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Race-Conscious Remedies in the Criminal Justice System as Reparations

Samantha L. Diaz

I. Introduction

The United States incarcerates a greater percentage of its citizenry than any other country in the world.¹ More than 1 in 100 adults is incarcerated in the United States.² However, the rates of incarceration are not proportionately distributed among its citizenry. Hundreds of thousands of African Americans³ are incarcerated at disproportionately high rates. African Americans account for 12.8% of the United States population, yet comprise 42% of those incarcerated in federal and state prisons.⁴ For example, in 2006, one in nine young Black men was incarcerated, and Black men were eight times more likely to be incarcerated than their white male counterparts.⁵ What I have just described is known as the mass incarceration of African Americans, which is “the imprisonment of a percentage of the population greater than that necessary to accomplish valid penal goals. Mass incarceration may be used for purposes of genocide, group oppression or repressive social control.”⁶

This paper contends that the disproportionate rising crime and incarceration rates plaguing poor communities of color are a manifestation of income and educational inequality—both of which are continuing legacies of slavery and Jim Crow “(the period between the end of the Civil

¹Pew Center on the States, *One in 100: Behind Bars in America*, 5 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf

² *Id.*

³ Throughout this paper, I will use “African American” and “Black” interchangeably.

⁴ A.E. Raza, *Legacies of the Racialization of Incarceration: from Convict-Lease to the Prison Industrial Complex*, 2011 J. INST. JUST. INT’L STUD. 159, 160.

⁵ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, 98 n.24 (The New Press 2010).

⁶ Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: or Why the ‘War on Drugs’ was a ‘War on Blacks’*, 6 J. GENDER RACE & JUST. 381, 392 n.74 (2002).

War and the modern Civil Rights era of the 1950s, which witnessed limited voting, educational, and employment opportunities).”⁷ The source of educational and economic inequality stems, in large part, from the United States’ failure to compensate generations of African American families for the egregious wrongs inflicted upon them, namely, decades of forced uncompensated labor from 1620 until 1865, when slavery was abolished, followed by decades of Jim Crow segregation.⁸

The consequences that resulted from the failure to pay reparations for slavery and the atrocities that were thrust upon blacks through the system of Jim Crow are poverty and limited educational opportunities—both of which serve as a breeding ground for high levels of crime and disproportionately high incarceration rates. Scholars have shown direct connections between poverty and incarceration,⁹ and the lack of education and incarceration.¹⁰ This paper contends that because poverty is significantly connected to crime and the lack of education, there is an increased likelihood that the poor will be incarcerated relative to their wealthier counterparts. Thus, it follows that African Americans are more likely to be poor because of slavery, and therefore, more likely to be incarcerated.

This paper argues that poverty is a direct consequence of slavery, and since the government failed to compensate slaves and their descendants, the government is partly responsible for Black poverty. And because the government is responsible for Black poverty, it follows that the government is responsible for the mass incarceration of African Americans. The government has a duty to compensate the descendants of slaves not because of the need to remedy past harms,

⁷ ALFRED BROPHY, *REPARATIONS: PRO & CON*, xi-xii (Oxford Univ. Press 2006).

⁸ *Id.* at xi.

⁹ Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM L. & CRIMINOLOGY 1043, 1059 n.108 (2010).

¹⁰ *Id.*

but because of the continued subjugation of African Americans following slavery and Jim Crow, and those eras' continuing effects on African Americans today.

In addition to the United States' failure to pay reparations, even after the passage of the Thirteenth Amendment, which abolished slavery, Blacks continued to be enslaved through the Black Codes, the convict-lease system, and Jim Crow laws. Today, this continued enslavement is exemplified in the practice of racial profiling, which can be traced directly to the Slave Codes; the disparities in the drug sentencing laws, which can be traced directly to the Black Codes; and in the prison-industrial complex, which can be traced directly to the convict-lease system.

This paper contends that slavery continues to exist in the mass incarceration of African Americans. I am seeking to prescribe a solution to the mass incarceration of African Americans.¹¹ The mass incarceration of African Americans is no mistake—it is an incident of slavery, and therefore, descendants of slaves are entitled to race-conscious remedies in the context of the criminal justice system as a form of reparation for African Americans.

