

## Platonic Justice: Giving Prisoners Their Due

Gaven DeVillier

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# Platonic Justice: Giving Prisoners Their Due

Gaven M. DeVillier\*

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## INTRODUCTION

Most people like money.<sup>1</sup> It helps you pay for your vacation, your kids' tuition, your parents' anniversary dinner, your plans for corporate expansion to Mars.<sup>2</sup> Money can certainly be a good thing, yet it is a means

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1. Ryan J. Dwyer & Elizabeth W. Dunn, *Wealth Redistribution Promotes Happiness*, PROC. NAT'L ACAD. SCI. U.S. (Nov. 7, 2022), <https://www.pnas.org/doi/10.1073/pnas.2211123119>.

2. This briefly references the corporate space race undertaken by billionaires Elon Musk, Jeff Bezos, and Richard Branson through SpaceX, Blue Origin, and Virgin Galactic. In fairness, the aims of these companies are different. SpaceX aims to make humanity a multiplanetary species. *Mission*, SPACEX, <https://www.spacex.com/mission/> [https://perma.cc/8M92-R7VP] (last accessed Nov. 13, 2023). Blue Origin "was founded with a vision of millions of people living and working in space for the benefit of Earth." *About Blue Origin*, BLUE ORIGIN, <https://www.blueorigin.com/about-blue/> [https://perma.cc/Y7YM-F8SR] (last accessed Nov. 13, 2023). Virgin Galactic's purpose is "to connect people across the globe to the love, wonder, and awe created by space travel." *Welcome*

to an end. You can neither consume your money for calories nor date your “Benjamins.” Money cannot love you back.<sup>3</sup> Money transfers ownership to other things which themselves have value.

Money is king in a capitalist society. There is a difference, however, between money’s role in ordinary governmental operations and its role in the Prison Industrial Complex.<sup>4</sup> First, the money in ordinary governmental operations is generated through taxes for the provision of some public need (e.g., roads, schools, and prisons). Those public goods can involve private contractors or generate revenue for the ongoing function of a state-identified need, as is the case with highway construction and the National Parks Service. What distinguishes the Prison Industrial Complex from other public goods is that it is: (1) a publicly funded good whose “benefit” is paid for by both the ordinary taxpayer and, in many state prisons, the convict;<sup>5</sup> (2) a struggling, unreformed governmental program that impacts over 1.2 million people, causing states like Louisiana to have the highest per capita incarceration rate in the world;<sup>6</sup> and (3) an industry that uses the

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to *Virgin Galactic*, VIRGIN GALACTIC, <https://www.virgingalactic.com> [<https://perma.cc/G4XF-E7FB>] (last accessed Nov. 13, 2023).

3. Inanimate objects are notoriously incapable of feeling emotions. It is common, however, for people to assign emotions to objects. “Personification is not only wildly popular, it’s a fascinating psychological phenomenon that reveals a lot about how we might understand the world.” Chi Luu, *Personification is Your Friend: The Language of Inanimate Objects*, JSTOR DAILY, (Mar. 23, 2016), <https://daily.jstor.org/personification-is-your-friend-the-amazing-life-of-letters/> [<https://perma.cc/E96J-86T5>].

4. This Paper will use the term “Prison Industrial Complex” to refer to several different components of the American penal system. In its most common use, it refers to the collective body of United States federal, state, and local prisons. In other uses, it refers specifically to private prisons within the United States.

5. This is seen in other rare circumstances, like fee payments by biopharmaceutical companies to the FDA for drug approval whereby the corporate entity double-pays as both a general taxpayer and a particular user of the service. What makes the prison system unique is that the service provided, incarceration, is punitive like the administration of a fine. The payment for a crime can be a fine, time, or labor; usually not all of the above.

6. *Prisoners in 2021 – Statistical Tables*, BUREAU JUST. STATS, (Dec. 2022), <https://bjs.ojp.gov/library/publications/prisoners-2021-statistical-tables>. See also *Louisiana Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/LA.html#:~:text=Louisiana%20has%20an%20incarceration%20rate,thn%20any%20democracy%20on%20earth> [<https://perma.cc/6L8T-WUU7>] (last visited Nov. 14, 2023).

Thirteenth Amendment to shirk minimum wage laws at the expense of prisoner reformation.<sup>7</sup>

This Paper argues chiefly that incarceration and recidivism per capita rates are higher in the United States than other nations because the punitive character of American incarceration provides neither economic restoration and rehabilitation nor constitutional protections for inmate labor. The current design of the Prison Industrial Complex maintains a steady employment rate with cheap wages, making a product—prisoners—more accessible to corporate consumers. Though there are brilliant minds in government who seek to remedy the palpable injustice perpetrated against predominantly poor and minority individuals,<sup>8</sup> the wheels of corporate greed infect a system meant to foster greater good for the American body politic.<sup>9</sup> High arrest and incarceration rates of African American men are a *de facto* continuation of the “badges, incidents, and relics of slavery and involuntary servitude” of 18th and 19th century American chattel slavery.<sup>10</sup>

This Paper seeks to demonstrate that: (1) the Thirteenth Amendment provides certain human rights protections inherent in the Exceptions

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7. *Captive Labor: Exploitation of Incarcerated Workers*, AM. CIV. LIBERTIES UNION, (June 15, 2022), <https://www.aclu.org/news/human-rights/captive-labor-exploitation-of-incarcerated-workers#:~:text=The%20government%20takes%20up%20to,half%20of%20their%20gross%20pay> [https://perma.cc/86DS-LRCK] [hereinafter *Captive Labor*].

8. See e.g. *Fact Sheet: White House Launches Fair Chance Business Pledge*, WHITE HOUSE, (Apr. 11, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

9. *Roadmap to Reentry: Reducing Recidivism Through Reentry Reforms at the Federal Bureau of Prison*, DEP'T JUST. ARCHIVE, <https://www.justice.gov/archives/reentry/roadmap-reentry> (last updated Apr. 19, 2017), see also *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, DEP'T JUST. ARCHIVE, <https://www.justice.gov/archives/prison-reform#recentandongoingreforms> (last updated Mar. 6, 2017).

10. *United States v. Cannon*, 750 F.3d 492, 500 (5th Cir. 2014) (outlining the doctrine of badges and incidents of slavery, though not providing American incarceration as an example thereof) (citing Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190 (2009), div. E, § 4702) (codified as amended at 18 U.S.C. § 249).

clause;<sup>11</sup> (2) one such protection is against a recidivistic system,<sup>12</sup> especially one that discriminates against persons of color<sup>13</sup> like African chattel slavery; and (3) a cause of this recidivism is the “pay-to-stay” programs operated by many states.<sup>14</sup> This Paper also aims to provide legislative solutions and a template for non-profit organizations to use the Thirteenth Amendment as a ground to sue state governments for an end to pay-to-stay programs. Section I addresses the philosophical, historical, and legislative backgrounds of both the Thirteenth Amendment and the Prison Industrial Complex. Section II provides legislative solutions to ongoing problems within the Prison Industrial Complex. Section III proposes a litigation strategy to reform the Prison Industrial Complex.

