

THE PROFITABILITY OF RACISM: DISCRIMINATORY DESIGN IN THE CARCERAL STATE

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I. INTRODUCTION

The name Kalief Browder is familiar to many. Beginning at age sixteen, Browder was incarcerated on Riker's Island, where he spent most of his time in solitary confinement.¹ Browder remained in detention due to his family's financial inability to post bail for the theft of a backpack, a charge that was later dismissed.² After his release, he ultimately committed suicide at the young age of twenty-one.³ It is imperative that we ask how many Kalief Browders fail to capture headlines, yet still suffer almost incomprehensible indignities under contemporary practices of mass surveillance, criminalization, and incarceration. How, in a democratic society, can widespread detentions and the subjugation of human beings happen so commonly? Entire communities are under siege, and I argue the prolific and normalized detentions of black and brown bodies are the legacy of a legal system built and predicated on the profitability of racialized subjugation.

In this paper I attempt to unpack the assertion, that what scholars refer to as the era of mass incarceration, and more recently mass criminalization and surveillance, is produced by a systematic marginalization of poor people of color that is *built into* our legal system by design. The criminal justice system, in its initiation on American soil and operating into the present, is predicated on an ideological framework that normalizes the incentivization of exploiting black bodies. Racial ideology performs the role of making these disparate outcomes not only acceptable, but conceals their function as illusively natural.⁴ Mistreatment and disenfranchisement, disproportionately meted out along racial lines through legal processes, have protected and generated

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¹ PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 220–21 (2017).

² *Id.*

³ *Id.*

⁴ See Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995); see also EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 1–4 (2014).

lucrative enterprises since the founding of the nation, beginning with the system of racialized enslavement on which the American economy was built.⁵

From Michelle Alexander's *The New Jim Crow*,⁶ to Paul Butler's *Chokehold*,⁷ to David Cole's *No Equal Justice*,⁸ the structural inequality of the criminal justice system's unfolding along lines of race is well documented. Empirical data shows mass criminalization involves disproportionate arrests, sentencing, detention, incidences of police brutality, and traffic stops for black people in America.⁹ Not to mention the racially disparate social, political, and economic impacts of the sprawling carceral state.¹⁰ A black child born in 1990 has a one in four chance of having a parent incarcerated.¹¹ All of this is well known, the statistics are well documented, and the criminal justice system is widely discussed for its racist causes and impacts.

But, what is less considered and requires greater attention are the economic imperatives tied to the carceral state, in addition to the role of race that reproduces structural inequality in tandem with the economy. Race and class are inextricably linked in American society.¹² While I agree with scholars such as Alexander and Butler that mass incarceration results from

⁵ See 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* (2017); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

⁷ BUTLER, *supra* note 1.

⁸ DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999).

⁹ See, e.g., ALEXANDER, *supra* note 6; COLE, *supra* note 8; Lindsey Price Jackson, *50 Years of Police Militarization Against Communities of Color*, VERA INST. OF JUST. (Apr. 23, 2018), <https://www.vera.org/blog/two-societies/50-years-of-police-militarization-against-communities-of-color>; William Farrell, *Predominately Black Neighborhoods in D.C. Bear the Brunt of Automatic Traffic Enforcement*, D.C. POL'Y CTR. (June 28, 2018), <https://www.dcpolicycenter.org/publications/predominately-black-neighborhoods-in-d-c-bear-the-brunt-of-automated-traffic-enforcement/>; Jonese Franklin, *Why Are Louisville's Black Kids Jailed More Than White Kids?*, 89.3 WFPL: RECUT (June 26, 2018), <http://wfpl.org/recut-why-are-louisvilles-black-kids-jailed-more-than-white-kids/>; Jon Swaine, Oliver Laughland & Jamiles Lartley, *Black Americans Killed by Police Twice as Likely to be Unarmed as White People*, THE GUARDIAN (June 1, 2015, 8:38am), <https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>.

¹⁰ See AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (2014); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

¹¹ Sara Wakefield & Christopher Wildeman, *Mass Imprisonment and Racial Disparities in Childhood Behavioral Problems*, 10 CRIMINOLOGY & PUB. POL'Y 793, 800 (2011).

¹² See Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004).

an intentional racial design,¹³ I think it is also critical for us to consider why the dehumanizing system continues to be tolerated and, more precisely, whom it benefits in our society. In my analysis, it is imperative to consider the ways the subjugation of black bodies has been incentivized through carceral state processes. And also, to pay attention to the ideological dimensions of race that play an integral role in maintaining an unequal political economy that is predicated on the disenfranchisement of people of color. The argument unfolding in this paper is organized into four parts: first, James Forman's *Locking Up Our Own*¹⁴ will be used to argue that the system functions as it was designed to, even when individuals of color are positioned in seats of power; second, I will examine the historical perspective and the different ways racial structure and ideology were intimately tied to and shaped by the economy; third, I will discuss three ways the contemporary criminal justice system actively links detention to profits; and finally, the conclusion will explore the theoretical and analytical implications of my argument along with brief suggestions for change.

Worthy of note is that the assertion I present here is distinguishable from the notion of the "prison industrial complex" view that positions contemporary rapid prison expansion as the result of political lobbying to expand the prison industry for profit. I contend the ideological foundations of our legal system, particularly within the context of the criminal justice system, are by design predicated on practices of dehumanization and legal detentions of people of color for the continued generation of profit. Mass criminalization and surveillance are generated through what Princeton scholar Ruha Benjamin refers to as "discriminatory design," racist outcomes built into "the machine" that continue to be systematically replicated overtime because they are part of the original blueprint.¹⁵

II. *LOCKING UP OUR OWN* & THE COMPLEXITIES OF STRUCTURAL RACISM

James Forman's work, *Locking Up Our Own*, skillfully documents the contributions of black politicians in expanding the carceral state and creating mass incarceration.¹⁶ Focusing primarily on the actions of African American political leaders in Washington, D.C., he highlights tough on crime policies they championed, such as harsher penalties for gun possession and opposing

¹³ See ALEXANDER, *supra* note 6, at 6–7, 12–15; BUTLER, *supra* note 1, at 9–15.

¹⁴ See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

¹⁵ See RUHA BENJAMIN, *RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CROW* (2019).

¹⁶ FORMAN, *supra* note 14, at 9–14

the decriminalization of marijuana.¹⁷ These policies were supported and passed by black community members and advocated for by institutions such as the church.¹⁸ Forman's work also highlights the failures of hiring more black police officers to roll back the mass criminalization of low-income communities, and to quell instances of brutality and profiling in black neighborhoods.¹⁹ The book, as he explains it, attempts to, "recover a portion of African American social, political, and intellectual history" and the "role that blacks have played in shaping criminal justice policy over the past forty years . . . as citizens, voters, mayors, legislators, prosecutors, police officers, police chiefs, corrections officials, and community activists."²⁰

Forman's work reminded me of my own time as a public defender in New Orleans, Louisiana—the incarceration capital of the industrialized world. Louisiana's incarceration rate is five times that of Iran's, thirteen times that of China's, and twenty times that of Germany's.²¹ In New Orleans, one in every fourteen black men is incarcerated and one in seven is either in prison, on probation, or on parole.²² I was sworn in and declared able to practice law in this state and promptly received a caseload of 300 clients the next day. My world was very similar to the one described in *Locking Up Our Own*. Many of the judges I practiced in front of were African American. A large number of correctional staff at the infamous Orleans Parish Prison were also black. The elected Sheriff Marlin Gusman, who advocated for building a new jail in the city, is African American. The jail, whose plans were later scaled back, resulted from an initial request from Gusman to provide for 5,000 new inmate beds, one for every sixty residents of the city.²³ As of 2017, the Metropolitan Crime Commission issued a report that inmate totals at the now two-year-old \$145 million facility exceeded its capacity, and more than the existing 1,438 beds were needed.²⁴

¹⁷ See *id.* at 20–46.

¹⁸ *Id.* at 39–43.

¹⁹ *Id.* at 78–115.

²⁰ *Id.* at 10.

²¹ Cindy Chang, *Louisiana Incarcerated: State is No. 1 in Prisoners*, THE TIMES-PICAYUNE (May 13, 2012), http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html.