The paper will proceed as follows: Part II will briefly examine what reparations are, and the justification underlying reparations payments for slavery. Part II introduces Paul Butler's approach to reparations for past and present discrimination suffered by descendants of slaves, which seeks to prescribe a solution to mass incarceration, namely, employing race-conscious remedies in the criminal justice system.¹² In this part, I introduce Butler's approach to reparations in the context of the criminal justice system, which is the foundational premise upon which my proposed solutions to mass incarceration articulated in Part IV rely and build upon.

¹¹ Although Latinos are victims of mass incarceration, the concept of reparations for Latinos is beyond the scope of this paper.

¹² Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. REV. 841, 875 (1997) (noting that proponents of race-conscious remedies in the criminal justice system would experience difficulty making the connection between historical discrimination and "disproportionate black criminality").

Part III discusses reparations in its historical context to identify the direct consequences that resulted from the United States' failure to make reparations payments for slavery, such as income and educational inequality. Part III examines the historical parallels between the subordination of Blacks post-emancipation and the gross inequalities that plague African Americans today, like poverty, educational disparities, racial profiling, disparities in the federal drug sentencing laws, and the disproportionate number of African Americans incarcerated—all of which are continuing effects of slavery and Jim Crow. These historical parallels are specifically examined by tracing the practice of racial profiling to the Slave Codes; the disparities in the drug sentencing laws to the Black Codes; and the prison industrial complex to the convict-lease system. By undertaking this historical analysis, Part III demonstrates that the overrepresentation of Blacks in prisons is attributable to poverty, educational inequality, and the disproportionate enforcement and racialization of criminal law, all of which have been historically used to preserve the legacy of slavery and maintain white supremacy. Part III establishes evidence of racial meaning in the criminal justice system by analogizing historical practices to modern-day inequalities from which we can conclude are directly traceable to slavery. Characterizing governmental action as racially significant or racially meaningful is to say that it is influenced by racism.¹³ Evidence of racial meaning, which Part III demonstrates with historical parallels, justifies the use of race-conscious remedies in the criminal justice system as a form of reparation.

Part IV examines and builds upon Butler's use of race-conscious remedies in criminal justice as a form of reparation.¹⁴ Butler's work differs from my proposal insofar as his does not undertake an analysis of historical parallels as a substantiating basis. Part IV examines solutions

¹³ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 2 (1987).

¹⁴ Butler, *supra* note 12, at 875.

to the disparities in incarceration, namely, mandating drug treatment alternatives to incarceration; changing the conditions of parole, post-release supervision, and probation, and adequate discharge planning to reduce the rate of recidivism. Lastly, Part IV expands upon the solutions proposed to mass incarceration, and proposes race-conscious remedies that will reduce recidivism, and the disproportionate number of African Americans incarcerated.

II. What are Reparations?

First, in order to understand why race-conscious remedies should be employed in the criminal justice system as a form of reparation, one must understand what reparations are and their justifications. This part discusses what reparations are and the justifications underlying reparations payments for slavery and Jim Crow. Lastly, this part introduces Paul Butler's unique solution to mass incarceration, namely, employing race-conscious remedies in the criminal justice system as a form of reparation. In this part, I introduce Butler's argument for reparations in the context of the criminal justice system because it serves as the guiding, foundational premise upon which my proposed solutions to mass incarceration articulated in Part IV rely and build upon.

What are reparations? Alfred Brophy, one of the leading reparations proponents, describes reparations as "*programs that are justified on the basis of past harm and that are also designed to assess and correct that harm and/or improve the lives of victims in the future.*"¹⁵ By making reference to the lives of victims in the future, this proposition presumes that there will be victims in the future because of those past harms, and thus acknowledging further victimization by virtue of past harms, accepts that those harms are continuing. This paper proceeds to

¹⁵ Brophy, *supra* note 12, at 15.

demonstrate that because African Americans continue to suffer from the harmful effects of slavery and Jim Crow, reparations in the context of the criminal justice system are justified.