## I. BACKGROUND

Plato famously asked, “what is Justice?”, a question which he then spent nearly a thousand pages opining on.<sup>15</sup> Plato distilled the concept that “each one man must perform one social service in the state for which his nature is best employed”<sup>16</sup> and that this principle is “embodied in child, woman, slave, free, artisan, ruler, and ruled.”<sup>17</sup> A critical component of justice is the dignity afforded each person. Though Plato continues in other sections of the Republic to categorize persons into three distinct, caste-

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11. “Neither slavery nor indentured servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XII (emphasis added).

12. Recidivism is “the tendency of a convicted criminal to reoffend.” *Recidivism*, OXFORD ENG. DICTIONARY (last modified July 2023).

13. This paper will use, interchangeably, the term “persons of color” to refer to either all non-white minorities, or in most instances, African Americans. This paper may also include the terms “African American” and “Black” to refer to descendants of the African Diaspora or to people of a black skin tone. Though the former group is more particular and reflects the continuing nature of slavery’s effects in America, the latter group is nonetheless included in America’s systemic discrimination of black people.

14. Pay-to-stay is “the practice of charging people to pay for their own jail or prison confinement....” Megan Schumann, *States Unfairly Burdening Incarcerated People with “Pay to Stay” Fees*, RUTGERS TODAY (Nov. 20, 2020), <https://www.rutgers.edu/news/states-unfairly-burdening-incarcerated-people-pay-stay-fees> [https://perma.cc/7VNY-JRLV].

15. PLATO, THE REPUBLIC, (B. Jowett trans., Project Gutenberg updated 2021) (c. 379 B.C.).

16. *Id.* at 433a.

17. *Id.* at 433d.

esque classes, his thinking nevertheless creates a floor for human dignity: all persons have value.<sup>18</sup> Other thinkers crafted similar rules emphasizing the dignity of the human person, such as: give to each what is their due.<sup>19</sup>

Questions regarding the dignity of the human person plagued certain Framers and 17th century political thinkers, including John Adams, Thomas Paine, and Marquis de Lafayette.<sup>20</sup> Concerns about the nature of the human person and each person's duty to society bubbled up into debates about the Missouri Compromise and boiled over into the American Civil War.<sup>21</sup> Indeed, Article I of the Thirteenth Amendment to

18. *Id.* at 413c.

19. A brief selection of the global philosophical tradition for the Golden Rule is reproduced here. Ancient Egypt: "Proper *macat* cannot stop at the repair and punishment of 'falsehood' or at the coldly impersonal leveling-off by the scales; proper *macat* includes the positive seeking-out of justice... 'Now this is the command: Do to the doer to cause that he do.'" JOHN ALBERT WILSON, *THE CULTURE OF ANCIENT EGYPT*, 121 (Univ. of Chicago Press, 2013). Ancient India: "He who, from motives of his own happiness, slays other harmless creatures with the rod of chastisement, never attains to happiness, in the next world.... One should never do that to another which one regards as injurious to one's own self." VYASA, *MAHABHARATA*, BOOK 13 SECTION CVIII, (Kisari Ganguli trans., 1883, proofread update by John Hare 2006) (c. 3rd century BC). PENTATEUCH (Judaism): "You shall love your neighbor as yourself." LEVITICUS 19:18, NEW AMERICAN BIBLE. THE ANALECTS (Confucianism): "'Is there one word which may serve as a rule of practice for all one's life?' The master said, 'Is not RECIPROCITY such a word? What you do not want done to yourself, do not do to others.'" LAO TSE, *CONFUCIUS, THE ANALECTS* - 15, (trans., by James Legge) (c. 551-479 B.C.). GOSPEL (Christianity): "Do to others whatever you would have them do to you. This is the law and the prophets." MATTHEW 7:12, NEW AMERICAN BIBLE. QUR'AN (Islam): "Woe to those that deal in fraud – those who, when they have to receive by measure from men, exact full measure, But (sic) when they have to give by measure or weight to men, give less than due." THE PROPHET MUHAMMAD, *THE QUR'AN: A GUIDE AND MERCY* 465 (Abdullah Yusuf Ali trans., 2012) (c. 610-632 AD).

20. Daryl Austin, *Anti-Slavery Revolutionaries Who Practices What They Preached*, THE HILL (July 10, 2020), <https://thehill.com/changing-america/opinion/506782-anti-slavery-revolutionaries-who-practiced-what-they-preached> [<https://perma.cc/DMB3-77AU>].

21. It may be fairer to suggest that both the Missouri Compromise and the American Civil War had less to do with ontological questions about the nature of the human person and more to do with a person's right to property. "Who is a person?" is an important question, yet its answer was based more on a person's financial interest than on an intellectually honest curiosity. Though scientific racism did exist, it was an intellectual evolution used to justify slavery and "anti-Black racism and white supremacy." See *Scientific Racism*, HARVARD LIBRARY,

the United States Constitution proclaims, “Neither slavery nor involuntary servitude... shall exist within the United States, or any place subject to their jurisdiction.”<sup>22</sup> Yet despite their grievances against slavery, the Amendment’s drafters included an exception allowing for slavery or indentured servitude “as a punishment for crime whereof the party shall have been duly convicted.”<sup>23</sup> The exception clause here was borrowed from Article 6 of the 1787 Ordinance governing the Northwest Territory.<sup>24</sup>

The exception served two purposes: (1) to ensure that the ever-expanding industrial America had access to labor to improve infrastructure;<sup>25</sup> and (2) to require a person to restore the community he

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<https://library.harvard.edu/confronting-anti-black-racism/scientific-racism> [https://perma.cc/SFN7-4R2T] (last visited Feb. 24, 2024). “Enslaved people were seen not as people at all but as commodities to be bought, sold, and exploited.” Mary Elliott & Jazmine Hughes, *The 1619 Project*, NY TIMES (2019). Salmon Chase insisted that because there was an absence of positive law on the holding of slaves and because “slaveholding is contrary to natural law and justice,” that slaveholding and the Fugitive Slave Act were unconstitutional. Chase further argued that “slaves were entitled to the protection of the Due Process clause because they were persons.” Rebecca E. Zietlow, *Contextualizing the Thirteenth Amendment: James Ashley and Antislavery Constitutionalism*, 18 (2011) (citing SALMON P. CHASE, AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AS THE DECEMBER TERM, 1846: IN THE CASE OF WHARTON JONES VS. JOHN VANZANDT 101 (1847)). Again, the argument that an African was a person was important, though its opponents were results-oriented thinkers and likely already knew the answer. This is to be distinguished from Plato’s philosophy on the nature of persons which addressed roles and character traits within a meritocracy while affording each “metal” the status of a person.

22. U.S. CONST. amend. XIII.

23. *Id.*

24. CONSTITUTION ANNOTATED: ANALYSIS AND INTERPRETATION OF THE U.S. CONSTITUTION at AMDT 13 S1.4 EXCEPTIONS CLAUSE, LIBRARY OF CONG. (citing *Ordinance of 1787*, LIBRARY OF CONG. (Const. Cong. no. 225) [<https://lccn.loc.gov/90898154>]).

