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## As Fires Blaze Through California, Could They Blaze a New Path for Incarcerated Individuals: A Model for Back-End Abolition

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# As Fires Blaze Through California, Could They Blaze a New Path for Incarcerated Individuals: A Model for Back-End Abolition

Jacquelyn Kelsey Arnold\*

## *Abstract*

*This Note provides a critique on the current system of prison labor through the lens of the California wildfires and the lack of inmate labor due to early release in the wake of COVID-19. This Note provides an overview of the relevant history of the Thirteenth Amendment, contextualizes mass incarceration as a product of the “War on Drugs” in the United States, and consequently, discusses the significant and dramatic expansion of the prison industrial complex and the use of prison labor as a growing source of production labor. It concludes with a recommendation for a provisional back-end abolition model that provides relief for any inmate who completes prison labor. This includes both those who are currently incarcerated, and those who have already been released. The relief is meant to go beyond the measures currently implemented on the front-end and to complement the prison abolition movement.*

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\* J.D. Candidate, May 2022, Washington and Lee University School of Law. I would like to extend my sincerest gratitude to everyone who assisted me in the writing process for this Note. Specifically, I would like to thank Brandon Hasbrouck, my Note Advisor, and Danielle Potter, my Note Editor, for their critiques and suggestions along the way. I would also like to thank my mom and my sisters for their continued support throughout my law school career.

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*“You have to act as if it were possible to radically transform the world. And you have to do it all the time.”*

—Angela Davis

### *I. Introduction*

California currently faces unprecedented wildfires, already breaking the record for acres burned by this time last season.<sup>1</sup> Officials across the country argue that a lack of resources due to inmate firefighters either being released following compassionate release programs or needing to be quarantined due to exposure or

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1. See Hollie Silverman, *Wildfires Force Evacuation of Entire Town in Central California*, CNN, (last updated Sept. 7, 2020 10:23 PM) (“The state broke its record for land scorched statewide [September 6, 2020] with 2.09 million acres burned . . .”) [<https://perma.cc/M5E8-L5UT>].

illness from COVID-19 is exacerbating this problem.<sup>2</sup> Mike Hampton, a former corrections officer who worked for an inmate fire camp, criticized the California Department of Corrections and Rehabilitation (“CDCR”) for releasing inmate firefighters during a global pandemic, asking “[h]ow do you justify releasing all of these inmates in prime fire season with all these fires going on. The inmates should have been put on the fire lines, fighting fires.”<sup>3</sup> California’s reliance on this source of labor is now being exploited, rather than exacerbated, following the release of thousands of inmates.<sup>4</sup> The justification is that inmates are humans, who should not be asked to risk their life to the dangers of firefighting without considerable compensation, a sentence reduction, or relief from collateral consequences.<sup>5</sup>

On Friday September 9th, 2020, California Governor Gavin Newsom signed Bill AB2147, allowing certain inmates who are on the frontlines fighting wildfires to have their records expunged after serving their sentences.<sup>6</sup> Shockingly, prior to the passage of

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2. See Alisha Ebrahimji & Sarah Moon, *California Faces an Inmate Firefighter Shortage Because the State Released Them Early Due to the Pandemic*, CNN, (last updated Aug. 24, 2020 12:23 PM) (discussing the CDCR early release program) [<https://perma.cc/33B5-YLWM>]; see also Thomas Fuller, *Coronavirus Limits California’s Efforts to Fight Fires With Prison Labor*, N.Y. TIMES, (last updated Aug. 24, 2020) (explaining how there were many inmate firefighters absent from the fire lines as they had already gone home as part of an early release program protecting them from coronavirus) [<https://perma.cc/L5NF-JFMA>]; see Ebrahimji, *supra* note 2 (“With inmates being released early, ‘this leaves us with less hand crews for firefighting efforts.’”); see also Fuller, *supra* note 2 (detailing the reduced number of inmate firefighters currently deployed).

3. Fuller, *supra* note 2.

4. See *id.* (highlighting that the release of inmate firefighters through the early release programs is bringing up questions of whether or not the state should be relying in this program).

5. Inmate laborers make pennies on the dollar. Not only do inmate firefighters risk their lives through the normal dangers of firefighting, but this year are also facing considerable risks of exposure to COVID-19. Therefore, now more than ever inmates should be protected from additional harm from the virus and fairly compensated for their labor. See Emma Gray Ellis, *Covid-19’s Toll on Prison Labor Doesn’t Just Hurt Inmates*, WIRED (May 19, 2020, 2:07PM) (“Going to work in prison during a pandemic presents all the same health risks that going to work in the outside world does, and then heaps dozens more potential problems on top of them.”) [<https://perma.cc/5KWP-Q7DD>].

6. See J. Edward Moreno, *Newsom Signs Legislation Allowing Pathway for Inmate Firefighters to Become Professional After Release*, THE HILL (Sept. 12,

this legislation, inmates who served on the frontlines as inmate firefighters were not able to become career firefighters upon release because of their criminal record.<sup>7</sup>

The COVID-19 compassionate release programs are a great first step for relief for many incarcerated individuals.<sup>8</sup> Thousands of individuals have been released in this year alone because of these programs.<sup>9</sup> However, the program's reach is limited as to whom can qualify.<sup>10</sup> This program only offers relief to nonviolent offenders who did not have to register as sex offenders and had only sixty days or less to serve.<sup>11</sup> Further, upon release, the returned citizens are still faced with the uphill battle of reentry due to looming collateral consequences.<sup>12</sup>

There is a long history of mass incarceration, and the corresponding practice of using prison labor, in the United States.<sup>13</sup> The lack of inmate firefighters in California highlighted the much larger issue of our nation's reliance on prison labor, and

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2020, 5:18PM) (explaining California Governor's recent legislation allowing some firefighters to become professional upon release) [<https://perma.cc/CHM5-GAAB>].

7. See Mihir Saveri, *As Inmates, They Fight California's Fires. As Ex-Convicts, Their Firefighting Prospects Wilt*, N.Y. TIMES (Nov. 15, 2018) (detailing various fire departments' policies prohibiting individuals with criminal records from gaining employment with the fire department) [<https://perma.cc/D4EQ-76D2>].

8. See *COVID-19 Information*, CALIFORNIA DEP'T OF CORRECTIONS AND REHABILITATION, (last updated Jan. 29, 2021) (explaining the effect of the compassionate release on prison populations) [<https://perma.cc/FHB2-SQVU>].

9. See *id.* (explaining that the prison population has been reduced by 24,657 since March 11, 2020).

10. See *Additional Actions to Reduce Population and Maximize Space*, CALIFORNIA DEP'T OF CORRECTIONS AND REHABILITATION (explaining that this relief only extends to persons serving a sentence for non-violent offenses, who did not have to register as a sex offender and had 60 days or less to serve) [<https://perma.cc/M2Z3-RU2C>].

11. See *id.* (explaining the limited reach of the COVID-19 early release programs).

12. See Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. 1031, 1032 (2020) (explaining that the lasting effects of collateral consequences are often the harshest part of a criminal sentence, especially when defendants often do not know of these consequences at the time they enter into a plea deal).

13. See generally Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 THE JOURNAL OF AM. HISTORY 703 (2010).

it helped to expose the systemic racism present in our criminal justice system. In late 2020, the Democrats in the House and Senate introduced a joint resolution seeking to abolish prison labor.<sup>14</sup> The resolution would remove the punishment clause from the Thirteenth Amendment,<sup>15</sup> which effectively allows members of prison to be used as “cheap and free labor.”<sup>16</sup> This Note advances a provisional model<sup>17</sup> for back-end abolition that expands the scope of relief of the COVID-19 compassionate release programs and Governor Newsom’s collateral relief to all inmates through an incentivized, optional labor program. If the joint resolution is successful, this back-end provisional model would allow incarcerated individuals to opt into the labor system, making them eligible for minimum wage payment, sentence reductions, and relief from collateral consequences through expungement, pardons, and commutations. If unsuccessful, the back-end model calls for the same relief to be provided to all incarcerated individuals being forced to participate in prison slavery.<sup>18</sup> Finally, through sentence reductions alone, this model

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14. See Brakkton Booker, *Democrats Push ‘Abolition Amendment’ to Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020 6:43 PM) (explaining a joint resolution introduced in the House and Senate that seeks to remove the “punishment” clause from the Thirteenth Amendment as an attempt to root out systematic racism in the country) [<https://perma.cc/FD6G-RU2P>]; see also Terry Tang, *Lawmakers Mark Juneteenth by Reviving ‘Abolition Amendment’*, AP (June 18, 2021) (explaining the revival of the joint resolution following the nation’s announcement of Juneteenth as a federal holiday) [<https://perma.cc/8R9Q-QGYZ>].

15. U.S. CONST. amend. XIII.

16. See *id.* (explaining that the purpose of the abolition amendment is to end the longstanding practice of prison slavery made possible through the Thirteenth Amendment’s punishment clause).

17. This model is provisional because each state has a different system of laws regarding commutation, pardons, and expungement, so states can work off of this model and adopt and alter it consistent with the laws of that state. See Devon W. Carbado *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L. J. 1479, 1483 (2016) (“The model I offer does not purport to be a ‘total theory’ explanation . . . instead, as a heuristic device or provisional account . . .”).

18. See Jennifer Rae Taylor, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 GONZ. L. REV. 365, 368 (2011) (“Modern prison slavery and felon disenfranchisement are lingering remnants of post-Civil War laws that deliberately manipulated the criminal law for the purpose of relegating Blacks to a constitutionally permissible state of second-class citizenship.”).

would have a tremendous impact on the abolition movement by way of massive decreases in the number of individuals currently incarcerated and lessening the impact of collateral consequences on returned citizens.

This Note proceeds as follows. Part II<sup>19</sup> provides the relevant history of Thirteenth Amendment, contextualizes mass incarceration as a product of the “War on Drugs” in the United States, and consequently, discusses the significant and dramatic expansion of the prison industrial complex and the use of prison labor as a growing source of production labor.

Part III<sup>20</sup> explains the state and federal changes to compassionate release and the similar state laws as they relate to COVID-19 and early release. These laws are essential for protecting inmates, many of whom are part of an “increased risk”<sup>21</sup> population, yet officials in states like California are criticizing the laws because it leaves them in need of laborers. This Part explains the need for these early release policies and highlights how these laws have exposed the over-reliance on inmate labor in the United States. Additionally, this Part examines the specific example of the California wildfire crisis and explains that officials claim that early release programs exacerbated this problem, yet those same officials fail to address the benefits of the early release program to these at-risk individuals. This example encapsulates the country’s larger scale reliance on prison labor, and how COVID-19 has impacted this reliance.