Reparations advocates argue that because the freed slaves were never compensated for the harms of slavery, and because they were prohibited from learning how to read when they were enslaved, their descendants inevitably inherited both educational and economic inequality.¹⁶ Consequently, the racial injustices that began during slavery, and continued throughout Jim Crow have had a lasting impact on the opportunities available to African Americans today, thus leaving Blacks socially and economically inferior to whites.¹⁷

Racial justice, which can be achieved through the redistribution of wealth, is a central focus underlying the payment of reparations for slavery and Jim Crow.¹⁸ The idea is to put the descendants of slaves back in the position they would have been in had it not been for the legacy of slavery and Jim Crow.¹⁹ However, because the United States failed to make reparations payments, it is responsible for Black poverty and educational inequality, both of which are direct consequences of slavery. This paper contends that because poverty is significantly connected to crime and the lack of education, African Americans are more likely to be incarcerated since they are more likely to be poor because of slavery. As a result, the United States is responsible for the continued subjugation of African Americans in the criminal justice system where there are a strikingly disproportionate number of African Americans incarcerated.

¹⁶ *Id.* at 875.

¹⁷ *Id.* at 24.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 17.

Paul Butler argues that Blacks would not be overrepresented in the criminal justice system had it not been for slavery and entrenched racism.²⁰ Butler proposes expanding affirmative action to the context of the criminal justice system for African American criminal defendants as reparation for past discrimination.²¹ Butler argues that race conscious procedures should be used to rectify “race-based injuries” suffered by African Americans in the criminal justice system.²² However, Butler notes that proponents of race-conscious remedies in the criminal justice system would experience difficulty making the connection between historical discrimination and “disproportionate black criminality.”²³ Contrastingly, the justification underlying reparations in the context of the criminal justice system pursuant to my proposals are premised upon those connections, which are examined in Part III. Furthermore, neither of the reparationists have applied nor looked in depth at reparations in the context of the criminal justice system.

III. Reparations, a Solution to Mass Incarceration

This part discusses reparations in its historical context to identify the consequences that resulted from the government’s failure to compensate the freed slaves, and the descendants of the enslaved, such as income and educational inequality. American history coupled with the mass incarceration of African Americans in our criminal justice system, reveals that in addition to the United States’ government being responsible for income and educational inequality; it has continued to enslave African Americans in our country’s criminal justice system.

Although the Thirteenth Amendment abolished slavery, the freed slaves only experienced freedom in its literal sense since the government failed to fulfill its promises to restore the former

²⁰ Butler, *supra* note 12, at 844.

²¹ *Id.* at 860.

²² *Id.*

²³ *Id.* at 875.

slaves to the position they would have been in absent slavery. After decades of racial subjugation, oppression, and forced uncompensated labor no reparations action was ever taken. Slavery was abolished in 1865 as a result of the Civil War.²⁴ During the period of Reconstruction, which lasted from 1865 to 1877, promises were made to provide assistance to former slaves.²⁵ Those promises were never fulfilled.²⁶

After slavery was abolished in 1865,²⁷ General William T. Sherman issued Field Order 15, which allocated 400,000 acres of land confiscated from Southern whites for the use of the freed slaves.²⁸ The plan promised each family 40 acres and a mule; however, President Johnson revoked the military order, evicted the families, and returned the land to the Southern whites.²⁹ The provision of Forty acres and a mule was not to compensate for past wrongs, but to enable the freed slaves to become economically independent.³⁰

Notwithstanding the abolition of slavery, African Americans were only free in the literal sense of the word because they were not free from the shackles of poverty and limited educational opportunities. The freed slaves were deprived of the opportunity to become economically self-sufficient—all they had was their freedom and no reparations action was ever taken.³¹ Poverty is a direct result of the United States' failure to compensate the freed slaves for the injuries that were inflicted upon them which would have enabled them to become economically independent.³² Because the descendants of slaves inherited that poverty, they are

²⁴Alfred L. Brophy, Reparations Talk: Reparations for Slavery and the Tort Law Analogy, 24 B.C. THIRD WORLD L. J. 81, 20 (2004).