25. This is a positive take on the exception clause within the Thirteenth Amendment, though there may not have been many positive results coming from this clause. Whether the framers of the Thirteenth Amendment intended to create space whereby former slave states could create black codes and perpetuate slavery is unclear. See Becky Little, *Does an Exception Clause in the 13th Amendment Still Permit Slavery?*, HISTORY (Apr. 20, 2021), <https://www.history.com/news/13th-amendment-slavery-loophole-jim-crow-prisons> [https://perma.cc/5EJE-X6X2].

harmed.<sup>26</sup> The Supreme Court reiterated the utility of conscripted labor in *Bailey v. Alabama*.<sup>27</sup> “From Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads. The system was introduced from England, and, while it has produced no Appian Way, appropriateness to the circumstances existing in rural communities gave it general favor.”<sup>28</sup>

Conscripted service for a public good has been upheld by the Supreme Court as an exception to the Thirteenth Amendment in a variety of public duties, including certain required construction labor under state law,<sup>29</sup> service as a material witness for a nominal sum,<sup>30</sup> and military conscription in a war declared by Congress.<sup>31</sup> Consistent with other public goods, the Thirteenth Amendment’s drafters’ understanding of justice involved a duty of the incarcerated person to repair and support the community that they themselves damaged. The Amendment’s drafters likely intended the exception for incarcerated persons to encompass the kind of difficult and uncomfortable work by which prisoners would best remunerate society.<sup>32</sup>

Implicated here are two principle theories of justice: restorative and retributive.<sup>33</sup> “Restorative justice is a response to wrongdoing that

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26. The Supreme Court in *Bailey v. Alabama*, 219 U.S. 219 (1911) held that a state could not create a statute presuming a worker committed criminal fraud for non-performance in a construction contract whereby punishment for the crime was either a fine or hard labor.

27. *Id.*

28. *Butler v. Perry*, 240 U.S. 328, 331 (1916).

29. *United States v. Kozminski*, 487 U.S. 931 (1988).

30. *Hurtado v. United States*, 410 U.S. 578 (1973).

31. *Selective Draft Law Cases*, 245 U.S. 366 (1918).

32. “Convicts who were not facing the death penalty were chained and subjected to public hard labor throughout the day, forced to spend hours repairing roads and buildings before returning to their cells at night.” Kamau Littletree-Holston, *Prison Labor in the United States*, NYU GALLATIN’S CONFLUENCE (Apr. 23, 2019), <https://confluence.gallatin.nyu.edu/context/interdisciplinary-seminar/prison-labor-in-the-united-states> [<https://perma.cc/KJT5-MQJ7>] (citing Genevieve Lebaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*, 15 J. LAB. SOC’Y, no. 3, 332 (2012)).

33. Rehabilitation is less a theory of justice and more a consequence of justice’s restorative and retributive aims. Some thinkers incorporate rehabilitation into a restorative justice model by considering the person’s rehabilitation to be an integral component in the community’s healing. Policy recommendations at the intersection of rehabilitation and restorative justice are discussed in greater detail in Christy Visser and John Eason’s article, *A Better Path Forward*. Christy Visser & John Eason, *A Better Path Forward: Changing Prisons to Help People Change*, BROOKINGS (Apr. 2021), <https://www.brookings.edu/research/a-better-path-for>



prioritizes repairing harm and recognizes that maintaining positive relationships with others is a core human need. It seeks to address the root cause of crime, even to the turning point of transforming unjust systems and structures.”<sup>34</sup> One famous example of restorative justice is the Rwandan Gacaca courts, in which communities within Rwanda would come to judge and sentence a person for their crimes.<sup>35</sup> This system of justice was critical in the international legal response to the Rwandan genocide.<sup>36</sup>

There are, nevertheless, shortcomings to the philosophy behind restorative justice. Because it is focused on repairing relationships, it often seeks constructive, action-based “punishments” to repair damaged communities. Restorative justice fails to account for every cost suffered by the community because the wrongdoer, by accomplishing the crime, has received some gain that the law does not take away. Conversely, retributive justice seeks to punish the offender for the crime committed instead of repairing fractured communal relations.<sup>37</sup> In retributive justice,

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[ward-for-criminal-justice-changing-prisons-to-help-people-change](https://perma.cc/DVU8-3SGH) [https://perma.cc/DVU8-3SGH].

34. *Three Core Elements of Restorative Justice*, RESTORATIVE JUST. EXCH., <https://restorativejustice.org/what-is-restorative-justice/three-core-elements-of-restorative-justice> [https://perma.cc/EM98-Z5XG] (last visited Mar. 7, 2024).

35. Gacaca courts “deriv[e] their name from the Kinyarwanda word meaning ‘grass’ (the place where communities gather to resolve disputes) ... One of the government’s aims in encouraging community participation was to make ordinary Rwandans the main actors in the process of dispensing justice and fostering reconciliation.” *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts*, HUMAN RIGHTS WATCH (May 31, 2011) <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts> [https://perma.cc/UE85-RMU4].

36. “A few months after the end of the genocide, Rwandan prisons were bursting at the seams with genocide suspects. By 1998, around 130,000 prisoners were crammed into space meant for 12,000, resulting in conditions that were universally acknowledged to be inhumane and that claimed thousands of lives. Conventional courts began trying genocide cases in December 1996, but had only managed to try 1,292 genocide suspects by 1998.... [T]he government proposed to set up community-based courts to try genocide-related crimes using the customary [*G*]acaca model” and was “[a]imed at speeding up genocide trials, reducing the prison population, and rapidly rebuilding the nation’s social fabric[.]” *Id.* There were nevertheless many shortcomings with the Gacaca courts, including accusations of corruption, violations of the right to a fair trial, and trumped-up charges. *Id.*

37. *Retributive Justice*, STANFORD ENCYC. OF PHIL. (July 31, 2020), <https://plato.stanford.edu/entries/justice-retributive/> [https://perma.cc/VC9R-KRXH].

one is more likely to owe a cock to Asclepius<sup>38</sup> than community service hours.<sup>39</sup> The goals of both retributive and restorative justice are to repair what the community has lost by requiring the convicted to give their time back to the community through either labor or confinement. The philosophical intent undergirding the American prison system was always a blend of these two forms of justice – requiring a punishment of extended time with little to no freedom while also requiring the convict’s labor to rebuild a community.

The Prison Industrial Complex does not, however, operate comparably to that retributive and restorative framework likely intended by the Civil War Amendments’ drafters. It would be nonsensical for the United States government to intentionally craft legislation to continue slavery after the Civil War cost approximately 620,000 American lives.<sup>40</sup> Post-Civil War America created a new form of justice: a pecuniary one. Many former slave states were able to use black codes to perpetuate a system of southern slavery after the Civil War.<sup>41</sup> Though there may have been good reasons for including the exception clause for prisoner reformation, e.g., work as a good for prisoner rehabilitation, it is nonetheless obvious that the clause is subject to manipulation.