Part IV<sup>22</sup> explores collateral consequences, which are legal disabilities imposed by law as a result of a criminal conviction, and why they have such a devastating impact on formerly incarcerated individuals.

Finally, Part V<sup>23</sup> provides recommendations to implement a provisional back-end abolition model. This model provides relief

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19. See *infra* Part II.

20. See *infra* Part III.

21. See *People with Certain Medical Conditions*, CDC, (last updated Aug. 20, 2021) (stating the various medical conditions that have been linked with severe illness from the virus that causes COVID-19) [<https://perma.cc/U4WR-MKX8>].

22. See *infra* Part IV.

23. See *infra* Part V.

for all inmates who complete any sort of prison labor, including those currently incarcerated and those who have already been released. This model includes proper wages, sentence reductions, expungement, and relief from other collateral consequences as incentive for completion of prison labor. The extent of relief will be dependent on factors such as type of offender (violent versus non-violent) and the amount of time worked. This model is meant to provide relief beyond what has already been provided on the front-end. It is important to underscore that this model is a complement to—and perhaps essential to—the prison abolition movement.

## II. Background

This Part provides an overview of the history of slavery and prison labor in the United States. It provides the reader with an understanding of how the Thirteenth Amendment, though passed to abolish slavery, instead provided an exception clause that has allowed slavery to persist under a new name.

### A. The Thirteenth Amendment

The Thirteenth Amendment states that “[n]either slavery nor involuntary 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.”<sup>24</sup> The natural reading of the punishment exception allows for both slavery and involuntary servitude to persist.<sup>25</sup> It is often asked whether or not it was successful in ending slavery.<sup>26</sup> As such, Democrats introduced a joint resolution late last year

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24. U.S. CONST. amend. XIII (emphasis added).

25. See Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 989 (2009) (explaining that the language used in the punishment clause allows for slavery and involuntary servitude to persist despite the amendment being passed to end slavery).

26. See, e.g., Michelle Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 922 (2019) (“...one cannot but wonder: *was slavery every truly meant to be abolished?*”).



seeking to remove the punishment clause from the Thirteenth Amendment.<sup>27</sup>

As it was originally proposed, the Thirteenth Amendment prohibited slavery completely, but it allowed for “involuntary servitude” as punishment for a crime—implying that those who might be sentenced to hard labor were not condemned to lifelong enslavement.<sup>28</sup> Though the drafters discussed several versions of the Amendment, no record of the Senate Judiciary Committee’s deliberation survives.<sup>29</sup> Therefore, the complete meaning of the “Punishment Clause” is not readily ascertainable from its scarce legislative history.<sup>30</sup> Historians are left to debate whether race was discussed in conjunction with the creation of the Punishment Clause.<sup>31</sup> Some scholars suggest that the Punishment Clause was intended to reinforce and legitimize inequality among citizens and is responsible for “institutionalizing a system of relentless racial subordination.”<sup>32</sup> Other historians point out that by 1835, imprisonment with hard labor was a common punishment for most crimes, and they therefore argue that the Thirteenth Amendment was meant to preserve this existing system of prison labor.<sup>33</sup> Critics of this theory point out that those systems were

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27. See Booker, *supra* note 14 (explaining a joint resolution introduced in the House and Senate that seeks to remove the “punishment” clause from the Thirteenth Amendment as an attempt to root out systematic racism in the country).

28. See Howe, *supra* note 25, at 994 (explaining that the first proposal by Representative Ashley stated, “Slavery, being incompatible with a free Government, is forever prohibited in the United States; and involuntary servitude shall be permitted only as punishment for a crime”).

29. See *id.* at 991 (explaining the deliberation processes of the Senate Judiciary Committee and the fact that no record of the deliberation remains).

30. See Goodwin, *supra* note 26, at 925 (explaining the lack of deliberations record and the difficulty ascertaining the true meaning because of “scant legislative history”).

31. See *id.* at 926 (“Historians debate whether the Punishment Clause had anything to do with race.”).

32. See *id.* at 928 (explaining the argument of scholars who think this was meant to continue institutional racism and racial subordination).

33. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16 (2010) (tracing the origins of “penal slavery” to contemporary mass incarceration).

already racialized.<sup>34</sup> “Thus, whether the Thirteenth Amendment’s Punishment Clause preserved penal labor as a longstanding criminal justice norm or not, it has functionally preserved slavery as a means of persistent racial subjugation.”<sup>35</sup>

Following the abolition of slavery, states found new ways to restrict the freedom of newly emancipated Black individuals through the creation of “Black Codes.”<sup>36</sup> The Black Codes consisted of special laws that applied only to Black persons.<sup>37</sup> These codes created barriers to full freedom and equality even after the passage of the Thirteenth and Fourteenth Amendments.<sup>38</sup> Some states denied Black citizens ownership of land and prohibited them from operating businesses, forcing them to return to work for contracts.<sup>39</sup> Black Codes provided a legal work around for the demand for low or no wage labor by way of the Punishment Clause of the Thirteenth Amendment.<sup>40</sup> Penalties for breaking these codes were incredibly harsh. Fines could be as much as fifty dollars,<sup>41</sup> for even minor offenses, and failure to pay resulted in confinement to labor, authorized by the Black Codes.<sup>42</sup> “These laws were expressively retaliatory against

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34. See Goodwin, *supra* note 26, at 932 (“What they overlook, however, is that those systems were already racialized.”).

35. *Id.* at 933.

36. See *id.* at 935 (explaining that the Black Codes which were enacted in many southern states severely restricted the rights of newly freed Blacks).

37. See *The Southern Black Codes of 1865-66*, CONST. RTS. FOUND. (explaining that these codes applied only to Black persons and were harsh and vindictive) [<https://perma.cc/GE99-NW4H>].

38. See Goodwin, *supra* note 26, at 935 (explaining that even after the abolishment of slavery, the Black Codes imposed various obstacles to freedom).

39. See HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW 13–15 (1985) (explaining that slavery was effectively reinvented through the use of Black Codes, Jim Crow laws, and the use of violence by labor unions).

40. See Goodwin, *supra* note 26, at 936 (“Rather than individual planters illegally exerting control over their former slaves by forcing them to labor for no compensation . . . a legislative solution provided the mechanism to acquire noncompensated [*sic*] laborers through exercise of the Punishment Clause.”).

41. According to the Bureau of Labor Statistics, a fifty-dollar fine in 1913 is equivalent to \$1,259.28 in 2017. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT. [<https://perma.cc/GD6J-W99V>].

42. See Goodwin, *supra* note 26, at 937–38 (describing the harsh consequences for even minor offenses under the Black Codes).

Blacks, barring where they could live and forcing them to provide annual reports related to their homes and employment.”<sup>43</sup> Some states, such as Georgia, even had Black Codes that provided for life-long leasing of Black individuals.<sup>44</sup>

Those early Black Codes helped birth what came to be known as “Jim Crow” Laws.<sup>45</sup> States enacted these laws to legitimize racial segregation.<sup>46</sup> Additionally, language lacking from the Fifteenth Amendment allowed for states to impose barriers to voting, such as literacy tests, poll taxes, and other devices to prevent Black individuals from voting.<sup>47</sup> The Jim Crow Laws created a system that reinforced white supremacy by creating boundaries based on race.<sup>48</sup> Further, despite the explicit language of the Constitution, Jim Crow Laws mandated raced space<sup>49</sup>, and effectively created unequal protection and treatment under the law.<sup>50</sup>

“The result of Jim Crow Laws and cases is that discrimination exists in a kind of terrible subtlety.”<sup>51</sup> As a society, we often think that these archaic laws have been left in the past, and we are quick to point to the societal progress towards a new era of understanding and “colorblindness”; however, the fact that

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43. *Id.* at 938.

44. *See id.* (“Perhaps the cruelest laws among the various Black Codes were those that provided for life-long leasing of Blacks . . .”).

45. *See* Frances L. Edwards and Grayson Bennett Thompson, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created through Jim Crow Laws*, 12 BERKELEY J. AFR. AM. L. & POL’Y 145, 151 (2010) (explaining the birth of Jim Crow laws).

46. *See id.* (“States and local legislatures enacted Jim Crow Laws in order to legitimize racial segregation.”).

47. *See* ALEXANDER, *supra* note 33, at 30 (describing the various ways Black voters were suppressed).

48. *See* Edwards, *supra* note 45, at 151 (describing the spatial boundaries based on race created by Jim Crow Laws).

49. *See id.* at 145 (“Jim Crow Laws defined property rights and restricted the use of architectural space for both White and African Americans. As a result, these laws intentionally, yet subtly, created a kind of ‘raced space.’”).

50. *See id.* (explaining the effect Jim Crow had by effectively mandating unequal protection and treatment under the law, despite the explicit language of the U.S. Constitution).

51. *Id.* at 154.

Jim Crow has been eradicated has not solved the problems of racial separation or discrimination.<sup>52</sup>

Fixation on the accounts of slavery exclusively based on the antebellum plantations and cotton picking in a field obscures its broader reach; in doing this, it traps readers into “essentialist and reductive framings of slavery.”<sup>53</sup> This limited understanding of slavery interferes with one’s ability to recognize how it can persist under alternative conditions and transform into something beyond its historically identifiable form.<sup>54</sup> “If the definition of American slavery is primarily or exclusively based on the spectacle of those terms and contours—unpaid labor of Blacks toiling in pastoral fields—it is possible to overlook or misidentify its other iterations and broader social contexts then and now.”<sup>55</sup>

Michelle Alexander powerfully draws many parallels between the Jim Crow era laws and the current system of mass incarceration.<sup>56</sup> “Mass incarceration depends for its legitimacy on the widespread belief that all those who appear trapped at the bottom actually chose their fate.”<sup>57</sup>

### *B. Mass Incarceration, the War on Drugs, and the Growth in Prison Population*

The Sentencing Reform Act of 1984 included the elimination of the parole system and the implementation of federal mandatory minimums in sentencing.<sup>58</sup> Based in part on these changes, the number of people incarcerated for drug offenses in

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52. See ALEXANDER, *supra* note 33, at 2 (“[W]e use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices we supposedly left behind.”).

53. See Goodwin, *supra* note 26, at 918 (“Defining slavery exclusively by antebellum plantations and Blacks picking cotton in pastoral fields is an understandable mistake.”).

54. See *id.* (discussing that this limited view of slavery “stymies a more nuanced discourse” and analysis on slavery’s past and its transformations).

55. *Id.* at 918–19.

56. See generally ALEXANDER, *supra* note 33.

57. *Id.* at 309.

58. Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (2018).

the U.S. rose from 40,900 in 1980 to 452,964 in 2017.<sup>59</sup> To put that number into context, today, there are more people behind bars for a drug offense than the number of people who were in prison or jail for any crime in 1980.<sup>60</sup> The U.S. has less than five percent of the world's population but nearly a quarter of the world's known prison population.<sup>61</sup>

Mass incarceration has not touched all communities equally, however. In 2017, Black individuals represented twelve percent of the U.S. adult population but thirty-three percent of the sentenced prison population.<sup>62</sup> White individuals accounted for sixty-four percent of adults but only thirty percent of incarcerated individuals, and Hispanics represented sixteen percent of the adult population but twenty-three percent of incarcerated individuals.<sup>63</sup> Broken down further, this means that Black adults are incarcerated at more than six times the rate of white adults,<sup>64</sup> Black men are incarcerated at six times the rate of white men,<sup>65</sup> and the imprisonment rate for Black women is two times that of white women.<sup>66</sup>

The spike in incarceration rates and much of these racial disparities can be traced back to Reagan's presidency, which is credited as the inception of the War on Drugs.<sup>67</sup> "There is general

59. See *Criminal Justice Facts*, THE SENT'G PROJECT (explaining the rise in prison population from the 1980s to 2019) [perma.cc/2KEC-XXZQ].

60. See *id.* (explaining the context of the steep rise in prison population).

61. See *Federal Sentencing Reform*, A.B.A. (explaining that the United States relies on its criminal justice system more than any other nation) [perma.cc/HL4J-ZLRU].

62. See John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019) (stating that the racial and ethnic makeup of U.S. prisons looks different than the demographics of the country as a whole) [perma.cc/D26J-H97N].

63. See *id.* (providing a comparison of the racial and ethnic makeup of the prison population compared to the country as a whole).

64. See *id.* ("In 2017 there were 1,549 black prisoners for every 100,000 black adults – nearly six times the imprisonment rate for whites . . .").

65. See *Criminal Justice Facts*, *supra* note 59 (stating the rate of incarceration for black men versus white men).

66. See *Criminal Justice Fact Sheet*, NAACP (stating that of the 6.8 million people incarcerated in the U.S. in 2014, there were twice as many African American female inmates as white female inmates) [perma.cc/LY2R-BP8C].

67. See *Criminal Justice Facts*, *supra* note 59 ("Since its official beginning in the 1980s, the number of Americans incarcerated for drug offenses in the U.S.

agreement that the War on Drugs is the single most important explanation for mass incarceration.”<sup>68</sup> Though the passage of the Civil Rights Act formally ended Jim Crow, the War on Drugs marshalled a new war targeting Black individuals.<sup>69</sup> Presidents Reagan, Bush, and Clinton boasted a tough on crime administration that federalized more crimes and punished those crimes with draconian sentences.<sup>70</sup> By signing the Anti-Drug Abuse Act in 1986, President Reagan effectively criminalized drug addiction, leading to the mass and disproportionate incarceration of primarily non-violent drug offenders.<sup>71</sup> The majority of these non-violent drug offenders are Black and Latinx.<sup>72</sup>

Despite the rise in incarceration rates, over the past several decades the violent crime rates steadily decreased in the United States.<sup>73</sup> Harsh sentencing laws, such as mandatory minimums, also contributed to this growth; half of the growth in the state prison population between 1980 and 2010 was due to an increase of time served in prison for all offenses.<sup>74</sup> Additionally, the number of life sentences has dramatically increased to one in

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has skyrocketed from 40,900 in 1980 to 430,926 in 2019.”); *see also* ALEXANDER, *supra* note 33, at 49 (stating that Reagan officially announced his administration’s war on drugs in 1982 despite less than two percent of the American public viewing drugs as the most important issue facing the nation).

68. Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISC. 200, 212 (2020).

69. *See id.* at 211 (stating that the War on Drugs targeted Black people with “surgical precision”).

70. *See id.* at 212 (explaining that these three presidents championed being tough on crime).

71. *See* André Douglas Pond Cummings, “*All Eyes on Me*”: *America’s War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417, 418 (2012) (explaining the effects of President Reagan’s enactment of the Anti-Drug Abuse Act in 1986).

72. *See id.* (stating that over sixty-five percent of non-violent drug offenders are African American and Latinx).

73. *See id.* at 419 (discussing the decreasing rates of violent crimes).

74. *See Criminal Justice Facts, supra* note 59 (explaining the effects of harsher sentences which keep people incarcerated for longer periods of time).

nine inmates serving a life sentence.<sup>75</sup> One third of those inmates are not eligible for parole.<sup>76</sup>

The clearest example of racially driven sentencing is the sentencing disparity between crack and powder cocaine.<sup>77</sup> Prior to 2010, individuals found with crack cocaine were punished with sentences one hundred times that of powder cocaine.<sup>78</sup> Notably, at the time, ninety-three percent of convicted crack cocaine offenders were Black, whereas only five percent were white.<sup>79</sup> In contrast, powder cocaine offenders were predominantly white.<sup>80</sup> Therefore, there were vast racial disparities in the average length of sentences for comparable offenses for two types of the same drug.<sup>81</sup> More disturbingly, on average, under the 100:1 regime, Black individuals served virtually the same time in prison for non-violent drug offenses as whites did for violent offenses.<sup>82</sup> This was partially remedied by the Fair Sentencing Act of 2010<sup>83</sup> which adjusted the disparities in sentences between crack and powder cocaine from 100:1 to 18:1.<sup>84</sup>

Though this helped individuals who were yet to be sentenced, it did not help those who were already sentenced under the

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75. *See id.* (“There has also been a historic rise in the use of life sentences: one in nine people in prison is now serving a life sentence . . .”).

76. *See id.* (explaining that a third of individuals who serve a life sentence are not eligible for parole).

77. *See* Kevin Ring & Heather Rice-Minus, *Why do we still punish crack and powder cocaine offenses differently?*, THE HILL (Mar. 3, 2021, 1:00 PM) (discussing the racially discriminatory history behind the crack-powder sentencing disparity) [perma.cc/7QX4-PLWD].

78. *See* ALEXANDER, *supra* note 33, at 112 (detailing the case of a young Black man who was caught with crack cocaine and sentenced severely).

79. *See id.* (explaining the discriminatory impact of crack versus powder cocaine sentencing).

80. *See id.* (stating that individuals who were caught with powder cocaine were predominantly white).

81. *See Fair Sentencing Act*, ACLU (explaining the draconian crack cocaine sentencing laws set up by the 100:1 regime) [perma.cc/CN4E-7B3J].

82. *See id.* (“On average, under the 100:1 regime, African Americans served virtually as much time in prison for non-violent drug offenses as whites did for violent offenses.”).

83. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

84. *Id.*

previous draconian laws.<sup>85</sup> In 2018, President Trump passed the First Step Act<sup>86</sup> which, among other things, made the Fair Sentencing Act retroactive and thus permitted incarcerated persons to submit motions for sentence reductions.<sup>87</sup> The retroactive application of the Fair Sentencing Act is not automatic; an inmate must petition the court for a reduction.<sup>88</sup> Though the Fair Sentencing Act was a step towards fairness, the 18:1 ratio was a compromise and reflects outdated assumptions about crack cocaine.<sup>89</sup> “The only truly fair ratio is 1:1.”<sup>90</sup>

Non-violent drug offenders make up nearly half of the federal prison population, despite a growing number of states decriminalizing marijuana and other low-level drugs.<sup>91</sup> Marijuana is legal in nineteen states, Washington D.C., and Guam.<sup>92</sup> Though Biden has expressed that he would support federal decriminalization of the drug, it remains an illegal Schedule I drug by the federal government.<sup>93</sup>

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85. *See Fair Sentencing Act, supra* note 81 (“Even though people sentenced before the FSA can benefit from the retroactive Sentencing Guideline amendments, they remain subject to pre-FSA statutory mandatory minimums.”).

86. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

87. *See id.* § 404 (explaining the covered offenses eligible for relief under the act).

88. CONG. RSCH. SERV., R45558, FIRST STEP ACT OF 2018: AN OVERVIEW 9 (2019).

89. *See Fair Sentencing Act, supra* note 81 (“Because crack and powder cocaine are two forms of the same drug, there should not be any disparity in sentencing between crack and powder cocaine offenses . . .”).

90. *Id.*

91. *See Offenses*, FEDERAL BUREAU OF PRISONS, (last updated Sept. 25, 2021) (reporting that drug offenses make up 46.1% of the federal inmate populations’ convictions) [perma.cc/ZQS9-PJSR].

92. *See* Claire Hansen & Horus Alas, *Where is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (June 30, 2021, 12:12 PM) (discussing the states that have legalized recreational marijuana) [https://perma.cc/3M9E-CWL8].

93. *See* Jeremy Berke, et al., *Marijuana legalization is sweeping the US. See every state where cannabis is legal*, BUS. INSIDER (July 9, 2021, 9:20 AM) (explaining that because marijuana is still illegal at the federal level, states are forced to chart their own paths towards legalization) [perma.cc/47SL-DRHE].



Further, in November 2020, Oregon became the first state to decriminalize the possession of all drugs for personal use.<sup>94</sup> The drugs are still illegal, as is selling them; however, possession is now a civil, not criminal violation.<sup>95</sup> Oregon provided several reasons for the decriminalization of drugs for personal use: the first reason was that drug prohibition has failed.<sup>96</sup> The second reason was that decriminalization put the state's money to better use.<sup>97</sup> The third reason was that the drug war specifically targets people of color.<sup>98</sup>

Both the legalization of marijuana and Oregon's decriminalization of drugs for personal use show front-end movements to mitigate the damages caused in the wake of the War on Drugs. But until adopted by the federal government, harsh drug sentences will still be disproportionately felt by historically marginalized groups.

Though convict leasing was legally abolished in 1928, at least thirty-seven states still permit contracting prison labor to private companies.<sup>99</sup> This following section provides an overview of convict leasing in the United States and explains how we as a country arrived at the current system of prison labor.

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94. See Scott Akins & Clayton Mosher, *Oregon Just Decriminalized All Drugs – Here's Why Voters Passed this Groundbreaking Reform*, U.S. NEWS (Dec. 10, 2020, 11:07 AM) (explaining the law passed by Oregon during the November 2020 election) [<https://perma.cc/LU9D-88A2>].

95. See *id.* (explaining that a violation could still result in a fine or court-ordered therapy but not jail).

96. See *id.* (explaining that decades of research found that the deterrent effect of strict criminal punishment for drug use to be small, if present at all).

