<sup>86</sup> It was nothing more than a thing, “an ordinary article of merchandise,” like a horse or a chair, “[to] be bought and sold . . . whenever a profit could be made from it.”<sup>87</sup>

### III. BLACK CODES AND CONVICT LEASING

The second era of black commodification included the Black Codes and convict leasing which started just after the end of the Civil War in 1868.<sup>88</sup> At that time, the defeated Southern states were both physically and economically devastated.<sup>89</sup> The slaves that the South relied on for wealth, stability, and their way of life were no longer commodities; they were citizens.<sup>90</sup> With its cities and land in ruins and their loss of this unfree labor, the South needed to rebuild their economy; they found a way to do that by reimposing slavery on the freemen in every way but in name.<sup>91</sup>

#### A. Thirteenth Amendment

Even though the Thirteenth Amendment is hailed for banning slavery in America, a close reading of the text reveals an important “*except*” loophole.<sup>92</sup> By its explicit text, the Amendment actually provided for the continuation of slavery and involuntary servitude, but only “as a punishment for crime whereof the party shall have been duly convicted.”<sup>93</sup> That provision of the Thirteenth Amendment laid the foundation for the Black Codes and convict leasing by marrying massive private financial gain with the further exploitation of black bodies.<sup>94</sup>

#### B. Black Codes

The Thirteenth Amendment was instrumental in allowing the South to solve its “labor crisis”<sup>95</sup> by facilitating the restoration of its

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86. *See id.*

87. *Id.*

88. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 53–54 (Anchor Books 2009) (2008).

89. *Id.* at 53.

90. *See id.*

91. *Id.*

92. U.S. CONST. amend. XIII, § 1 (emphasis added).

93. *Id.*

94. *See infra* Sections III.B–C.

95. *See* BLACKMON, *supra* note 88, at 53–54.

dominance over the large numbers of free black people.<sup>96</sup> Southern legislators quickly passed laws called Black Codes which were designed to criminalize nearly every behavior or status of black freemen.<sup>97</sup> Under the provisions of the Thirteenth Amendment and the new Black Codes, freemen could now be arrested, jailed, quickly tried, and “duly convicted of a crime,”<sup>98</sup> and thereby be legally subjected to “slavery [ ]or involuntary servitude.”<sup>99</sup>

The Black Codes were aimed with “almost surgical precision” at black freemen<sup>100</sup> and essentially criminalized the status of just being black in public, or as one scholar described it, “living while black.”<sup>101</sup> Although there was massive unemployment among both black and white men, the enforcement of the Black Codes “was reserved almost exclusively for black men . . . [fundamentally] for the offense [of] blackness.”<sup>102</sup> Under the Black Codes, it was literally a crime for a black man to be found in public without proof of having a job working for a white man.<sup>103</sup> It was also criminal for a black person to be alone in public, walk down a road, or walk across a field.<sup>104</sup> Having been freed from slavery but with generally no place to go, many freedmen “found themselves designated [as] ‘trespassers,’ ‘disturbers of the peace,’ ‘vagrants,’ or ‘loiterers.’”<sup>105</sup>

The Black Codes listed specific crimes for the “free negro” alone: “mischief,” “insulting gestures,” “cruel treatment to animals,” and the “vending of spiritous or intoxicating liquors.” Free blacks were also prohibited from keeping firearms and from cohabiting with whites. The penalty for intermarriage, the ultimate taboo, was “confinement in the State penitentiary for life.”<sup>106</sup>

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96. *See id.*; *see also* MUHAMMAD, *supra* note 9, at 2 (describing the durability of the white myth that Negroes are, and always have been, considered “stranger[s] in our midst”).

97. *See* BLACKMON, *supra* note 88, at 53.

98. U.S. CONST. amend. XIII, § 1; *see also* OSHINSKY, *supra* note 37, at 60 (“The typical state prisoner was a young, illiterate, male Negro serving a first-time sentence for burglary or theft. Typically his trial took place without a lawyer, in a matter of minutes, before an all-white jury prone to discount ‘nigger testimony’ as a pack of lies.”).

99. U.S. CONST. amend. XIII, § 1.

100. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

101. MUHAMMAD, *supra* note 9, at xvi.

102. BLACKMON, *supra* note 88, at 1.

103. *Id.*

104. *See* Gloria J. Browne-Marshall, *Stop and Frisk: From Slave-Catchers to NYPD: A Legal Commentary*, 21 TROTTER REV. 98, 105–06 (2013).

105. MICHAEL A. HALLETT, PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE 2 (2006).

106. OSHINSKY, *supra* note 37, at 21.

It is clear from even a casual glance at history that the Black Codes were enshrined to protect, support, and advance the cause of white supremacy and white privilege in the South; as such, they were “vigorously enforced.”<sup>107</sup> As one scholar has correctly observed, “the Convict Lease system was wielded almost exclusively against people of African descent.”<sup>108</sup>

### C. *Convict Leasing*

The Black Codes enabled the practice of convict leasing which “emerged as a uniquely southern solution for solving the postbellum labor shortage—and a powerful vehicle for the continuation of white supremacy.”<sup>109</sup> The vigorous enforcement of the Black Codes resulted in overflowing southern jails and penitentiaries.<sup>110</sup> The solution to this problem of extreme overcrowding was not to build new jails or penitentiaries but instead to engage in the exploitive and lucrative practice of convict leasing.<sup>111</sup> In this leasing program, a middleman would pay the fees and fines that a convicted freedman owed the court, sublease these men and boys out to private businesses who would pay the middleman a fee per head, and keep as profit the difference between the payments to the court and the payments from the private businesses.<sup>112</sup> And in the convict leasing business, business was good, very good.<sup>113</sup> The profits made by everyone in this chain of exploitation were enormous by any measure.<sup>114</sup> This chain included the county that tried the convict, the broker or middleman who leased him out, and the private businesses who extracted large profits from virtually free labor, and then quite literally worked the convicts to death.<sup>115</sup> Because convict labor was so cheap, the common refrain among those that practiced it was: “One dies, get another.”<sup>116</sup>

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107. *See id.*

108. HALLETT, *supra* note 105, at 4.

109. *Id.* at 2.

110. *See* OSHINSKY, *supra* note 37, at 21.

111. *See* HALLETT, *supra* note 105, at 2–3; *see generally* ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 3, 19 (1996) (explaining the convict leasing system and how it worked, how the convicts were treated, and the lasting implications of Convict Leasing).

112. *See* OSHINSKY, *supra* note 37, at 43–44.

113. *See id.* at 44.

114. *Id.*

115. *See id.*

116. MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928*, at 2–3 (1996) (“[A] Southern delegate who leased prisoners gave



If a slave died, he or she was expensive to replace.<sup>117</sup> One noted scholar has observed that, “[a]lthough the nature of prisoners’ commodity value has changed” from slavery, in the convict leasing program, “prisoners [were] no longer profitable solely for their labor, but for their bodily ability to generate per diem payments for their private keepers.”<sup>118</sup> Because the black convicts had no intrinsic value and cost so little to acquire and replace, there was no financial incentive to keep them alive very long; they were routinely worked to death.<sup>119</sup>

One scholar’s description of convict labor summarizes the grim and fatal nature of the system: “In short, the incentive structure operative under the Convict Leasing system was oriented toward working men quite literally to their deaths—‘pushing every convict to the limit of endurance.’”<sup>120</sup>

W.E.B. Du Bois, writing about the practice of convict leasing in the Postbellum South, observed that “the South believed in slave labor, and was thoroughly convinced that free Negroes would not work steadily or effectively [without it]. The whites were determined after the war, therefore, to restore slavery in everything but in name.”<sup>121</sup>

Armed with the Black Code’s new powers, local sheriffs could arrest virtually every freedman they encountered who was not otherwise already working for a white man.<sup>122</sup> These local law enforcement officials would then harvest, jail, try, and convict them on a wholesale basis.<sup>123</sup> Thus, under the express terms of the Thirteenth Amendment, they were again subject to “slavery or

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. . . his opinion of [one speaker’s] denunciations [of convict leasing] in terms that summarize the significance of hundreds of statistics, reports, letters, diaries, speeches, laws, and court cases accumulated in a dozen dusty archives. ‘Before the war, we owned the negroes,’ the lessee reflected nostalgically. ‘If a man had a good negro, he could afford to keep him . . . . But these convicts, we don’t own ‘em. One dies, get another.’ One dies, get another: no apothegm could better capture the distinctive feature of convict leasing, the origins of its brutality, or, for that matter, the most salient difference between it and slavery.”)

117. *See id.*

118. HALLETT, *supra* note 105, at 3–4.

119. *See id.* at 50–51.