The Prison Industrial Complex uses more clandestine means to oppress people of color for economic gain than outright slavery. It entails the systematic exploitation of persons for wealth-generating services. While the Prison Industrial Complex may have the twin aims of community restoration and criminal punishment, it has likely added a third aim – to profit corporations at the expense of the poor.<sup>42</sup> By the numbers,

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38. “Socrates’s last words were, Crito, we ought to offer a cock to Asclepius. See to it, and don’t forget it.” Colin Wells, *The Mystery of Socrates’s Last Words*, 16 ARION 137, 137 (2008). “Asclepius was the Greek god of healing, and offering a cock in sacrifice was a way of [Socrates] thanking [Asclepius] for healing Socrates with hemlock.” *Id.* at 138.

39. “It is intrinsically morally good... if some legitimate punisher gives them the punishment they deserve.” *Retributive Justice*, *supra* note 37.

40. Drew G. Faust, *Death and Dying*, NAT’L PARK SERV., [https://www.nps.gov/nr/travel/national\\_cemeteries/death.html](https://www.nps.gov/nr/travel/national_cemeteries/death.html) [https://perma.cc/6F6A-WTRE] (last accessed Nov. 13, 2023).

41. “Enacted in 1865 and 1866, the (black codes) were designed to replace the social controls of slavery that had been removed by the Emancipation Proclamation and the Thirteenth Amendment to the Constitution.” *Black Code*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/black-code> [https://perma.cc/7PBW-9DCE] (Feb. 9, 2024).

42. The sociologies Robert Martinson argued in his article that rehabilitative sentences are unlikely to work, a concept that led to the sharp uptick in incarceration. Gordon Dahl & Magne Mogstad, *The Benefits of Rehabilitative*

this would seem to be the case. Eighty-three percent of federal prisoners in America will be rearrested within nine years.<sup>43</sup> The Prison Industrial Complex, including federal, state, and private prisons, employs 800,000 of the near 1.2 million incarcerated persons.<sup>44</sup> The average incarcerated person's wage ranges from \$0.14 per hour to \$1.41 per hour.<sup>45</sup> This is in stark contrast to the \$11,000,000,000+ worth of goods and services that prison labor generates annually.<sup>46</sup>

Furthermore, incarcerated persons must pay for many essential goods, including food, toilet paper, and soap.<sup>47</sup> These goods often require

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*Incarceration*, 1 NAT'L BUREAU ECON. RSCH. REPORTER 18 (2020) (citing Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 THE PUBLIC INTEREST 22 (1974)). Dahl and Mogstad demonstrate in their study that: imprisonment discourages further criminal behavior, time spent in prison may not be likely to cause future criminal activity, and the reduction in crime is driven by individuals who were not working prior to incarceration. This data tends to show that prison can be beneficial for convicted persons. However, the purpose of incarceration is not the benefit of a corporation. It's true *telos* is the restoration of a community and reformation of a person. While companies should be able to make a profit for legitimate services rendered to a state, the current system allows for-profit companies to exploit states, local governments, and convicted persons for gains on two fronts: the fees generated, both by the government and prisoners, and the labor produced by convicted persons. It is also important to note that, while Dahl and Mogstad's paper focused on the benefits of incarceration, it did so in the context of a rehabilitative prison environment like that in Norway. Instituting a system similar to that of a small European nation would be exceedingly challenging for a number of reasons, as the paper notes in detail.

43. Denis Yukhnenko et al., *A Systematic Review of Criminal Recidivism Rates Worldwide: 3-year Update*, NAT'L LIBR. MED. (Nov. 3, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6743246/> [https://perma.cc/9ZGP-9PCY].

44. *Captive Labor*, *supra* note 7.

45. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> [https://perma.cc/CH3Q-KB6F].

46. Dani Anguiano, *US Prison Workers Produce \$11bn Worth of Goods and Services a Year for Pittance*, THE GUARDIAN (June 15, 2022), <https://www.theguardian.com/us-news/2022/jun/15/us-prison-workers-low-wages-exploited> [https://perma.cc/2EPF-YB2W].

47. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUSTICE (July 31, 2014), <https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate> [https://perma.cc/DSG5-MJQF] (pub'd originally in Loyola J. Pub. Interest L.). For more information on prison commissary sales, see Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y

incarcerated persons to take out loans to cover the cost of incarceration.<sup>48</sup> “All but two states have so-called ‘pay-to-stay’ laws that make prisoners pay for their time behind bars.”<sup>49</sup>

The Prison Industrial Complex double dips into the prison population, requiring inmates to pay with both their human and financial capital. In a survey conducted by the Ella Baker Center for Human Rights, researchers found that 48% of families “were unable to afford the costs associated with a conviction, while among poor families (making less than \$15,000 per year), 58% were unable to afford these costs.”<sup>50</sup> The study also found that the average debt incurred by convicted persons was \$13,607, not including the fees charged by prisons or the cost of necessary goods.<sup>51</sup> Across three states, the average, annual, per-person expenditure on commissary goods was \$947.<sup>52</sup> The average annual fee assessed by the Bureau of Prisons in 2020 on federal inmates held in a federal facility was \$120.59 per day.<sup>53</sup> Totaling the average annual fees assessed on prisoners by the federal government, the average cost of litigation alongside ancillary debts, and the cost of necessary commissary expenditures, the average, first-year federal prisoner would likely spend \$58,569.35.

It is estimated that nearly 40% of all crime is poverty-related and most incarcerated persons are themselves below the poverty line.<sup>54</sup> Because most incarcerated persons live below the poverty line and because incarceration has such a high cost, it is likely (and indeed the case) that

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INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [https://perma.cc/A58W-YGG6].

48. Annie Harper, et al, *Debt, Incarceration, and Re-entry: a Scoping Review*, NAT’L LIBR. MED. (Aug. 11, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7417202> [https://perma.cc/5WR3-LKWP].

49. Pat Eaton-Robb, *At \$249 Per Day, Prison Stays Leave Ex-Inmates Deep in Debt*, AP NEWS (Aug. 27, 2022), <https://apnews.com/article/crime-prisons-lawsuits-connecticut-074a8f643766e155df58d2c8fbc7214c> [https://perma.cc/986M-39T3].

50. Ella Baker Center for Human Rights, et. al., *Who Pays? The True Cost of Incarceration on Families*, FORWARD TOGETHER at 7 (2015) [hereinafter *Who Pays*].

51. *Id.* at 9.

52. Raheer, *supra* note 47.

53. Notice, 86 FR 49060 (Sept. 1, 2021).

54. *Who Pays*, *supra* note 50, at 7 (citing Holzer, Harry J. et al, *The Economic Costs of Childhood Poverty in the United States*, J. CHILD. POVERTY 1, 41-61 (Mar. 2008) and Eisen, Lauren-Brooke, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (2014)).

many prisoners take out loans to pay for prison.<sup>55</sup> At an annual percentage rate of 5% compounded monthly,<sup>56</sup> the average prisoner could pay off this loan in 13 years and 5 months if he paid \$500 per month.<sup>57</sup> Though these numbers seem incredibly high, they are not unrealistic. For her two and a half year stay in prison, Teresa Beatty owed \$83,762 to the State of Connecticut.<sup>58</sup>

The story behind prison loans' impact on recidivism rates is easy to imagine. After a period of incarceration, a person begins looking for work. He struggles to find work above the federal minimum wage, either because of his past conviction or because he had few marketable skills to begin with.<sup>59</sup> "In the first full calendar year after release, only 55 percent (of ex-prisoners) reported *any* earnings, with the median earnings being about \$10,090."<sup>60</sup> Operating out of either a minimum wage job or below minimum wage annual earning, he struggles to feed himself, let alone pay down the interest-bearing loan that gave him permission to be in prison.<sup>61</sup>

Finding that the money he makes at his minimum wage job is not enough, he then begins to participate in the sale and distribution of

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55. *Id.*

56. As of October 10, 2023, the Federal Interest rate averaged 5.33%. Federal Reserve Bank of New York, *Effective Federal Funds Rate*, <https://www.newyorkfed.org/markets/reference-rates/effr> [https://perma.cc/A59T-H8ER] (last visited Nov. 21, 2021).