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸BROPHY, *supra* note 7, at 25.

²⁹*Id.*

³⁰*Id.* at 26.

³¹*Id.*

³²*Id.* at 26.

entitled to some form of reparations, like the Japanese Americans were compensated \$20,000 per person for being placed in internment camps during World War II,³³ and the restoration of property to some Native American tribes.³⁴

Not only did the descendants of slaves inherit poverty because no reparations action was ever taken, but because poverty has its collateral consequences, African Americans' access to educational opportunities was severely limited. During slavery, in the South, it was a crime to teach slaves how to read.³⁵ And once slavery was abolished, and freed Blacks were allowed to learn to read and write,³⁶ they attended racially segregated substandard schools with inadequate resources.³⁷ Segregation deprived Blacks of equality of treatment because it required children to attend inferior facilities, and as articulated by the United States Supreme Court in *Brown v. Board of Ed.*, segregation had “a tendency to (retard) the educational and mental development of [African American] children.”³⁸

If Blacks were first prohibited from learning how to read or write when they slaves, and were later required to attend schools that were substantially inferior to those attended by whites when they were liberated, their descendants have been similarly deprived of the opportunities that were denied to their ancestors by virtue of inheritance. Accordingly, African Americans are more likely to be poor because one of the lingering vestiges of slavery is the economic inferiority of African Americans,³⁹ and they are more likely to be less educated than whites because their ancestors were first prohibited from learning how to read or write, and were later required to attend inferior schools. Because income inequality and disparities in education are direct

³³ *Id.* at 30.

³⁴ *Id.* at 40-41.

³⁵ Brophy, *supra* note 20, at 24.

³⁶ ALEXANDER, *supra* note 5, at 29.

³⁷ *Id.* at 50.

³⁸ *Brown v. Board of Ed.*, 347 U.S. 483, 494 (1954) (citing *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952)).

³⁹ Albert Mosley, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353, 360 (2003).

consequences and continuing effects of slavery that are significantly connected to crime, Blacks are entitled to reparations in the criminal justice system since there is an overwhelmingly disproportionate number of African Americans incarcerated for which the government is partly responsible.

Like poverty and educational inequality, both of which are incidents of slavery that are significantly connected to crime and the continued enslavement of African Americans in our criminal justice system, other connections can be made to modern-day practices that are directly traceable to slavery. The government's failure to compensate Blacks for slavery, which resulted in both income and educational inequality, coupled with the Black Codes and convict-lease system that emerged after slavery was abolished, and the current state of incarceration embodied in the prison-industrial complex after the convict-lease system was abolished, reveal the perpetuation of what appears to be a deliberate cycle of enslavement.

Notwithstanding the passage of the Thirteenth Amendment,⁴⁰ which abolished slavery, the United States' continued enslavement of African Americans is made possible under the Thirteenth Amendment's exception to slavery as a punishment for crime; however, pursuant to a "Thirteenth Amendment framework," we identify practices that are rooted in the institution of slavery—and are traceable to the modern-day inequalities faced by Blacks today, and for the purpose of this paper, provide a justification for the use of race-conscious remedies in the criminal justice system as a form of reparation. My argument that slavery still exists is premised upon the modern-day inequalities faced by Blacks in our criminal justice system, which can be

⁴⁰ U.S. CONST. amend. XIII, §§ 1-2 ("Neither 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. Congress shall have the power to enforce this article by appropriate legislation.").

traced directly to slavery, and that is where the justification for race-conscious remedies in the criminal justice system as reparations lies.