120. *Id.* at 50. The author also notes that “[t]he lessees regarded black labor as a commodity inseparable from the convicts themselves, much as slaveholders had regarded slaves.” *Id.* at 46.

121. W.E.B. Du Bois, *The Spawn of Slavery: The Convict-Lease System in the South*, in *AFRICAN AMERICAN CLASSICS IN CRIMINOLOGY & CRIMINAL JUSTICE* 81, 84 (Shaun L. Gabbidon et al. eds., 2002).

122. *See* HALLETT, *supra* note 105, at 2.

123. *Id.*

involuntary servitude” implicitly, for life.<sup>124</sup> Once hurriedly convicted, naturally a preference would be given to their old slave master to continue to work in the fields from which they came, just as if the institution of slavery had never ended.<sup>125</sup> Convicted black men were also leased out on a retail basis to middle men who would then sublease them to private industry.<sup>126</sup> Everybody in the chain accumulated massive wealth through these practices and had absolutely no incentive to ever give it up or lower their profit margins by treating the convicts humanely.<sup>127</sup> Humane treatment of the convict laborers was an expensive luxury that they did not pay for because they did not have to.<sup>128</sup>

In the hands of private businesses, these freedmen were put to work in the most wretched conditions of the coal mines, sawmills, railroad camps, cotton fields, and agriculture of all types, under the harshest of conditions, like standing all day in waist deep water, draining swamps.<sup>129</sup> These forms of difficult, dangerous, and agonizing work were referred to by those in the convict leasing world as “nigger work” and were distained by all white workers.<sup>130</sup> This disdain was not just because they thought that “nigger work” was beneath them, but also because free white laborers expected to get paid for their work, whereas convict labor was virtually free.<sup>131</sup> Free white laborers deeply resented the convict leasing programs, because it was difficult to compete for jobs against convict laborers who worked for almost nothing.<sup>132</sup>

Technically black convict laborers were only supposed to be held and worked until the pay that they earned, as miniscule as it was, had paid back the broker who had paid for their “freedom.”<sup>133</sup> Once the broker and the private business that subleased the convict had

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124. *Id.* at 1–2.

125. *Cf. id.* at 2.

126. *Id.*

127. *Id.* at 51.

128. *See id.*

129. *See id.* at 2.

130. *See* OSHINSKY, *supra* note 37, at 36; *see also* Devon Bowers, *Slavery by Another Name: The Convict Lease System*, HAMPTON INST. (Oct. 30, 2013), [https://www.hamptoninstitution.org/convictleasesystem.html#.XkCL\\_hNKgXp](https://www.hamptoninstitution.org/convictleasesystem.html#.XkCL_hNKgXp) [<https://perma.cc/79AU-EKSG>].

131. *See* OSHINSKY, *supra* note 37, at 36; *see also* Bowers, *supra* note 130.

132. *See* Bowers, *supra* note 130.

133. *See* *Slavery v. Peonage*, PBS, <http://www.pbs.org/tpt/slavery-by-another-name/themes/peonage/> [<https://perma.cc/JX28-CPTR>] (last visited Apr. 6, 2020).

recouped their costs, the convict was supposed to be released.<sup>134</sup> However, because their new industrial masters deducted their leasing cost from their wages, few convicts ever paid off their debts and many never received a dime for their endless labor.<sup>135</sup> In fact, no matter how hard or how long these convicts worked, few were ever “released.”<sup>136</sup>

Although some men survived their ordeal as a convict laborer, it was generally a death sentence for a black man to be convicted of violating a Black Code.<sup>137</sup> The convergence of the Black Codes to fill up the southern jails with young black men, and the convict leasing programs to empty them out while giving everyone in the chain a handy profit, as one scholar in the field put it, this perpetual profit machine “kept alive a racially disproportionate system of involuntary servitude—and a slavery-era understanding of captives as legally exploitable commodities.”<sup>138</sup>

To maximize profits, the owners of the private companies that subleased these convicts sought earnestly to reduce the costs of maintaining the convicts in every conceivable way.<sup>139</sup> Money-saving efforts included: little or no clothing, stale and rancid water, bad food, and sometimes little to no food at all.<sup>140</sup> For these new masters, no effort was spared in trying to get the most work possible from these black men while reducing the costs involved in maintaining them as much as possible.<sup>141</sup> Unlike the practice of convict leasing in the Jim Crow south, during slavery, the slave masters had an expensive investment in each slave, “good” slaves often cost hundreds or even thousands of dollars;<sup>142</sup> therefore the slave masters had a vested interest in keeping the slaves reasonably healthy, alive, and strong enough to work in the fields for as long as possible.<sup>143</sup>

One scholar described the unimaginable misery that the convict laborers were made to endure:

The prisoners ate and slept on bare ground, without blankets or mattresses, and often without clothes . . . . Some who tried to escape were whipped ‘till the blood ran down their

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134. *See id.*

135. *See id.*

136. *See id.*

137. *See HALLETT, supra note 105, at 50; see also OSHINSKY, supra note 37, at 21.*

138. HALLETT, *supra note 105, at 3* (emphasis omitted).

139. *See id.* at 49–51.

140. MANCINI, *supra note 116, at 64–65.*

141. *Id.* at 22–23.

142. *See BERRY, supra note 17, at 1–2; cf. MANCINI, supra note 116, at 38.*

143. MANCINI, *supra note 116, at 2–3.*

legs'; others had a metal spur riveted to their feet. Convicts dropped from exhaustion, pneumonia, malaria, frostbite, consumption, sunstroke, dysentery, gunshot wounds, and shackle poisoning (the constant rubbing of chains and leg irons against bare flesh.)<sup>144</sup>

The cruelty visited upon the black men caught up in the convict leasing system created a “[n]ew . . . [s]lavery.”<sup>145</sup>

The Faustian bargain between law enforcement and private industry produced massive private wealth at the expense of the lives of hundreds of thousands of young black men and boys who suffered unimaginable, horrific misery and death.<sup>146</sup> During this practice, which thrived for more than sixty years, from 1865 to the 1940's, the law made no distinction between children and adults, which resulted in boys as young as eight years old being convicted for the most trivial of offenses and leased out to private industries who held these children in the most unspeakable states of human misery and simply, without a shred of human decency or remorse, worked them to death.<sup>147</sup>

#### *D. Punishment*

Convict laborers were not only constantly stalked by imminent death, but they also endured the most painful and degrading punishments, not only as punishments for some trivial perceived offense but also as a public display to the other convicts.<sup>148</sup> It has been noted that “[t]hese methods were not only directed at the individual convict but also aimed at the group as a whole—to reinforce that subjective perception of legal inferiority to whites, ‘to keep blacks in their place.’”<sup>149</sup> The chief method of punishment for convicts was “the lash . . . used by whipping bosses, a designated agent whose job it was to inflict public punishment” to the convict for the most minor of offenses of the rules.<sup>150</sup>

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144. OSHINSKY, *supra* note 37, at 45.

145. HALLETT, *supra* note 105, at 46.

146. *See id.* at 48–50.

147. *See* OSHINSKY, *supra* note 37, at 47–48; *see generally* BLACKMON, *supra* note 88, at 377–78 (discussing the general lack of laws and oversight surrounding this new form of slavery).

148. *See* MANCINI, *supra* note 116, at 75–76.

149. HALLETT, *supra* note 105, at 51.

150. MANCINI, *supra* note 116, at 75.

The causal connections between the era of convict leasing and today's era of racialized mass incarceration and private prisons cannot be ignored.<sup>151</sup> Just as the vigorous enforcement of the Black Codes filled southern prisons to overflowing to maintain a system of involuntary servitude using black bodies to create the profitable practice of convict leasing,<sup>152</sup> the vigorous enforcement of the war on drugs created today's system of mass incarceration and for-profit prisons.<sup>153</sup> The historical record clearly shows that the commodification of black bodies did not end when convict leasing was finally eliminated in 1942; rather, it was simply repackaged and rebranded as mass incarceration and private prisons.<sup>154</sup>

#### IV. MASS INCARCERATION

The third era of commodifying black people in America is mass incarceration, which began in the early 1970s.<sup>155</sup> In terms of the “big issues of the day . . . mass incarceration was, and is, perhaps the preeminent moral domestic issue of our time.”<sup>156</sup> The staggering rise of mass incarceration in 1972 was a political response<sup>157</sup> to the gains made by black people during the civil rights movement.<sup>158</sup> Up until the legislative victories of the civil rights movement,<sup>159</sup> blacks were separated from mainstream white society by traditions of segregation and Jim Crow laws.<sup>160</sup> However, once those racist institutions and traditions were banned by law,<sup>161</sup> new systems had to be put in place to maintain white supremacy to control, isolate, and contain black people.<sup>162</sup> Therefore, the Jim Crow era justification for white supremacy that was based on the belief in black inferiority and

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151. See *supra* Part III; see also *infra* Section IV.A.

