

# The Thirteenth Amendment, Prison Labor Wages, and Interrupting the Intergenerational Cycle of Subjugation

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*“When our elders presented school to us, they did not present it as a place of high learning but as a means of escape from death and penal warehousing.”*  
– Ta-Nehisi Coates<sup>1</sup>

## INTRODUCTION

On September 9, 2016, more than 24,000 prison inmates and even some corrections officers across twelve states began a weeks-long protest.<sup>2</sup> This protest took the form of the largest prison strike in U.S. history and was commenced to organize “against slavery in America”; the protest brought attention to prison labor conditions, with prisoners hoping to find protection from the exploitation of the Thirteenth Amendment to the United States Constitution.<sup>3</sup> The strength of the strike prompted prison officials to withhold newspapers, shut down prisoners’ access to social media accounts, and place prisoners on lockdown in an attempt to disrupt the organizing efforts and end the strike.<sup>4</sup>

The Thirteenth Amendment states, “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have*

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\* J.D. Candidate, 2019, Seattle University School of Law. I would like to thank those who supported me through this process and the Seattle University Law Review staff for their help in improving this Note. For all who stumble upon this Note, please remember that change often comes through the political process, and many of those who need it most have been disenfranchised. Please both vote and encourage others to vote as well.

1. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 26 (2015).

2. Beth Schwartzapfel, *A Primer on the Nationwide Prisoners’ Strike*, THE MARSHALL PROJECT (Sept. 27, 2016), <https://www.themarshallproject.org/2016/09/27/a-primer-on-the-nationwide-prisoners-strike#.xgp4Txx0s> [<https://perma.cc/J5LK-9NLG>].

3. Alice Speri, *The Largest Prison Strike in U.S. History Enters Its Second Week*, INTERCEPT (Sept. 16, 2016), <https://theintercept.com/2016/09/16/the-largest-prison-strike-in-u-s-history-enters-its-second-week/> [<https://perma.cc/WM7K-YHSP>].

4. Kamala Kelkar, *From Media Cutoffs to Lockdowns, Tracing the Fallout from the U.S. Prison Strike*, PBS: NEWS HOUR (Dec. 18, 2016), <https://www.pbs.org/newshour/nation/prison-strike-lockdown-fallout> [<https://perma.cc/S7KZ-4CRP>].

*been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”<sup>5</sup> Our Constitution banned slavery of all men, women, and children more than 150 years ago but preserves it for those who committed a crime. Convicts may be forced into labor without compensation.

According to data collected by the Bureau of Justice Statistics, the prison labor industry consists of 870,000 inmates.<sup>6</sup> For those inmates, earning minimum wage would constitute a windfall. On average, prisoners earn \$0.20 per hour if held in a state prison and \$0.31 per hour in a federal prison.<sup>7</sup> For reference, a day of work might earn a prisoner enough to buy a bar of soap or make a short phone call.<sup>8</sup> One might justify compensating prisoners with such low wages by citing the high cost of incarceration. In fact, the cost of incarceration has become so burdensome that forty-three states have laws authorizing prisons to charge inmates fees for room and board.<sup>9</sup>

The justification for charging inmates room and board fees and paying them pennies on the dollar turns on whether one believes that the criminal justice system is, in fact, just. If criminals deserve to be punished for their crimes, then surely they should contribute to the cost to literally repay their debt to society. However, if the efficacy of our criminal justice system comes into doubt, so does the justification for charging men, women, and, in some instances, children for the privilege of incapacitation.

Regrettably, our criminal justice system wants for criticism like its cells want for residents. The U.S. is home to 25% of the world’s prisoners despite having only 5% of the world’s people.<sup>10</sup> We incarcerate 693 out of every 100,000 people in our country.<sup>11</sup> That amounts to more than 2.2

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5. U.S. CONST. amend. XII, § 1 (emphasis added).

6. See Beth Schwartzapfel, *Modern-Day Slavery in America’s Prison Workforce*, AMERICAN PROSPECT (May 28, 2014) [hereinafter *Modern-Day Slavery*], <http://prospect.org/article/great-american-chain-gang> [<https://perma.cc/V7C3-7XJK>]; see also Schwartzapfel, *supra* note 2.

7. *Modern-Day Slavery*, *supra* note 6.

8. Jaweed Kaleem, *‘This Is Slavery’: U.S. Inmates Strike in What Activists Call One of the Biggest Prison Protests in Modern History*, L.A. TIMES (Oct. 28, 2016), <http://www.latimes.com/nation/la-na-prison-strike-snap-story.html> [<https://perma.cc/U8EK-A6KQ>].

9. Tanzina Vega, *Costly Prison Fees Are Putting Inmates Deep in Debt*, CNN: MONEY (Sept. 18, 2015), <http://money.cnn.com/2015/09/18/news/economy/prison-fees-inmates-debt/index.html> [<https://perma.cc/A5KG-VKGT>].

10. David Hudson, *President Obama: “Our Criminal Justice System Isn’t as Smart as It Should Be”*, OBAMA WHITEHOUSE (July 15, 2015), <https://obamawhitehouse.archives.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be> [<https://perma.cc/2XMZ-ZYEQ>].

11. Katie Hicks, *US Incarceration Is 5 to 10 Times Higher Than That of Other NATO Countries*, VOX (June 16, 2016), <https://www.vox.com/2016/6/16/11955484/mass-incarceration-stat> [<https://perma.cc/6S3A-SDLS>]; *Countries with the Largest Number of Prisoners Per 100,000 of the National*

million people.<sup>12</sup> The only country with a higher incarceration rate is Seychelles,<sup>13</sup> an African country with a population fewer than 100,000.<sup>14</sup> When comparing our incarceration rate to our more comparable North Atlantic Treaty Organization (NATO) allies, our rates dwarf theirs.<sup>15</sup> Great Britain is the NATO country with the next highest incarceration rate, and our rate is more than four times as large.<sup>16</sup> Russia incarcerates its citizens at a rate almost 40% lower than the United States.<sup>17</sup> Despite having the second-highest incarceration rate, our country is only forty-fourth on the crime index ranking.<sup>18</sup>

Further, evidence suggests that imprisonment does little to reduce the crime rate.<sup>19</sup> Other evidence shows that prison has a criminogenic effect, meaning that imprisonment can actually lead people to commit more crimes after release.<sup>20</sup> Prisons offer little rehabilitative programming and often release individuals back to communities without money, job prospects, access to social safety nets, or funding to pursue higher education leaving them vulnerable and likely to recidivate.<sup>21</sup> Research shows that 39% of the prison population is incarcerated despite presenting no threat to public safety, and alternatives to incarceration would be effective for 25% of the prison population.<sup>22</sup> As a result, incarceration can increase recidivism and, at times, offers no benefit to public safety.<sup>23</sup>

This Comment argues that meager or no compensation for prisoners, who are disproportionately black and other persons of color, entraps them and their children in a cycle of subjugation that dates back to the days of slavery, and this Comment proposes to interrupt this cycle by setting a

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*Population, as of July 2017*, STATISTA [hereinafter *Number of Prisoners*], <https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/> [https://perma.cc/2RQL-93W4].

12. Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME (Dec. 9, 2016), <http://time.com/4596081/incarceration-report/> [https://perma.cc/W6DD-WZ5S].

13. *Number of Prisoners*, *supra* note 11.

14. *Seychelles*, CIA: WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/se.html> [https://perma.cc/5TKZ-UK5A].

15. *See* Hicks, *supra* note 10.

16. *Id.*

17. *Number of Prisoners*, *supra* note 11.

18. *Crime Index for Country 2017 Mid-Year*, NUMBEO, [https://www.numbeo.com/crime/rankings\\_by\\_country.jsp](https://www.numbeo.com/crime/rankings_by_country.jsp) [https://perma.cc/7RDE-8H5B].

19. JAMES B. AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, *HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED?* 5 (2016), [https://www.brennancenter.org/sites/default/files/publications/Unnecessarily\\_Incarcerated.pdf](https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated.pdf) [https://perma.cc/UQN3-48QU].

20. *Id.*

21. *Id.*; *see* Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [https://perma.cc/A5YM-64UL].