57. Special thanks to the free, online calculator provided by calculator.net. For the exact calculation, visit: <https://www.calculator.net/repayment-calculator.html?cloanamount=58569.35&cupfrontfee=0&cinterestrates=5&ccompound=monthly&cpayback=month&cpaybackway=a&cyears=5&cmonths=0&paybackwayamount=500&printit=0&x=89&y=19#payment-result> (last visited Nov. 21, 2021).

58. *Prisoner Pay-to-Stay Laws Leave Ex-Inmates Deep in Debt*, BOSTON HERALD (Aug. 27, 2022), <https://www.bostonherald.com/2022/08/27/at-249-per-day-prison-stays-leave-ex-inmates-deep-in-debt/>.

59. The average incarcerated person struggles to find work in the first year after they are released. For more details about post-incarceration work, see Adam Looney, *5 Facts about Prisoners and Work, Before and After Incarceration*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/blog/up-front/2018/03/14/5-facts-about-prisoners-and-work-before-and-after-incarceration> [https://perma.cc/3V6N-PVQZ].

60. *Id.*

61. For more information on the financial struggle of minimum wage life, see Elizabeth Aldrich, *I Make Minimum Wage. What Should my Budget Look Like?*, MOTLEY FOOL (July 17, 2021), <https://www.fool.com/the-ascend/banks/articles/minimum-wage-what-budget> [https://perma.cc/GQ9K-2MXR].

narcotics – a career that previously landed him in prison.<sup>62</sup> This time, however, the need to sell drugs is not purely to impact his lifestyle. Now, he seeks to afford the prison sentence he already served. Upon arrest and re-conviction, he again must take out more loans to be incarcerated. The cycle begins again. The state, and the corporations that buy the prison labor, effectively own a chattel slave. Though some states have ensured that insolvent persons are absolved of a pay requirement or pay a discounted rate, there is nevertheless a real evil that requires persons to work in prison and pay for the back-handed privilege to be there.<sup>63</sup> This Note proposes two solutions to these problems: (1) ending the direct costs to prisoners for their incarceration; and (2) paying prisoners a wage capable of covering their prison expenses.

## II. LEGISLATIVE SOLUTIONS

### A. *Ending Costs to Prisoners*

Ending direct costs to prisoners for their incarceration is a practical and efficient way to reduce post-prison loans and prison-caused recidivism. As previously stated, an incarcerated person's average debt for fines and court costs alone is \$13,607.<sup>64</sup> Prisoners can be charged \$20 to \$80 per day for the cost of their incarceration, with some states, such as Connecticut, requiring \$249 per day.<sup>65</sup> Depending on the state, the annualized sum owed can range from \$7,300 to \$90,885. These fees differ from the \$14,000 to \$70,000 that states expect to pay per inmate.<sup>66</sup> The fees that some states charge inmates are so marginal and, because of the insolvency of many incarcerated persons so unlikely to be collected, that

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62. For more details on the breakdown of prisons by crime, see in part “Mass Incarceration” by the Prison Policy Initiative. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [https://perma.cc/GP72-YACG].

63. For information on a state-by-state analysis of medical co-pays, see *State and Federal Prison Co-Pay Policies and Sourcing Information*, PRISON POL’Y INITIATIVE (Apr. 19, 2017), [https://www.prisonpolicy.org/reports/copay\\_policies.html](https://www.prisonpolicy.org/reports/copay_policies.html) [https://perma.cc/82P4-K2E9].

64. *Who Pays*, *supra* note 50, at 9.

65. *Explainer: Do Prisoners Really Pay \$249 Per Day?*, HOW TO JUST., <https://howtojustice.org/getting-released-from-prison/explainer-do-prisoners-really-pay-249-per-day> [https://perma.cc/LS7J-SHNJ] (last accessed Nov. 21, 2023).

66. Ronnie Stephens, *Annual Prison Costs a Huge Part of State and Federal Budgets*, INTERROGATING JUST. (Feb. 16, 2021), <https://interrogatingjustice.org/prisons/annual-prison-costs-budgets> [https://perma.cc/45K7-4CWY].

it seems unnecessary to charge prisoners in the first place. Other states charge incarcerated persons substantially more than the mere cost of imprisonment, serving more as a fine than direct pay-to-stay compensation. In the former, it seems odd that states should care that prisoners pay anything when they are unlikely to recover money; in the latter, it seems suspect that states should seek to profit from prisoners themselves.

There are sound arguments for requiring prisoners to pay for their incarceration. Connecticut State Senator John Kissel, while explaining the state's policy to charge incarcerated persons, said: "The policy is to make one appreciate that your incarceration costs money... The taxpayers footed the bill. They didn't do anything wrong. And knowing that one has to pay the state back a reasonable sum on a regular basis is not a bad policy."<sup>67</sup> Senator Kissel summarizes two primary arguments for requiring incarcerated persons to pay a portion of their way through prison: responsibility and deterrence.<sup>68</sup> It is easy to understand that taxpayers have no desire to be burdened by another person's crimes. It is also easy to understand that, if a would-be-criminal recognizes that they will have to pay both with their time and with money for their criminal behavior, it may deter persons from committing those crimes in the future.

The logic, though simple and straightforward, fails to account for other causes of a person's incarceration and the other means by which a prisoner reimburses the state. Any deterrence effect would have little value to a person whose crimes are committed out of the desperation of poverty. The moral wrong of stealing a loaf of bread is typically outweighed by the countervailing good of feeding the hungry.<sup>69</sup> Regarding prisoner responsibility for the cost of their incarceration, many people develop a false dichotomy: either the prisoner pays for their incarceration, or the taxpayer must. However, in an industry that generates over \$11,000,000,000 worth of goods, the incarcerated persons' labor alone should satisfy the annual cost of their room, board, safekeeping, and rehabilitation programming.<sup>70</sup>

Corporations utilizing prison labor could be required to offset the annual cost of prisoners in such a manner that the 800,000 workers can cover the 1,200,000+ incarcerated persons' expenses. Even if corporations were not made to shoulder the burden of incarceration expenses in the ordinary *quid pro quo* exchange of market capitalism, the burden of paying

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67. See Eaton-Robb, *supra* note 49.