152. See *supra* Part III.

153. See *infra* Section IV.B.

154. See ALEXANDER, *supra* note 15, at 156–57; see BLACKMON, *supra* note 88, at 377–79.

155. James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [https://perma.cc/2T6L-7K83].

156. COATES, *supra* note 19, at 221–22.

157. See ALEXANDER, *supra* note 15, at 47.

158. See *id.*

159. See *Civil Rights Movement Timeline*, HIST., <https://www.history.com/topics/civil-rights-movement/civil-rights-movement-timeline> [https://perma.cc/L4JL-MZG7] (last updated Jan. 16, 2020).

160. See Andrew Pegoda, *What People Still Get Wrong About Segregation*, TIME (Feb. 3, 2020), <https://time.com/5775300/segregation-separation> [https://perma.cc/2ZYY-XKFE].

161. *Civil Rights Movement Timeline*, *supra* note 159.

162. See discussion *supra* Sections IV.A–C.

unworthiness<sup>163</sup> morphed into a national fear mongering campaign of black criminality led by politicians trying to one-up one another by being “tough on crime”<sup>164</sup> and by an insatiable media appetite for sensationalism.<sup>165</sup>

*A. Prison Labor*

Not only are millions of young black and brown men subjected to mass incarceration,<sup>166</sup> they are not left idle while serving out their sentences.<sup>167</sup> Instead they are commodified as workers who are paid little to nothing to work both inside and outside of the prison,<sup>168</sup> reminiscent of the convict labor system.<sup>169</sup> This work often includes maintaining the facility, a function that eliminates the need for hiring outside paid labor to do the job and generates significant cost savings to the state.<sup>170</sup>

One observer makes the point that:

[i]f U.S. prisons had to pay prisoners the minimum wage, they could not keep operating. If they paid outside workers to do the work that inmates do, costs could rise 30 to 45 times for the same services. Under current arrangements, the prison industry saves hundreds of millions of dollars each year on labor costs.<sup>171</sup>

In addition, prisoners are often required to produce goods and services for the state and even outside companies.<sup>172</sup> One journalist noted that “[t]he average wage in state prisons is 20 cents per hour. In federal prisons, the average wage is 31 cents per hour.”<sup>173</sup> The optics

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163. See ALEXANDER, *supra* note 15, at 26–27.

164. *Id.* at 42–43.

165. See *id.* at 50.

166. *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet> [<https://perma.cc/L7TZ-7GY8>] (last visited Apr. 6, 2020).

167. See Beth Schwartzapfel, *Taking Freedom: Modern-Day Slavery in America's Prison Workforce*, PAC. STANDARD (May 7, 2018), <https://psmag.com/social-justice/taking-freedom-modern-day-slavery> [<https://perma.cc/6HYK-XLMR>].

168. See *generally id.* (discussing the labor protections and average pay of inmates who are forced to work).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* (noting that “for growing numbers of companies, prisons provide a cheap source of labor that legal wages cannot compete with . . . [which] establishes a model for linking corporate profit and prison labor—and, by extension, the potential for profit-

of this prison labor system are extremely troubling and harken back to the days of slavery and convict leasing.<sup>174</sup> As one observer described, “Thousands of prisoners toil in the hot sun every day and make nothing . . . . Prison guards on horseback, 10-gallon hats, prisoners in their uniforms. It looks like what it is: plantation labor all over again.”<sup>175</sup> Another scholar assesses the situation more directly, making the point that cheap (sometimes free) compelled prison labor undercuts both domestic and global labor costs when she writes that, “prison constitutes the new slavery and . . . millions in cages are there to provide cheap labor for corporations looking to lower stateside production costs . . . . [V]irtually every state, including California, has a law requiring prisoners to work.”<sup>176</sup>

### B. *War on Drugs*

Much like the Black Codes enabled convict leasing,<sup>177</sup> the so-called war on drugs that started during the Nixon Administration in the 1970s put in place a system to incarcerate large numbers of black and brown men.<sup>178</sup> Marc Mauer summarizes the dramatic increase in prison population by observing that:

[T]he number of inmates in U.S. state and federal prisons . . . skyrocketed from 196,000 in 1972 to 1,159,000 by 1997, a 500 percent increase. At the local jail level, the numbers have similarly escalated from 130,000 to 567,000 for a total of more than 1.7 million inmates. Thus, there are now five times as many U.S. citizens locked up as there were twenty-five years ago, for an overall rate of incarceration of 645 inmates per 100,000 population, or about one of every 155 Americans.<sup>179</sup>

Mauer goes on to conclude that in America’s eagerness to imprison in 1994, half of the over one million individuals imprisoned were African American; a price paid for the economic and social changes

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driven exploitation”); *see also* Genevieve LeBaron, *Prison Labour, Slavery, and the State*, in *REVISITING SLAVERY AND ANTISLAVERY* 151, 151–53 (Laura Brace & Julia O’Connell Davidson eds., 2018).

174. Schwartzapfel, *supra* note 167.

175. *Id.*

176. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 21 (2007) (explaining the logic behind the “new slavery” argument and identifying problems with the underlying reasoning).

177. *See supra* Part III.

178. *See* MARC MAUER & THE SENTENCING PROJECT, *RACE TO INCARCERATE* 18–19 (2006).

179. *Id.* at 19.

occurring in America at the time.<sup>180</sup> Some have argued that the dramatic rise in the rate of incarceration is just reflective of higher crime rates; however, “[a]n analysis of the growth in the use of prisons from [the 1980’s] until the present undermines the contention that the continuing race to incarcerate . . . is a result of higher rates of violent crimes.”<sup>181</sup>

In fact, “research has demonstrated that changes in criminal justice policy, rather than changes in the crime rates, have been the most significant contributors leading to the rise in state prison populations.”<sup>182</sup> Additionally, it has been observed that “both official crime rates and prison rates may be affected by the level of punitiveness in a society.”<sup>183</sup> Many experts have concluded that “[t]he correlation between incarceration and crime is . . . statistically insignificant . . . . Statistics like these have led some commentators to discount any relationship between crime and punishment.”<sup>184</sup>

### C. Prison Boom

Although the United States constitutes only 5% of the world’s population, it houses 25% of the world’s incarcerated prisoners.<sup>185</sup> America’s rate of incarceration dwarfs that of some of the world’s largest jailers, including Russia, China, and Iran.<sup>186</sup> America remains the most carceral country in world history.<sup>187</sup>

Since the start of the prison boom in 1972, the imprisoned population in the United States has exploded.<sup>188</sup> “To accommodate this colossal movement toward confinement, close to one thousand prisons have been built throughout the United States . . . .”<sup>189</sup> Counting both the actual incarcerated population, consisting of over 2

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180. *Id.* at 22.

181. *Id.* at 23.

182. *Id.* at 34.

183. *Id.* at 38.

184. See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 38 (2006).

185. GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 4–5 (2008).

186. ALEXANDER, *supra* note 15, at 6.

187. Kelly Lytle Hernández, Khalil Gibran Muhammad, & Heather Ann Thompson, *Introduction: Constructing the Carceral State*, 102 J. AM. HIST. 18, 18 (2015), <https://doi.org/10.1093/jahist/jav259> [<https://perma.cc/TYS6-LD77>].

188. *See id.* at 20.

189. Brady Heiner, *Excavating the Sedimentations of Slavery: The Unfinished Project of American Abolition*, in DEATH AND OTHER PENALTIES: PHILOSOPHY IN A TIME OF MASS INCARCERATION 13, 13 (Geoffrey Adelsberg et al. eds., 2015).



million people,<sup>190</sup> and adding those who are on probation or parole, or otherwise under state supervision, the numbers are staggering.<sup>191</sup> Altogether, they amount to “over 7 million” people.<sup>192</sup>

This level of incarceration led to a crisis of overcrowded prisons bursting at the seams and over stressing every service and function of the prison.<sup>193</sup> Among the actual 2.3 million incarcerated prisoners, “nearly 70 percent” are black or brown.<sup>194</sup> As Michelle Alexander points out, “[o]ne in three young African American men will serve time in prison if current trends continue, and in some cities more than half of all young adult black men are currently under correctional control—in prison or jail, on probation or parole.”<sup>195</sup>

#### D. *Prison Racial Makeup*

The crime analysis above helps to explain why the vast increase in incarceration “is concentrated among the disadvantaged and the large race and class disparities in imprisonment reinforce lines of social disadvantage. High incarceration rates among less educated, less skilled, financially disadvantaged, and minority men are unmistakable.”<sup>196</sup> These numbers and their social implications are striking, unprecedented, and politically unacceptable to most of the Western World.<sup>197</sup> “In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men.”<sup>198</sup> Counting both state and federal corrections facilities, while black people make up only 12.3% of the American population, they represent “roughly half” of the incarcerated.<sup>199</sup> Adding brown men, this calculation results in black and brown

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190. James A. Manos, *From Commodity Fetishism to Prison Fetishism: Slavery, Convict-Leasing, and the Ideological Productions of Incarceration*, in DEATH AND OTHER PENALTIES: PHILOSOPHY IN A TIME OF MASS INCARCERATION, *supra* note 189, at 43, 43.