22. AUSTIN ET AL., *supra* note 19, at 7.

23. *Id.*

minimum wage for prisoners and creating college savings accounts for their children.<sup>24</sup> As part of the cycle, when people enter prisons and the doors behind them close, so do their families' bank accounts and the doors to their children's schools.<sup>25</sup> At the same time, the cells next to them open, ready to welcome their children.<sup>26</sup>

Part I of this Comment argues that the history and exploitation of the Thirteenth Amendment and laws leading to mass incarceration have led to the targeted and cyclical imprisonment of people of color, particularly the black community. This history must be considered when examining the harms of prison and possible remedial policies because it shows how the cycle deliberately entrapped its victims. Part II argues that classic penology's four ends do not apply to current prison labor practices and lead prisoners' children to become vulnerable to incarceration. Part III argues for a two-tiered approach to interrupting the cycle of subjugation: paying prisoners real wages for their labor and allowing them to create savings accounts for their children's education.

#### I. FORMER AND CURRENT INCARCERATIONS ARE INTERTWINED WITH RACE AND BIAS

The disparate treatment of people of color in and by the criminal justice system, particularly black persons, is a longstanding criticism and deserves special attention in an examination of the Thirteenth Amendment exception, mass incarceration, and the subsequent cycle of subjugation that has entrapped people of color, particularly black males.<sup>27</sup> This Comment documents that while incarcerated individuals have committed crimes, our criminal justice system targeted the black population and created a system of oppression as a result; throughout our country's history, the criminal justice system has consistently been used as a sword against the black community rather than a shield to protect it. Lawmakers have routinely used their power for personal gain at the expense of people

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24. The "cycle of poverty" and "school-to-prison pipeline" are recognized theories that pertain to or encompass the factors discussed in this Comment, but as this Comment does not delve into analyses of either theory, it will not directly reference either. It more so discusses Michelle Alexander's theory that mass incarceration is the new Jim Crow, functioning as a contemporary system of racial control, so "cycle of subjugation" will be the term employed. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) [hereinafter *THE NEW JIM CROW*]; Michelle Alexander, *How the Drug War Has Subjugated Poor People of Color and Nullified the Fourth Amendment*, NIEMAN WATCHDOG (Sept. 20, 2010) [hereinafter *How the Drug War*], <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=486> [<https://perma.cc/Y625-S3C5>].

25. *See* sources cited *supra* note 24.

26. *See* sources cited *supra* note 24.

27. *See, e.g.*, *How the Drug War*, *supra* note 24.

of color.<sup>28</sup> While these lawmakers have reaped financial and political gain, they have sown the seeds of a cycle that has entrapped generations of people of color.

Racist motivations behind our criminal laws have led to the intentional mass incarceration and exploitation of persons of color so that the justice system does not apply equitably. Because criminal justice laws have targeted persons of color for personal gain, we must reconsider prison labor practices. The most evident examples of exploitation are the creation of the black codes to recapture slave labor and the coded “tough-on-crime” platforms employed by campaigning lawmakers that led to mass incarceration.

*A. The Black Codes Legally Continued Slavery for  
Decades After Emancipation*

In the driest of ironies, the Thirteenth Amendment, the constitutional amendment that eliminated the existence of slavery in our country, immediately became a tool to continue enslavement of the black community for decades after its ratification.<sup>29</sup> While the Thirteenth Amendment, on its face, ended slavery, the “duly convicted” exception created a loophole for those owed punishment for a crime.<sup>30</sup> There is little congressional documentation of the debate surrounding the adoption of the Thirteenth Amendment from which we could interpret the intent behind the duly convicted exception.<sup>31</sup>

History is ripe with examples of exploitation of the duly convicted exception used to continue reaping the benefits of slavery after emancipation.<sup>32</sup> Before the Thirteenth Amendment became a certified part of the Constitution, southern states began passing “an array of interlocking laws essentially intended to criminalize black life.”<sup>33</sup> In November 1865, a month before our country ratified the Thirteenth Amendment,

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28. Dan Baum, *Legalize It All*, HARPER’S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> [<https://perma.cc/9VWH-YSDJ>].

29. See, for example, three Acts partially comprising the Mississippi Black Code: An Act to Confer Civil Rights on Freedmen, and for Other Purposes, 1865 Miss. Laws 82; An Act to Regulate the Relation of Master and Apprentice Relative to Freedmen, Free Negroes, and Mulattoes, 1865 Miss. Laws 86; An Act to Amend the Vagrant Laws of the State, 1865 Miss. Laws 90.

30. See Schwartzapfel, *supra* note 2.

31. Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 875 (2012).

32. See sources cited *supra* note 29.

33. DOUGLAS A. BLACKMAN, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 53 (2008). The Thirteenth Amendment was ratified on December 6, 1865. *13th Amendment*, NAT’L ARCHIVES FOUND., <https://www.archives.gov/13th-amendment/> [<https://perma.cc/G8C7-EKFF>]. The Mississippi Black Code was passed in November 1865. See sources cited *supra* note 29.

Mississippi became the first state to pass such laws, enacting the Mississippi Black Code.<sup>34</sup> The Mississippi Black Code compelled former slaves into slave-like labor conditions by criminally punishing “freedmen, free Negroes, and mulattoes . . . over the age of eighteen years . . . with no lawful employment or business, or found unlawfully assembling themselves together either in the day or nighttime.”<sup>35</sup> In conjunction with the Mississippi Black Code, the State enacted a convict leasing system.<sup>36</sup> Convict leasing was the leasing out of convicted individuals to private contractors who paid a fee to the state and agreed to feed, clothe, and shelter the convicts.<sup>37</sup> Thus, through the Black Codes and convict leasing, Mississippi used the duly convicted exception to force black residents to either accept jobs with slave-like conditions or face compelled labor as punishment for not having accepted such a job.

Mississippi was not alone in its abuse of the Amendment. Nine of the other former slave states adopted black codes to recreate slavery in all but name.<sup>38</sup> The black codes created new offenses, such as “insolent gesture” or “malicious mischief,” which deliberately targeted former slaves.<sup>39</sup> Sentences for offenses were statutorily extended, and due process protections were summarily dispensed.<sup>40</sup> As a result of the black codes, the states essentially became the largest slave owners, free to auction off former slaves to the highest private bidder without treatment standards or protection from brutality.<sup>41</sup> The states did little to hide their motives or treatment of convicts.<sup>42</sup> In 1870, the Virginia Supreme Court declared that a convict lost all personal rights and “is for the time being a slave, in a condition of penal servitude to the State, and is subject to such laws and regulations as the State may choose to prescribe.”<sup>43</sup>

As stories of abuse and conditions spread, convict leasing eventually declined and was eliminated, though not entirely until almost sixty years after the practice began.<sup>44</sup> This example of exploitation of the criminal

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34. See sources cited *supra* note 29.

35. An Act to Amend the Vagrant Laws of the State, § 2, 1865 Miss. Laws 90, 90.

36. James M. McPherson, *Parchman's Plantation*, N.Y. TIMES: BOOKS (Apr. 28, 1996), <http://www.nytimes.com/books/97/05/25/np/19465.html> [https://perma.cc/6MK5-DU2L] (reviewing DAVID M. OSHINSKY, *WORSE THAN SLAVERY* (1996)).

37. *Id.*

38. Armstrong, *supra* note 31, at 876.

39. *Id.*

40. *Id.* at 876–77.

41. *Id.* at 877.

42. See *id.* at 876–77.

43. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 798 (1871).

44. NANCY O'BRIEN WAGNER, BLUESTEM HERITAGE GRP., *SLAVERY BY ANOTHER NAME HISTORY BACKGROUND 4–5* (2012), [https://bento.cdn.pbs.org/hostedbento-prod/filer\\_public/SBAN/Images/Classrooms/Slavery%20by%20Another%20Name%20History%20Background\\_Final.pdf](https://bento.cdn.pbs.org/hostedbento-prod/filer_public/SBAN/Images/Classrooms/Slavery%20by%20Another%20Name%20History%20Background_Final.pdf) [https://perma.cc/DME9-5S8Q].

justice system is one of the first, but certainly not the last, to target the black community.

*B. The Era of Mass Incarceration Has Origins Steeped in Racism*

The disparate treatment of people of color in the criminal justice system has continued with force in the modern era, with evidence showing that racially based motives shaped the system into its current form. Now, it disproportionately affects persons of color. Currently, our country is in the era of mass incarceration.<sup>45</sup> Mass incarceration is more than just the number of persons currently incarcerated; it is an immense system through which people are swept into the criminal justice system, branded as criminals and felons, imprisoned for significant periods of time, and released into a permanent second-class status.<sup>46</sup>

The mass incarceration era initially began with both the rising crime rate and the civil rights movement in the 1960s,<sup>47</sup> which created political opportunities for the Republican Party in localities where the Democratic Party had long been dominant.<sup>48</sup> While the Democratic Party split on how to respond to the crime rate and civil rights movement, many opportunistic Republican candidates and office-holders began developing political strategies that capitalized on white racial anxieties.<sup>49</sup> These candidates exploited fear in the white community that the civil rights movement would expose the white community to crime committed by black individuals.<sup>50</sup> In turn, these lawmakers enacted the tough-on-crime policies that created mass incarceration.