97. See *id.* (stating that Oregon spent about \$375 million on drug prohibition in 2016 and now some of that money will be diverted to pay for about a dozen new drug prevention and treatment centers nationwide, which has been found to be a more cost-effective strategy).

98. See *id.* (asserting that another goal of decriminalization was to mitigate the racial and ethnic disparities associated with drug enforcement).

99. See Daina Ramey Berry & Talitha L. LeFlouria, *Five Myths About Slavery*, WASH. POST (Feb. 7, 2020) (explaining the history of prison labor in the United States) [[perma.cc/EL75-P5QN](https://perma.cc/EL75-P5QN)].

*C. Convict Leasing and Inmate Labor*

Profiting from the use of forced human labor is a longstanding practice in the U.S.<sup>100</sup> The Thirteenth Amendment's Exception Clause allowed for a new form of slavery through convict leasing.<sup>101</sup> "The U.S. began to satisfy the need for cheap labor through the use of indentured servants [slaves], and now it has turned to using inmate laborers to make a profit."<sup>102</sup> Convict leasing was a practice in which private enterprises leased felony prisoners from the state for a fee.<sup>103</sup> Convict leasing primarily targeted Black men, women, and youth and involved holding people against their will, separating them from families, working them long hours, and physical abuse.<sup>104</sup> Though convict-leasing broke down by the 1920s, the system fostered the postbellum normalization of forced labor.<sup>105</sup> At least thirty-seven states still permit the contracting of prison labor to private companies.<sup>106</sup> For example, incarcerated individuals manufacture military equipment and uniforms, office furniture, as well as fight fires, answer customer service calls, and even plant and harvest crops.<sup>107</sup>

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100. See Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. CIV. RTS. & ECON. DEV. 679, 683 (2015) (noting that profiting off of forced labor is not novel to the United States, as demonstrated by slavery and indentured servitude of the past, and inmate labor today).

101. See Artika Tyner & Darlene Fry, *Iron Shackles to Invisible Chains: Breaking the Binds of Collateral Consequences*, 49 U. BALT. L. REV. 357, 358–59 (2020) (explaining that the Exception Clause further exacerbated the denial of equal rights to African Americans by permitting the continued economic exploitation of Black individuals through convict leasing).

102. Fulcher, *supra* note 100, at 683.

103. See Berry & LeFlouria, *supra* note 99 (explaining the history of convict leasing in the United States).

104. See *id.* (describing how harsh the system of convict leasing and that it primarily targeted Black individuals).

105. See Goodwin, *supra* note 26, at 918 (describing the residual effects of the convict leasing system).

106. See Berry & LeFlouria, *supra* note 99 (providing a link to the 37 states that permit contracting prison labor).

107. See *id.* (explaining the various labor inmates do while receiving pennies per hour, if anything for their labor).

The direct cost of incarceration in the criminal justice system is more than \$80 billion annually, or \$260 per capita.<sup>108</sup> The cost of incarceration is increasingly offset by the revenues generated by prison labor and prison-related business.<sup>109</sup> The Federal Prison Industries (“FPI”) was created by federal statute in 1934 and is the largest inmate-training program operated by the Bureau of Prisons.<sup>110</sup> The FPI operates as a wholly owned, self-sustaining government corporation under the trade name UNICOR.<sup>111</sup>

The systematization of incarcerated labor provides profits for federal, state, and private prisons, as well as for private corporations, because the workers are paid little to nothing.<sup>112</sup> For example, “state prisons pay working inmates an average of \$0.93 to \$4.37 per hour; federal prisons pay \$0.00 to \$4.37 per day; and private prisons pay \$0.16 to \$0.50 per hour,” making this a multi-million dollar industry.<sup>113</sup> Federal inmates earn \$0.12 to \$0.40 cents per hour for their work assignments.<sup>114</sup> Moreover, the federal prison system requires sentenced inmates to do work as long as they are “medically able.”<sup>115</sup>

The Bureau of Justice Statistics census of prison population in 2005 found that eighty-eight percent of U.S. prisons had implemented work programs.<sup>116</sup> “Just as Black slaves lacked legal

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108. See Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. OF L & SOC. CHANGE 1, 20 (2019) (explaining the cost of incarceration in the United States).

109. See *id.* (“Combined with similar state prison labor programs, the market for prison labor is worth over one billion dollars.”).

110. See *Federal Prison Industries*, FED. BUREAU OF PRISONS (describing the Federal Prison Industries training program as one that employs and “provides skills training to Federal inmates in diverse factory settings and contributes to the safety and security of Bureau facilities by keeping inmates constructively occupied.”) [<https://perma.cc/5R4N-8HMZ>].

111. See *id.* (explaining the structure of the FPI as operating under the trade name UNICOR).

112. See Cao, *supra* note 108, at 21.

113. Fulcher, *supra* note 100, at 682.

114. See *Work Programs*, FED. BUREAU OF PRISONS (explaining the range of pay federal inmates receive) [[perma.cc/AKD3-GP4P](https://perma.cc/AKD3-GP4P)].

115. See *id.* (explaining that sentenced inmates must work unless they are not medically able).

116. Cao, *supra* note 108, at 21.

rights and protections under the antebellum chattel system, so too did the slaves of the Punishment Clause system.”<sup>117</sup> Therefore, it should not come as a surprise that this system also forced these same individuals to carry out the risky and unhealthy work.<sup>118</sup>

Furthermore, the increasing number of people incarcerated directly benefits corporate interests.<sup>119</sup> Companies such as Merrill Lynch and other Wall Street investment firms profit from the prison construction bonds and by providing financing services at inflated prices.<sup>120</sup> Estimates of the tax-exempt bonds to underwrite U.S. prison construction exceeds \$2.3 billion annually.<sup>121</sup> While forward-looking profit statements are normal, what is not normal are statements that base their entire potential profit regime on a steady stream of “clients,” or those sentenced to prison time.<sup>122</sup> This system requires that private prisons maximize profits for shareholders by increasing “demand” for its services, which means that the desired outcome for private prison companies is an increase in the number of individuals incarcerated in the United States.<sup>123</sup> The more prisons that are built and the more beds that are installed to house the incarcerated, the more inmates are needed.<sup>124</sup> Reports issued in 2011 state that the two largest private prison companies, CCA and GEO Group, together profited more than \$2.9 billion in

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117. See Goodwin, *supra* note 26, at 942 (explaining how the Punishment Clause allows for the continuation of slavery under a new name).

118. See *id.* (describing the riskier jobs resulting in the death of many convicts forced to complete this labor).

119. See Cummings, *supra* note 71, at 421 (recounting an example of a private profiteer who claimed that the yearly increase in the prison population was good news from a business model perspective).

120. See *id.* (describing the corporations that benefit off of this system).

121. See *id.* (emphasizing the magnitude of the economic benefits of inmate labor to corporations).

122. See *id.* at 436 (describing the troubling result of profit statements that are based entirely on the need for future “clients” who are “U.S. citizens sentenced to hard prison time”).

123. See *id.* (detailing the convoluted system of private prison profiting off of and hoping for mass incarceration).

124. See Goodwin, *supra* note 26, at 961 (discussing how policing in the United States has become tainted with the need to fill and meet quotas).

2010.<sup>125</sup> To create and increase these profits, private prison corporations hire lobbyists to increase prison populations and construction.<sup>126</sup> The largest private prison companies have spent “dozens of millions of dollars lobbying both state and federal legislators since the origin of the U.S. private prison corporation.”<sup>127</sup>

Beyond profiting from merely building the prisons, many companies also profit from the low cost of prison labor.<sup>128</sup> The corporatization of the prison system in the United States creates a perverse incentive for public corporations and Wall Street to work for mass incarceration and against prison reform and rehabilitation.<sup>129</sup> Investors have income opportunities through purchasing public shares in private prisons or purchasing bonds through Wall Street banks.<sup>130</sup> “Imprisoning U.S. citizens has morphed into a significant growth industry and profit stream.”<sup>131</sup>

Despite the profit derived from this practice, the prison industry is exempt from the requirements of the Fair Labor Standards Act (“FLSA”) because labor performed by individuals in prison is not considered employment.<sup>132</sup> The Fourth Circuit rejected the theory that incarcerated individuals were employees for the purposes of the FLSA on the grounds that the custodial relationship of inmates is distinguishable from the employer-

125. See Cummings, *supra* note 71, at 437 (describing the profits of the two largest private prison companies).

126. See Andrea Nill Sanchez, *Private Prisons Spend Millions on Lobbying to Put More People in Jail*, THINK PROGRESS BLOG (June 27, 2011) (describing lobbying efforts in various states in an attempt to privatize prisons) [perma.cc/XUM9-YZ5A].

127. Cummings, *supra* note 71, at 438.

128. See *id.* at 422 (“Notable multi-national corporations that use prison labor are IBM, Compaq, Microsoft, and Boeing, as well non-high-tech industrial leaders such as J.C. Penney and Victoria’s Secret.”).

129. See *id.* at 440 (discussing the perverse incentives for corporations against reform or rehabilitation).

130. See *id.* (explaining how investors get involved in the process through purchase of public shares or through Wall Street banks).

131. *Id.* at 441.

132. See Cao, *supra* note 108, at 34 (explaining that despite inmates being paid and prison labor generating vast revenues for corporations, this labor is not considered employment for the purposes of the Fair Labor Standards Act).

employee relationship contemplated by the FLSA.<sup>133</sup> Further, in cases where incarcerated workers have sued their prison-employers to enforce minimum wage laws or the FLSA, courts have ruled that the relationship between the penitentiary and the inmate worker is not primarily economic; thus the worker is not protected under the statute.<sup>134</sup>

Moreover, defining the work as rehabilitative rather than remunerative allows the labor to be viewed differently than similar work done by employees working for free.<sup>135</sup> Because labor is intended as part of their sentence, incarcerated people are believed not to deserve the same wage or workplace protections as free workers.<sup>136</sup> Incarcerated workers are not entitled to the minimum wage provisions of the FLSA, are not covered by workers' compensation statutes in many states, are generally ineligible for unemployment compensation, and cannot form unions.<sup>137</sup> This is because it is believed that their labor provides enhanced post-conviction employment prospects and therefore these protections are not needed.<sup>138</sup> The Fourth Circuit has stated that if the FLSA is to be extended to cover inmates, Congress must make that decision, rather than the courts.<sup>139</sup>

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133. See *Prisoner Not Covered by Fair Labor Standards Act*, PRISON LEGAL NEWS (May 15, 2007) (explaining the Fourth Circuit's rationale for denying that inmates were entitled to legal protection under FLSA) [perma.cc/BQ6U-344W].