²² *Id.*

²³ Aviva Shen, *The Most Incarcerated City in the Most Incarcerated State Considers Expanding Notorious Jail*, THINK PROGRESS (Jan. 2, 2017, 8:18 PM), <https://thinkprogress.org/most-incarcerated-city-considers-expanding-notorious-jail-397884abb15d/>.

²⁴ See Emily Lane, *Plans Call for New Jail Building, 89 New Beds to House New Orleans' Mentally Ill Inmates*, THE TIMES-PICAYUNE (Jan. 5, 2017), https://www.nola.com/crime/index.ssf/2017/01/plans_revealed_for_new_jail_bu.html; see also Richard Rainey, *New Orleans City Council Advances 89-bed Jail Expansion Plans*, THE TIMES-PICAYUNE (May 18, 2017), https://www.nola.com/politics/index.ssf/2017/05/new_orleans_city_council_advan.html.

The New Orleans Police Department (NOPD) also included black officers in its ranks and in 2016, 57% of the department identified as black.²⁵ This is the same New Orleans police department that was the subject of a Department of Justice (DOJ) investigative report issued in 2011.²⁶ The report found the NOPD engaged in unconstitutional patterns and practices in the use of force, stops, searches, and arrests, and engaged in discriminatory policing.²⁷ In the days following Hurricane Katrina, New Orleans police officers fatally shot Henry Glover then burned his body in a car, and in what came to be known as the Danziger Bridge incident, shot and killed two people and injured others.²⁸ Two of the ten officers facing federal charges for these crimes were officers of color.²⁹ Not only were many of the criminal justice system stakeholders African American, but the city was also a stronghold for black political representation. From 1978 until 2010, New Orleans elected a black mayor and much of the representation on the New Orleans City Council was also African American.³⁰

In writing this piece, I have considered my own role in the criminal justice system as a black female public defender. I distinctly recall covering magistrate court proceedings, and one night in particular, when I represented every one of about twenty individuals as they pled guilty in order to go home at their arraignment hearing and avoid a lengthier period of incarceration

²⁵ John Simerman, Jeff Adelson & Matt Sledge, *NOPD Diversity Decreasing As More Recruits Hired, Numbers Show; Police Chief Unconcerned*, THE ADVOCATE (Sept. 3, 2016, 7:30 PM), http://www.theadvocate.com/new_orleans/news/crime_police/article_014fb50c-7149-11e6-bfe1-27c4c9b87293.html.

²⁶ See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEP'T. (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

²⁷ *Id.*

²⁸ See John Simerman, *Settlements Reached In Henry Glover Shooting, Burning Civil Rights Cases*, THE ADVOCATE (Dec. 14, 2016, 12:38 PM), https://www.theadvocate.com/new_orleans/news/courts/article_b4c85d0e-c226-11e6-bb62-f7263a63e267.html; Brendan McCarthy, *Five NOPD Officers Indicted In Shooting, Burning of Henry Glover After Katrina*, THE TIMES-PICAYUNE (June 11, 2010), https://www.nola.com/crime/index.ssf/2010/06/nopd_officers_indicted_in_henr.html; Campbell Robertson, *New Orleans Police Officers Plead Guilty in Shooting of Civilians*, N.Y. TIMES (Apr. 20, 2016), <https://www.nytimes.com/2016/04/21/us/hurricane-katrina-new-orleans-danziger-bridge-shootings.html>; Laura Maggi, *Six New Orleans Police Officers Indicted in Danziger Bridge Shootings*, THE TIMES-PICAYUNE (July 13, 2010), https://www.nola.com/crime/index.ssf/2010/07/prosecutors_will_seek_detentio.html.

²⁹ See Robertson, *supra* note 28; Maggi, *supra* note 28.

³⁰ See Ashley Cusick, *As New Orleans Mayor is Sworn in Monday, La. Has Three Black Women Leading Its Largest Cities*, WASH. POST (May 6, 2018), https://www.washingtonpost.com/national/as-new-orleans-mayor-is-sworn-in-monday-la-has-three-black-women-leading-its-largest-cities/2018/05/06/6a80bcbe-4fd8-11e8-84a0-458a1aa9ac0a_story.html?noredirect=on&utm_term=.2aff922ff6d5; Brentin Mock, *The Changing Face of Political Power in New Orleans*, THE ROOT (Aug. 23, 2010), <https://www.theroot.com/the-changing-face-of-political-power-in-new-orleans-1790880656>.

after being assigned a bail they could not afford. There was no justice in this system. On this night, our criminal justice institutions seemed to function more like a machine: processing, warehousing, and surveilling primarily young, poor black men. Often unemployed, and almost always undereducated, my clients were already failed by other institutions long before their appearance in court, and the criminal justice system represented the state's response to their plight.

My mere presence as a state-appointed attorney, who spoke with each of my clients that night for no more than one to two minutes, provided the bare minimum representation that theoretically protected the individuals' constitutionally guaranteed rights. On this night, and during most of my days as a public defender, the criminal justice system did not achieve fairness or due process. The carceral state and its policies and practices systematically disenfranchised primarily young black men from communities of concentrated poverty, and all of this was and continues to be entirely legal by constitutional standards. The idea that our criminal justice institutions including police, probation officers, and court staff constitute a system is important. As mentioned, they operate much like a machine designed to produce a particular outcome. Considering the ways all these components function in tandem and operate to form one organism that carries out the mandates of legislatures begs a very important question: What precisely is this system designed for?

One obvious answer is public safety, but study after study shows there is something more operating within the criminal justice system.³¹ Marie Gottschalk illuminated the massive size and scope of the contemporary carceral state when she wrote:

It includes not only the country's vast archipelago of jails and prisons, but also the far-reaching and growing range of penal punishments and controls that lies in the never-never land between the prison gate and full citizenship. As it sunders families and communities and radically reworks conceptions of democracy, rights, and citizenship, the carceral state poses a formidable political and social challenge.³²

Is our current criminal justice system designed to accomplish the goal of making us safer?

³¹ BUTLER, *supra* note 1, at 96, 128, 230–31.

³² MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS I* (2015).

In attempting to answer these questions, I came to understand the phenomena of *Locking Up Our Own* and the contribution of African Americans in perpetuating racially disparate outcomes in the criminal justice system. I hypothesize that you can place an individual of any race or even a well-meaning, reform-minded, anti-racist individual at any decision-making site in the whole of the carceral state and the same disproportionate outcomes along lines of race and class will persist. You can have more black police officers, political leaders, probation officers, and even public defenders, but without disincentivizing the financial imperatives in the system, mass criminalization will continue to grow and expand its processing and warehousing of black bodies because that is what the carceral state is designed to accomplish.

With regard to the question of the role of African Americans in growing mass incarceration, I use a different approach than Forman. Forman talks about the carceral state as comprised of different components, each functioning in their own sphere, and the passage of policies.³³ These components and policies, once combined, created the exorbitant carceral state.³⁴ He identifies mass incarceration as “the result of small, distinct steps, each of whose significance becomes more apparent over time, and only when considered in light of later events.”³⁵ From my perspective, however, it is necessary for us to think about police, judges, policymakers, and other stakeholders as participating in a system that is intended to function in a particular way, and to have this understanding requires us to use a broader historical perspective. Mass incarceration is not the New Jim Crow, nor is it the new form of slavery. But, mass incarceration and mass criminalization are the contemporary manifestations of a political economy that has always made the subjugation of people of color profitable and further expanded white wealth for a concentrated few through the process of this subjugation.

I see the American criminal justice system as reflective of what Ruha Benjamin refers to as “discriminatory design.”³⁶ Although Benjamin invoked this term in relationship to the creation of new technologies and scientific discoveries, in my mind it applies to the foundations of the criminal justice system and to a degree, the larger apparatuses of the American legal system.³⁷ Benjamin writes that discriminatory design:

³³ See FORMAN, *supra* note 14, at 13–14.

³⁴ *Id.*

³⁵ *Id.* at 45.

³⁶ Ruha Benjamin, *Catching Our Breath: Critical Race STS and the Carceral Imagination*, 2 *ENGAGING SCI., TECH., & SOC'Y* 145, 148 (2016).