Richard Nixon's "War on Drugs" initiated the explosion of the incarceration rate and targeted the black community with surgical precision.<sup>51</sup> Nixon employed a strategy called "dog whistle politics."<sup>52</sup> Dog whistle politics is the use of coded language to speak to a specific

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45. See Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control"*, PBS: FRONTLINE (Apr. 29, 2014), <http://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/> [<https://perma.cc/EE53-RQNX>].

46. *Id.*

47. NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 112 (Bruce Western & Jeremy Travis eds., 2014); Childress, *supra* note 45.

48. NAT'L RESEARCH COUNCIL, *supra* note 47, at 113.

49. Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, THE NATION (Nov. 13, 2012), <https://www.thenation.com/article/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/> [<https://perma.cc/Y9EK-W2WU>].

50. *Id.*; Childress, *supra* note 45.

51. Baum, *supra* note 28.

52. Geoff Nunberg, *Is Trump's Call For 'Law And Order' A Coded Racial Message?*, NAT'L PUB. RADIO (July 28, 2016), <https://www.npr.org/2016/07/28/487560886/is-trumps-call-for-law-and-order-a-coded-racial-message> [<https://perma.cc/MR3B-LMUP>].

group while bypassing the general public.<sup>53</sup> John Ehrlichman, Assistant to the President for Domestic Affairs under President Nixon, advisor on multiple campaigns, and co-conspirator in the Watergate scandal, shamelessly explained Nixon's 1968 successful presidential campaign strategy:

You want to know what [the War on Drugs] was really all about? . . . The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.<sup>54</sup>

The Nixon Administration began a decades-long spike in our country's incarceration rate.<sup>55</sup> In 1973, after fifty years of stability, the rate of our country's incarceration began a sustained period of growth. In 1972, 161 U.S. residents were incarcerated per 100,000; by 2007, that rate had more than quintupled to 767 per 100,000.<sup>56</sup>

With the success of Nixon's strategy, others followed in his path, and the "southern strategy" was formed.<sup>57</sup> Lee Atwater, a campaign strategist for both Ronald Reagan and George H.W. Bush, candidly explained the southern strategy:

[Y]ou start out in 1954 by saying "nigger, nigger, nigger." By 1968 you can't say "nigger," that hurts you, backfires, so you say stuff like "forced bussing, states rights" and all that stuff, and you're getting so abstract. Now you're talking about cutting taxes and all these things. What you're talking about are totally economic things, and the byproduct often is Blacks get hurt worse than whites.<sup>58</sup>

America elected Ronald Reagan on his tough-on-crime and conservative-economics platform.<sup>59</sup> Reagan attributed the rise in crime to

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53. Ian Olosov, *Offensive Political Dog Whistles: You Know Them When You Hear Them. Or Do You?*, VOX (Nov. 7, 2016), <https://www.vox.com/the-big-idea/2016/11/7/13549154/dog-whistles-campaign-racism> [<https://perma.cc/FW4T-EBHM>].

54. Baum, *supra* note 28.

55. See NAT'L RESEARCH COUNCIL, *supra* note 47, at 33.

56. *Id.*

57. Perlstein, *supra* note 49.

58. *Id.*

59. Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 17-18 (2013).



“welfare culture,” employing the imagery of “welfare queens” and “hardened criminals.”<sup>60</sup> The first lady, Nancy Reagan, spearheaded the “Just Say No” campaign, painting a picture of ingenious drug criminals “who work every day to plot a new and better way to steal children’s lives.”<sup>61</sup> Backing up his administration’s rhetoric, Reagan presided over significant expansions of the federal role in criminal justice with an emphasis on punishing “big-time drug pushers.”<sup>62</sup>

To a similar effect, George H.W. Bush’s 1988 campaign (with Atwater as its manager) modernized the southern strategy by innovatively bringing actual images of black criminals into voters’ living rooms.<sup>63</sup> Bush supporters released an ad distinguishing Bush from his Democratic opponent, saying that Bush supported the death penalty, while his opponent was soft on crime and, as governor, allowed weekend furloughs for prisoners.<sup>64</sup> The ad displayed pictures of Willie Horton, a black man who perfectly fit the most barbaric of racial stereotypes.<sup>65</sup> Horton was a convicted murderer who was released on furlough and used his freedom to rape a white woman and stab her fiancé.<sup>66</sup> With this ad, Bush established himself as tougher on crime than his opponent.<sup>67</sup> As president, Bush would sign into law the Crime Control Act of 1990, a law partly based on a legislative package he sent to Congress to “assist law enforcement efforts in keeping violent criminals off our Nation’s streets.”<sup>68</sup>

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60. *Id.*; Robert Pear, *Reagan Seeks Welfare Plan to Free Poor from Government Dependency*, N.Y. TIMES (Feb. 5, 1986), <https://www.nytimes.com/1986/02/05/us/reagan-seeks-welfare-plan-to-free-poor-from-government-dependency.html> [https://perma.cc/SCK5-HMT2]; President Ronald Reagan, Radio Address to the Nation on Crime and Criminal Justice Reform (Sept. 11, 1982) [hereinafter Radio Address] (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=42952> [https://perma.cc/UMT5-G67S]); see President Ronald Reagan, Remarks to Members of the National Governors’ Association (Feb. 23, 1987) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=33893> [https://perma.cc/2MN2-5N3Z]).

61. Tess Owen, ‘Just Say No’: How Nancy Reagan Helped America Lose the War on Drugs, VICE: NEWS (Mar. 6, 2016), <https://news.vice.com/article/just-say-no-how-nancy-reagan-helped-america-lose-the-war-on-drugs> [https://perma.cc/YQA6-F868].

62. Radio Address, *supra* note 60.

63. *George Bush and Willie Horton*, N.Y. TIMES (Nov. 4, 1988) [hereinafter Willie Horton], <http://www.nytimes.com/1988/11/04/opinion/george-bush-and-willie-horton.html> [https://perma.cc/K6TU-SQ4Y].

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

68. President George H.W. Bush, Statement on Signing the Crime Control Act of 1990 (Nov. 29, 1990) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=19114> [https://perma.cc/84XD-BFTG]).

Following his predecessors, Bill Clinton also ran as a tough-on-crime candidate to head off potential political attacks.<sup>69</sup> Standing in front of uniformed officers, Clinton seemed to reference Bush's use of Willie Horton, saying, "four years ago this crime issue was used to divide America. I want to use it to unite America."<sup>70</sup> Dedicated to the cause, Clinton even left the campaign trail to oversee an execution in his home state and afterward remarked, "I can be nicked on a lot, but no one can say I'm soft on crime."<sup>71</sup> Once elected, Clinton directly targeted youths involved with drugs and gangs.<sup>72</sup> Hilary Clinton famously referred to these youths as "super-predators" with no conscience or empathy.<sup>73</sup> Two decades later, Bill Clinton eventually acknowledged that his policies locked up "minor actors, for way too long" and set a national trend for doing the same,<sup>74</sup> adding "we wound up . . . putting so many people in prison that there wasn't enough money left to educate them, train them for new jobs and increase the chances when they came out so they could live productive lives."<sup>75</sup>

With Nixon's ruthless tactics and the advent of the "southern strategy," coded language found its place on the national stage, tough-on-crime bills found their way onto Presidents' desks, and persons of color found homes behind bars.

The racial prison population disparity is too real. Black males are six times more likely to be incarcerated than white males.<sup>76</sup> *One out of every three* black males born today can expect to go to prison in his lifetime if current trends continue.<sup>77</sup> Black Americans are more likely than white Americans to be arrested if they commit a crime; once arrested, they are more likely to be convicted than their white counterparts arrested for the

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69. Gwen Ifill, *The 1992 Campaign: The Democrats; Clinton, in Houston Speech, Assails Bush on Crime Issue*, N.Y. TIMES (July 24, 1992), <http://www.nytimes.com/1992/07/24/us/1992-campaign-democrats-clinton-houston-speech-assails-bush-crime-issue.html> [https://perma.cc/3GJA-VRP8].