191. *See id.*

192. *Id.*

193. *See* Heiner, *supra* note 189, at 13.

194. *Id.* at 13–14.

195. ALEXANDER, *supra* note 15, at 9.

196. WESTERN, *supra* note 184, at 15.

197. *See id.* at 13–15; *see also* ALEXANDER, *supra* note 15, at 6.

198. ALEXANDER, *supra* note 15, at 7; *see* JAMIE FELLNER, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (2000), [http://www.precaution.org/lib/hrw\\_war\\_on\\_drugs.2000.pdf](http://www.precaution.org/lib/hrw_war_on_drugs.2000.pdf) [<https://perma.cc/YHW5-ZR6D>] (“In at least fifteen states, black men are admitted to prison on drug charges at rates that are from 20 to 57 times greater than those of white men.”).

199. PAUL STREET, THE VICIOUS CIRCLE: RACE, PRISON, JOBS, AND COMMUNITY IN CHICAGO, ILLINOIS, AND THE NATION 5–6 (2002).

people making up over 70% of the imprisoned population.<sup>200</sup> One scholar notes that “[h]alf of all prison inmates are now African American, and another 17 percent are Hispanic—percentages far out of proportion to their numbers in the general population.”<sup>201</sup>

*E. Impact on Communities*

The prison has deeply penetrated most inner-city black communities; so much so that, in these communities, the prison has become:

[P]art of the socialization process. “Every family, every household, every individual in these neighborhoods has direct personal knowledge of the prison—through a spouse, a child, a parent, a neighbour, a friend. Imprisonment ceases to be the fate of a few criminal individuals and becomes a shaping institution for whole sectors of the population.”<sup>202</sup>

In the wake of the prison influence, many inner-city neighborhoods may experience a situation in which there are no eligible young men left anymore.<sup>203</sup> Many young men are either dead from street violence, in the drug trade, in prison, on parole, on probation, or under some other form of state supervision.<sup>204</sup> “[I]n major cities wracked by the drug war, as many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives.”<sup>205</sup> Once they have criminal records, they are branded with the label of convicted felon and are almost fatally socially and economically disabled by that label, which creates a type of civil death.<sup>206</sup> As a result, many of these ex-felons are unmarriageable, unemployable, homeless, sick, mentally or emotionally disturbed, and permanently banished to a lower and outside caste of undesirables.<sup>207</sup>

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200. Heiner, *supra* note 189, at 13–14.

201. MAUER, *supra* note 178, at 118–19 (emphasis omitted).

202. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1288 (2004).

203. *See generally id.* (explaining the social effects of mass incarceration on inner-city neighborhoods).

204. *See id.* at 1282–83 (discussing how increasing incarceration of black males has an effect on black communities as a whole, leaving “enormous burdens” on women in those communities).

205. ALEXANDER, *supra* note 15, at 7.

206. *See id.* at 94.

207. *See id.* at 97.

*F. Crack Epidemic*

Just like the Black Codes were enacted after the end of slavery to control freed slaves,<sup>208</sup> shortly after the war on drugs was declared, Congress passed a number of extraordinarily punitive measures aimed directly at young black people either selling or possessing drugs, especially crack.<sup>209</sup> They also allocated billions of dollars of federal funds to states and localities that arrested and prosecuted those who either possessed or sold crack.<sup>210</sup> In fact, as one noted scholar has observed, blacks and whites used drugs in about the same percentages.<sup>211</sup> “One 2012 analysis, the National Survey on Drug Use and Health, found that White youths (6.6 percent) were 32 percent more likely than Black youths (5 percent) to sell drugs. But Black youths were far more likely to get arrested for it.”<sup>212</sup>

He went on to demonstrate that, “During the crack craze in the late 1980s and early 1990s, the situation was the same. Whites and Blacks were selling and consuming illegal drugs at similar rates, but the Black users and dealers were getting arrested and convicted much more.”<sup>213</sup>

Most importantly, the white false narrative and conspiracy theory about crack held that most of the consumers of crack were black, while most consumers of powder cocaine were white.<sup>214</sup> However persistent this perception of the connection between black youth and crack use was among police, prosecutors, judges, politicians, and the white public consciousness, crack cocaine was overwhelmingly used by white people, and not black people.<sup>215</sup> In fact, “[i]n 1996 when two-thirds of the crack users were White or Latina/o, 84.5 percent of the defendants convicted of crack possession were Black.”<sup>216</sup> One

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208. *See supra* Section III.B.

209. *See* ALEXANDER, *supra* note 15, at 53.

210. *See id.*

211. *See* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 435–36 (2016) (“Between 1985 and 2000, drug offenses accounted for two-thirds of the spike in the inmate population. By 2000, Blacks comprised 62.7 percent and Whites 36.7 percent of all drug offenders in state prisons—and not because they were selling or using more drugs. That year, the National Household Survey on Drug Abuse reported that 6.4 percent of Whites and 6.4 percent of Blacks were using illegal drugs. Racial studies on drug dealing usually found similar rates.”).

212. *Id.* at 436.

213. *Id.*

214. *See* U.S. DEP’T OF JUSTICE, FEDERAL COCAINE OFFENSES: AN ANALYSIS OF CRACK AND POWDER PENALTIES 6 (2002).

215. *See* NICOLE D. PORTER & VALERIE WRIGHT, CRACKED JUSTICE 10 (2011).

216. KENDI, *supra* note 211, at 436.

national study on the racial dynamics of drug use found that “white students use cocaine at seven times the rate of black students, use crack cocaine at eight times the rate of black students, and use heroin at seven times the rate of black students.”<sup>217</sup>

The false narrative about the supposed links between blacks and crack sparked fear in mainstream America and served as fuel to ignite the legislative and media-driven frenzy that was responsible for putting millions of young black and brown men in prison.<sup>218</sup> The resulting surge in arrests of black youth for nonviolent drug offenses created an explosion and darkening of the overall prison population, which led to severe overcrowding and gave birth to the private prison industry.<sup>219</sup>

This is not to suggest that the use and sale of crack cocaine in the inner-city black communities did not create significant damage and dislocation.<sup>220</sup> As Michelle Alexander has poignantly observed, “[n]o one should ever attempt to minimize the harm caused by crack cocaine and the related violence.”<sup>221</sup> The negative impact of crack on black inner city communities was also observed by another prominent scholar when he wrote that “[c]rack blew through America’s poor black neighborhoods like the Four Horsemen of the Apocalypse,’ leaving behind unspeakable devastation and suffering.”<sup>222</sup> However true these observations are, they fall far short of explaining why the explosion of political, media, and law enforcement attention and resources became so focused on crack and the black community.<sup>223</sup>

The horrors and the violence caused by the use and sale of crack in black neighborhoods did not motivate such a profound and unprecedented response by political actors, law enforcement personnel, media executives, and white social engagement.<sup>224</sup> These intensive efforts by politicians and law enforcement were not the cavalry coming to the rescue of the black neighborhoods that had been ravaged by the sale and use of crack.<sup>225</sup> Instead, they were

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217. ALEXANDER, *supra* note 15, at 99.

218. *See id.* at 53.

219. *See* Roberts, *supra* note 202, at 1272.

220. *See* ALEXANDER, *supra* note 15, at 51.

221. *Id.*

222. *Id.* (alteration in original) (quoting DAVID M. KENNEDY, DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 10 (2011)).

223. *See infra* notes 224–38 and accompanying text.

224. *See* ALEXANDER, *supra* note 15, at 52.