³⁷ *Id.* at 149.

[N]ormalizes racial hierarchies—not as an ideological aberration from business-as-usual, but as an economic imperative that is built in to the machine. One need not harbor any racial animus to exercise racism in this and so many other contexts; rather, when the default settings have been stipulated, simply doing ones job—clocking in, punching out, turning the machine on and off—is enough to ensure the consistency of white domination over time.³⁸

The criminal justice system does not simply involve the targeting of black men and people of color for malicious reasons; in fact, as Forman shows, black political leaders were incredibly well-meaning in their formulation of policies that increased mass criminalization.³⁹ The criminal justice system does not disproportionately incarcerate poor black men for the sole purpose of maintaining the psychological benefits of white supremacy or for the sake of keeping whites at the top of society's hierarchy of social relations. While white supremacy undoubtedly has an ideological dimension, it primarily maintains an economic function that serves to concentrate wealth in the hands of a few. The intentionally designed “Chokehold,” as Paul Butler calls it,⁴⁰ or the “New Jim Crow”⁴¹ arrangements created by carceral state contact persist because of the lucrative nature of incarcerating and detaining black bodies.

III. THE HISTORICAL ROLE OF THE CARCERAL STATE: ECONOMIC CHANGES & THE FLUX OF RACISM

Since the founding of this country and the creation of modern capitalism, the subjugation of black people for the creation of white wealth has been a mainstay and an incredibly profitable enterprise.⁴² The legal apparatuses created at the birth of America were designed to support the founding of the nation as a slaveholders' republic; the framers included provisions in the Constitution to govern the system of enslavement that was foundational to the economic and political life of the nation.⁴³ As Butler acknowledges, “anti-

³⁸ *Id.* at 148.

³⁹ See FORMAN, *supra* note 14, at 12.

⁴⁰ See BUTLER, *supra* note 1.

⁴¹ See ALEXANDER, *supra* note 6.

⁴² Jalil Bishop Mustafa, *Mapping Violence, Naming Life: A History Of Anti-Black Oppression in the Higher Education System*, 30 INT'L J. OF QUALITATIVE STUD. IN EDUC. 711, 713–14 (2017).

⁴³ Pem Davidson Buck, *The Strange Birth and Continuing Life of the US as a Slaving Republic: Race, Unfree Labor, and the State*, 17 ANTHROPOLOGICAL THEORY 159, 177 (2017).

blackness is instrumental rather than emotional. As slaves built the White House, the Chokehold builds the wealth of white elites.”⁴⁴

The economic imperatives and the lucrative nature of mass criminalization and incarceration at the expense of black bodies fuels the racism embedded within the system. Comprised of institutions that include courts, police and sheriffs’ offices, and prisons and jails that warehouse predominately poor people, the criminal justice system and many of its stakeholders derive profit in various ways from those caught within its grip. Ta-Nehisi Coates’s quote that, “the sprawling carceral state, the random detention of black people, the torture of suspects—are, at the very least, byproducts of democratic will,”⁴⁵ reflects the idea that racial ideology promotes a buy-in to this arrangement whether or not individual whites or even middle-class blacks directly profit from the system.

It is critical to distinguish between the two manifestations of racism and to nuance claims that the criminal justice system is racist. Racism maintains two mutually reinforcing dimensions: racist or racial ideology and structural racism embedded in the political economy and its institutions. The latter is where discriminatory design resides. In this section, I explore the history of the legal machinery of slavery and Jim Crow as genealogically linked to present-day mass incarceration as previous scholars have,⁴⁶ but with greater attentiveness to the ways the legal system created a framework that made permissible the subjugation, social control, and detention of black bodies for profit.

Michelle Alexander smartly detailed the role of racial ideology in creating a political wedge between whites and non-whites that are similarly situated economically, beginning with the development of the idea of race in colonial America.⁴⁷ The term “white” begins to make its way into American law after Bacon’s Rebellion in 1676 when indentured servants and laborers rose up against the planter class in Virginia.⁴⁸ Following the Rebellion, colonial legislatures began constructing a racial strategy by passing laws that restricted interracial relationships and marriages, and created restraints on black members of colonial society, including limitations on black ownership of guns and gathering publicly.⁴⁹ This racial strategy was predicated on

⁴⁴ BUTLER, *supra* note 1, at 8.

⁴⁵ Ta-Nehisi Coates, *Blue Lives Matter*, THE ATLANTIC (Dec. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/12/blue-lives-matter-nypd-shooting/383977/>.

⁴⁶ See ALEXANDER, *supra* note 6; BERRY, *supra* note 5; A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996).

⁴⁷ See ALEXANDER, *supra* note 6, at 25.

⁴⁸ See HIGGINBOTHAM, *supra* note 46, at 41.

⁴⁹ See *id.* at 43.

dividing the class of laborers and on establishing a racialized basis for enslavement that was proving to be incredibly profitable.⁵⁰

Daina Ramey Berry's powerful work documents the value of enslaved black bodies, even unborn black babies, and the wealth they generated for their owners.⁵¹ Her book *The Price for Their Pound of Flesh* provides a harrowing look at public auctions where families were often separated by sale and the further cruelty of mothers being soundly whipped for too loudly expressing their grief at the loss of a child.⁵² Each chapter in her book begins with the average appraisal values and average sale prices for a particular age group, divided by sex.⁵³ For example, the average sale price of a female child or infant was \$236, a price that amounted to \$6,940 in 2014.⁵⁴ Her work is the first to systematically detail the value of black people as chattel, as she writes it is a "financial recapitulation of black bodies and souls."⁵⁵ Similar to the goal of her work, I hope this line of argumentation surrounding the criminal justice system helps highlight the systemic processes that devalue black life while generating profits for others.

Higginbotham argued that one goal of early colonial law in America was to enforce the inferiority of blacks in an open and public manner to reinforce to whites of any economic status that they were superior to black people.⁵⁶ While legal devices divided white indentured servants from enslaved black people, the legal system also operated to protect the wealth of propertied whites generated through enslaving African descended people.⁵⁷ Individuals who owned human property by law in early American society profited from the sale, death, and birth of black people through exploiting their labor and through processes of inheritance.⁵⁸ The subjugation of black bodies was further achieved through the criminal justice system's systematic repudiation of the right to self-defense for black people,⁵⁹ that seems akin to the almost absolute impunity police officers receive in the wake of the shooting deaths of young black men.⁶⁰ This is precisely discriminatory design. At the moment

⁵⁰ See ALEXANDER, *supra* note 6, at 25.

⁵¹ BERRY, *supra* note 5.

⁵² *Id.* at 44.

⁵³ *Id.*

⁵⁴ *Id.* at 33.

⁵⁵ *Id.* at xiii.

⁵⁶ See HIGGINBOTHAM, *supra* note 46, at 29.

⁵⁷ *See id.* at 13–15.

⁵⁸ *See id.* at 276.

⁵⁹ *See id.* at 100.

⁶⁰ Mark Berman & Wesley Lowery, *Baton Rouge Police Officers Won't Be Charged in Fatal Shooting Of Alton Sterling*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/03/27/baton-rouge-police-officers-wont-be-charged-in-fatal-shooting-of-alton-sterling/?utm_term=.dbb8f7dbe1f6; Denise Lavoie, *Virginia Prosecutor Won't Charge Officer in Deadly Shooting*, FOX NEWS (Aug. 31, 2018), <http://www.foxnews.com/us/2018/08/31/virginia-prosecutor-wont->

of their creation, American legal institutions were designed to protect the wealth of a few, generated at the expense of people brought to the country against their will.