68. *Id.*

69. See VICTOR HUGO, LES MISÉRABLES, (Lee Fahnestock and Norman MacAfee trans., Penguin Randomhouse 2013) (1862).

70. Anguiano, *supra* note 46.

for prisons must fall to the taxpayer.<sup>71</sup> Mill, Locke, de Tocqueville, and Hobbes would all agree that one of the government's primary functions is the protection of persons and property.<sup>72</sup> An essential component of that protection is the temporary detention of persons who have violated the sanctity of person or property.

The government is funded to perform that protection through taxes. Though it is inconvenient that the average person is required to shoulder the burdens of other persons' criminal behavior, paying for prisons is no less necessary than paying for infrastructure, welfare, military expenses, and humanitarian aid. Paying for prisons is an integral component of living in a society where the many contribute to the good of the many.

### *B. Establishing a Minimum Wage for Incarcerated Persons*

A minimum wage should be established in prison systems to parallel the ordinary federal minimum wage. Paying incarcerated persons a livable wage that they can save up for post-incarceration can have substantial, long-term benefits. First, it enables the person to feel that the work of their

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71. Corporations pay for prison labor, but not much. Corporations receive "a tax credit of \$2,400 per work-release inmate under the Work Opportunity Tax Credit for hiring a 'risky target group.'" Jareli Reynoso Guterrez, *Corporations' Use of Prison Labor*, UC BERKELEY SCH. L. (Nov. 24, 2020) <https://sites.law.berkeley.edu/sustainability-compliance/corporations-use-of-prison-labor/> [https://perma.cc/DLL8-HWCE]. The price to taxpayers for prisoners, who gain nothing from prisoners, is \$133 per taxpayer in Louisiana. Every state has comparable numbers, with the lowest cost per taxpayer at \$51 in Utah and the highest at \$429 in Alaska. Chris Mai & Ram Subramanian, *The Price of Prisons: Examining State Spending Trends 2010-2015 State Survey Data*, VERA (May 2017), <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends> [https://perma.cc/22WY-2UWH].

72. "When person and property are to a certain degree insecure, all the possessions of the weak are at the mercy of the strong." JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY*, Chapter VIII (1848); "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and [jointed] to it something that is his own, and thereby makes it his *Property*." JOHN LOCKE, *SECOND TREATISE*, ch. 16, § 27 (1689); "[N]ations are less disposed to make revolutions in proportion as personal property is augmented and distributed among them, and as the number of those possessing it is increased." II ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, ch. 20 (1840); "A person's property is what he can keep for himself by means of the laws and the power of the whole commonwealth, i.e., by means of the one on whom its *sovereign power* has been conferred." THOMAS HOBBS, *ON THE CITIZEN* 85 (1642).



hands is valued.<sup>73</sup> Second, it enables a person to begin to pay back and provide for their other financial needs while in prison and have greater stability when they leave prison. Finally, it can enable a person to support their communities during incarceration, ensuring that the only person that is punished for a crime is the incarcerated person and not the community to which they belong.

In 1988, a Jesuit pastor in Aliso Village, Los Angeles began finding and creating jobs for gang members and ex-convicts.<sup>74</sup> Today, what became Homeboy Industries is now “the largest gang intervention, rehabilitation, and re-entry program in the world.”<sup>75</sup> Homeboy Industries is responsible for providing meaningful work to persons who would have otherwise been unable to gain meaningful employment. Norma Lopez, a beneficiary of Homeboy’s work, said, “[m]y record was keeping me from getting a job.... [Another employer] wanted to hire me somewhere, and when they found out that I had a record and felonies, they denied me.”<sup>76</sup> Norma continued by explaining how gaining meaningful work enabled her to earn her sobriety and peace.<sup>77</sup> Homeboy Industries is a relatively small company with respect to the greater Prison Industrial Complex. The lessons of Homeboy Industries – the proper valuing of a person’s time and energy, the dignity inherent in work, and safeguarding the rights of the vulnerable – bear many practical implications for prisons and legislatures. In many instances, it is not that prisoners do not desire to work; it is that they are taught, by their own scarlet letter, that their work

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73. This value is both intrinsic and extrinsic. As Locke notes, “(God) gave (the World) to the use of the Industrious and Rational, (and Labour was to be his Title to it;) not to the Fancy or Covetousness of the Quarrelsome and Contentious. He that had as Good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another’s Labour: If he did, ‘tis plain he desired the benefit of another’s Pains, which he had not right to, and not the Ground which God had given him in common with others to labour on...” and “... [L]abour makes the far greatest part of the value of things...” JOHN LOCKE, SECOND TREATISE, § 34, 42 (1689).

74. *Our Founder Father Greg*, HOMEBOY INDUS., <https://homeboyindustries.org/our-story/father-greg/> [https://perma.cc/Z26U-5E4B] (last accessed Nov. 21, 2023).

75. *About Us*, HOMEBOY INDUS., <https://homeboyindustries.org/our-story/about-homeboy> [https://perma.cc/MF5H-7MGV] (last accessed Nov. 21, 2023).

76. *Meet Norma Lopez*, HOMEBOY INDUS., [https://homeboyindustries.org/transformation\\_story/norma-lopez/](https://homeboyindustries.org/transformation_story/norma-lopez/) [https://perma.cc/A3X6-HPRP] (last accessed Nov. 21, 2021).

77. *Id.*

is not valuable.<sup>78</sup> “The average prison wage maxes out at 52 cents per hour.... That means that basics, like a \$3 tube of toothpaste, can take days of work to afford.”<sup>79</sup>

The time and effort to dollar ratio alone is enough to leave even the most highly motivated person discouraged. The double effect of the state taking those wages and then some is incredibly discouraging, affecting the incarcerated person’s psyche as much as their pockets. The jobs that Homeboy Industries provides are not glamorous. Father Greg Boyle, founder of Homeboy Industries, provides the following examples of jobs provided by Homeboy Industries: silk screening and baking, as well as working as a barista or as a member of a graffiti painting crew.<sup>80</sup> This manual labor, not unlike the kind that incarcerated persons perform in prison, is different in one area – pay. For instances, one job position advertised by Homeboy Industries is a line cook offering \$18 per hour.<sup>81</sup> Though paying incarcerated persons \$18 per hour may be impractical in 2023, this figure nevertheless shows a part of why Homeboy Industries has been able to lower the recidivism rate in its region – it helps people realize that they are valuable.

The costs of incarceration are incredible. Because the average cost of incarceration is \$13,607, two-thirds of families had difficulty meeting basic needs as a result of a loved one’s incarceration.<sup>82</sup> Additionally, one in five families surveyed by Forward Together reported that they had to take out a loan to cover the cost of incarceration.<sup>83</sup> Even if incarcerated persons were only paid the current federal minimum wage of \$7.25 per hour, working a 40 hour week every week of the year would enable them

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78. In other instances, it is the family environment that an incarcerated person was raised in that contributes to his failure to see the value in work. For more information on the negative impacts of growing up in a fatherless home, see *The Fatherless Generation*, WORD PRESS, <https://thefatherlessgeneration.wordpress.com/statistics> [<https://perma.cc/SX95-9EQU>] (last accessed March. 12, 2023).