70. *Id.*

71. Mark Mauer, *Bill Clinton, "Black Lives" and the Myths of the 1994 Crime Bill*, THE MARSHALL PROJECT (Apr. 11, 2016), <https://www.themarshallproject.org/2016/04/11/bill-clinton-black-lives-and-the-myths-of-the-1994-crime-bill> [https://perma.cc/TG7C-NJEA].

72. Hilary Rodham Clinton, First Lady, Campaign Speech at Keene State College (Jan. 25, 1996) (transcript available at <https://www.c-span.org/video/?69606-1/mrs-clinton-campaign-speech> [https://perma.cc/4LVZ-7DPQ]).

73. *Id.*

74. Dan Merica, *Bill Clinton Says He Made Mass Incarceration Issue Worse*, CNN (July 15, 2015), <http://www.cnn.com/2015/07/15/politics/bill-clinton-1994-crime-bill/index.html> [https://perma.cc/FY4K-9MDK].

75. *Id.*

76. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> [https://perma.cc/WZ8A-PP6E].

77. *Id.*

same crime; and once convicted, they are more likely to be incarcerated or to face stiff sentences than white convicts.<sup>78</sup> As a result, we imprison people of color at an alarmingly high rate. In 2016, black Americans represented 12% of the U.S. adult population but 33% of the sentenced prison population.<sup>79</sup> White Americans, on the other hand, accounted for 64% of the U.S. adult population but only 30% of prisoners.<sup>80</sup>

The next Section explains how this disparate imprisonment of the black community creates a cycle of subjugation, where the families of inmates earn less, and the children of inmates face more factors that put them at risk of incarceration.

## II. MEAGER OR NO COMPENSATION FOR INMATE LABOR FURTHERS THE INTERGENERATIONAL CYCLE OF SUBJUGATION BY REDIRECTING EARNINGS FROM FAMILIES TO PRISONS

While the days of the black codes and convict leasing ended nearly a century ago, the practice of exploiting prisoner labor has not. With more than two million people behind bars, the United States spends over \$80 billion annually on its prison population.<sup>81</sup> The average annual cost to incarcerate an individual is more than \$31,000.<sup>82</sup> Governments offset these costs and other budget gaps by putting inmates to work with little or no pay.<sup>83</sup> As a result, the fruit of inmates' labor enables mass incarceration when the inmates could otherwise use financial earnings to support their families.

Currently, prison labor practices are often justified under classic penology's four ends of criminal punishment: retribution, rehabilitation, deterrence, and incapacitation.<sup>84</sup> The justifications provided by proponents

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78. See *id.*; Kim Farbota, *Black Crime Rates: What Happens When Numbers Aren't Neutral*, HUFFINGTON POST (Sept. 2, 2016), [https://www.huffingtonpost.com/kim-farbota/black-crime-rates-your-st\\_b\\_8078586.html](https://www.huffingtonpost.com/kim-farbota/black-crime-rates-your-st_b_8078586.html) [https://perma.cc/Y5W6-JSS5].

79. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, PEW RES. CTR. (Jan. 12, 2018), <http://www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/> [https://perma.cc/4ZDV-3EYK].

80. *Id.* Latinos are also disproportionately incarcerated, representing 16% of the adult population but accounting for 23% of inmates in 2016. *Id.*

81. Kelsey Warner, *These States Have the Highest Cost Per Prisoner*, TIMES NEWS (May 3, 2016), <http://www.thetimesnews.com/news/20160503/state-by-state-how-much-does-it-cost-to-keep-someone-in-prison> [https://perma.cc/7GP7-DDJE].

82. Marc Santora, *City's Annual Cost Per Inmate Is \$168,000, Study Finds*, N.Y. TIMES (Aug. 23, 2013), <http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html> [https://perma.cc/TE2W-GZ2Z].

83. Robbie Brown & Kim Severson, *Enlisting Prison Labor to Close Budget Gaps*, N.Y. TIMES (Feb. 24, 2011), <https://www.nytimes.com/2011/02/25/us/25inmates.html> [https://perma.cc/YNM9-4MKR].

84. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1890 (1991).

of current prison labor practices are retribution and rehabilitation.<sup>85</sup> When taking Nixon's and Regan's advisors at their word that the policies leading to mass incarceration were politically and racially motivated, it is difficult to justify such practices under any theory of penology; however, this Comment will entertain such an analysis.

We should re-examine prisoner compensation because political justifications for uncompensated or nominally compensated labor shifted from the four ends of criminal punishment to prioritizing other state interests; the commonly cited ends—retribution and rehabilitation—do not justify current practices, and the effect of current practices unjustifiably causes intergenerational harm.

*A. Because of Philosophical Shifts Surrounding Current Prison Labor Practices, State Actors No Longer Base Current Practices on Classic Penology's Four Ends*

State motivations behind prison labor have changed from classic penology's four ends so that the four ends no longer shape current prison labor practices.<sup>86</sup> Prison labor began in this country in the late eighteenth century, primarily as a way to combat idleness and rehabilitate prisoners.<sup>87</sup> Offsetting the operational costs of running the prison was only a secondary aim.<sup>88</sup> However, the priorities of states for using prison labor began shifting during the nineteenth century, and the motive behind requiring prison labor changed to defraying costs of incarceration.<sup>89</sup> In the North, when the rise of factory work and urbanization resulted in labor scarcities and worker rebellions, prisoners were put to work in large-scale industrial factories to fulfill the need for a productive and disciplined labor force.<sup>90</sup> In the South, convict leasing was implemented as a response to supplement a loss of slave labor post-emancipation.<sup>91</sup> Eventually, the Great Depression brought the end of privatized prison labor in order to stimulate the private

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85. *Work Programs*, FED. BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/work\\_programs.jsp](https://www.bop.gov/inmates/custody_and_care/work_programs.jsp) [<https://perma.cc/C428-P6G6>]; see Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sep. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [<https://perma.cc/JX9G-TCNP>].

86. William Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1161–64 (2004).

87. *Id.* at 1161.

88. *Id.* at 1162.

89. Genevieve LeBaron, *Slaves of the State: American Prison Labour Past and Present*, OPEN DEMOCRACY (Apr. 23, 2015), <https://www.opendemocracy.net/beyondslavery/genevieve-lebaron/slaves-of-state-american-prison-labour-past-and-present> [<https://perma.cc/GC2E-KC6E>].

90. *Id.*

91. *Id.*

economy when the Ashurst-Summers Act made the interstate transportation and sale of prison-made goods a federal crime.<sup>92</sup>

However, this change was temporary. By 1979, lawmakers transitioned back to exploiting prison labor when Congress passed the Private Industries Enhancement Certificate Program.<sup>93</sup> This law allowed the private use of prison labor so long as inmates were paid the prevailing wage.<sup>94</sup> However, this program received little use.<sup>95</sup>

The exploitation of prison labor gained momentum in the mid-1990s when private companies lobbied state lawmakers to pass the Prison Industries Act, which created methods for private companies to use prison labor without paying the prevailing wage.<sup>96</sup> The same private lobbying organization also successfully pushed for longer prison sentences, further demonstrating the exploitative intent behind the legislation.<sup>97</sup>

The modern exploitation of prison labor for economic gain is not limited to the federal government.<sup>98</sup> States have also exploited prison labor.<sup>99</sup> California serves as the perfect example: in response to budget crises, California has increasingly turned to prisons for skilled labor, replacing unionized government employees.<sup>100</sup> California's prisoner firefighter program reportedly saves the state \$1 billion a year.<sup>101</sup>

*B. Retribution: Punishment for Crimes Extends Beyond the Prisoners and Therefore Is Not Justified Under Classic Penology's Four Ends*

The retribution theory of punishment no longer justifies requiring labor with nominal or no compensation because the punishment extends to prisoners' children. Prison labor in exchange for nominal or no compensation is a manifestation of the retributive theory of punishment, though a closer examination of the current practice reveals that the retributive theory cannot justify it. Retributivists argue that punishment is justified to counteract or compensate for the harm inflicted by the wrongdoer: “‘An eye for an eye’ is proper redress for a crime in order to

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92. Quigley, *supra* note 86, at 1162.

93. Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, THE NATION (Aug. 1, 2011), <https://www.thenation.com/article/hidden-history-alec-and-prison-labor/> [<https://perma.cc/TUM3-N28H>].