134. Whitney Bennis, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015),] (describing the importance of being an "employee" for worker's protection such as the Fair Labor Standards Act to apply) [perma.cc/R6CZ-ZA5A].

135. See Cao, *supra* note 108, at 34 (explaining another justification for why inmate labor is not covered by the Fair Labor Standards Act).

136. See *id.* (explaining that OSHA does not define inmates as employees).

137. See *id.* (describing that incarcerated people do not receive the same or even similar protection as someone who is considered to be an employee under FLSA).

138. See *id.* (explaining that prison workers have very few protections); *but see* MICHAEL B. MUSHLIN, 2 RIGHTS OF PRISONERS § 8:8 (5th ed. 2017) (detailing that prison workers are protected by civil rights laws prohibiting employment discrimination on unlawful grounds such as race, religion, age, and sexual orientation).

139. See *Harker v. State Use Indus.*, 990 F.2d 131, 136 (4th Cir. 1993) ("For more than fifty years, Congress has operated on the assumption that the FLSA does not apply to inmate labor. If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts.").

### III. Compassionate Release and the Crisis in California

Prior to the passage of the First Step Act of 2018, inmates applying for compassionate release faced many hurdles. A study conducted by Families Against Mandatory Minimums (“FAMM”) looked at state by state report on the early release program’s findings, which detailed that the process to decide if an inmate was eligible for release often had multiple layers of review, which consumed time for individuals with worsening health or facing imminent death.<sup>140</sup> Additionally, inmates often faced strict or vague eligibility requirements, categorical exclusions, missing or contradictory guidance, complex and time-consuming review processes, and unrealistic time frames.<sup>141</sup> The First Step Act made applying for Compassionate Release easier on a federal level, which prior to COVID-19 was rarely used.

Many states have implemented similar programs, especially in response to COVID-19. California, for example, implemented emergency measures to protect individuals who live and work in the state prisons.<sup>142</sup> As of January 28, 2021, the prison population had been reduced by 24,657 since March 11, 2020.<sup>143</sup> In April 2020, the California Department of Corrections and Rehabilitation (“CDCR”) expedited the release of almost 3,500 incarcerated persons serving a sentence for non-violent offenses, who did not have to register as a sex offender, and had sixty days or less to serve.<sup>144</sup> In July 2020, the CDCR announced that nearly 10,000 persons had been released since the start of the pandemic

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140. See Rabiah Burks, *New State-by-State Report Reveals Compassionate Release Programs Are Rarely Used*, FAMM (June 27, 2018) (noting the infrequency with which compassionate release programs are used) [perma.cc/46LU-MZ2L].

141. See *id.* (discussing various hurdles inmates need to clear to achieve compassionate release).

142. See *Additional Actions to Reduce Population and Maximize Space*, CAL. DEP’T OF CORRS. & REHAB. (explaining the measures taken to increase protection for those who live and work in California state prisons and to protect the community at large) [perma.cc/B8YQ-NH2S].

143. See *COVID-19 Information*, CAL. DEP’T OF CORRS. & REHAB., (last updated Jan. 29, 2021) (providing the COVID-19 related statistics for California’s in-custody population) [perma.cc/ERA2-NBHV].

144. See *id.* (explaining month by month the actions taken by the CDCR to reduce the prison populations).

and hoped to have as many as 8,000 more inmates eligible for release at the end of August.<sup>145</sup> Additionally, the CDCR issued twelve weeks of credit to incarcerated people who had no rules violations from March 1, 2020 to July 5, 2020.<sup>146</sup> This credit did not extend to those serving life sentences without the possibility of parole or to those who are condemned.<sup>147</sup> Lastly, 6,500 inmates were identified as medical high-risk for COVID-19 and were evaluated for potential expedited release on a case-by-case basis, based on public safety and health considerations.<sup>148</sup> However, not everyone was celebrating the early release of California's inmates.

Some blamed the worsening of wildfires in California on a lack of inmate firefighters. California opened Rainbow Conservation Camp in Fallbrook in 1946 which housed inmates to fight fires.<sup>149</sup> Los Angeles County Fire Department contracted with the CDRC to open five camps in L.A. County in the 1980s.<sup>150</sup> Since then, inmate firefighters have often been called to assist with a wide range of duties. When not assigned to fires, inmate crews “work on fuel reduction projects near their camp location.”<sup>151</sup> When assigned to fires, “inmate crews are assigned to initial attack, fire line creation, and mop ups to make a fire safe or reduce residual smoke after the fire is controlled.”<sup>152</sup>

The CDRC, in cooperation with the California Department of Forestry and Fire Protection (“CAL FIRE”) and the LA County Fire Department (“LAC Fire”), jointly operate thirty-five

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145. See *Updates*, CAL. DEP'T OF CORRS. & REHAB., (last updated Sept. 10, 2021) (explaining actions taken by the CDCR to reduce the California state prison populations) [perma.cc/XMC8-KK2L].

146. See *Additional Actions to Reduce Population and Maximize Space*, CAL. DEP'T OF CORRS. & REHAB. (explaining further measures taken by the CDCR to reduce populations in the state prisons) [perma.cc/HRJ7-G83Z].

147. See *id.* (explaining limitations on the relief provided).

148. See *id.* (detailing the procedure for inmates who are identified as medically high risk for COVID-19).

149. See *Conservation (Fire) Camps*, CAL. DEP'T OF CORRS. & REHAB. (explaining the mission and history of the California Conservation Camp program) [perma.cc/U4XG-3XVT].

150. See *id.* (explaining how the program began).

151. Ebrahimji & Moon, *supra* note 2.

152. See *id.* (providing an overview of the duties when inmate firefighter crews are assigned to fires).



conservation camps, commonly known as fire camps, located in twenty-five counties.<sup>153</sup> All camps are minimum-security facilities, and all are staffed with correctional staff.<sup>154</sup> As of October 2020, there are approximately 1,800 inmates working at fire camps.<sup>155</sup> Approximately 1,200 of those are fire line-qualified inmates.<sup>156</sup> In addition to inmate firefighters, camp inmates can work as support staff for the camps.<sup>157</sup> According to the Associated Press, inmates earn one dollar an hour in the field and two dollars a day when they're not on duty.<sup>158</sup> Inmate firefighters are also eligible to have their sentence reduced for every day spent fighting fires.<sup>159</sup> However, despite the extensive training and experience inmate firefighters gain while incarcerated, many states prohibit individuals with criminal records from obtaining the certification necessary to become a career firefighter.<sup>160</sup> California passed legislation that takes the first step to break down this barrier, but many other states still have similar prohibitions on becoming a career firefighter.<sup>161</sup>

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153. See *Conservation (Fire) Camps*, *supra* note 149 (explaining the setup of the fire camps across the state of California).

154. See *id.* (detailing the security level and staff at each fire camp).

155. See *id.* (stating the number of incarcerated individuals working at fire camps as of October 2020).

156. See *id.* (explaining that not all individuals at fire camps are fire line qualified).

157. See *id.* (explaining that some inmates who work at the fire camps work as support staff instead of on the fire front lines).

158. See Jonathan J. Cooper and Paul Elias, *14,000 Fight California Fires, Some From Prisons or Overseas*, AP NEWS (Aug. 9, 2018) (detailing the pay inmate firefighters receive) [<https://perma.cc/TBS4-E9DY>].

159. See *id.* (“Inmate firefighters also typically have their sentence reduced for every day spent fighting fires.”).

160. See, e.g. *Hiring Standards*, SALT LAKE CITY FIRE DEPARTMENT (stating that the Salt Lake City Fire Chief will not recommend the hiring of a firefighter that has been convicted of a felony crime) [[perma.cc/TV43-5EEX](https://perma.cc/TV43-5EEX)]; see also N.C. GEN. STAT. § 143B-943 (2015) (stating that in North Carolina, fire departments and emergency medical services will check the criminal records for any person who applies to be a firefighter); see also GA. CODE § 25-4-8 (2015) (disqualifying any person who has been convicted of, or pleaded guilty to, a felony in any jurisdiction of becoming a firefighter).

161. See Vanessa Romo, *California Bill Clears Path For Ex-Inmates To Become Firefighters*, NPR (Sept. 11, 2020) (stating that Gavin Newsom signed bill AB 2147 which allows inmates to become professional firefighters) [[perma.cc/KRD8-7EG7](https://perma.cc/KRD8-7EG7)].

Though this model provided early release relief for many incarcerated individuals, a large class were ineligible for early release through the COVID-19 relief programs.<sup>162</sup> As mentioned above, the relief only extends to those who are serving a sentence for non-violent offenses, who did not have to register as a sex offender, and who had sixty days or less to serve.<sup>163</sup> In 2017, half of the individuals admitted to California prisons were convicted of an assault, robbery, or weapons charge.<sup>164</sup> This prevents them from qualifying for relief under California's COVID-19 release plan, regardless of if they are high risk or not.<sup>165</sup> An individual's worst action should not define them for the rest of their life, and therefore the back-end model advocates for relief for all categories of offenders, not solely nonviolent offenders.<sup>166</sup>

#### IV. Collateral Consequences

The impact of mass incarceration is intensified by collateral consequences.<sup>167</sup> Collateral consequences are structural disabilities imposed by law as a result of a criminal conviction, regardless of whether an individual spends any time incarcerated.<sup>168</sup> The Model Penal Code states that collateral

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162. See John Myers, *California to Release 8,000 Prisoners in Hopes of Easing Coronavirus Crisis*, L.A. TIMES (July 10, 2020) (describing how prisoners who are serving time for any state law crime defined as violent or that involves domestic violence would be ineligible to participate in the COVID-19 early release program) [<https://perma.cc/YSG8-K9UG>].

163. See *COVID-19 Information*, CALIFORNIA DEP'T OF CORRECTIONS AND REHABILITATION (last updated January 29, 2021) (explaining who is eligible for the COVID-19 relief program) [[perma.cc/c5ay-xede](https://perma.cc/c5ay-xede)].

164. See *California's Prison Population*, PPIC (explaining the percentage of individuals incarcerated for various categories of offenses) [[perma.cc/DR2P-STNG](https://perma.cc/DR2P-STNG)].

165. See *COVID-19 Information*, *supra* note 162 (explaining who is eligible for the COVID-19 relief program).

166. See *infra* Part IV.

167. See Tyner and Fry, *supra* note 101, at 358 (explaining that the hidden consequences of incarceration have profound impacts on former inmates by limiting access to jobs and professional licensure).