The foundations of American law explicitly wrote black people out of the human family, defined them as property, and protected the creation of wealth for property-owning whites through the ownership and the exploitation of black labor.⁶¹ Racial ideology that socially constructed black people as an inferior group helped accomplish buy-in from all whites in the society, not just those who directly owned human chattel.⁶² The maltreatment of black folks for the purpose of creating profits came to be justified through racial ideology demarcating black people as inferior, and less than human.⁶³ We should also be very clear about the extent of brutality perpetrated against African-descended people that racial ideology justified. I am often startled by the similarities between C.L.R. James's descriptions of black bodies being mutilated to maintain the system of enslavement and the graphically documented mutilation perpetrated against black bodies during lynchings in the Jim Crow South by many newspapers.⁶⁴ To quote James Baldwin:

[T]here was a day, and not really a very distant day, when Americans were scarcely Americans at all but discontented Europeans, facing a great unconquered continent and strolling, say, into a marketplace and seeing black men for the first time. The shock this spectacle afforded is suggested, surely, by the promptness with which they determined that these black men were not really men but cattle.⁶⁵

Thus, by its very design, the American criminal justice system sanctioned and justified a brutal economy that relied on the enslavement of black people

charge-officer-in-deadly-shooting.html; Mark Berman & Antonia Noori Farzan, *Minneapolis Police Officers Won't Be Charged for Fatally Shooting Thurman Blevins*, WASH. POST (July 30, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/07/30/thurman-blevins-shooting-graphic-body-cam-footage-shows-fleeing-black-man-killed-by-minneapolis-police-who-say-he-was-armed/?noredirect=on&utm_term=.398f40a90013; Carolyn Sung & Catherine E. Shoichet, *Freddie Gray Case: Charges Dropped Against Remaining Officers*, CNN (July 27, 2016, 5:52 PM), <https://www.cnn.com/2016/07/27/us/freddie-gray-verdict-baltimore-officers/index.html>; Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html>.

⁶¹ See *Scott v. Sandford*, 60 U.S. 393, 475 (1857).

⁶² See HIGGINBOTHAM, *supra* note 46, at 9–12.

⁶³ See *id.* at 9–10, 15.

⁶⁴ See C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION* 22 (2d ed. 1989); *Legacy of Lynching*, EQUAL JUST. INITIATIVE, <https://eji.org/racial-justice/legacy-lynching> (last visited Aug. 31, 2018); JAMES ALLEN, HILTON ALS, JOHN LEWIS & LEON F. LITWACK, *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* (2000).

⁶⁵ JAMES BALDWIN, *Stranger in the Village*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION, 1948-1985* 79, 85 (1985).

and their status as a valuable commodity. Systematically denying black people the right to defend themselves is one specific and understudied way this process unfolded in criminal courts. Take for example the North Carolina case *State v. John Mann*.⁶⁶ Justice Thomas Ruffin wrote that for slavery to persist, it required the absolute dominion of the owner over the enslaved; in his own words:

The power of the master must be absolute, to render the submission of the slave perfect. . . . We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master.⁶⁷

In the 1830 case, Mann leased an enslaved African woman named Lydia and ultimately shot her for a minor transgression while she was in his employ.⁶⁸ The Supreme Court of North Carolina dismissed criminal charges against Mann because the profitable system of enslavement could not tolerate the challenge of allowing some modicum of rights for black people to exercise over their own bodies.⁶⁹ The act of Mann, in shooting his leased human property, could not, and would not, be considered criminal. Black human beings were owned as property, and as the court rationalized in the *Mann* case, slavery was solely for the benefit of the slave master.⁷⁰ Lydia's owner, as did other owners, received compensation for injuries to their living and breathing chattel that resulted in a loss of income.⁷¹

It is also of note that other institutions comprising the carceral state played a role in maintaining the system of enslavement. The roots of American policing are tied to slave patrols, and this functioned to establish a persistent pattern of control and containment policing for African-descended people.⁷² During the antebellum era, paterollers maintained the authority to "stop, search, whip, maim, and even kill any African slave caught off the

⁶⁶ *State v. Mann*, 13 N.C. 263 (1829).

⁶⁷ *Id.* at 266–67.

⁶⁸ *Id.* at 263.

⁶⁹ See also HIGGINBOTHAM, *supra* note 46, at 99–101 (discussing the case *Missouri v. Celia* where a fourteen-year-old enslaved African American girl struck and killed her seventy-year-old owner, Robert Newsome, who sexually assaulted and impregnated her, but was denied a self-defense instruction during her murder trial and was ultimately executed by the state).

⁷⁰ *Mann*, 13 N.C. at 266–68.

⁷¹ *Id.* at 264.

⁷² See generally Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156 (2001); NEIL WEBSDALE, *POLICING THE POOR: FROM SLAVE PLANTATION TO PUBLIC HOUSING* (2001); Larvester Gaither, *All the Brother Wanted Was a Ride: Lynching and Police Powers in Texas*, in STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS 191, 204 (Joy James ed., 2000).

plantation without a pass, engaged in illegal activities or running away.”⁷³ As Larvester Gaither wrote, “[a]lthough in some communities all white males were required to serve some time as paterollers, their ranks were usually filled with poor whites.”⁷⁴ Here is an example of how the system was incentivized and benefitted working-class and poor whites that helped to maintain the systematic structures of racism. According to DuBois, the backlash of working-class whites toward Reconstruction was fundamentally a labor war between white and black men fighting for the same jobs.⁷⁵ Dubois noted that, “[a]fterward, the white laborer joined the white landholder and capitalist and beat the black laborer into subjection through secret organizations and the rise of a new doctrine of race hatred.”⁷⁶

Racial ideology performs multiple roles: it performs the function of ideologically dividing people of similar economic classes along lines of race; it masks larger economic processes that make society *across the board* highly unequal; and, it promotes buy-in to a system that subjugates and dehumanizes people of color. Derrick Bell argued:

[D]iscrimination based on race disguises the more subtle though hardly less pernicious class-based disadvantage suffered by many whites. The compulsive attention given to the whites’ superior status compared to that of those blacks in the lowest socio-economic ranks obscures the far more sizeable gap between the status of most whites and those who occupy the lofty top levels of our society.⁷⁷

More recently, in *Dog Whistle Politics*, Ian Haney Lopez presented a compelling argument on the ways in which racial appeals made by politicians aided in winning “support for regressive policies that help corporations and the super-rich” decimate the middle class.⁷⁸

Racial ideology also reveals its relationship to the political economy through the way it changes and fluctuates alongside political and economic shifts. To invoke the terminology of Omi and Winant, race is a socio-historical concept, subject to the social, economic, and political configurations of the place where it is produced and reproduced.⁷⁹ Despite its

⁷³ W. MARVIN DULANEY, *BLACK POLICE IN AMERICA* 2 (1996).

⁷⁴ Gaither, *supra* note 72, at 196.

⁷⁵ W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880* 549 (Oxford Univ. Press 2007).

⁷⁶ *Id.*

⁷⁷ Derrick Bell, *Reconstruction's Racial Realities*, 23 *RUTGERS L.J.* 261, 269 (1992).

⁷⁸ IAN HANEY LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* xii (2015).

⁷⁹ MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 109 (3d ed.

vacillations, however, a mainstay of racial ideology in its various articulations is the hierarchy of black inferiority and white supremacy, whether expressed explicitly or implicitly, to support an unequal division of resources. CLR James noted that the Civil War was not fought over the morality of enslavement and a desire to end its brutal practices, rather the war resulted from a shift in the global economy from agrarian to industrial.⁸⁰

In its wake, the establishment of Jim Crow segregation after a brief period of Reconstruction, was given national legal sanction through the 1896 Supreme Court case *Plessy v. Ferguson* with its separate but equal doctrine.⁸¹ Racial ideology once again supported the subjugation of black labor by poor and working class whites, whose violence against black people was manifested through Ku Klux Klan activity and in the wholesale destruction of entire black communities such as Rosewood.⁸² We can understand lynchings during this time as the pinnacle of violence in a broader social system that dictated daily behaviors and practices expected of all black people in deference to whites. But, again, there were class dimensions of racial ideology within the context of segregation that were tied to the structure of the political economy. For example, proximity between whites and blacks would be tolerated in public accommodations so far as their proximity resulted from the subservient relationship of the African American to a white person i.e., as a domestic worker or a caretaker for children.⁸³

The legal machinery of segregation during this time may have looked different, and by comparison more benign than racialized enslavement, but it still functioned to protect the wealth of white property owners. As C. Vann Woodward explained, “[t]he determination of the Negro’s ‘place’ took shape gradually under the influence of economic and political conflicts among divided white people—conflicts that were eventually resolved in part at the expense of the Negro.”⁸⁴ W.E.B. DuBois put it most succinctly when he described the system of debt peonage in *Souls of Black Folk* and argued that the court system of the South was being used to re-enslave newly emancipated black people.⁸⁵ His work *Black Reconstruction* describes in detail the political disenfranchisement of black people in the South and the legal machinery implemented to exploit black labor.⁸⁶ He wrote, “[i]t must

2015).