94. *Id.* “Prevailing wage” laws require that wages paid reflect wages for similar jobs. See *Prevailing Wage Resources*, NAT’L CONF. STATE LEGISLATORS, <http://www.ncsl.org/research/labor-and-employment/prevailing-wage-resources.aspx> [<https://perma.cc/Q5TN-WYBJ>].

95. See Quigley, *supra* note 86, at 1163.

96. See Elk & Sloan, *supra* note 93.

97. *Id.*

98. LeBaron, *supra* note 89.

99. *Id.*

100. *Id.*

101. *Id.*

set right the moral balance.”<sup>102</sup> Under a retribution theory, incarceration is a form of compensation by the prisoner to society.<sup>103</sup> Prisoners should reimburse the state for the cost of their punishment.<sup>104</sup> More so, labor is a form of just deserts: “People who do not behave like decent human beings do not merit being treated like decent human beings” or compensated like decent human beings for their labor.<sup>105</sup>

In many state and federal prisons, officials force inmates to labor.<sup>106</sup> Inmates often are required to work once cleared by prison medical professionals and are punished for refusing to do so, with few exceptions.<sup>107</sup> Punishments include solitary confinement, loss of earned good time, and revocation of family visitation.<sup>108</sup>

Compensation for labor is either meager or nonexistent. On average, state prisoners earn \$0.20 per hour and federal prisoners earn \$0.31 per hour.<sup>109</sup> Throughout the fifty states and the federal prison system, the average minimum wage prisoners earn for regular, non-industry jobs, which 94% of prison laborers work, is \$0.14 per hour.<sup>110</sup> The average maximum is \$0.64 per hour.<sup>111</sup> Since 2001, prisoner wages have declined.<sup>112</sup> The average minimum daily wage decreased from \$0.93 in 2001 to \$0.86 in 2017.<sup>113</sup> The average daily maximum wage decreased from \$4.73 in 2001 to \$3.45 in 2017.<sup>114</sup>

Prisoners earn even less than the face value of their already-meager wage when factoring in deductions.<sup>115</sup> Once deductions are taken for things like court-assessed fines, court costs, and victim witness assessments, prisoners often take home less than half of their gross pay.<sup>116</sup> Five states—Alabama, Arkansas, Georgia, South Carolina, and Texas—do not pay inmates any wage for their labor.<sup>117</sup>

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102. Massaro, *supra* note 84, at 1891.

103. *Id.*

104. Bennis, *supra* note 85.

105. *See id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Modern-Day Slavery*, *supra* note 6.

110. Wendy Sawyer, *How Much Do Incarcerated People Earn In Each State?*, PRISON POLICY INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [https://perma.cc/75XW-KNR8].

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

Prisoners often need to purchase essential household items in prison to maintain their humanity, and relative to their wages, these items can be unaffordable.<sup>118</sup> For example, in Colorado, a box of tampons costs two weeks' worth of wages.<sup>119</sup> In Pennsylvania, a \$10 phone card costs almost two weeks of wages.<sup>120</sup> Florida requires all able-bodied inmates to work at least four hours a week.<sup>121</sup> Most regular, non-industry jobs in Florida are unpaid.<sup>122</sup> For prisoners that do receive a wage, many rules exist with a seemingly transparent purpose of depriving them of their wages. The Florida statute mandating and regulating prison labor and compensation states the following:

It shall be the policy of the department to require inmates receiving compensation for work performed in community programs to reimburse the state for lodging, food, transportation, and other expenses incurred for sustaining the inmate. Reimbursement shall be according to rules promulgated by the department, which shall provide that the inmate retain only a minimal amount of money for personal items . . . .<sup>123</sup>

Then, if prisoners violate prison rules or regulations, the prison may take the prisoners' wages as punishment.<sup>124</sup> Fittingly, the statute concludes by cementing the Thirteenth Amendment exception, saying, "Nothing in this section is intended to restore, in whole or in part, the civil rights of any prisoner."<sup>125</sup>

While proponents may argue that retribution justifies forcing prisoners to support their punishment, little thought is given to prisoners' eventual release and the collateral damage their families suffer when they lose a source of income to support them. More than half of inmates are parents of children under the age of eighteen and half of these inmates were their families' primary breadwinners.<sup>126</sup>

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118. *See id.*

119. *Id.*

120. *Id.*

121. FLA. STAT. § 946.002(1)(b) (2018).

122. *State and Federal Wage Policies and Sourcing Information*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), [https://www.prisonpolicy.org/reports/wage\\_policies.html](https://www.prisonpolicy.org/reports/wage_policies.html) [<https://perma.cc/6PX7-9NFD>].

123. FLA. STAT. § 946.002(2)(c).

124. *Id.* § 946.002(4)(a).

125. *Id.* § 946.002(5).

126. MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 14 (2014), [http://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/v8\\_THP\\_10CrimeFacts.pdf](http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_THP_10CrimeFacts.pdf) [<https://perma.cc/UV9E-VPA2>].

Further, studies find that former inmates rarely ever achieve economic security.<sup>127</sup> They struggle to meet even minimal needs for shelter and food.<sup>128</sup> In one study, in the first full year after former inmates' release, only 55% reported any earnings, with the median earnings being \$10,090.<sup>129</sup> Of those with earnings, 4% earned less than \$500, 32% earned between \$500 and \$15,000, and only 20% earned more than \$15,000.<sup>130</sup>

If prisoners struggle to meet their own basic needs, how will they meet the needs of their families? This reality aids in creating an intergenerational cycle, explained below.

Sadly, the understanding and acknowledgement of these harms is not a novel phenomenon. In 1927, Charles S. Hyneman, a well published professor raised these same points:

We have, in the past, been prone to take a very short sighted view of the problem of paying a wage in money to prisoners. Anything which would increase the state's expenditure for this already too costly group has been vigorously opposed. But our very earnestness in curbing expenditures in behalf of the criminal class has blinded us to the most economical way of dealing with that group. In refusing the prisoner a wage we have made it impossible for him to support his family. Society, thereby, has been forced to bear that expense itself . . . . By refusing to pay a money wage to the prisoner, society has made it impossible for him to accumulate a fund to support himself after his release from prison while he fits himself into the working and earning world. In so doing the state has not merely increased the obstacles in the way of the convict who is determined to go right, but has forced many of them to return to the paths which first landed them behind the bars.<sup>131</sup>

Given the real economic difficulties prisoners face after they have paid their debt to society and the effects these difficulties have on their families' ability to make ends meet, it seems retribution extends beyond incarceration.

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127. David Harding et al., *Making Ends Meet After Prison*, 33 J. POL'Y ANALYSIS & MGMT. 440, 440 (2014).

128. *Id.*

129. Adam Looney, *5 Facts About Prisoners and Work, Before and After Incarceration*, BROOKINGS INST. (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/R9TR-W6E6>].

130. *Id.*

131. Charles S. Hyneman, *The Problem of Providing Incentive for Prison Labor*, 17 AM. INST. CRIM. L. & CRIMINOLOGY 603, 605–06 (1927).



*C. Rehabilitation: Vocational Learning Does Little to Reduce Recidivism and Thus Does Not Justify Requiring Work Without Compensation or Meager Compensation*

The rehabilitation theory of punishment no longer justifies requiring labor with nominal or no compensation because prison labor does not prepare prisoners to support themselves upon release. Proponents of low- or nonexistent-wage prison labor justify it not only with the principle that prisoners must financially pay their debt to society but also by arguing that the labor benefits the prisoners.<sup>132</sup> Under the rehabilitation justification, the government punishes offenders to change their norm-violating ways, affecting their behavior so that they become law-abiding citizens.<sup>133</sup> Many people in prison have never held a job and will face barriers when trying to get one after release.<sup>134</sup> Intuitively, people who hold a job while incarcerated will have more success in finding post-release employment because they demonstrate that they can work, will benefit from immersion into the structure of a work environment, and will learn or maintain a compensable skill. Therefore, the argument goes, that labor is a form of vocational education that suffices to compensate prisoners.<sup>135</sup> It rehabilitates inmates by teaching them job skills. However, the results do not support this theory.