225. *See id.* at 49.

essentially invaders; actors exploiting the worst social stereotypes about crime, drugs, blackness, violence, and dangerousness to their own racist political, economic, and social advantage.<sup>226</sup>

Consider the evidence: “Crack hit the streets in 1985, a few years after Reagan’s drug war was announced . . . . Joblessness and crack swept inner cities precisely at the moment that a fierce backlash against the Civil Rights Movement was manifesting itself through the War on Drugs.”<sup>227</sup> Many other Western democracies dealt with their own drug crises through “drug treatment, prevention, and education or economic investment in crime ridden communities.”<sup>228</sup> America, however, “in the wake of the crack crises, . . . for reasons traceable largely to racial politics and fear mongering[,] . . . chose war.”<sup>229</sup> Following the legacy of America’s long held belief in the inherent relationship between blackness and crime, “[c]onservatives found they could finally justify an all-out war on [the] ‘enemy’ that had been racially defined years before. Almost immediately after crack appeared, the Reagan Administration leaped at the opportunity to publicize crack cocaine in an effort to build support for its drug war.”<sup>230</sup> The almost universal understanding among whites at every social, political, and economic level, was a false narrative that was effectively used to give the police a license to storm into the black community like an invading army.<sup>231</sup> Not to serve and protect but to

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226. *See id.* at 49–50; *see also infra* notes 227–38 and accompanying text.

227. *Id.* at 51.

228. *Id.* Which was exactly what America did when the drug addicts and deaths from over-doses became white and suburban. *See* Julie Netherland & Helena Hansen, *White Opioids: Pharmaceutical Race and the War on Drugs That Wasn’t*, PMC: BIOSOCIETIES (June 28, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5501419/> [<https://perma.cc/WY7J-3CGM>]. These white, rural, and suburban addicts were not addicted to and dying from crack, but rather from opioids—often doctor prescribed—as well as street heroin when prescriptions could no longer be obtained. *See id.* When drug addiction, violence, and death was associated with black people, it was considered by law enforcement and political actors as a criminal matter that had to be dealt with by the criminal justice system. *See id.* However, when these same problems began to be associated with white people, from the lower to the upper classes, it was suddenly considered to be a public health problem. *See id.* As such, it was not a problem that had to be dealt with by the criminal justice system but rather by the medical professionals who ran drug treatment centers. *See id.* When wealthy white teens overdosed and died by the tens of thousands in their bedrooms, in all-white upscale suburban neighborhoods, from intact families with two economically successful and employed parents, it was not described as a criminal epidemic, but rather as a public health problem. *See id.* The racist assumptions and double standards here are almost too obvious to merit mentioning. *See id.*

229. ALEXANDER, *supra* note 15, at 52.

230. *Id.*

231. *See* KENDI, *supra* note 211, at 436.

harass and arrest virtually every young black man who they suspected of possessing crack.<sup>232</sup> The enormity of this gulf between the possession of crack versus powder cocaine was evident in the 1986 Anti-Drug Abuse Act, which was passed by Congress with bipartisan support:

[The Act] prescribed a minimum five-year sentence for a dealer or user caught with five grams of crack, the amount typically handled by Blacks and poor people, the mostly White and rich users and dealers of powder cocaine—who operated in neighborhoods with fewer police—had to be caught with five hundred grams to receive the same five-year minimum sentence.<sup>233</sup>

This disparity was driven by the false narrative and conspiracy theory of black criminality being far more of a danger to society than white criminality, and thus must be punished much more harshly to deter the crime and protect the white community from black drug crime.<sup>234</sup> As Michelle Alexander has observed, law enforcement concentrated their efforts based on “a racialized conception of the drug problem.”<sup>235</sup> Alexander goes on to note that this “racialized cultural script about who and what constitutes the drug problem renders illegal drug activity by whites invisible.”<sup>236</sup>

Law enforcement justifies their concentration on enforcing drug laws in inner city black communities because, they argue, that is where most of the drug use and sales are concentrated.<sup>237</sup> Arguing against this racialized view, Michelle Alexander noted that “[t]he notion that most illegal drug use and sales happens in the ghetto is pure fiction. Drug trafficking occurs there, but it occurs everywhere else in America as well.”<sup>238</sup>

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232. *See id.*

233. *Id.* at 435.

234. *Id.* at 435–36 (“Racist ideas then defended this racist and elitist policy.”).

235. ALEXANDER, *supra* note 15, at 127 (quoting Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 436 (2005)).

236. *Id.*; *see also* Beckett et al., *supra* note 235, at 436.

237. ALEXANDER, *supra* note 15, at 125.

238. *Id.* at 100.

*G. Media Fuels Perceptions of Crack Epidemic and Black Criminality*

The leading edge of the effort to publicize and demonize the relationship between the criminality of blacks and the scourge of crack was the use of the willing and complicit media to quite literally bomb the public with images and stories about what came to be known as the “crack epidemic.”<sup>239</sup> All of the Reagan Administration’s efforts to recruit the media as useful tools in its campaign to associate crack with blackness was successful beyond its wildest fantasies.<sup>240</sup> Just months after these efforts got underway:

In June 1986, Newsweek declared crack to be the biggest story since Vietnam/Watergate, and in August of that year, Time magazine termed crack “the issue of the year.” Thousands of stories about the crack crisis flooded the airwaves and newsstands, and the stories had a clear racial subtext. The articles typically featured black “crack whores,” “crack babies,” and “gangbangers.”<sup>241</sup>

Even when two notable professional black athletes, Len Bias and Don Rogers, died from overdoses of powder cocaine in 1986, “the media erroneously reported their deaths as caused by crack.”<sup>242</sup> Michelle Alexander eloquently described the situation:

The bonanza continued into 1989, as the media continued to disseminate claims that crack was an “epidemic,” a “plague,” “instantly addictive,” and extraordinarily dangerous—claims that have now been proven false or highly misleading. Between October 1988 and October 1989, the Washington Post alone ran 1,565 stories about the “drug scourge.” Richard Harwood, the Post’s ombudsmen, eventually admitted the paper had lost “a proper sense of perspective” due to such a “hyperbole epidemic.” He said that “politicians are doing a number on people’s heads.” . . . “Crack was a godsend to the Right.” . . . It could not have appeared at a more politically opportune moment.<sup>243</sup>

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239. *See id.* at 52.

240. *Id.* at 5.

241. *Id.* at 52.

242. *Id.*

243. *Id.* at 52–53.

As part of this crack and drug frenzy, at one point in 1989, President Bush “characterized drug use as ‘the most pressing problem facing the nation.’”<sup>244</sup> Contemporaneously, “a New York Times/CBS News Poll reported that 64% of those polled—the highest percentage ever recorded—now thought that drugs were the most significant problem in the United States.”<sup>245</sup> This intensity of public concern was not correlated to any increase in the use of drugs, generally, but instead from fears stoked in the white mind of dangers associated with the crack epidemic.<sup>246</sup> Thus, it “was the product of a carefully orchestrated political campaign . . . highly correlated with political initiative, . . . and partisan appeals.”<sup>247</sup> Many “conservative politicians found they could mobilize white racial resentment by vowing to crack down on crime.”<sup>248</sup>

The association between blackness and criminality has a long history in America from the earliest days of slavery to mass incarceration.<sup>249</sup> One scholar has written that, “[i]deas about black criminality are part of slavery’s legacy of justifying why black bodies have been used for white wealth creation, electoral politics, and popular culture.”<sup>250</sup>

It is important to note that although school children learn that the Civil War ended in 1865, “[t]he end of the Civil War did not bring an end to plunder, political race-baiting, and blackface. White supremacy did not die with slavery. It evolved during Reconstruction” with the times and still dominates and haunts the lives of virtually all young black men.<sup>251</sup> The association of blackness with criminality, “is still hardwired behind the walls of our homes and workplaces even as it powers our smartphones and latest digital devices. The old and the new often go hand in hand.”<sup>252</sup> This association constitutes a continuity within both American minds and institutions, and if “we refuse to see continuity and insist only on change, then we will miss what’s behind the walls of our society.

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244. KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 44 (1997).

245. *Id.*

246. *See* ALEXANDER, *supra* note 15, at 69–70 (detailing use of war on drugs in reaction to success of affirmative action and civil rights enforcement).

247. *Id.* at 69.

248. *Id.* at 55.

249. *See generally id.* at 25–73 (providing a detailed historical account on the early days of slavery to the manifestation of mass incarceration).