168. See A.B.A., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS JUDICIAL BENCH BOOK 4*, (defining collateral consequences and providing background on how they can create social and economic disadvantages to the individuals) [[perma.cc/4MQW-LH37](https://perma.cc/4MQW-LH37)].

consequences “are penalties, disabilities, or disadvantages . . . that are authorized or required by state or federal law . . . but are not part of the sentence ordered by the court.”<sup>169</sup> They are “hidden sanctions that emerge automatically at the onset of a criminal conviction.”<sup>170</sup> A criminal record can be a persistent impediment to employment, which restricts one’s access to employment, higher education and even professional licensure.<sup>171</sup> This negatively impacts one’s ability to access the ladder of economic mobility.<sup>172</sup> However, for many defendants, collateral consequences are the harshest sanctions “because they limit opportunity, can be timeless, and inhibit full reentry.”<sup>173</sup> Collateral consequences have expanded since their inception and now include penalties such as mandatory deportation, inclusion on a public registry, loss of access to public housing and benefits, financial aid ineligibility, and occupational licensing restrictions.<sup>174</sup> Collateral consequences arise under both federal and state law, and in most states, hundreds of collateral consequences attach to any felony conviction, and additional collateral consequences attach for specific types of criminal convictions.<sup>175</sup>

Due to their overrepresentation in the criminal justice system, there is a disparate impact on the quality of life within

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169. See MODEL PENAL CODE § 6.01 (AM. L. INST., Proposed Final Draft 2017) (defining collateral consequences).

170. See Tyner and Fry, *supra* note 101, at 360 (describing collateral consequences as hidden sanctions because they are not quantifiable by a sentence or penalties).

171. See *id.* at 369 (discussing the impact of collateral consequences on employment opportunities).

172. See *id.* (discussing the impact of collateral consequences on economic mobility).

173. See Murray, *supra* note 12, at 1032 (explaining that the lasting effects of collateral consequences are often the harshest part of a criminal sentence, especially when defendants often do not know of these consequences at the time they enter into a plea deal).

174. See MODEL PENAL CODE § 6.01 (AM. L. INST., Proposed Final Draft 2017) (explaining the collateral consequences of criminal convictions).

175. See MARGARET COLGATE LOVE, JENNY ROBERTS, AND CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY & PRACTICE (2013) (discussing the different types of collateral consequences).

the Black community.<sup>176</sup> Moreover, there is a social stigma associated with felony convictions. “Chief Justice Earl Warren noted: ‘Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.’”<sup>177</sup> Despite these broad implications, there is a lack of awareness of collateral consequences for the general public and attorneys.<sup>178</sup>

### A. Employment

“Becoming gainfully employed is one of the key exit points of the criminal justice system.”<sup>179</sup> Forty of the fifty states and the District of Columbia require parolees to maintain employment, or else face more prison time.<sup>180</sup> Employment impacts upward mobility, wealth-building, and one’s quality of life.<sup>181</sup> Conversely, joblessness has been identified by some as the single most important predictor of recidivism.<sup>182</sup> Black ex-offenders are the most severely disadvantaged applicants in the job market, and Black men convicted of felonies are the least likely to receive job offers of any demographic group.<sup>183</sup> In response to this issue, a

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176. See *id.* at 370 (explaining how collateral consequences have a disparate impact on the Black community due to their overrepresentation in the criminal justice system).

177. *Id.* (citing *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960)).

178. See *id.* (noting that despite the harsh effects of collateral consequences, their impacts are not widely known).

179. Tyner and Fry, *supra* note 101, at 373.

180. See ALEXANDER, *supra* note 33, at 152 (highlighting the pressure on the former prisoners to promptly find employment, else face the potential for more time in prison).

181. See THE COUNCIL OF STATE GOV'TS JUSTICE CTR., INTEGRATED REENTRY AND EMPLOYMENT STRATEGIES: REDUCING RECIDIVISM AND PROMOTING JOB READINESS 2 (2013) (detailing the benefits of employment on recidivism statistics) [perma.cc/XX49-N7SD].

182. See, e.g., Tyner and Fry, *supra* note 101, at 373 (stating the finding that joblessness was the single most important predictor of joblessness).

183. See ALEXANDER, *supra* note 33, at 152 (discussing the disparate impact of a criminal conviction on Black individuals, particularly Black men, as compared to other groups).

growing number of advocates have launched “Ban the Box”<sup>184</sup> campaigns, but “because the association of race and criminality is so pervasive, employers may use less accurate and discriminatory methods to screen out those perceived to be likely criminals.”<sup>185</sup> Misguided proxies can be used by employers when no box is available on the application form to identify criminals.<sup>186</sup>

### B. Voting

Though voting is a basic right of American citizens, over 6.1 million Americans are prohibited from voting due to felony disenfranchisement laws.<sup>187</sup> These laws prohibit an American citizen from voting because of a prior felony conviction, regardless of how relevant said felony is to the right, ability, or competency to vote.<sup>188</sup> The Fourteenth Amendment allows a state to revoke a citizen’s voting rights for “participation in rebellion, or other crime.”<sup>189</sup> As a result of racially discriminatory policies, more Black individuals today are disenfranchised than in 1870 when the Fifteenth Amendment was passed.<sup>190</sup> Some states allow for

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184. See *About: The Ban the Box Campaign*, THE BAN THE BOX CAMPAIGN (explaining the Ban the Box Campaign as one started by a national civil rights movement of formerly incarcerated people and their families asking employers to remove the box asking about prior convictions history on employment applications) [perma.cc/94J5-4UL2].

185. *Id.*

186. See *id.* (explaining that some scholars believe a result of the Ban the Box Campaign is that Black males may suffer more discrimination when criminal history information is not available).

187. See *Richardson v. Ramirez*, 418 U.S. 24, 42–43 (1974) (holding that because of Section Two of the Fourteenth Amendment and the legislative history behind the Fourteenth Amendment, a state could constitutionally disenfranchise felons); see also Erin Kelly, *Do the Crime, Do the Time—And Then Some: Problems with Felon Disenfranchisement and Possible Solutions*, 51 U. TOL. L. REV. 389, 389 (2020) (explaining felon disenfranchisement and its consequences on the formerly incarcerated).

188. See Kelly, *supra* note 187, at 389 (describing felony disenfranchisement laws).

189. U.S. CONST. amend. XIV, § 2.

190. See Kelly, *supra* note 187, at 390 (describing the effect of voter disenfranchisement as compared to prior to the enactment of the 15th Amendment); see also ALEXANDER, *supra* note 33, at 159 (discussing the fact that 48 states and the District of Columbia prohibit former inmates from voting).

restoration of voter rights, but only after the individual pays outstanding court costs or fines.<sup>191</sup> This is made impossible by the “debtor’s prison” that returned citizens face following their incarceration.<sup>192</sup> In some jurisdictions, returned citizens are even billed for drug testing and drug treatment they are required to receive as a condition of probation.<sup>193</sup> Beyond this, many states add additional “poverty penalties” by imposing late fees, payment plan fees, and interest.<sup>194</sup> These act as modern poll taxes and literacy tests—“rules designed to make voting a practical impossibility for a group defined largely by race.”<sup>195</sup>

### C. Housing

More than 650,000 people are released from prison each year, and for many, finding a new home is among the hardest of their tasks upon reentry.<sup>196</sup> The history of housing discrimination against Black individuals is longstanding and spans back throughout American history.<sup>197</sup> The War on Drugs expanded several federal laws that contributed to a new zero-tolerance policy for any criminal behavior in public housing, most notably, the One Strike policy.<sup>198</sup> “These policies require every public

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191. See ALEXANDER, *supra* note 33, at 159 (“Typically the restoration process is a bureaucratic maze that requires the payment of fines or court costs.”).

192. See *id.* at 155 (describing the host of agencies that newly released prisoners are required to make payments to following their release).

193. See *id.* (discussing the notion that some states also impose fees for services or treatments required as conditions of release).

194. See *id.* (describing the “poverty penalty” that further increases the debt required to be paid before an individual can go through the restoration process).

195. See *id.* at 159 (describing that voter restoration process often resembles a modern-day poll tax).

196. See ALEXANDER, *supra* note 33, at 148 (explaining that prisoners returning home are typically the poorest of the poor, who lack the ability to pay for private housing and are often denied public housing, yet they are the individuals who need this stability most).

197. See Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U. L. REV. 1123, 1125 (2016) (giving a historical overview of housing discrimination in the United States).

198. See *id.* at 1138 (describing the “One Strike” policies that arose from concerns about the perceived increase of crime within public housing authorities).

housing lease to stipulate that if the tenant, or any member of the tenant's household, or any guest of the tenant, engages in any drug-related or other criminal activity on or off the premises, the tenancy will be terminated."<sup>199</sup> Public authorities even have the discretion to terminate the lease of a tenant when a family member or guest engages in drug related activity, therefore dissuading individuals to take in relatives or friends with prior drug convictions.<sup>200</sup>

Though the One Strike rules were implemented with good intentions, low-income tenants, often mothers wishing to keep their families together, are the ones who bear the brunt of the rule's unfairness.<sup>201</sup> Affordable housing is crucial to the economic security of low-income families.<sup>202</sup> "When parents are rejected from public housing through the One Strike policy they are at greater risk of homelessness and family disintegration."<sup>203</sup> Restrictions on access to subsidized housing or termination of tenancy based on criminal activity continues to be one of the most consequential obstacles to successful reentry.<sup>204</sup>

These effects are felt even more onerously by someone in subsidized housing who is found to be involved in a criminal offense or drug activity.<sup>205</sup> Offending parties are sometimes offered "permanent exclusion" rather than eviction, as a way for the leaseholder to retain their tenancy.<sup>206</sup> This leaves families with the heartbreaking choice of breaking up their family or

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199. ALEXANDER, *supra* note 33, at 146.

200. See Cammett, *supra* note 197, at 1140–41 (depicting HUD's harsh eviction scheme in the wake of the War on Drugs).

201. See *id.* at 1141 (explaining that innocent people who have the least power or economic resources are often the ones most impacted by these rules).

202. See *id.* at 1143 (stating that affordable housing has an impact on the family as a whole, rather than just the individual).