⁸⁰ C.L.R. JAMES, A HISTORY OF PAN-AFRICAN REVOLT 57–58 (2012).

⁸¹ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁸² See GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA 94 (2012).

⁸³ See HIGGINBOTHAM, *supra* note 46, at 95–96.

⁸⁴ C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 6 (2d ed. 1966).

⁸⁵ W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 137, 150, 157 (2d ed. 1903).

⁸⁶ DUBOIS, *supra* note 75, at 549–80.

be remembered and never forgotten that the civil war which overthrew Reconstruction was a determined effort to reduce black labor as nearly as possible to a condition of unlimited exploitation and to build a new class of capitalists on this foundation."⁸⁷

In the wake of emancipation, the southern criminal justice system explicitly played the role of subjugating black labor vis a vis the black codes and the convict leasing system.⁸⁸ During this time, black men were arrested and put to work for employers who faced labor shortages.⁸⁹ The South created a criminal justice system predicated on imprisoning African Americans, and this system fed the material interests of wealthy whites.⁹⁰ Convicts were placed into work in the newly industrializing South in coal mines and for companies such as US Steel.⁹¹ "At one point Alabama earned nearly 12% of its total annual revenue from the leasing of convicts. . . . Two Mississippi sheriffs reported making between \$20,000 and \$30,000 each from the sale of black convicts to white planters in one year," this amount is equivalent to \$263,000 and \$394,000 today.⁹² The convict leasing system benefited corporations, funded the activities of local government, and left profits to sheriffs' offices as well.⁹³ "In addition to the fees they received from defendants, sheriffs also kept any amount left over from daily feeding fees paid for each prisoner by the state."⁹⁴

The convict leasing system garners much attention in the literature but there were other multifarious ways the criminal justice system incentivized the devaluation of black lives during Jim Crow. The carceral state propped up the system of sharecropping and the social order it spawned through the trying of black men by all-white juries for crimes that were tantamount to defying southern social practices tied to race.⁹⁵ A strong example is presented by the Groveland case where four black defendants were charged with the sexual assault of a white woman.⁹⁶ British economist Terrance McCarthy commented on the case that, "[b]lack farmers like Henry Shepard and his family threatened by their example, the whole system of servitude and forced labor which is the base of the local economy," adding that whites were more interested in "seeing the demise of all independent colored farmers" rather

⁸⁷ *Id.* at 549.

⁸⁸ See BLACKMON, *supra* note 5, at 7–8.

⁸⁹ See *id.*; see also KING, *supra* note 82, at 80.

⁹⁰ See BLACKMON, *supra* note 5, at 55–56.

⁹¹ See *id.* at 1–2.

⁹² HANEY LOPEZ, *supra* note 78, at 39.

⁹³ See BLACKMON, *supra* note 5, at 55–56.

⁹⁴ See *id.* at 65.

⁹⁵ See KING, *supra* note 82, 331–32; ALEXANDER, *supra* note 6, at 119–23.

⁹⁶ See KING, *supra* note 82, at 108–09.

than justice for the alleged victim of the sexual assault.⁹⁷ Eric Foner in his *Short History of Reconstruction, 1863-1877* described a legal complex comprised of labor regulations and criminal laws, enforced by an all-white police force and judicial system.⁹⁸ According to Foner, “[s]heriffs, justices of the peace, and other local officials rarely prosecuted whites accused of crimes against blacks.”⁹⁹ For instance, Texas courts indicted some 500 white men for the murder of blacks between 1865 and 1866 and not a single one was convicted.¹⁰⁰

Butler mapped the chronological trajectory of racial ideology and its relationship to the economy from enslavement to Jim Crow to the present when he wrote, “[a]fter the civil rights movement of the 1960s stigmatized overt racism, the national economy, which from the founding has been premised on a racialized form of capitalism, still required black bodies to exploit.”¹⁰¹ The American criminal justice system has historically maintained and controlled black labor and its role has expanded, contracted, and morphed based on the ways the economy has changed over time. The idea of preservation through transformation presented by legal scholar Reva Siegel is relevant here, that as hierarchical status relations are challenged and contested, legal frameworks change to limit the scope of subjugation while simultaneously maintaining the same hierarchical relationship.¹⁰²

While many scholars focus on the transformation element of Siegel’s theory, it also maintains that as the system transforms some freedoms are granted to a wider array of the population.¹⁰³ This widening of the net for increased access to resources seems to be a particularly relevant point when one considers the premise of *Locking Up Our Own*. Forman makes a call for greater attentiveness to class divisions within the African American community and his text highlights some of the ways middle-class African Americans have deviated from the cause of lower-class black people.¹⁰⁴ The gains of the Civil Rights movement provided the legal framework that allowed black people greater access to positions of power, but this has also

⁹⁷ *Id.* at 97 (internal quotations omitted).

⁹⁸ ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION, 1863-1877* (1990).

⁹⁹ *Id.* at 95.

¹⁰⁰ *Id.*

¹⁰¹ BUTLER, *supra* note 1, at xi.

¹⁰² Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1115–16 (1997).

¹⁰³ *See id.*

¹⁰⁴ FORMAN, *supra* note 14, at 13, 39, 100–01, 223–24; *see also*, M.J. FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* (2015).

created class divisions as discussed by Eugene Robinson in *Disintegration* and Sheryll Cashin in *Failures of Integration*.¹⁰⁵

For example, Cashin discusses an episode in the summer of 1996 when black residents in Prince George's county hired private police forces to stop and check the identity of all black male youth in the neighborhood after black children from Washington, D.C. began traveling to the community to play basketball with their middle-class colleagues.¹⁰⁶ Forman's chapter on black police officers is even more illustrative of the class divide in the black community.¹⁰⁷ He cites a study conducted in 1966 by University of Michigan researchers who either rode or walked with black and white police officers in three major American cities.¹⁰⁸ Their findings were that while black officers were not as prejudiced as white officers, 28% of black officers working in black precincts were identified as "highly prejudiced" or "prejudiced."¹⁰⁹ In addition to the negative perceptions adopted by a number of black officers, some black police simply wanted a job.¹¹⁰ Forman also cites interviews from 1964-1965 of hundreds of black New York Police Department officers who signed up for the force because it was a secure, stable work opportunity that provided good benefits.¹¹¹

Stated differently, the widening of the net in the post-Civil Rights era allowed increased access to resources and power for some people of color, but it did not fundamentally alter the discriminatory design of the political economy. The end to segregation served to exacerbate class cleavages in the black community.¹¹² Intra-racial socioeconomic divisions, in my assessment, point toward the need to understand the functioning of the institutionalized, systemic processes of the American criminal justice system as the result of a racialized political economy predicated on black disenfranchisement. In the introduction to *From #BlackLivesMatter to Black Liberation*, Keeanga-Yamahtta Taylor notes that the inequality gap "between the rich and poor is more pronounced among Blacks than among whites."¹¹³ The Civil Rights movement clearly accomplished greater numbers of African Americans in

¹⁰⁵ EUGENE ROBINSON, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* 1–24 (2010); SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* ix–xxiii (2004).

¹⁰⁶ CASHIN, *supra* note 105, at 139.

¹⁰⁷ FORMAN, *supra* note 14, at 78–115.

¹⁰⁸ *Id.* at 108.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 110.

¹¹¹ *Id.*

¹¹² See KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* 6–9 (2016); David Theo Goldberg, *Surplus Value: The Political Economy of Prisons and Policing*, in *STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS* 205, 208–10 (Joy James ed., 2000).

¹¹³ TAYLOR, *supra* note 112, at 7.

positions of power, and these gains even led to the election of the first black president, but it did not deviate from the intended overall design of the political and legal system.