Studies comparing recidivism rates have concluded that prisoners benefit from prison labor. A Rand Corporation meta-analysis study showed that inmates who participated in vocational training programs were 28% more likely to find employment after release than those who did not.<sup>136</sup> A meta-analysis study by New York University School of Law concluded that good vocational programs can reduce recidivism by 20%, raise earnings post-release, and diminish future criminality.<sup>137</sup> A study by the Florida Department of Corrections found that inmates who earned a

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132. Sarah Shemkus, *Beyond Cheap Labor: Can Prison Work Programs Benefit Inmates?*, GUARDIAN (Dec. 9, 2015), <https://www.theguardian.com/sustainable-business/2015/dec/09/prison-work-program-ohsa-whole-foods-inmate-labor-incarceration> [https://perma.cc/6RFX-BHKV].

133. See Massaro, *supra* note 84, at 1893.

134. Emily Galvin, *Let Them Work: Prisoners Need Jobs While Still in Prison to Break America's Epidemic of Recidivism*, SLATE (Apr. 21, 2016), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/04/a\\_great\\_way\\_to\\_end\\_recidivism\\_give\\_prisoners\\_jobs.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/04/a_great_way_to_end_recidivism_give_prisoners_jobs.html) [https://perma.cc/GC4B-UAZR].

135. *Education and Vocational Training in Prisons Reduces Recidivism, Improves Job Outlook*, RAND CORP. (Aug. 22, 2013), <https://www.rand.org/news/press/2013/08/22.html> [https://perma.cc/TD2C-WBRZ].

136. *Id.*

137. Galvin, *supra* note 134.

vocational certificate were nearly 15% less likely to recidivate.<sup>138</sup> California and Washington studies reached similar conclusions.<sup>139</sup>

However, these statistics are misleading at least to some degree. The meta-analysis studies mentioned above include a “strong caveat”: they are overwhelmingly methodologically weak.<sup>140</sup> Most of the studies examined did not employ experimental designs or control for selection bias of those inmates studied.<sup>141</sup> Further, studies produce contradictory results.<sup>142</sup> For example, when the State of Washington published two studies on the effect on recidivism of inmate participation in the State’s more sought out Correctional Industry work program, the studies, published a month apart, contained contradictory findings.<sup>143</sup>

Further, prison labor often does not lead to prisoners learning the transferrable, employable skills necessary to support themselves. While corrections departments across the country have partnered with private industries, the majority of prison work consists of low-skill jobs within the prisons.<sup>144</sup> Most prisoners, about 700,000 of the 870,000 working inmates,<sup>145</sup> work as janitors, groundskeepers, and kitchen workers.<sup>146</sup> The skills learned in these jobs do little more than prepare former inmates for minimum wage jobs, leaving prisoners and their families with little hopes of ever escaping poverty.

Even the more esteemed and sought-after Correctional Industry jobs, where inmates are supposed to perform higher-level work while fulfilling contracts with private companies or state agencies, do not always teach transferable skills. The Washington State Correctional Industry program, the fourth largest correctional program in the country, was called into question after an investigation into its operations.<sup>147</sup> Inmates working

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138. *Id.*

139. Shemkus, *supra* note 132.

140. ROBERT BOZICK ET AL., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION iii (2013); Shawn Bushway, Employment Dimensions of Reentry: Understanding the Nexus Between Prisoner Reentry and Work 2 (May 2003) (unpublished discussion paper) (on file with the Urban Institute, <https://www.urban.org/sites/default/files/publication/59406/410853-Reentry-and-Prison-Work-Programs.PDF> [<https://perma.cc/W4K7-4ZQC>]).

141. Bushway, *supra* note 140, at 2.

142. Michael J. Berens & Mike Baker, *Broken Prison Labor Program Fails to Keep Promises, Costs Millions*, SEATTLE TIMES (Dec. 13, 2014), <http://projects.seattletimes.com/2014/prison-labor/1> [<https://perma.cc/AXK8-QPWX>].

143. *Id.*

144. *See Modern-Day Slavery*, *supra* note 6.

145. *Id.*

146. Paige St. John, *Federal Judges Order California to Expand Prison Releases*, L.A. TIMES (Nov. 14, 2014), <http://www.latimes.com/local/political/la-me-ff-federal-judges-order-state-to-release-more-prisoners-20141114-story.html> [<https://perma.cc/29Q5-9V8M>]; *see* WASH. ST. DEP’T OF CORRECTIONS, CLASS III CORRECTIONAL INDUSTRIES QUARTERLY DETAIL STATEMENTS, THIRD QUARTER 2017 REPORT (2017).

147. Berens & Baker, *supra* note 142.

within the State's Correctional Industry program are supposed to learn specialized skills using the latest technologies, preparing them for jobs once they are released.<sup>148</sup> However, the investigation found that the program was not teaching inmates transferable skills and was undermining its mission of rehabilitation.<sup>149</sup>

The Washington State Department of Corrections allowed profit maximization to impede inmate rehabilitation.<sup>150</sup> For example, one industry the Department of Corrections engaged in was furniture manufacturing.<sup>151</sup> However, rather than developing inmate skills in furniture building, the Department of Corrections bought premade furniture and resold it at a profit.<sup>152</sup> The job duties of inmates in this industry involved merely unpackaging the premade furniture and performing basic assembly.<sup>153</sup> Further, the Department of Corrections attempted to minimize costs by filling many of the jobs with inmates serving life sentences, who command lower wages and would never realize the benefits of vocational training.<sup>154</sup> The investigation also found that the Washington State program negatively influenced businesses within the state.<sup>155</sup> The businesses had difficulty competing because the Department of Corrections could pay laborers pennies on the dollar, while businesses must pay their workers at least the minimum wage.<sup>156</sup> Thus, since competing businesses had to freeze or reduce their hiring, inmates faced diminished opportunities to use their learned skills upon release.

These problems are not unique to the Washington State program.<sup>157</sup> An audit of the Pennsylvania Correctional Industries program found similar problems.<sup>158</sup> More than half of Pennsylvania inmates likely did not learn transferable skills because they manufactured clothing and there are few U.S.-based clothing manufacturers.<sup>159</sup> Furthermore, one-third of the inmates working in the program were serving life sentences and, again, would not reap the economic benefits of vocational training.<sup>160</sup> In Nevada and Texas, lawmakers had to place restrictions on their correctional

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148. *Id.*

149. *Id.*

150. *See id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

industry programs because local businesses could not compete with the labor costs.<sup>161</sup>

In reality, the purpose of exploiting prison labor is not to rehabilitate the prisoners but rather to profit on the exploitation of a vulnerable population. Rather than paying the prevailing wage, a prison can fill jobs for nominal or no wages.<sup>162</sup> Not only have government officials said as much, but they have used this rationale to argue against sentencing reform.<sup>163</sup> One Louisiana sheriff bemoaned a newly passed law that ordered a reduction of the prison population through the release of nonviolent offenders. The sheriff explained, “they’re releasing some good [inmates] that we use every day to wash cars, to change oil in our cars, to cook in the kitchens, to do all that where we save money.”<sup>164</sup> This thinking is not exclusive to a rural sheriff from the south; prosecutors under the supervision of former California Attorney General Kamala Harris argued in court that if forced to release inmates early, prisons would lose a substantial labor pool.<sup>165</sup>

*D. Meager Prison Wages Do Not Support Prisoners’ Children,  
Causing Generational Harm*

The effects of incarceration on the children of inmates creates a truly harmful cycle of subjugation, breaking classic penology justification theory. More than half of inmates are parents of children under the age of eighteen.<sup>166</sup> Half of these inmates were the primary provider of financial support for their children before their incarceration.<sup>167</sup> Because prison wages are so meager, incarcerated parents cannot financially contribute in any meaningful way, even when ordered to by a court.<sup>168</sup>

When prisoners cannot support their families, the harm of meager wages becomes cumulative. Growing up in poverty dramatically increases the likelihood of incarceration:

Boys who grew up in families in the bottom 10 percent of the income distribution were 20 times more likely to be in prison on a given day

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161. *Id.*

162. Eli Rosenberg, *Louisiana Sheriff Argues Against Releasing Prisoners ‘You Can Work,’ Drawing Slavery Comparisons*, WASH. POST (Oct. 12, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/louisiana-sheriff-argues-against-releasing-prisoners-you-can-work-drawing-slavery-comparisons/?utm\\_term=.2c73c49244fe](https://www.washingtonpost.com/news/post-nation/wp/2017/10/12/louisiana-sheriff-argues-against-releasing-prisoners-you-can-work-drawing-slavery-comparisons/?utm_term=.2c73c49244fe) [<https://perma.cc/M8L4-LUUV>]; St. John, *supra* note 146.