203. See *id.* at 1144–45 (describing the hardships on families when they are rejected from public housing).

204. See *id.* at 1137 (detailing the difficulties in obtaining housing with a criminal record).

205. See *id.* at 1144 (describing the impact of subsidized housing laws on young offenders).

206. See *id.* (explaining the "permanent exclusion" option given to young offenders in order to prevent the whole family from facing eviction).

losing their home.<sup>207</sup> Though this One Strike policy is formally race-neutral, it reinforces racial stigma because Black individuals are arrested and incarcerated at disproportionate rates, making them “statistically more vulnerable to exclusions from subsidized housing.”<sup>208</sup> Access to stable and affordable housing is a basic human right, and it also increases the likelihood that a person with a criminal record will obtain and retain employment, will remain drug free, and will avoid re-offending.<sup>209</sup>

Once convicted, collateral consequences follow the individual for the rest of his or her life.<sup>210</sup> Some have argued that because of this effect, collateral consequences should be understood as a mode of punishment due to their incapacitating effect, and thus understood to be a part of the criminal sentence a defendant receives from a guilty plea.<sup>211</sup> The back-end abolition model detailed in the next Part of this Note explains the need for relief in the form of the removal of collateral consequences. Collateral consequences punish individuals long after they have served their time, and thus voting rights should be restored, housing and financial benefits should not be impacted, employers should not be permitted to discriminate based on prior convictions, because a criminal conviction should not be permitted to haunt a formerly incarcerated individual for the rest of their lives.

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207. *See id.* (“Such a situation creates a conflict of interest between parents and their offspring, leaving many families with the terrible choice of whether to send a member into exile for life or relinquish the family’s home.”).

208. *See id.* at 1145 (explaining the race-based effects on Black citizens due to their higher rates of incarceration).

209. *See* ALEXANDER, *supra* note 33, at 148 (explaining why affordable and reliable housing is crucial to the success of the formerly incarcerated; research shows that the use of state prisons and jails dropped by 74 and 40 percent, respectively, when individuals with prior criminal records were provided with supportive housing).

210. *See, e.g.,* Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C.L. 213, 226 (2016) (stating that courts have recognized civil death as punishment and additional restrictions can be imposed at any time).

211. *See id.* (explaining his argument that collateral consequences should be associated with criminal sentences that immediately alter individual liberty).



*V. Provisional Back-End Abolition Model*

A comprehensive overhaul is needed to fix the injustices that have occurred within the criminal justice system since its inception. Reform can begin with a reduction of sentences on the front-end. However, a reduction in prison terms does not substantially impact those individuals who are already incarcerated and a part of the criminal justice system.<sup>212</sup> “Once a person is labeled a felon . . . discrimination, stigma, and exclusion are perfectly legal and privileges of citizenship such as voting and jury service are off-limits.”<sup>213</sup>

The system of prison labor as it stands is a badge and incident of slavery that needs to be abolished. “Over time, the Thirteenth Amendment’s Punishment Clause has rendered freedom from the shackles of slavery more illusory than real.”<sup>214</sup> There is a distinction between work and slavery, but that distinction has become muddled within the prison system.<sup>215</sup> Michele Goodwin holds the Chancellor’s Professorship at the University of California, Irvine and is partially-known for her scholarship in the area of civil liberties.<sup>216</sup> Goodwin highlights the fact that “abysmally low prison wage does not fit within the norm of what traditional definitions of ‘work’ convey and more fittingly locates within the slavery context.”<sup>217</sup> One individual noted that while working was good and productive, the issue with prison labor is that the inmates are being charged for the services produced, rather than compensated.<sup>218</sup> Moreover, if they do not

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212. See ALEXANDER, *supra* note 33, at 277 (“As of 2008 there were approximately 2.3 million people in prisons and jails, and a staggering 5.1 million people under ‘community correctional supervisions’ – i.e., on probation or parole.”).

213. *Id.*

214. Goodwin, *supra* note 26, at 980.

215. See *id.* at 963 (highlighting the fact that “work,” as opposed to slavery, implies the worker will be fairly compensated).

216. See *About Michele’s Research*, MICHELE BRATCHER GOODWIN (explaining Goodwin’s research and scholarship) [<https://perma.cc/YB3J-NR XR>].

217. Goodwin, *supra* note 26, at 963.

218. See *id.* at 963–64 (“Melvin Ray, an inmate . . . stated: ‘Work is good for anyone . . . The problem is that our work is producing services that we’re being charged for, that we don’t get any compensation from.’”).

complete their work, they can be punished by having their sentence lengthened.<sup>219</sup>

At the Angola prison, where inmates grow and harvest crops, the memory of slavery remains potent—three quarters of the Angola inmates are Black and work in “backbreaking conditions while armed guards stand watch on horseback.”<sup>220</sup> Goodwin argues that as written, the Thirteenth Amendment provides authority for the leasing of any human labor subject to criminal punishment, and the evidence has exposed the disparate impact of both Jim Crow and modern slavery on Black individuals.<sup>221</sup> Further, she advances several ways to divest from prison slavery and the systems that feed into it: Amending the Thirteenth Amendment,<sup>222</sup> adding a new amendment abolishing prison slavery,<sup>223</sup> enacting legislation,<sup>224</sup> or getting the Supreme Court involved.<sup>225</sup> Any of these solutions would certainly aid in the advancement of this proposed back-end abolition model. However, none of these solutions alone are enough.

Several states have passed legislation to try and aid in back-end relief for incarcerated and formerly incarcerated individuals.<sup>226</sup> For example, in California, Governor Gavin

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219. See Kanyakrit Vongkiatkajorn, *Inmates are Kicking Off a Nationwide Prison Strike Today*, MOTHER JONES (Sept. 9, 2016) (detailing the reasoning behind a nationwide prison strike) [<https://perma.cc/X8T4-WE2Q>].

220. See Goodwin, *supra* note 26, at 966 (explaining the troubling comparison between Antebellum slavery and Angola’s inmate laborers).

221. See *id.* at 980 (explaining that the Thirteenth Amendment has allowed for this system of modern slavery to persist).

222. See *id.* at 981 (proposing that the amendment could be revised by simply striking the language “except as a punishment for crime whereof the party shall have been duly convicted” completely).

223. See *id.* at 982 (stating that a new amendment could be passed, striking the Punishment Clause from the Thirteenth Amendment).

224. See *id.* at 983–84 (advancing another solution through the enactment of legislation to ban slavery, including for conviction of a crime, at a state-by-state level).

225. See *id.* at 987 (proposing Supreme Court intervention to determine the constitutionality of the existing and the above proposed amendments).

226. See, e.g., Matt Vasilogambros, *More States Expand the Ballot to Previously Incarcerated*, THE PEW CHARITABLE TRUSTS (June 1, 2021) (explaining that 20 states have restored voting rights to formerly incarcerated individuals) [<https://perma.cc/7KKM-5242>]; Eliza Schultz and Rebecca Vallas, *Six States Leading the Charge on Second-Chance Policies*, CENTER FOR AMERICAN PROGRESS

Newsom signed Bill AB2147 on September 9th, 2020, allowing certain individuals who are on the frontlines fighting wildfires to have their records expunged after serving their sentences.<sup>227</sup>

Last year, Michigan also passed a law which sets aside convictions for certain offenses after a fixed period of time.<sup>228</sup> Beginning two years after the act's passage, the automatic expungement allows for the setting aside of "a misdemeanor conviction for an offense for which the maximum punishment is imprisonment for not more than 92 days."<sup>229</sup> Additionally after ten years, felony convictions detailed in the act can be set aside if a list of criteria are met.<sup>230</sup> The most notable result is that this law allows individuals with misdemeanor marijuana convictions to clear the offenses sooner if their behavior would not have been criminalized after voters' legalization of marijuana in 2018.<sup>231</sup> However, again, there are exclusions if the individual has more than one conviction for an assaultive crime, or has attempted to commit an assaultive crime.<sup>232</sup>

These state models, as well as the COVID-19 early release programs, are great first steps, but they do not go far enough. Additionally, most states are failing to pass these types of laws, and the states that have limit relief to certain classes of offenders. The Restoration of Rights Project details each state's expungement and pardoning rights, showing that very few states

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(Apr. 7, 2017, 7:00AM) (detailing various pieces of re-entry reform legislation that has been passed or is being considered) [<https://perma.cc/9SAL-NFS2>].

227. See J. Edward Moreno, *Newsom Signs Legislation Allowing Pathway for Inmate Firefighters to Become Professional After Release*, THE HILL (Sept. 12, 2020, 5:18 PM) (explaining California Governor's recent legislation allowing some former inmate firefighters to become professional firefighters upon release) [<https://perma.cc/K6UL-NXXC>].

228. See H.B. 4980, 100th Leg., Reg. Sess. (Mich. 2020) detailing the application process for setting aside convictions) [<https://perma.cc/6ED4-ELSU>].

229. MICH. COMP. LAWS ANN. § 780.621g (West 2021).

230. *Id.*

231. See David Eggert, *Michigan Legislature Approves Automatic Expungement Bills*, AP NEWS (Sept. 24, 2020) (explaining the effects of Michigan's expungement bill) [<https://perma.cc/766X-ZJC4>].

232. See H.B. 4980, *supra* note 228 (detailing the limitations on the Act's reach).

have elected to provide this relief to the formerly incarcerated.<sup>233</sup> Therefore, there is limited relief available for incarcerated and formerly incarcerated individuals to either have sentences reduced or to have records expunged so that they can more easily reenter society. The provisional back-end abolition model expands the relief provided from these programs to all individuals through an incentive-based, voluntary labor program.

#### *A. The Back-End Abolition Model*

This provisional model<sup>234</sup> provides relief to incarcerated individuals forced to participate in the prison labor system by paying fair hourly wages for labor, granting sentence reductions in relation to hours worked, and relief from collateral consequences once released.<sup>235</sup> This relief is available for all individuals, regardless of their crime. The type of offense (non-violent versus violent) will matter for determining how quickly an individual can reduce his or her sentence, but violent offenders are still eligible for the same relief. Additionally, this model is meant to be retroactive and therefore apply to any returned citizen who worked while incarcerated, making them eligible for expungement, pardons, or clemency. Lastly, this model is not meant to be exhaustive, but merely meant to raise the foundational issues and begin to offer solutions to redressing these issues. This model can be implemented by either the Executive branch through its power to pardon and executive orders, or through Legislative branch's creation of a new law reflecting this policy.

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233. See *50 State Comparison: Expungement, Sealing & Other Record Relief, RESTORATION OF RTS. PROJECT* (providing a 50-state comparison of each states' expungement, sealing, and other record relief) [<https://perma.cc/Z364-W7VY>].

234. See Carbado, *supra* note 17, at 1479 (explaining the concept of a provisional model as one that is not meant to be total or complete).

235. If the Abolition Amendment is passed, this model would just allow for individuals to opt into the labor, instead of being forced to do labor while incarcerated.