IV. THE FINANCIAL IMPERATIVES OF THE CONTEMPORARY CARCERAL STATE

In the era of the post-industrial economy, the criminal justice system plays multiple roles in relationship to the political economy: (1) jails and prisons warehouse surplus labor as we move toward a workerless economy; (2) in a number of jurisdictions, criminal justice institutions extract fines and fees to supplement the funding of government in an era of austerity; (3) the criminal justice system still incentivizes the subjugation and incarceration of black bodies through private prisons, prison labor, and the bail system.¹¹⁴ I will discuss each of these phenomena in turn in order to demonstrate how modern mass criminalization continues the legacy of incentivizing social control and management of black bodies through the carceral state.

In the post-industrial era, we are headed toward what some refer to as a workerless economy.¹¹⁵ Automation and technology have diminished the availability of work in a variety of sectors, and more precarious forms of temporary, low-wage, no-benefits work are on the rise.¹¹⁶ Currently, nearly 50% of millennial workers are freelancers and within a decade it is estimated that the majority of the American workforce will be freelance workers.¹¹⁷ With apps such as Uber, Airbnb, and Postmates, we can literally see the gig economy on our smartphones where workers are defined as independent contractors without access to benefits and other protections for workers designated as employees.¹¹⁸

¹¹⁴ See WEBSDALE, *supra* note 72, at 48, 209–11; Angela Y. Davis, *From the Convict Lease System to the Super-Max Prison*, in STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS 60, 69 (Joy James ed., 2000); Salim Muwakkil, *The New Black Leadership: Gang-Related?*, in STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS 85, 90–91 (Joy James ed., 2000); U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEP'T* 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter Ferguson Investigation].

¹¹⁵ See Caleb Gayle, *US Gig Economy: Data Shows 16m People in 'Contingent Or Alternative' Work*, THE GUARDIAN (June 7, 2018), <https://www.theguardian.com/business/2018/jun/07/america-gig-economy-work-bureau-labor-statistics>; Elaine Profeldt, *Are We Ready For A Workforce That is 50% Freelance?*, FORBES (Oct. 17, 2017), <https://www.forbes.com/sites/elainepofeldt/2017/10/17/are-we-ready-for-a-workforce-that-is-50-freelance/#1ea6f4d83f82>.

¹¹⁶ See LOIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 4–5 (2009); Gayle, *supra* note 115.

¹¹⁷ Profeldt, *supra* note 115.

¹¹⁸ Gayle, *supra* note 115.

In this day and age, the criminal justice system functions as a mechanism for managing surplus labor. Goldberg writes, “Impoverished youth of color . . . are seen as surplus in the sense of an unusable commodity, an inhuman capital capable of producing profit on capital investment only by being treated as alienable objects.”¹¹⁹ The history of how inner-cities came to be centers for neighborhoods of concentrated black poverty and black male unemployment requires a deep dive into the housing policies pursued by local, state, and federal governments nationally, white flight to the suburbs as a response to school desegregation, and changes in the economy sparked by deindustrialization and globalization. I will refrain from detailing these phenomena. However, what is clear is that mass incarceration and criminalization have become the primary state response to communities of color experiencing social isolation, racial segregation, and economic inequality in the post-industrial era.¹²⁰

For scholars such as Loic Wacquant, Manning Marable, and others, prisons of the United States function as warehouses for the poor and unemployed, particularly in the neoliberal era of government austerity and cutbacks to state-provided social services.¹²¹ Marable asked how the United States copes with a vast polarization between wealth and poverty and concluded that the primary response has been the massive expansion of public and private security forces and the incarceration of millions of black, brown, and poor people.¹²² The 1994 Omnibus Crime Bill constituted a \$30 billion investment with \$10.8 billion in federal matching funds for the hiring of 100,000 more police officers over a five-year period and an additional \$10 billion for the construction of new federal prisons.¹²³

What should also be considered is how the ballooning carceral state apparatus creates jobs and also distorts the labor market. In 1999, Western and Beckett argued that the United States penal system acted as a regulatory mechanism to keep unemployment down.¹²⁴ They wrote:

¹¹⁹ David Theo Goldberg, *Surplus Value: The Political Economy of Prisons and Policing*, in STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS 205, 219 (Joy James ed., 2000).

¹²⁰ See Goldberg, *supra* note 119; Manning Marable, *Black Radicalism and an Economy of Incarceration*, in STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS 53 (Joy James ed., 2000).

¹²¹ See generally ROBERT MEEROPOL ET AL., STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS (Joy James ed., 2000); WACQUANT, *supra* note 116, at 204–08; Marable, *supra* note 120.

¹²² Marable, *supra* note 120, at 56–57.

¹²³ *Id.* at 57.

¹²⁴ See Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market?: The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1053 (1999).

U.S. incarceration lowers conventional measures of unemployment in the short run by concealing joblessness among able-bodied, working-age men, but it raises unemployment in the long run by damaging the job prospects of ex-convicts after release. Incarceration, unlike social welfare policy, deepens inequality because its effects are increasingly detrimental for young black and unskilled men, whose incarceration rates are highest and whose market power is weak.¹²⁵

In terms of job creation, according to Websdale, in 2001 the prison industry employed more than 523,000 people making it the country's biggest employer after General Motors.¹²⁶ Police work also serves this role as well:

[T]o secure their jobs in an economy increasingly short on meaningful, well-paid labor for working-class and middle-class men, police must effect arrests, justify their existence, and ensure that their departments attract more federal funding. They must feed blacks and Hispanics into the growing prison system, itself staffed from the same job market sector as police officers. Like the slave patrollers of old, working class white men employed in the criminal justice system regulate still poorer men and women of color discarded by global capitalism.¹²⁷

These brief examples open the door to a conversation about how job creation is predicated on the detention of black people.

Another contemporary incentivization of the criminal justice system resides in the assessment of fines and fees by courts that were highlighted by the Department of Justice's Ferguson Report.¹²⁸ The report cited the experience of one black Ferguson resident involved in a minor illegal parking violation who was ultimately arrested twice, spent six days in jail, and paid \$550 to the court.¹²⁹ After two years of fee payments and court appearances for the citations, she still owed \$541 towards her court-assessed fines and fees.¹³⁰ The DOJ discovered that the biased policing practices of the Ferguson police department were incentivized by a revenue-generating system funding the municipality and its court system.¹³¹ An email sent by the Ferguson City Finance Director to the Chief of Police read, "unless ticket writing ramps up

¹²⁵ *Id.* at 1031.

¹²⁶ WEBSDALE, *supra* note 72, at 48.

¹²⁷ *Id.* at 154.

¹²⁸ Ferguson Investigation, *supra* note 114, at 4; *see also* Elizabeth Jones, *Racism, Fines and Fees and the US Carceral State*, 59 RACE & CLASS 38 (2017).

¹²⁹ Ferguson Investigation, *supra* note 114, at 4.

¹³⁰ *Id.* at 4.

¹³¹ *Id.* at 9.

significantly before the end of the year, it will be hard to significantly raise collections next year.”¹³²

Ferguson is not the only jurisdiction that functions as a revenue generator. The traffic stop leading to Philando Castile’s death was one in a series of many stops conducted by police for various violations.¹³³ He had, it transpired, been stopped forty-six times in previous years, generating \$6,000 worth of fines.¹³⁴ For Castile, these minor traffic violations initiated years-long cycles of court appearances, driving license suspensions, and fines.¹³⁵ The assessment of fines for low-level offences, court costs, and fees for supervision, accompanied by their enforcement for non-payment, has become prolific in America.¹³⁶ As a result, in March 2016, the DOJ issued a letter to various jurisdictions throughout the country which cautioned against assessing defendants with excessive monetary penalties for traffic citations, misdemeanors, and low-level violations.¹³⁷ It also advised local courts against using unconstitutional practices in enforcing fines and fees by punishing people, including incarcerating them, for their inability to pay.¹³⁸ The DOJ letter highlighted the consequences of fines and fees, including escalating debt, repeated, unnecessary incarceration for non-payment, loss of jobs, and entrapment in a cycle of poverty.¹³⁹

Lastly, and most clearly, the private prison industry, prison labor, and the bail industry explicitly make the incarceration of predominately black and brown bodies incredibly lucrative. Here, I want to present some of the numbers that demonstrate the profitability of the incarceration enterprise. In the early 2000s, estimates were that companies such as Goldman Sachs and Merrill Lynch wrote \$2 to \$3 billion in prison construction bonds every year.¹⁴⁰ Private prison industry conglomerates CoreCivic, formerly known as the Corrections Corporation of America, and GEO Group reportedly made \$3.3 billion in annual revenue in 2014, through the operations of a combined

¹³² *Id.* at 2 (internal quotations omitted).