79. Beth Schwartzapfel, *Prison Money Diaries: What People Really Make (And Spend) Behind Bars*, THE MARSHALL PROJECT (Aug. 4, 2022), <https://www.themarshallproject.org/2022/08/04/prison-money-diaries-what-people-really-make-and-spend-behind-bars> [<https://perma.cc/9ZCF-XUKU>].

80. GREG BOYLE, S.J., *TATTOOS ON THE HEART* (2010).

81. *Line Cook*, SIMPLYHIRED (posted Jan. 17, 2023), [https://www.simplyhired.com/job/KiSRvJM\\_orXJHj-87U9M0ZFv8cGZH86vmk2WUKSPA4VUqKewVS8ZmQ](https://www.simplyhired.com/job/KiSRvJM_orXJHj-87U9M0ZFv8cGZH86vmk2WUKSPA4VUqKewVS8ZmQ).

82. *Who Pays*, *supra* note 50, at 17.

83. *Id.*

to earn \$15,080 annually and cover the average cost of incarceration.<sup>84</sup> The state could hold those payments in a custodial fund that could be accessed by the family to cover basic needs or provide for the incarcerated person's new life on the other side of prison.

This way, punishment would be limited to the person who committed the crime instead of forced upon an entire community. The state ought to be permitted to recoup losses from operating prisons in only one of two ways: (1) labor; or (2) pay to stay fees. The harm suffered from a convict's crime befalls the citizen and taxpayer. The state is not entitled to recover compensation where it did not suffer. An argument can be made that the state is recovering damages *in loco parentis*, namely that any damages recovered is on behalf of a community or person that has been victimized by the incarcerated person. However, the state already recovers in this manner through the act of incarceration; additional recovery would be inappropriate.

This logic fails to account for the fact that the extra money recovered by the state does not absolve the taxpayer of her annual burden to cover prison expenses. By double-charging inmates for their capital and labor and by charging the taxpayer, the state can thrice divide its costs among other groups and save any profits to incentivize or reward corporate prisoner use. Such state practices throw the scales of justice out of balance. All that remains is a warped conception of justice that leeches from the many to profit the few. True reform should seek a return to the ideals of justice: an equitable distribution of punishment and restoration for everyone's benefit.

### III. LITIGATION STRATEGY

State legislatures are unlikely to change current practices on their own. It is unpopular among legislators to require that corporations friendly to the state pay more to use the state's mandatory work force. Thus, public interest litigation is not only likely but necessary to safeguard the constitutionally protected rights of incarcerated persons.

Suit would likely need to be brought in federal court. This has less to do with parity and more to do with separating a state's judiciary from the state's interest. In order to have standing: (1) "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical'; (2) "there must be a causal connection

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84. This would vary between states depending on the interest rate assigned to the loan and the income tax assessed on the incarcerated person.

between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court’; and (3) “it must be ‘likely’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”<sup>85</sup> Other relevant Supreme Court decisions have found that the injury cannot be self-inflicted.<sup>86</sup>

The ideal plaintiff would be a person who was incarcerated in a pay-to-stay state and worked while incarcerated. In order to cover his incarceration, this plaintiff was forced to take out a loan. Failing to find work that paid enough to provide for his basic needs and unable to repay his loan, this plaintiff would need to have participated again in criminal activity for which he was sent back to prison. Ideally, his criminal activity would be non-violent and directly related to the acquisition of food or some other necessity.

The harm suffered by the plaintiff was concrete and particularized in their need to take out a loan to pay for their prison stay. That loan caused him actual harm in that he could not afford both timely loan payments and food. Choosing to avoid loan delinquency, the plaintiff was forced to steal the latter. The causal connection between the loan and the incarceration is self-evident: the loan covered the cost of the plaintiff’s imprisonment. This harm could be redressed for the immediate plaintiff through the dismissal of the debt. The plaintiff could also enjoin the state from charging for any past, present, or future periods of incarceration.

Ripeness is “best seen in a twofold aspect, requiring us to evaluate both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration.”<sup>87</sup> This case is ripe because the potential plaintiff suffered the actual harm of going back to prison after he could not afford both his daily needs and prison debt service.<sup>88</sup> The plaintiff suffers substantial hardship because of their loan.<sup>89</sup>

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85. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *See Spokeo, Inc. v. Robbins*, 578 U.S. 330 (2016).

86. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013).

87. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

88. This arguably creates a hybrid, unconstitutional debtor’s prison as well as a badge and/or incident of slavery. *See Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (rendering debtor’s prison unconstitutional). *See also Tate v. Short*, 401 U.S. 395 (1971) (rendering the conversion of a fine to jail time unconstitutional).

89. In 2010, the Brennan Center for Justice published a paper titled *The Hidden Costs of Criminal Justice Debt*. The Brennan Center’s paper differs from this Note in a critical way: the Brennan Center addresses how states were incarcerating people for the debt that former prisoners failed to pay, whereas this Note discusses how the debt is the but-for cause of future criminal activity and

The cause of action could be mooted if the state or a third-party agency forgave the debt or repaid it on his behalf. If the person's debt has been wiped away, the court could apply only one mootness exception. The doctrine of collateral consequences is one where the "petitioner must show some concrete and continuing injury other than the now-ended incarceration... come 'collateral consequence' of the conviction – if the suit is to be maintained."<sup>90</sup> Here, the concrete injury resulting from the conviction is the ongoing loan that was required for the petitioner to fulfill his sentence.

The Capable of Repetition Yet Evading Review (CRYER) doctrine would be unhelpful to the plaintiff's case. In order to qualify for a CRYER mootness exception, "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."<sup>91</sup> Here, should a person's debt be forgiven, they would be unable to bring the suit because their injury – their cyclic reincarceration – would have been eliminated by their debt forgiveness. Though there would still be a cause of action, that particular plaintiff would lose their right of action.

The plaintiff suffered a badge or incident of slavery from the combination of the disproportionate incarceration of racial minorities, the charging for prison stays, the required labor of prisoners, and the recidivism resulting from an inability to pay for daily necessities and prison debt. Thus, the plaintiff could sue under 42 U.S.C. § 1983. Congress enacted 42 U.S.C. § 1983 to enforce the Civil War Amendments.<sup>92</sup> The

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incarceration. Of the findings, the Center noted that states had common collection practices that included: probation or parole officers that monitored payments; that the debtor must attend regular meetings before a judge, clerk, or other collection official; incarceration for failure to pay; debt was referred to private collection agencies; probation terms were extended for failure to pay; a person's driver's license was suspended for failure to pay; the debt was converted to a civil judgment; and wages were garnished and tax rebates intercepted. Alicia Bannon et al, *The Hidden Cost of Criminal Justice Debt*, BRENNAN CTR FOR JUST. 11 (2010) [https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Criminal\\_Justice\\_Debt\\_report\\_V8.pdf](https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Criminal_Justice_Debt_report_V8.pdf) [https://perma.cc/2LAK-KSEE].

90. *Spencer v. Kemna*, 523 U.S. 1 (1998).