250. MUHAMMAD, *supra* note 9, at xiv.

251. *Id.*

252. *Id.*



Miss how it all works. We will not understand how it is possible that America built the greatest punishment system the world has ever known.”<sup>253</sup>

The large racial disparity between white and black and brown men in American jails and prisons, “for many they define black humanity. In all manner of conversations about race—from debates about parenting to education to urban life—black crime statistics are ubiquitous. By the same token, white crime statistics are virtually invisible, except when used to dramatize the excessive criminality of African Americans.”<sup>254</sup> There is an old saying that goes, “[t]here are three kinds of lies: lies, damned lies, and statistics.”<sup>255</sup> In America, from convict labor to mass incarceration, “[a]lthough the statistical language of black criminality often means different things to different people, it is the *glue that binds race to crime* today as in the past.”<sup>256</sup> These ubiquitous social and racialized stereotypes of black men constitute one of the pillars of what came to be known as the “Negro Problem.”<sup>257</sup> W.E.B. Du Bois eloquently described the meaning, weight, and significance of this question: “Between me and the other world there is ever an unasked question: . . . the real question, [h]ow does it feel to be a problem? I answer seldom a word. And yet, being a problem is a strange experience,—peculiar even for one who has never been anything else.”<sup>258</sup> The so-called “Negro Problem” has been in wide parlance among Whites from the end of slavery to this very day.<sup>259</sup> It was then, and continues to be, just a shorthand version of reference to the dominant White perception of a natural linkage between blackness and criminality.<sup>260</sup> In fact, references to this racialized stereotype “became a proxy for a national discourse on black inferiority.”<sup>261</sup>

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253. *Id.* at xiv–xv.

254. *Id.* at 1.

255. See Mike Brickner, *CCA’s False Advertising*, AM. CIV. LIBERTIES UNION (Mar. 2, 2012, 11:28 AM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/ccas-false-advertising> [<https://perma.cc/5VU8-SAM3>].

256. MUHAMMAD, *supra* note 9, at 1 (emphasis added).

257. *Id.*

258. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 9–10 (Henry Louis Gates Jr. & Terri Hume Oliver eds., 1999).

259. See *supra* Part I.

260. See MUHAMMAD, *supra* note 9, at 8.

261. *Id.*

## V. PRIVATE PRISONS

The private prison industry is part of the mass incarceration era of the commodification of black bodies.<sup>262</sup> It is the most modern attempt to commodify and profit from exploiting black bodies since slavery itself and the profiteering of the convict leasing system.<sup>263</sup> As mass incarceration grew, both state and federal prisons burst to overflowing.<sup>264</sup> To monetize the demand for more space to house the oversupply of prisoners, the private prison industry emerged.<sup>265</sup>

This modern industry is highly motivated by the opportunity to gain considerable private profits from selling the government enough excess capacity to relieve the public prisons from the overcrowding crisis.<sup>266</sup> The racialization of the private prison inmate population is consistent with the racial disproportionality of black people in public prisons, where more than 40% of the prisoner population consists of black people.<sup>267</sup> In fact, the great majority of the prisoner population in private prisons are also black or brown.<sup>268</sup>

Over the last forty years, mass incarceration has been filling up all of America's jails and prisons far beyond the point of overflowing and faster than new prisons can be built—primarily populated with black and brown bodies.<sup>269</sup> This overcrowding has been so extreme that the Supreme Court has ruled that such deplorable overcrowding constitutes a violation of the Constitutional prohibition of “cruel and unusual punishment.”<sup>270</sup> Moreover, the costs of housing and maintaining this near bursting of the seams of public jails and prisons has become extremely burdensome to both state and federal

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262. *See supra* Part IV.

263. *See supra* Part II.

264. *See* Cullen, *supra* note 155.

265. DAVID SHAPIRO, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 5–6 (Nov. 2011), <https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration> [<https://perma.cc/8GSU-5KFH>].

266. *Id.*

267. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE, (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/EC98-MKA5>].

268. Rina Palta, *Why For-Profit Prisons House More Inmates of Color*, NAT'L PUB. RADIO, (Mar. 13, 2014, 7:12 AM), <https://www.npr.org/sections/codeswitch/2014/03/13/289000532/why-for-profit-prisons-house-more-inmates-of-color> [<https://perma.cc/7K2J-2MDB>].

269. *See* Cullen, *supra* note 155.

270. *See* *Brown v. Plata*, 563 U.S. 493, 509–10 (2011).

budgets.<sup>271</sup> It has been estimated that altogether, “criminal justice spending totals more than \$260 billion”<sup>272</sup>

The phenomenon of private prisons or prisons for profit grew out of this stained history of slavery and convict leasing.<sup>273</sup> The historical practice of convict leasing set the precedent to use the prison system to enrich private corporate interests.<sup>274</sup> For more than thirty years, the practice of outsourcing state and federal prison populations to private prisons has evoked considerable debate within state and federal governments and among legal and community advocates.<sup>275</sup>

It is important to note that the deplorable system of convict leasing was not confined to the Postbellum South.<sup>276</sup> Instead, despite the “official bans” on the practice, it continued in everything but name in many places in America, right up to the beginning of World War II.<sup>277</sup> Currently, the historic barbarity of convict leasing for the economic gain of private companies has morphed and been resurrected into the relatively recent permutation of a private-for-profit-prison system.<sup>278</sup> This new system has wrung billions of dollars out of the mass incarceration of young black men and the detention of undocumented migrants seeking asylum in America.<sup>279</sup> All of these economic gains have gone directly into the private-for-profit-prisons industry and their private shareholders’ investment portfolios.<sup>280</sup>

The very existence of the prisons-for-profit industry has raised important issues regarding the socially acceptable nature of penal punishment in terms of morality,<sup>281</sup> economic development<sup>282</sup> (especially in small rural towns), and the state’s responsibility for the

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271. See SHAPIRO, *supra* note 265, at 6.

272. EISEN, *supra* note 9, at 27.

273. See *supra* Part III.

274. See *supra* Section III.C.

275. See EISEN, *supra* note 9, at 7–8.

276. See OSHINSKY, *supra* note 37, at 76.

277. See BLACKMON, *supra* note 88, at 9 (“The practice [of forced labor] would not fully recede from their lives until the dawn of World War II, when profound global forces began to touch the lives of black Americans for the first time since the era of the international abolition movement a century earlier, prior to the Civil War.”); see also OSHINSKY, *supra* note 37, at 149, 224.

278. See EISEN, *supra* note 9, at 51.

279. See *id.* at 114, 164.

280. See *id.* at 122.

281. See *id.* at 7.

282. See *id.*

management, control, and supervision of the nation's prisons.<sup>283</sup> Some state and federal policy officials argued that the use of private-for-profit-prisons is an important tool in "providing a safe way to relieve overcrowding," in public prisons owned and run by either the states or the federal government.<sup>284</sup> Others argue that the availability of private-for-profit-prisons is some sort of panacea that will save the taxpayers millions of dollars and advance the American cause of the War on Crime.<sup>285</sup>

However, most people in America are blissfully unaware that private-for-profit-prisons exist all over our country.<sup>286</sup> Much less that these prisons are a critical problem morally, financially, and politically to the present and future of American incarceration policy.<sup>287</sup> But, among those that do know, or who are just learning about the existence and significance of the private-for-profit-prison industry, "[a]lmost no one is ambivalent about," these profit-driven, private sector prisons on both the national and state levels.<sup>288</sup> In the words of one expert in the field, Justin Jones, the:

[F]ormer Oklahoma director of corrections, [said that he] doesn't see a place for private prisons in American corrections. In 2014 he stated that private prisons "create demand for their services much like drug dealers ensure that their customers are addicted, but not so addicted [that] they die . . . . CEO profits and shareholder returns have no place in our criminal justice system."<sup>289</sup>

However, many believe that private-for-profit-prisons save millions of dollars for the government, and thereby the taxpayers.<sup>290</sup> Many of those who work outside of the system are keenly aware of the private-for-profit-prison industry and its effects on society, and appear to "care so passionately about who runs their prisons."<sup>291</sup> At its root, the passions surrounding the advocacy for, or opposition against, the private-for-profit-prison industry grow directly from the

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283. *See id.* at 7–8.

284. *Id.* at 8.

285. *See EISEN, supra* note 9, at 13.

286. *Cf. id.* at 189.

287. *See id.* at 7–8.

288. *Id.* at 13.