¹³³ Leah Donnelly, *46 Stops: On ‘The Driving Life and Death of Philando Castro’*, NPR: CODE SWITCH (July 20, 2016), <https://www.npr.org/sections/codeswitch/2016/07/20/486512846/46-stops-on-the-driving-life-and-death-of-philando-castile>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Jones, *supra* note 128, at 39.

¹³⁷ Zach Zapotosky, *Justice Department Warns Local Courts About Unlawful Fines and Fees*, WASH. POST (Mar. 14, 2016), https://www.washingtonpost.com/world/national-security/justice-department-warns-local-courts-about-unlawful-fines-and-fees/2016/03/13/c475df18-e939-11e5-a6f321ccdbc5f74e_story.html?utm_term=.a81c8b56670e.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ WEBSDALE, *supra* note 72, at 48.

162 prisons in the United States.¹⁴¹ In April 2018, the state of Kansas broke ground on a \$160 million prison building project that would house 2,400 prisoners under an agreement with the private company CoreCivic.¹⁴² The company received a twenty-year non-cancelable lease agreement and Kansas will pay the company \$15 million over the life of the agreement.¹⁴³

At the federal level, the Bureau of Prisons operates a program known as Federal Prison Industries that generated \$500 million in sales during its 2016 fiscal year for selling everything from mattresses to road signs.¹⁴⁴ Under this program, inmates are paid ninety cents an hour.¹⁴⁵ States also utilize prison labor to generate revenues.¹⁴⁶ According to *The Economist*, the market of captive labor is worth well over \$1 billion.¹⁴⁷ In fact, “California’s program expects to generate \$232 million in sales this year. In Idaho, prisoners roast potatoes [and] in Kentucky, inmates sell \$1 million in cattle per year.”¹⁴⁸

Prison incarceration is not the only enterprise predicated on the detention of human beings. A report issued by the nonprofit Color of Change and the American Civil Liberties Union detailed the lucrative nature of the for-profit bail system.¹⁴⁹ In Maryland, families paid around \$75 million over a five-year period in non-refundable bail-bond payments for individuals accused of crime that were later cleared of any wrongdoing.¹⁵⁰ In 2015 in New Orleans, fewer than 5,000 families in New Orleans paid \$4.7 million in non-refundable bond payments, and these were paid by black families 84% of the time.¹⁵¹ Bail bondsmen are not the only individuals profiting from this

¹⁴¹ Martha C. White, *Locked-in Profits: The U.S. Prison Industry, by the Numbers*, NBC NEWS (Nov. 2, 2015, 5:28 PM), <https://www.nbcnews.com/business/business-news/locked-in-profits-u-s-prison-industry-numbers-n455976>; The Editorial Board, *Under Mr. Trump, Private Prisons Thrive Again*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/opinion/under-mr-trump-private-prisons-thrive-again.html>.

¹⁴² Tim Carpenter, *Kansas Digs Into 20-Year Contract With Private Company to Replace Lansing Prison*, TOPEKA CAP.-J. (Apr. 19, 2018, 2:08 PM), <http://www.cjonline.com/news/20180419/kansas-digs-into-20-year-contract-with-private-company-to-replace-lansing-prison>; John Hanna, *Kansas Moving Forward With New Prison Built by Private Firm*, U.S. NEWS & WORLD REP. (Jan. 24, 2018, 8:20 PM), <https://www.usnews.com/news/best-states/kansas/articles/2018-01-24/top-kansas-lawmakers-set-to-decide-on-building-new-prison>.

¹⁴³ Carpenter, *supra* note 142; Hanna, *supra* note 142.

¹⁴⁴ *The Incarcerated Workforce: Prison Labour is a Billion-Dollar Industry, With Uncertain Returns for Inmates*, THE ECONOMIST (Mar. 16, 2017), <https://www.economist.com/usa/2017/03/16/prison-labour-is-a-billion-dollar-industry-with-uncertain-returns-for-inmates>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System*, ACLU (May 2017), <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

system. According to a 2017 article published in *The Atlantic*, “there are more than 250,000 bail-bonds companies across the U.S., only about 10 insurers are responsible for underwriting the bulk of the \$14 billion in bonds that are issued each year.¹⁵² The industry as a whole brings in around \$2 billion in profit a year.”¹⁵³

Even further, the American Bail Coalition (ABC) began lobbying in 1990 and since then, average bail amounts have almost tripled for felony cases, and between 2004 and 2012, revenues of ABC companies have increased 21% almost entirely from bail.¹⁵⁴ In an interview, Graymond Martin explained a bill he lobbied for in Louisiana, passed in 1993, that required defendants to pay an extra 2% fee on top of their 10% fee to a bondsman and that this fee would be divided up among the sheriff’s department, the district attorney, the public defender, and the judges, effectively giving every criminal justice stakeholder a financial interest in the bond system.¹⁵⁵

The opportunity of work provided by the criminal justice industry through the warehousing of surplus labor, the judicial assessments of court fines and fees that fund government operations, the for-profit bail system, private prisons, and using prisoners as a captive labor force are all lucrative enterprises. I have only highlighted a few mechanisms that make the detention of black bodies profitable, but it is important to understand the ways black bodies are subjugated by the criminal justice system in other forms. For example, the heightened police presence that occurs hand in hand with neighborhoods subjected to gentrification and the role of police in clearing space to enhance property values.¹⁵⁶ Another example is the current proliferation of surveillance technologies used by police departments and probation and parole offices.¹⁵⁷ These technologies purchased by carceral state institutions also generate profits for private companies that accomplish the surveillance of primarily black and brown communities.

¹⁵² Gillian White, *Who Really Makes Money Off of Bail Bonds?*, *THE ATLANTIC: BUSINESS* (May 12, 2017), <https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/>.

¹⁵³ *Id.*

¹⁵⁴ Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, *MOTHER JONES* (June 2014), <https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/>.

¹⁵⁵ *Id.*

¹⁵⁶ See Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, *THE ATLANTIC: THE PRESENCE OF JUST.* (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.

¹⁵⁷ *Id.*

V. CONCLUSION

Of course, there are exceptions and critiques to be made to my argument that the carceral state is a function of discriminatory design, and that it works to accomplish primarily economic imperatives at the expense of black bodies. However, when we use this framework for understanding the carceral state it highlights a couple of important concepts. First, I find that all of these invasive, exploitative practices that generate profits at the expense of the lives of black people are tolerated because of racial ideology. Racial ideology plays the psychological role of normalizing and naturalizing the systematic dehumanization of people of color. Mass criminalization and incarceration are legally tolerated because American law in its inception, and by its very design, has turned a blind eye to the persistent suffering experienced by black citizens. As Websdale wrote, “[c]onstructing criminals as indecent, immoral, or degenerate conveniently avoids the ongoing legacies of slavery and the enormous costs of global capitalism.”¹⁵⁸ Numerous scholars have written on the pervasive social constructions of black people as inclined toward violence and criminal behavior.¹⁵⁹ This racial ideology functions in much the same way as the explicitly racist doctrine during enslavement that wrote black people out of the human family to justify bondage. It promotes buy-in from working class and poor whites, as well as some middle-class African Americans, into a system that effectually promotes civic death in poor black communities through detentions and hyper-policing.

The analysis presented here is also instructive on what I refer to as the “masking function” of race. By this I mean that racial ideology, without additional attentiveness to the ways it connects to class, disguises a political economy that is unequal across the board. When race is the entirety of the focus, for example a singular attentiveness to the interracial wealth gap between blacks and whites, this myopic view misses that the entirety of the economic structure is shaped like a pyramid. As cited earlier, there are large intraracial wealth gaps between whites and also between black people, and this is part of the discriminatory design.¹⁶⁰ Although the system is primed to achieve the disenfranchisement of black bodies and makes the detention and exploitation of black bodies lucrative, the majority of people, regardless of

¹⁵⁸ WEBSDALE, *supra* note 72, at 151–52.