91. *United States v. Sanchez-Gomez*, 584 U.S. 381, 391 (2018) (citing *Turner v. Rogers*, 564 U.S. 431, 439-40 (2011)).

92. 42 U.S.C. § 1983. "Every Person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

potential plaintiff would be able to sue under this article because a state would have violated the Fourteenth Amendment by violating the Thirteenth Amendment's protection against slavery. The Supreme Court has held in dicta that "the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."<sup>93</sup>

An incident of slavery, as that term was used, was any legal right or restriction that necessarily accompanied the institution of slavery. Most often, "incident" was used to refer to the aspects of property law that applied to the ownership and transfer of slaves. It also was used to refer to the civil disabilities imposed on slaves by virtue of their status as property. In all, the term has clear, finite, historically determined meaning. It refers to a closed set of public laws that applied in the antebellum slaveholding states. Identifying an "incident of slavery," then, is an exercise of historical inquiry.<sup>94</sup>

It is possible that a potential plaintiff suffered an incident of slavery. Through a historical inquiry, continuous, cyclical work and debt are incidents of slavery. Sharecropping was an incident of slavery.<sup>95</sup> "Under

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the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

93. *United States v. Cannon*, 750 F.3d 492, 498 (5th Cir. 2014) (citing *Civil Rights Cases*, 109 U.S. (1883)) (emphasis in original).

94. *Id.* at 501 (citing Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575 (2012)).

95. "Sharecropping is a system where the landlord/planter allows a tenant to use the land in exchange for a share of the crop. This encouraged tenants to work to produce the biggest harvest that they could, and ensured they would remain tied to the land and unlikely to leave for other opportunities. In the South, after the Civil War, many black families rented land from white owners and raised cash crops such as cotton, tobacco, and rice. In many cases, the landlords or nearby merchants would lease equipment to the renters, and offer seed, fertilizer, food, and other items on credit until the harvest season. At that time, the tenant and landlord or merchant would settle up, figuring out who owed whom and how much." Sharecropping, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/sharecropping/> (last accessed Nov. 21, 2023); "For newly freed people,

the sharecropping system, Black laborers cleared, planted, and harvested land they did not own in exchange for a share of the crop, minus costs for food, supplies, and lodging[.]”<sup>96</sup> “High interest rates, unpredictable harvests, and unscrupulous landlords and merchants often kept tenant farm families severely indebted, requiring the debt to be carried over until the next year or the next.”<sup>97</sup>

Much like their sharecropping ancestors, formerly incarcerated black Americans struggle to pay interest, let alone the principle, off their prison loans.<sup>98</sup> Incarcerated persons, like sharecroppers, are not totally free to choose membership in a system that exploits them. The cyclical employment and inescapable debt brought about by a person’s incarceration echoes that of antebellum sharecropping and entitles a plaintiff to relief.

Like an incident of slavery, it is also likely that a plaintiff here suffered a badge of slavery.

In its most general sense, the term ‘badge of slavery’... refers to indicators, physical or otherwise, of African-Americans’ slave or subordinate status. Before the Civil War, the term referred to skin color. After the War, it came to mean the kinds of legal restrictions, such as the Black Codes, that were imposed on African-Americans to try to enforce inferior status on them. After the end of Black Codes, it came to mean “less formal but equally virulent means – including widespread violence and discrimination, disparate enforcement of racially neutral laws, and eventually, Jim Crow laws – to keep the freed slaves in an inferior

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many of whom worked the same land, lived in the same housing, and worked under close supervision of the same overseers, sharecropping was like ‘slavery under another name.’” *Sharecropping, Black Land Acquisition, and White Supremacy (1868-1900)*, DUKE SANFORD WORLD FOOD POL’Y CTR., <https://wfpc.sanford.duke.edu/north-carolina/durham-food-history/sharecropping-black-land-acquisition-and-white-supremacy-1868-1900/> [https://perma.cc/M474-MPZD] (last visited Nov. 21, 2023) (citing *Behind the Veil: Documenting African-American Life in the Jim Crow South Digital Collection*, JOHN HOPE FRANKLIN RSCH CTR (1995)).

96. Bryan G. Stevenson, *Reconstruction in America: Racial Violence after the Civil War, 1865-1876*, EQUAL JUST. INITIATIVE (2020) <https://eji.org/report/reconstruction-in-america/> [https://perma.cc/DL8D-26E3].

97. *Sharecropping*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/sharecropping/> [https://perma.cc/A8YQ-QVRK] (last accessed Nov. 21, 2021).

98. *Who Pays*, *supra* note 50.

status.”<sup>99</sup>

Of the more than 1.5 million drug arrests in 2013, 80% were for possession.<sup>100</sup> These drug arrests disproportionately affect people of color. Though black people comprise about 13% of the U.S. population, black people comprise 30% of those arrested for drug law violations, 40% of those incarcerated for drug law violations, and 38.5% of the total inmate population.<sup>101</sup> In a 2008 study published by the National Institutes of Health, 38.2% of white young adults aged 18 to 25 years old in 2003 reported illicit drug use in the past year compared to 30.6% of black young adults.<sup>102</sup> Thus, even controlling for race, it seems that there is a disparate enforcement of a racially neutral, anti-drug law. Therefore, a plaintiff could likely sue for having suffered a badge of slavery.

#### CONCLUSION

The Prison Industrial Complex is just that—complex. It is this complexity that oftentimes obscures one’s view of the justice society hopes to exact. Looking into a system with so many different moving parts, from private contractors to states and local counties to federal agencies, it is easy to get lost. Americans hold many different values about morality, work, responsibility, equity, and freedom. Throwing a person into prison implicates the spectrum of this pluralistic society’s values and forces the citizen to wrestle with what the body politic holds as core truths.

Amidst the cacophonous noise of competing interests, we understand one of truth’s chords: slavery is evil. This hard fought, blood-soaked truth should illuminate the gray space of prison walls and help us to see other demons cloaked in the guise of moral principles like responsibility and

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99. *Cannon*, 750 F.3d at 501 (citing Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575, 581-582 (2012)).

100. *The Drug War, Mass Incarceration and Race*, DRUG POL’Y ALLIANCE (June 2015), [https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA\\_Fact\\_Sheet\\_Drug\\_War\\_Mass\\_Incarceration\\_and\\_Race\\_June2015.pdf](https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf) [https://perma.cc/6F45-HXEE].

101. *Id. Inmate Race*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp) [https://perma.cc/949X-PLN5] (last updated Mar. 2, 2024).

102. *Race/Ethnicity and Gender Differences in Drug Use and Abuse Among College Students*, NAT’L LIBR. MED. (May 13, 2008) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2377408/> [https://perma.cc/9YYJ-WVQY] (Note: Though there may be some errors in the sample size, this data is likely still indicative of drug use in the U.S.).



justice. It is unjust to punish a person's family. It is unjust to punish a person long after their sentence has run. It is unjust to punish a person because of the color of their skin. Injustice anywhere is a threat to justice everywhere.<sup>103</sup> In the Prison Industrial Complex, injustice is everywhere. With legislative or jurisprudential reform in the Prison Industrial Complex, liberty's bell can ring purer her call to freedom.

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103. Martin Luther King, Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963).