*B. Sentence Reductions*

In addition to fair pay, even with the reform efforts on the front-end, sentence lengths are astronomical. This model includes sentence reductions in exchange for time worked. In this system, for every eight hours worked (consecutive or combined over several shifts), individuals receive time off their sentence.<sup>236</sup> This model differentiates between non-violent and violent offenders, using the definition provided by the Sentencing Commission to differentiate these offenses.<sup>237</sup> As illustrated in Figure 1, inmates who qualify as non-violent offenders receive four days off of his or her sentence for every eight hours of prison labor, meaning that they serve at least a fifth of the imposed sentence. Those categorized as violent offenders receive one day for every eight hours worked, thereby requiring they serve at least half of their sentence. A variation of this model is already seen in prisons that allow for “good time”<sup>238</sup> as well as the California model where inmates qualify to have their sentence reduced for each day spent fighting wildfires.<sup>239</sup>

Offense Type	Time Worked	Sentence Reduction Received	Example: 40 Year Sentence
Violent Offense	8 Hours	Sentence Reduction of 1 Day Per 8 Hour Day	40 Years Converted to 20 Years

236. Individuals serving a life sentence are eligible for relief under this model as well. To calculate their sentence reduction, the life sentence should be converted to years based on when the prison sentence began and the life expectancy for their race and gender. Once the sentence is calculated, the reduction formula shall apply. Similarly, the death penalty should be abolished and those currently on death row should have their sentences treated as life sentences and calculated for relief in the same manner.

237. See Federal Sentencing Guidelines Manual § 4B1.1, Am. 798 (United States Sentencing Comm’n 2016) (defining crimes of violence) [<https://perma.cc/6A8L-7MWZ>].

238. See *Good Time Law and Legal Definition*, US LEGAL (“Good time is an early release procedure under determinate sentencing regimes: prison inmates get an automatic reduction in sentence for every day they spend without being written up for a violation of prison rules.”) [<https://perma.cc/HT25-Z63U>].

239. See Moreno, *supra* note 227 (explaining that the inmate firefighter system in California allows for inmate firefighters to have their sentenced reduced for every day spent fighting fires).

Non-Violent Offense	8 Hours	Sentence Reduction of 4 Days Per 8 Hour Day	40 Years Converted to 8 Years
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Figure 1. Sentence Reductions for Each Eight Hours Worked

### C. Fair Wages

Incarcerated individuals deserve fair pay. For each hour worked, they should be compensated with either the minimum wage of that state, if in state prison, or the federal minimum wage if they are in either federal prison or a state that does not have a minimum wage higher than the federal minimum wage. Not only do the current low wages make it hard for individuals to afford items in prison, but these court ordered financial obligations also become detrimental to reintegration by competing with other “essential life expenses such as food, rent and child support.”<sup>240</sup> Moreover, a consequence of these financial burdens is that, particularly when individuals are unable to pay, recidivism becomes more likely.<sup>241</sup> Returned citizens can owe as much as sixty percent of their annual income in criminal debts.<sup>242</sup> Additionally, restitution is becoming an increasingly utilized punishment; many states allow courts to impose restitution in addition to other punishments and often this payment is a condition of parole or restoration of civil rights.<sup>243</sup> Therefore, it is essential that these individuals are properly compensated when working during prison so that they can pay off criminal debts with the money they earn, rather than leave prison in thousands of dollars of debt.

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240. See David Reutter, *Report Finds Criminal Justice Debt Creates Barriers to Offender Reintegration*, PRISON LEGAL NEWS (Aug. 4, 2016) (explaining the detrimental effect that prison debt can have on a returned citizen’s reintegration success) [<https://perma.cc/7SDG-STXX>].

241. See *id.* (detailing the consequences for returned citizens who are unable to pay resulting costs from their incarceration).

242. See *id.* (stating the high proportion of returned citizens’ income that is dedicated to paying criminal debts).

243. See, e.g., Charles Decker, *Time to Reckon with Prison Labor*, YALE ISPS (arguing the need for higher prison wages in order to meet the financial burdens imposed by the criminal justice system) [<https://perma.cc/Y6F8-SAWJ>].

*D. Relief from Collateral Consequences*

Relief from collateral consequences is a model that is already partially in effect and can be seen in Governor Newsom's bill passed in September of 2020.<sup>244</sup> This California bill allows for certain eligible individuals who have successfully participated in the California Conservation Camp Program, to withdraw a guilty plea, a plea of *nolo contendere*, or to have a guilty verdict dismissed.<sup>245</sup> This system incentivizes work by protecting against various collateral consequences facing individuals upon re-entry. Similarly, this back-end model calls for relief for any individual who participates in prison labor while serving their sentence. To be eligible for expungement, pardons, or clemency, individuals must opt into this program and work off at least twenty percent<sup>246</sup> of their sentence. This amount of time is in place to prevent individuals from working one day and claiming relief, while also recognizing that individuals should not have to spend their entire time incarcerated working to be eligible for relief. This final piece of relief provided is important for aiding returned citizens in their process of reentry. As detailed above, collateral consequences can often be the most damaging piece of a criminal conviction.<sup>247</sup> With difficulty securing housing, employment, and government aid, a criminal conviction stacks the cards against returned citizens.<sup>248</sup>

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244. See Assemb. B. 2147 (Cal. 2020) (explaining the process for expunging criminal records).

245. *Id.*

246. This percentage of time is still under consideration.

247. See Murray, *supra* note 12, at 1032 (explaining that the lasting effects of collateral consequences are often the harshest part of a criminal sentence, especially when defendants often do not know of these consequences at the time they enter into a plea deal).

248. See Tyner and Fry, *supra* note 101, at 372–73 (explaining that the hidden consequences of incarceration limit the ability to find housing and jobs, as well as licensures).

*E. Abolition*

There are currently 155,775 total federal inmates.<sup>249</sup> This provisional back-end model slashes sentence lengths in half for violent offenders, and into a fifth for non-violent offenders. Figure 2 depicts the contrast in average sentence lengths the various criminal offenses face under the current incarceration model compared to the back-end model.

Using this information, along with rough calculations using the average decline in prison population over the last few years, the average number of individuals sentenced at the federal level each year, and the average sentence length across the board (combining non-violent and violent offenders), Figure 3 shows the estimated difference in prison population using the current incarceration model and the back-end model. Because the back-end model proposes steep reductions in the amount of time an individual would spend incarcerated, it would have huge impacts on the prison population. Figure 3 depicts the projected difference in the prison population between the current model and the proposed back-end model. The potential impact this could have in assisting the abolition movement is huge.

Estimated Federal Prison Population	Average Sentence Imposed	Average Time Served Under Current Model (In Months) <sup>250</sup>	Average Time Served Under Back-End Model (In Months)
Violent Offenders	81.4	71.6	40.7

249. See *Population Statistics*, FEDERAL BUREAU OF PRISONS (last updated Sept. 20, 2021) (providing the number of federal inmates) [<https://perma.cc/8UEQ-KLXG>].

250. See *Prison Time Surges For Federal Inmates*, THE PEW CHARITABLE TRUSTS (Nov. 18, 2015) (citing the Bureau of Justice Statistics which estimates that federal prison inmates served an average of 88 percent of their sentence) [<https://perma.cc/XH5K-LSXT>].



Non-Violent Offenders (Drug Offenses)	66.6	58.6	13.3
Non-Violent Offenders (Property Offenses)	25.8	22.7	5.2
Non-violent Offenders (Public Order Offenses)	42.6	37.5	8.5
Non-Violent Offenders (Weapon Offenses)	64.7	56.9	12.9
Non-Violent Offenders (Immigration Offenses)	19.7	17.3	3.9

*Figure 2. Difference in Sentence Lengths Under Current Model and Back-End Model*<sup>251</sup>

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251. This data is based on 2012 Bureau of Justice Statistics. See Mark Motivans, Ph.D., *Federal Justice Statistics, 2012 – Statistical Tables* 39 tbl.7.11 (Jan. 2015) [<https://perma.cc/M28Q-56ZN>]. According to BJS, the average individual serves 88% of their sentence. Sentence served was then multiplied by (1/.88) to determine the average sentence length imposed by the court. This number was used to calculate the time that would be served under the back-end model. See *id.*

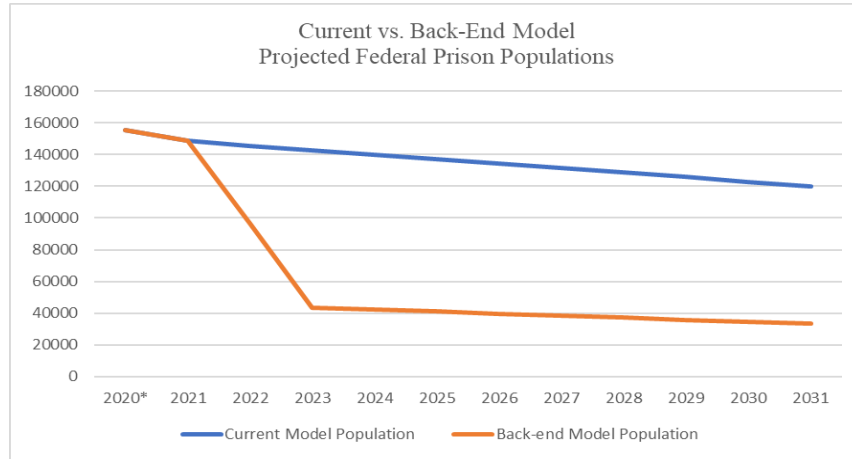


Figure 3. Projected Incarceration Rates: Current v. Back-End Model<sup>252</sup>

VI. Conclusion

“A new civil rights movement cannot be organized around the relics of the earlier system of control if it is to address

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252. Data points included in Figure 3; \*Special thanks to Holly Sowinski for her assistance forecasting the current model population and to Jordan Arnold for her assistance calculating the back-end model population.

Year	Current Model Population	Back-End Model Population
2020*	155,562	155,562
2021	148,490	148,490
2022	145,648	96,636
2023	142,807	43,513
2024	139,965	42,244
2025	137,124	40,975
2026	134,282	39,706
2027	131,435	38,437
2028	128,599	37,168
2029	125,758	35,899
2030	122,916	34,630
2031	120,075	33,361

meaningfully the racial realities of our time.”<sup>253</sup> Our system of incarceration is dated and broken. Abolition of the prison labor system is long overdue and mass incarceration needs to end. The proposed model would aid, if not be essential, in achieving all these goals. The proposed model estimates that in 10 years, the prison population would be less than a third of what it would be otherwise without intervention. Not only does this model reduce prison population, but it also helps keep returned citizens out of prison by removing the burden of a criminal record and collateral consequences, setting them up for success upon reentry. Implementation of this model is the best way forward to end mass incarceration that has long plagued the United States.

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253. ALEXANDER, *supra* note 33, at 277.