289. *Id.*

290. *See id.*

291. *See id.* at 13–14.

current controversy regarding mass incarceration generally,<sup>292</sup> and its contemporary racialized architecture specifically.<sup>293</sup> In the Postbellum South, the “practice [of convict leasing] was the shift in prison populations to predominantly African Americans.”<sup>294</sup> In this observation, Michael A. Hallett wrote:

The most striking thing about the reemergence of for-profit imprisonment in the United States, however, is not simply that it has reappeared, but that it should once again involve the disproportionate captivity of black men . . . [which have] been the industry’s chief source of revenue. Although the nature of prisoners’ commodity value has changed somewhat in modern times—prisoners are no longer profitable solely for their labor, but for their bodily ability to generate per diem payments for their private keepers—imprisonment for private profit is once again a viable economic industry in the United States.<sup>295</sup>

Prior to the emergence of the private prison system, the public racialized prison system was not only prohibitively expensive, it also had no financial upside.<sup>296</sup> While the state and federal government spent astronomical amounts of money building, staffing, equipping, and maintaining this system, no one in the private sector was making any money off this system.<sup>297</sup> It appeared to be a financial dead-end street and a financial sinkhole for taxpayer dollars.<sup>298</sup> Responding to a clear unsatisfied need in the carceral market, the entrepreneurial and capitalistic forces of the free market created from whole cloth the private prison industry.<sup>299</sup> In exchange for lucrative, long term contracts, the private prison industry offered to take the overcrowding burden off the shoulders of the state and house and care for surplus inmates claiming they “could ‘lock them up better, quicker, and for less’ than the state.”<sup>300</sup>

The profits from these private prisons are so lucrative that most of the major players in this market are now publicly owned companies

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292. *Id.*

293. *See* HALLET, *supra* note 105, at 3–4.

294. *Id.* at 2.

295. *Id.* at 3–4.

296. *See id.* at 56.

297. *See* EISEN, *supra* note 9, at 29.

298. *Id.* at 54–55.

299. *See id.* at 29, 66–67.

300. HALLET, *supra* note 105, at 94.

that are actively traded on the stock exchanges.<sup>301</sup> These private prison stocks are so ubiquitous that they are in many 401K funds, IRA funds, pension funds, union funds, annuities funds, corporate investment portfolios, hedge funds, private wealth management portfolios, and more.<sup>302</sup> From the investor's perspectives, these companies look like good sound investments; they are inflation proof, stable, almost guaranteed profitability, and experience positive growth way into the future.<sup>303</sup> Collectively, the markets are very bullish on these investment opportunities.<sup>304</sup>

However, toward the end of the Obama Administration, and on the President's orders, the Justice Department announced that the federal government is "in the process of reducing—and ultimately ending—[the] use of privately operated prisons."<sup>305</sup> On this news the stocks of the private prison companies fell precipitously.<sup>306</sup> However, as soon as the new administration took office in January of 2017, one of the first orders of business was for the new Attorney General, Jeff Sessions, to end the previous policy of attempting to extinguish the fire roaring under the private prison stocks, and Sessions announced that the new administration would continue using private prisons to keep with a "long-standing policy and practice."<sup>307</sup>

After this announcement, predictably, the stock prices of the private prison companies came roaring back and "enter[ed] a gold

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301. EISEN, *supra* note 9, at 31.

302. See Max Siegelbaum, *Public Pensions Pour Millions into Private Prison Companies*, DOCUMENTED (July 11, 2019, 8:33 AM), <https://documentedny.com/2019/07/11/public-pensions-pour-millions-into-private-prison-companies/> [<https://perma.cc/6MXY-BPWJ>].

303. See EISEN, *supra* note 9, at 123. But see Taylor Telford & Renae Merle, *Bank of America Cuts Business Ties with Detention Centers, Private Prisons*, WASH. POST (June 27, 2019, 1:42 PM), <https://www.washingtonpost.com/business/2019/06/27/bank-america-cuts-business-ties-with-detention-centers-private-prisons/> [<https://perma.cc/VC52-8EDD>] (discussing the current trend of private sector banks divesting in the private prison industry due to public outcry and political controversy).

304. See EISEN, *supra* note 9, at 30–31.

305. *Id.* at 231 (quoting Sally Q. Yates, *Phasing Out Our Use of Private Prisons*, U.S. DEP'T JUST. ARCHIVES (Aug. 18, 2016), <https://www.justice.gov/archives/opa/blog/phasing-out-our-use-private-prisons> [<https://perma.cc/A9HQ-KCEH>]).

306. *Id.* at 162–63.

307. *Id.* at 213 (quoting Memorandum from Jefferson B. Sessions III, Attorney Gen., U.S. Dep't of Justice, to the Acting Dir. Fed. Bureau of Prisons (Feb. 21, 2017), [https://www.justice.gov/oip/foia-library/attorney\\_general\\_memorandum\\_advising\\_the\\_federal\\_bureau\\_of\\_prisons\\_that\\_the\\_department\\_will\\_continue\\_to\\_use\\_private\\_prisons.pdf/download](https://www.justice.gov/oip/foia-library/attorney_general_memorandum_advising_the_federal_bureau_of_prisons_that_the_department_will_continue_to_use_private_prisons.pdf/download) [<https://perma.cc/GYH7-M4PZ>]).

age”<sup>308</sup> Given the profound reach of the private prison investments in the stock markets, if, as Obama tried to do, private prisons were banned tomorrow the entire stock market would shiver and lose hundreds of points in very short order.<sup>309</sup> This prediction is verified by the fact that when the private prison companies went into the immigration detention business, the stocks of all of these companies soared.<sup>310</sup> The market recognizes good financial news when it sees it.<sup>311</sup>

This historically recurring and racialized nightmare of profiting from the commodification of black bodies simultaneously creates massive profits for the private owners, and massive misery for the unfortunate racialized fuel.<sup>312</sup> However, if it wasn’t dark enough already, in its ever growing need to feed the machine, in search of greater profits, the private prison industry has expanded its reach from merely private prisons to now include private immigration detention facilities.<sup>313</sup> Given the current administration’s apparent eagerness to enforce the nation’s immigration rules more narrowly and with greater gusto, the foreseeable future of private immigration facilities looks very bright for the private prison companies and their shareholders.<sup>314</sup> Moreover, this profit-motivated evolution has sought to gain a foothold on a vertical monopoly by also owning the drug treatment facilities, half-way houses, mental health treatment facilities, and all of the many facilities that newly released felons can be ordered to participate in as part of their conditions of release.<sup>315</sup> And, the “corrections lifestyle” continues.<sup>316</sup>

## VI. CONCLUSION

There is, indeed, a straight historical and causal line of the exploitation of black bodies for private white profit, from Slavery<sup>317</sup>

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308. Heather Long, *Private Prison Stocks Up 100% Since Trump’s Win*, CNN (Feb. 24, 2017, 2:07 PM), <https://money.cnn.com/2017/02/24/investing/private-prison-stocks-soar-trump/index.html> [<https://perma.cc/H8MS-X4BR>].

309. *See id.* (showing how the mere suggestion of banning private prisons in a presidential debate took their stocks to the lowest it has been since the Great Recession); *see also supra* notes 298–99 and accompanying text.

310. *See* EISEN, *supra* note 9, at 212.

311. *See supra* notes 307–10 and accompanying text.

312. *See supra* Part II.

313. *See* CORECIVIC, 2018 ANNUAL REPORT 14 (2019).

314. *See* Eisen, *supra* note 9, at 213–14.

315. *Id.* at 215–16.

316. *See id.*

317. *See supra* Part II.

to the Black Codes and convict leasing,<sup>318</sup> to Racialized Mass Incarceration,<sup>319</sup> and finally to Private Prisons.<sup>320</sup> What connects these three historical eras? This article suggests that the connective tissue that binds these three eras together is best described as the historic and deeply held American values of white racism, white supremacy, and white privilege, without which America could have neither survived nor thrived as an international political and economic power.<sup>321</sup>

From this long historical legacy of the primacy of whiteness and its biological, genetic, and natural justifications based on racist tradition, then scientific racism to Jim Crow, back to racist social tradition in present day America and from its racist legacy,<sup>322</sup> it is clear that in every era of American history, racism has run like a dark and permanent thread that is tightly woven within the national fabric of the country.<sup>323</sup> So closely has this racism cleaved to the American mind and soul,<sup>324</sup> that it is now as American as apple pie on the Fourth of July. But it didn't have to be this way. It was neither foretold nor predictable that America would enslave, exploit, profit from, vilify, and imprison such a large proportion of its population so as to become the most racially inflected and most carceral country the world has ever known.<sup>325</sup>

Instead, America could have become and developed as an integrated nation that lived up to the liberties and rights that its founders expressed in the most coveted document, the Declaration of Independence, that states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."<sup>326</sup>

The writers of those words were very mindful that they were creating a new type of government, one that had never before seen its rival in the history of the world.<sup>327</sup> They chose their words carefully,

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318. *See supra* Part III.

319. *See supra* Part IV.

320. *See supra* Part V.

321. *See supra* notes 12–25 and accompanying text.

322. *See supra* Sections II.A, D; *see also supra* notes 155–65 and accompanying text.

323. *See supra* notes 2–9 and accompanying text.

324. *See supra* notes 18–21 and accompanying text.