163. Rosenberg, *supra* note 162.

164. *Id.*

165. St. John, *supra* note 146.

166. KEARNEY ET AL., *supra* note 126, at 14.

167. *Id.*

168. *Id.*

in their early 30s than children born in top ten percent of families. Almost one in ten children born to families in the bottom 10 percent were therefore incarcerated at age 30. At the extremes of the family income distribution, the differences are larger: Boys from the poorest families were 40 times more likely to end up in prison compared to boys from the richest families.<sup>169</sup>

Given that black Americans are disproportionately incarcerated—making up 33% of the sentenced prison population but only 12% of the U.S. adult population<sup>170</sup>—black children disproportionately experience poverty as a result of a parent’s incarceration. In turn, they are then significantly more likely to face incarceration. Thus, an intergenerational cycle ensues.

### III. A TWO-TIERED APPROACH OF FAIRLY COMPENSATING PRISONERS AND CHILDREN’S SAVINGS ACCOUNTS COULD END MASS INCARCERATION’S HARMFUL CYCLE

The cycle of subjugation, of which meager prison wages are a contributing factor, has become complex and institutionalized. It started centuries ago with enslavement of individuals, their children, and their children’s children, and continued with segregation, diminished educational and occupational opportunities, and incarceration. There are a great many factors that maintain this cycle and build off one another.<sup>171</sup>

To interrupt the cycle of subjugation, this Comment proposes two solutions aimed at addressing the cycle—one addressing immediate harm and one forward-looking. First, lawmakers should gradually implement a minimum wage for prisoners. Second, lawmakers should simultaneously establish a Children’s Savings Account (CSA) program for prisoners’ children.

It is important to both acknowledge and address the fear of increased costs before discussing the benefits of the proposals. As mentioned above, the cost of incarceration is enormous—\$80 billion annually—because the government must house, feed, and monitor more than 2.2 million individuals each year.<sup>172</sup>

However, pragmatic and reasoned sentencing reform could more than offset the cost increase of raising wages and establishing a CSA program. Research shows that of the 1.46 million federal and state

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169. Looney, *supra* note 129.

170. Gramlich, *supra* note 79.

171. See, e.g., THE NEW JIM CROW, *supra* note 24; Alana Semuels, *A Different Approach to Breaking the Cycle of Poverty*, ATLANTIC (Jan. 9, 2015), <https://www.theatlantic.com/business/archive/2015/01/a-different-approach-to-breaking-the-cycle-of-poverty/425541/> [https://perma.cc/CD7V-U5QH].

172. Warner, *supra* note 81.

prisoners, 39%—about 576,000 people—present little risk to public safety. Releasing these individuals would save \$20 billion annually, while also offsetting some of the cost of wage increases by reducing the number of prison laborers.<sup>173</sup> Research also shows that for 25% of current federal and state prisoners—about 364,000 people—alternatives to prison would have been more effective than incarceration at the outset.<sup>174</sup> Providing effective alternatives to incarceration would decrease the number of prisoners entering cells each year.

Sentencing reform would more than offset the cost of wage increases. If each of the 870,000 working prisoners were to receive an additional \$2 per hour, assuming they each work fulltime, increasing wages would cost \$3.5 billion annually. This is a lot of money but far less than the \$20 billion annually that could be saved by amending laws to reduce sentencing and increase alternatives to incarceration for those presenting little risk to public safety. Sentencing reform would also reduce the number of working prisoners, so the cost of \$3.5 billion would likely never materialize. Essentially, the cost is not prohibitive.

Further, as explained below, the proposed solutions of implementing a minimum wage and establishing a CSA program would reduce incarceration rates, lowering both the cost of incarceration and wage increases.

*A. Gradually Implementing a Minimum Wage for Prisoners Would Curtail the Factors That Lead to Immediate and Intergenerational Incarceration*

Compensating imprisoned laborers with a genuine wage could benefit prisoners and their children, both by curbing the factors that lead to recidivism and by limiting the factors that make children most susceptible to crime and incarceration. The wage need not be commensurate with the federal minimum wage, but it must be a real wage—more than cents—and it cannot be garnished for the costs of room and board.

Increasing prison wages could reduce recidivism by lowering the debt prisoners face, allowing them access to funds upon release. When released, 85% of prisoners face criminal justice debts, which can climb to tens of thousands of dollars.<sup>175</sup> In a growing trend, states and

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173. AUSTIN ET AL., *supra* note 19, at 7.

174. *Id.*

175. REBECCA VALLAS ET AL., CTR. FOR AM. PROGRESS, REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN: A TWO-GENERATION APPROACH 6 (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf> [<https://perma.cc/L4E5-NW4E>].

municipalities are receiving more of their funding from “offender funded justice.”<sup>176</sup> Ferguson, Missouri, for example, received a stunning 20% of its funding from fees and fines.<sup>177</sup> In addition, incarcerated parents often pile up debt from child support that they could not afford to pay in prison.<sup>178</sup> Missing a payment can result in reincarceration in many states.<sup>179</sup> A study of probation revocations found that at least 12% were due to a failure to pay financial obligations.<sup>180</sup> In 2017, Attorney General Jeff Sessions rescinded guidance to state courts meant to prevent such outcomes.<sup>181</sup> The financial pressures and paycheck garnishment resulting from unpaid debt leads to recidivism.<sup>182</sup> Paying prisoners real wages would allow them to pay child support and other fees while in prison, reducing the encumbering debt they face upon release.

Prisoners that have access to funds upon release are less likely to recidivate.<sup>183</sup> Researchers studying first-day recidivism and the amount of “gate money” provided to inmates have found that giving discharged prisoners more cash reduced first-day recidivism to zero, with no increase in crime later.<sup>184</sup> However, a survey of state department of corrections (DOCs) found that prisoners are usually given little or no gate money.<sup>185</sup> For DOCs that provided gate money, the amount provided varied across the country, ranging from “sums so minimal that they would scarcely pay for a bus ride home, let alone food and lodging for the night, to as much as \$200.”<sup>186</sup> The most common amount given was \$100.<sup>187</sup> Giving prisoners wages that would allow them to save money would provide them more security upon leaving prison. They could have some savings to meet

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 12.

180. RACHEL L. MCLEAN & MICHAEL D. THOMAS, U.S. DEP’T OF JUSTICE, REPAYING DEBTS 3 (2012), [https://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying\\_debts\\_full\\_report.pdf?sfvrsn=2](https://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying_debts_full_report.pdf?sfvrsn=2) [<https://perma.cc/D6YM-65VF>].

181. Chiraag Bains, *Sessions Says to Courts: Go Ahead, Jail People Because They’re Poor*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/opinion/sessions-says-to-courts-go-ahead-jail-people-because-theyre-poor.html> [<https://perma.cc/TJ9L-D5XP>].

182. MCLEAN & THOMAS, *supra* note 180, at 2.

183. Chandra Bozelko, *Give Working Prisoners Dignity—and Decent Wages*, NAT’L REV. (Jan. 11, 2017), <https://www.nationalreview.com/2017/01/prison-labor-laws-wages/> [<https://perma.cc/T47M-N7SD>].

184. *Id.*

185. NANCY LA VIGNE ET AL., URBAN INST., RELEASE PLANNING FOR SUCCESSFUL REENTRY: A GUIDE FOR CORRECTIONS, SERVICE PROVIDERS, AND COMMUNITY GROUPS 15 (2008), <https://www.urban.org/sites/default/files/publication/32056/411767-Release-Planning-for-Successful-Reentry.PDF> [<https://perma.cc/BA5U-N7D2>].

186. *Id.*

187. *Id.*

their basic needs, like purchasing food or renting a room. This reduction of the strain newly released prisoners face could lead to less recidivism.

Further, increased wages could help interrupt the intergenerational cycle by reducing the incidence of economic inequality that leads to increased rates of incarceration. An additional problem of prisoners' accumulation of child support debt is that their children are deprived of the payments they are entitled to. The lack of child support raises the likelihood the child will grow up in poverty. Low-income youths are more likely to engage in more serious crimes and, as a result, are more likely to become incarcerated.<sup>188</sup> Increasing prisoner wages would increase family income and reduce the degree of poverty experienced by children of incarcerated individuals. This would, in turn, reduce the likelihood that these children engage in criminal activity later and could thereby interrupt the cycle.