¹⁵⁹ See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010); Loic Wacquant, *Deadly Symbiosis: Rethinking Race and Imprisonment in America*, 27 BOSTON REV. (2002), <http://bostonreview.net/archives/BR27.2/wacquant.html>.

¹⁶⁰ TAYLOR, *supra* note 112, at 7.

race, are victims of a highly unequal political economy.¹⁶¹ This is precisely why I believe it is critical to trace the arc of the profitability of mass criminalization and incarceration.

Further, this perspective requires us to view whites, and other groups of people of color, not just as mere collateral damage to a system that targets African Americans, but as victims of precisely the same economic system. Following the election of Donald Trump, the increased crackdown against people who possibly crossed the border illegally has increased the stock value of private prison corporations.¹⁶² CoreCivic more than doubled its revenue from the Immigration and Customs Enforcement Agency between 2014 to 2015.¹⁶³ Again, the words of Derrick Bell are instructive, “The injustices that so dramatically diminish the rights of blacks because of race also drastically diminish the rights of many whites, particularly those who lack money and power.”¹⁶⁴

Lastly, this framework for understanding mass criminalization requires us to think of criminal justice reform more broadly. In fact, reform is simply insufficient. For example, Forman discusses the eventual decriminalization of marijuana as an example of the triumph of criminal justice reform, yet in place after place where it has been legalized or decriminalized African Americans are still more likely to be arrested for marijuana-related offenses.¹⁶⁵ Again, the system is primed for a particular outcome and these outcomes persist despite well-meaning efforts to transform them. Changing the system requires us to alter its discriminatory design, and it requires us to pursue a route of divestment from the subjugation of black bodies. This requires us to think differently about the structural inequalities present in our society, and to once and for all engage in the active dismantling of racial ideologies that support their reproduction over and over again in different forms.

Therefore, rolling back mass criminalization and mass incarceration is two-fold; it involves addressing structural inequalities embedded in the political economy and simultaneously pushing back against racial ideology

¹⁶¹ See Angela Hanks, et. al., *Systematic Inequality*, CTR. FOR AM. PROGRESS (Feb. 21, 2018, 9:03 AM), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/>.

¹⁶² Davis Richardson, *Private Prison Stocks Are Soaring Amid the Trump Administration's Immigration Crisis*, OBSERVER (June 20, 2018, 4:50 PM), <http://observer.com/2018/06/private-prison-stocks-soar-amid-immigration-crisis/>.

¹⁶³ Aimee Picchi, *One Winner Under Trump: The Private Prison Industry*, CBS NEWS (Feb. 21, 2018, 5:00 AM), <https://www.cbsnews.com/news/one-winner-under-trump-the-private-prison-industry/>.

¹⁶⁴ Bell, *supra* note 77, at 268.

¹⁶⁵ German Lopez, *After Legalization, Black People Are Still Arrested at Higher Rates for Marijuana Than White People*, VOX (Jan. 29, 2018, 8:50 AM), <https://www.vox.com/policy-and-politics/2018/1/29/16936908/marijuana-legalization-racial-disparities-arrests>.

that normalizes hierarchies. One solution can be found in the model used by Gideon's Promise that promotes wholesale cultural change in the criminal justice system among public defenders through client-centered approaches that humanize clients.¹⁶⁶ The organization trains public defenders from across the country every year and emphasizes the importance of telling the client's story in a model of representation that views the client as the focal point during the course of representation.¹⁶⁷ Through emphasizing a cultural shift and focusing on the way defendants are treated in the criminal justice system, the Gideon's Promise model pushes back against the processing impetus of the criminal justice system.¹⁶⁸ The organization seeks to create a movement among public defenders, because this cadre of lawyers are tasked with representing the majority of people in the justice system due to their indigent status.¹⁶⁹ A large-scale cultural shift within the system that values people over profits is one way to push back against racial ideologies that naturalize and normalize racialized subjugation.

Alternatively, a move to disinvest from private corporations that profit from incarceration is another way to create structural changes. Detaching incentives from the exploitation of black and brown bodies helps address one of the primary drivers of the expansive carceral state—its profitability. Recall that the criminal justice system historically sanctioned racial oppression that was predicated on a highly unequal economic order.¹⁷⁰ Recently, both Google and Facebook agreed to no longer take money from America's for-profit bail bond agencies.¹⁷¹ This is one small step in what could be a broader movement to disconnect the generation of profits from incarceration. In this vein, there should also be greater attentiveness paid to the ways racial biases are embedded in the algorithms and products produced by private companies that are in turn utilized by criminal justice agencies. Recent studies show that bias in the criminal justice system is replicated through proliferating technologies,

¹⁶⁶ See Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161 (2009); Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999 (2013).

¹⁶⁷ See *Trainer Development Conference*, GIDEON'S PROMISE, <https://www.gideonspromise.org/sites/default/files/Trainer%20Development%20Conference%20Brochure.pdf> (last visited Dec. 4, 2018) (hereinafter *Gideon's Promise Trainer Development*); see also Jonathan A. Rapping, *Grooming Tomorrow's Change Agents: The Role of the Law Schools in Helping to Create a Just Society*, 12 OHIO ST. J. CRIM. L. 465, 498–501 (2015).

¹⁶⁸ Gideon's Promise Trainer Development, *supra* note 167; Rapping, *supra* note 167, at 498–501.

¹⁶⁹ Gideon's Promise Trainer Development, *supra* note 167; Rapping, *supra* note 167, at 498–501.

¹⁷⁰ See Manning, *supra* note 120; Goldberg, *supra* note 119, at 203–11.

¹⁷¹ Jon Schuppe, *Bail-Bond Industry Suffers Another Blow as Facebook and Google Ban Ads*, NBC NEWS (May 8, 2018), <https://www.nbcnews.com/news/us-news/google-facebook-say-they-re-banning-profit-bail-bond-ads-n872386>.

including artificial intelligence and facial recognition technology.¹⁷² The danger of technology that leads to mass criminalization and surveillance is that it also has the veneer of scientific reliability while perpetuating racial inequalities.

Therefore, it is critical to not only address racial ideologies that disenfranchise people of color implicitly or explicitly but to also delink the subjugation and detention of human beings from financial incentives. In this article, I sought to unpack the assertion that, *by design*, mass criminalization results from the systematically incentivized social control and detention of poor African Americans that is foundational to the historical roots of the carceral state. The multifarious ways the criminal justice system generates profits were illustrated through a discussion of private industry profits for bail and prison companies, and the warehousing of surplus labor illustrates its ongoing connection with economic arrangements that vacillate over time. Further, I highlighted how racial ideology becomes instrumental in both masking the economic functions of racism and by promoting buy-in to the dehumanization of black people by the state as a commonly accepted practice. I agree with James Forman, that African Americans have also contributed to the perpetuation of mass criminalization and mass incarceration, but this is because larger systemic processes in the political economy cause the carceral state to function in this way irrespective of the actors. As a result of discriminatory design, you can put any person of any color in powerful positions within the carceral state and it will continue to replicate racially disparate outcomes without much larger and broader structural changes. My suggestions are only a starting point for answering one of the critical questions of our time—how can we fundamentally alter a for-profit system predicated on the subjugation of black bodies that has persisted over hundreds of years, without it transforming into yet another system of racialized oppression.

¹⁷² See Jackie Snow, *Even Black Robots Are Impacted By Racism*, FAST COMPANY (Aug. 3, 2018), <https://www.fastcompany.com/90212508/even-black-robots-are-impacted-by-racism>; Stephanie Wykstra, *Can Racial Bias Ever Be Removed From Criminal Justice Algorithms?*, PAC. STANDARD (July 12, 2018), <https://psmag.com/social-justice/removing-racial-bias-from-the-algorithm>; Lizette Chapman & Joshua Brusteim, *A.I. Has a Race Problem*, BLOOMBERG BUSINESSWEEK (June 26, 2016, 5:00 AM), <https://www.bloomberg.com/news/articles/2018-06-26/ai-has-a-race-problem>.