325. *See supra* Section IV.C; *see also supra* notes 26–33 and accompanying text.

326. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

327. *See* Myron Magnet, *The Vision of the Founding Fathers*, NAT'L REV. (July 3, 2015, 8:00 AM), <https://www.nationalreview.com/2015/07/vision-founding-fathers/> [<https://perma.cc/R2PH-VREZ>].



but without exception; they did not consider black people or women to be within the precepts and purview of that document.<sup>328</sup> On those hot summer days in Philadelphia, when the Constitution was written and signed unanimously by all of the representatives of the United States of America, the vicious snake of racial and gender prejudice lay coiled up around the table on which the Constitution was signed.<sup>329</sup> It held that document and those that signed it in its poisonous grip and infused its blatant hypocrisy deep in the souls of those signers and the legacy of race in America.<sup>330</sup>

In his majority opinion of *Dred Scott v. Sanford*, Chief Justice Taney of the United States Supreme Court ruled that slavery was not only legal throughout America but that it was entirely in keeping with the intent of the constitutional framers.<sup>331</sup> In support of this conclusion he wrote that black people in America were not really people but were instead “bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.”<sup>332</sup>

By the time the Declaration of Independence and later the Constitution were signed, slavery had been legal in America for over 150 years.<sup>333</sup> This racist legacy could not help but influence the drafters and signers of those documents.<sup>334</sup> The racial bias that infected the Declaration of Independence and the Constitution was based on the greed, immorality, and racism of those who signed it, profited from it, and gave its blessing.<sup>335</sup> While it professed to develop a country that was based on the values of freedom, liberty, and equality,<sup>336</sup> it was also used as a tool to ensure another 100 years of enormously profitable slavocracy and another 88 years of Jim Crow segregation, violence, and disenfranchisement to the present.<sup>337</sup>

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328. See Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107, 127–28, 151–52 (1998).

329. See Juan Williams, *The Survival of Racism Under the Constitution*, 34 WM. & MARY L. REV. 7, 11–12 (1992).

330. *Id.* at 16.

331. See *Dred Scott v. Sanford*, 60 U.S. 393, 608–09 (1857).

332. *Id.* at 407.

333. See William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1742–44 (1996).

334. See David Waldstreicher, *The Mansfieldian Moment: Slavery, the Constitution, and American Political Traditions*, 43 RUTGERS L.J. 471, 471–74 (2013).

335. See *supra* notes 12–14 and accompanying text.

336. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

337. See *supra* Parts II–III.

So, what can we do now to live up to those beautiful and lofty words after almost 400 years of racism has stunted, suppressed, repressed, murdered, and terrorized the aspirations of an entire people? Like searching for any redemption, it must first begin with an acknowledgement of the original sin and the significance of the problem. It also requires a recognition of the historic and continuing benefits that the dominant race has had and continues to have at the expense of the dominated race, as well as an appreciation for the suffering of the people who have been intentionally excluded from the benefits of the American experiment.<sup>338</sup> Healing and redemption requires proactive efforts to include a people who have been perpetually considered to be “strangers in our midst,” and who have somehow never been considered to be fully human or citizens of the American state<sup>339</sup> yet, somehow survived it all and for a myriad of reasons are still proud to call themselves American citizens. These are the minimum thresholds to be overcome for real meaningful change and inclusion of an historically dominated people. Since before America was even America, these problems manifested their poisonous effects, through slavery, convict leasing, mass incarceration, and now, private prisons.<sup>340</sup>

Given that history, how can you now persuade the large number of people that physically and economically benefitted, either directly or indirectly, from this tragic history? How can you convince them to voluntarily acknowledge the harm caused by their forebears and the benefits that they have reaped from those harms? How do you make them see the damage that history and its institutions have had on the descendants of those slaves? As Fredrick Douglass once declared: “Power concedes nothing without a demand; [i]t never has and it never will.”<sup>341</sup>

The old South was willing to give up tens of millions of dollars, and hundreds of thousands of lives to hold on to their way of life, which was based on and fueled by slavery.<sup>342</sup> They were made to

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338. See George Yancy, *Should I Give Up on White People?*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/opinion/white-racism-threats.html> [<https://perma.cc/2Q96-UY2K>]; see also *supra* notes 12–18 and accompanying text.

339. See Yancy, *supra* note 338; see also *Dred Scott v. Sandford*, 60 U.S. 393, 451 (1857).

340. See *supra* Part I.

341. See Amy Goodman & Denis Moynihan, *Frederick Douglass: Power Concedes Nothing Without a Demand*, NATION CHANGE (Feb. 4, 2017), <https://www.nationofchange.org/2017/02/04/frederick-douglass-power-concedes-nothing-without-demand/> [<https://perma.cc/5FXB-DXHK>].

342. See *supra* Part II; see also *supra* notes 88–91 and accompanying text.

give it up at a very high price.<sup>343</sup> Even after the legal emancipation of the slaves, white southerners, calling themselves “redeemers” of the Southern way of life, did everything they could to re-impose slavery in everything but name through targeted waves of violence and manipulation of the ballot box.<sup>344</sup> Even today, that legacy still simmers in the hearts of Southerners and those of many others who still yearn for a resurrection of the Lost Cause.<sup>345</sup> Hopefully that fantasy is now permanently out of reach (although, never out of mind).

Sadly, the social, political, and economic penetration of the racialized carceral state in America is so deep that like the Southern belief in antebellum slavery, many people today cannot even imagine an America without it.<sup>346</sup> The current racialized carceral state is making too much money for too many individuals and public and private institutions to end anytime within the foreseeable future.<sup>347</sup>

It has taken America 400 years to get to this point in its racialized history,<sup>348</sup> so it is not unreasonable to expect that it may take at least another 400 years to grow out of it. But the future is not hopeless. There are many small lights glowing in the distance. Many new voices are speaking out and speaking up to shine a light on the truth of America’s past, and its impact on America’s present and future. And many voices are speaking out for a vision for the future where we live up to the values expressed so eloquently in our founding documents, where all people are truly free and equal.<sup>349</sup> As the great James Baldwin wrote:

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343. See *supra* notes 88–91 and accompanying text.

344. See George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 *FORDHAM URB. L.J.* 851, 854–57 (2005); see also *How Did White Southerners React to Reconstruction?*, REFERENCE, <https://www.reference.com/history/did-white-southerners-react-reconstruction-3b1f0cc7a0d03d> [https://perma.cc/FHX4-QE9M] (last visited Apr. 6, 2020).

345. See Matthew Wills, *Origins of the Confederate Lost Cause: The Mythos of the Lost Cause of the Confederacy*, *JSTOR DAILY* (July 15, 2015), <https://daily.jstor.org/origins-confederate-lost-cause/> [https://perma.cc/MHS9-KBQF].

346. See *supra* Parts II–V.

347. See *supra* Part V.

348. See *supra* notes 12–18 and accompanying text.

349. See Jonathan Blanks, *How Equal Rights for Black Americans Still Aren’t Equal Enough*, *LIBERTARIANISM* (Sept. 30, 2014), <https://www.libertarianism.org/columns/how-equal-rights-black-americans-still-arent-equal-enough> [https://perma.cc/PR2T-NTAF]; see also David Cole, *Obama’s Civil Rights Legacy - and Ours*, *NATION* (Dec. 8, 2016), <https://www.thenation.com/article/archive/obamas-civil-rights-legacy-and-ours/> [https://perma.cc/3LFH-ECKZ]; see also David A. Graham, *A Strikingly Different State of the Union Address*, *ATLANTIC* (Jan. 12, 2016),

[T]hose innocents who believed that your imprisonment made them safe are losing their grasp on reality. But these men are your brothers—your lost, younger brothers. And if the word integration means anything, this is what it means: that we, with love, shall force our brothers to see themselves as they are, to cease fleeing from reality and begin to change it . . . . [W]e can make America what America must become. It will be hard . . . but you come from sturdy, peasant stock, men who picked cotton and dammed rivers and built railroads, and, in the teeth of the most terrifying odds, achieved an unassailable monumental dignity. You come from a long line of great poets . . . since Homer. One of them said, the very time I thought I was lost, My dungeon shook and my chains fell off . . . . We cannot be free until they are free.<sup>350</sup>

“God gave Noah the rainbow sign, No more water, the fire next time!”<sup>351</sup>

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<https://www.theatlantic.com/politics/archive/2016/01/state-of-the-union/423861/>  
[<https://perma.cc/4WPE-U2X7>].

350. JAMES BALDWIN, *THE FIRE NEXT TIME* 9–10 (Vintage Books 1993) (1963) (emphasis omitted).

351. *Id.* at 106 (emphasis omitted).