The additional income an incarcerated parent would be able to contribute is not insignificant in curbing factors that make their children susceptible to crime. It could have lasting effects. Research shows that boosting a poor child's annual family income by just \$3,000 between the child's prenatal year and age five leads to a 17% average increase in the child's future annual earnings.<sup>189</sup> The child's increased future earnings would not only decrease the likelihood the child is incarcerated but also decrease the likelihood that the child's child faces incarceration. Thus, increased wages interrupt the cycle.

*B. Establishing a CSA Program for Prisoners' Children Would Increase the Likelihood That Prisoners' Children Attend College*

Particularly for black Americans, a lack of educational attainment strongly increases the likelihood that they will see the inside of a cell. There is nearly a 70% chance that a black man without a diploma will be imprisoned.<sup>190</sup> That number seems almost unreal. And because incarceration creates an intergenerational cycle, incarceration has a direct negative effect on a prisoner's child's educational performance.<sup>191</sup> Children of all ages with an incarcerated parent are significantly more likely to have problems in school.<sup>192</sup> Educational challenges can result from chronic absenteeism as well as facing social stigma associated with

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188. KEARNEY ET AL., *supra* note 126, at 7.

189. *Id.*

190. *Id.* at 11.

191. Alia Wong, *How Parental Incarceration Affects a Child's Education*, ATLANTIC (Nov. 11, 2015), <https://www.theatlantic.com/education/archive/2015/11/how-parental-incarceration-affects-a-childs-education/414720/> [<https://perma.cc/9SMD-ZDZB>].

192. *Id.*



having an incarcerated parent.<sup>193</sup> Further, the “loss of financial support resulting from parental incarceration can undermine the ‘family’s housing stability, the child’s living arrangement, and subsequently the child’s school stability.’”<sup>194</sup>

Because of the relationship between education level and incarceration, interrupting the cycle requires promotion of academic achievement. Establishing a CSA program for prisoners’ children will increase the likelihood that those children attend college and, as a result, never become incarcerated.

CSAs as discussed in this Comment are long-term savings or investment accounts that provide incentives (e.g., initial deposits or savings matches) to help children build dedicated savings for postsecondary education.<sup>195</sup> Different CSA models exist, but all CSA programs have three features: incentives to grow savings, such as initial seed deposits or savings matches; designation of savings for postsecondary education or for purchasing a wealth-growing asset; and incentive funds that are restricted to postsecondary education.<sup>196</sup>

A CSA program for prisoners’ children should take the following form. When prisoners begin their first prison job, prior to earning their first paycheck for their labor, prison officials should present the prisoners with notice of the option to open a CSA for each of their children. The process for opening one should be straightforward and streamlined. When a prisoner takes the affirmative step of opening a CSA for their child, the government, whether it be state or federal, should make a \$20 seed deposit, intended to encourage prisoners to open the accounts. Thereafter, prisoners should be able to both automatically deduct amounts from their paychecks and make individual deposits of funds into these accounts. The government should then match deposits up to \$5 per week or \$250 annually per prisoner, although a lower amount would still be effective, as discussed below.

Only the children of the prisoners should be able to access the funds, and they should only be able to do so when they turn eighteen years old. If the funds are not paid directly to an educational institution upon the first withdrawal, then the government’s contributions would revert back to the government. Thus, the government would only contribute to the children’s education, nothing else.

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193. *Id.*

194. *Id.*

195. CAMPAIGN FOR EVERY KID’S FUTURE, PROSPERITY NOW, INVEST IN EVERY CHILD’S FUTURE WITH CHILDREN’S SAVINGS ACCOUNTS 1 (2017), [https://prosperitynow.org/sites/default/files/PDFs/08-2017\\_CSAs\\_101\\_FAQ.pdf](https://prosperitynow.org/sites/default/files/PDFs/08-2017_CSAs_101_FAQ.pdf) [<https://perma.cc/BR3N-GSSW>].

196. *Find a Children’s Savings Program*, PROSPERITY NOW, <https://prosperitynow.org/map/childrens-savings> [<https://perma.cc/T9MG-YZ6A>].

The prisoner CSA program would meet its goal even if little money were ever accrued in any individual account. The primary goals of most CSA programs are to build a “college-going identity in children, provide some of the financial means to pursue post-secondary education and increase enrollment and completion of post-secondary education.”<sup>197</sup> While there is a financial benefit to children that have CSAs, the effect is mostly psychological as it sets an expectation that they will attend college.<sup>198</sup> Children from low-income areas (and likely those with incarcerated parents) often doubt that they will ever attend college, but having a fund dedicated to that purpose can make the idea more tangible.<sup>199</sup>

CSAs are effective in increasing college enrollment and graduation. Even small amounts of savings have a substantial impact: low- and moderate-income children with \$1.00–\$499.00 designated for college are three times more likely to enroll in and four times more likely to graduate from a postsecondary degree or certificate program than children with no account.<sup>200</sup> When controlling for other predictive factors like parents’ income and education, children with basic savings accounts that are earmarked for postsecondary education are more likely to attend and graduate from college than those with savings for no specific purpose.<sup>201</sup> Thus, the very act of a prisoner opening a CSA will begin cycle interruption.

The infrastructure needed for a prisoner CSA program administered by the federal government or CSAs operated by each state already exists in some form. 382,000 children across thirty-two states and the District of Columbia have CSAs, though admittedly, many rely on public–private partnerships.<sup>202</sup> All fifty states and the District of Columbia have state-sponsored 529 plans (formally called qualified tuition plans), which could

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197. DEDRICK ASANTE-MUHAMMAD ET AL., PROSPERITY NOW, REINVENTING CHILDREN’S SAVINGS ACCOUNTS TO ADDRESS THE RACIAL WEALTH DIVIDE 5 (2018), [https://prosperitynow.org/sites/default/files/resources/CSAs\\_for\\_Racial\\_Wealth\\_Divide\\_0.pdf](https://prosperitynow.org/sites/default/files/resources/CSAs_for_Racial_Wealth_Divide_0.pdf) [<https://perma.cc/65GP-Y5W2>].

198. J.B. Wogan, *College Savings Accounts Are Popular But Missing Their Marks*, GOVERNING (Mar. 2017), <http://www.governing.com/topics/education/gov-college-savings-accounts.html> [<https://perma.cc/84N3-YJJ3>].

199. *Id.*

200. CAMPAIGN FOR EVERY KID’S FUTURE, *supra* note 195, at 2.

201. Wogan, *supra* note 198.

202. ASANTE-MUHAMMAD ET AL., *supra* note 197, at 5; REBECCA LOYA, ASSET FUNDERS NETWORK, CHILDREN’S SAVINGS ACCOUNT: SURVEY OF PRIVATE FUNDING 2015–2016, at 1 (2017). For a list of state-run CSAs, see Marsha Mercer, *Children’s Savings Accounts Help States Create ‘College-Going Culture’*, PEW: STATELINE (Apr. 6, 2015), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/4/06/childrens-savings-account-help-states-create-college-going-culture> [<https://perma.cc/W5Q7-8JGR>].

be used as an initial infrastructure.<sup>203</sup> These plans differ from CSAs in a number of ways, including incentivizing saving by providing tax benefits rather than deposit matching, requiring the saver to choose from a range of investment portfolio options and requiring the saver to pay fees.<sup>204</sup> Together, the state-sponsored 529 programs paired with the existing CSAs could provide the infrastructure for implementing a prisoner CSA program.

A prisoner CSA program could practically be established, would likely lead to more educational attainment for prisoners' children, and could interrupt the cycle of subjugation as a result.

#### CONCLUSION

The intergenerational cycle of subjugation, based on racially targeted criminal laws, has created racial disparities in the prison population. Meager or no compensation for prisoner labor harms both the prisoners and their children. It harms prisoners who, upon release, have no resources and often have substantial debt. These factors lead to recidivism and further incarceration. It harms prisoners' children because the children are deprived of an income source, subjecting them to factors that increase the likelihood of their own incarceration.

Unless active measures are taken to help those within the cycle of subjugation, the cycle will continue as it has for centuries, uninterrupted. Allowing prisoners to pay down debts, build savings, contribute to their families, and save for their children's education would interrupt the cycle and give children the opportunity to find a way out.

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203. Office of Inv'r Educ. & Advocacy, *An Introduction to 529 Plans*, SEC (May 29, 2018), <https://www.sec.gov/reportspubs/investor-publications/investorpubsintro529htm.html> [https://perma.cc/7L93-QJM3].

204. *Id.*