Employing race-conscious remedies in the context of the criminal justice system as a form of reparation is justified under an analysis of the Thirteenth Amendment since there are several practices that are rooted in the institution of slavery that can be traced directly to modern-day inequalities suffered by blacks, which serve to effectively continue their enslavement. In the *Civil Rights Cases*, the United States Supreme Court held that the Thirteenth Amendment vested Congress with the authority to “pass all laws necessary and proper for abolishing all badges and incidents of slavery.”⁴¹ Badges and incidents of slavery are “modern-day practices that are a legacy or outgrowth of slavery...”⁴² By employing the badges-incidents analysis in examining modern-day inequalities, we can determine whether such inequalities are rationally traceable to the system of slavery.⁴³

This paper traces the practice of racial profiling and the federal drug sentencing laws to practices that were employed during slavery and the Black Codes, which worked in tandem with the convict-lease system that emerged after slavery was abolished. Both the Slave Codes and the Black Codes mark the early racialization of the criminal law. The Black Codes and the convict-lease system became the sole means by which African Americans could be enslaved in accord with the Thirteenth Amendment’s exception to slavery—“except as a punishment for crime.”⁴⁴ What this essentially means is that history reveals that Blacks were, and continue to be the primary targets of the criminal law. And as a result, like the convict-lease system, the current

⁴¹ The Civil Rights Cases, 109 U.S. 3, 20 (1883).

⁴² William M. Carter Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 20 n. 15 (2004).

⁴³ *Id.*

⁴⁴ U.S. CONST. amend. XIII, §§ 1-2.

state of our criminal justice system has functionally replaced slavery through the selective and discriminatory enforcement of its criminal laws, thereby enabling the United States, along with private corporations, to profit tremendously from cheap convict labor in the prison industrial complex.⁴⁵

In addition to the badges incidents analysis, which provides a justification for race-conscious remedies in the criminal justice system, Charles R. Lawrence III also provides some helpful insight in his discussion of facially neutral actions that have a disproportionate impact on Blacks. Lawrence's discussion is useful insofar as it helps us conclude that although the criminal justice system appears to be racially neutral, the ultimate goal underlying its existence is discriminatory, namely, the mass incarceration of African Americans for the purposes of enslavement, and the preservation of white supremacy. In ascertaining whether governmental action is, in fact, racially neutral, Lawrence proposes a test that "evaluate[s] governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance," from which one may conclude is unconsciously racially motivated.⁴⁶

Evaluating governmental conduct by applying the test articulated by Lawrence would require us to examine the criminal justice system to establish evidence of "racial significance," from which we can conclude is traceable to slavery.⁴⁷ With respect to actions that appear facially neutral, but have a disparate impact on African Americans, it makes perfect sense to employ a badges incidents analysis or one like that suggested by Lawrence, considering the evidentiary burdens that are difficult to surmount since the law requires evidence of explicit racial discrimination to merit strict scrutiny under the Fourteenth Amendment's Equal Protection

⁴⁵ Raza, *supra* note 4, at 167.

⁴⁶ Lawrence, *supra* note 13, at 3.

⁴⁷ *Id.*

Clause.⁴⁸ Discriminatory intent could be demonstrated relatively easily if these historical parallels are thoughtfully scrutinized, and that is exactly what this paper proceeds to illustrate.

There is evidence of racial significance in the discriminatory practice of racial profiling and the crack/cocaine sentencing disparity, both of which directly influence the African American incarceration rate. These modern-day inequalities are all too reminiscent of the Slave Codes, the Black Codes, and the convict lease system, and here is why: During slavery, the Slave Codes punished Blacks more harshly than whites for the same conduct, and some offenses, if committed by whites, were not crimes.⁴⁹ Both the Black Codes and the convict-lease system legitimized the restoration of slavocratic conditions after the passage of the Thirteenth Amendment.⁵⁰ The Black Codes created categories of offenses for which Blacks and only Blacks could be convicted, and the convict lease system, which emerged after the passage of the Thirteenth Amendment, functionally replaced slavery by providing private contractors with cheap convict labor.⁵¹

A racial injustice has been inflicted upon African Americans in the criminal justice system. The disparities in incarceration rates are startling and questionable given the historical context in which the criminal law was racialized following the abolition of slavery. The justification underlying the use of race-conscious remedies in the criminal justice system as a form of reparations is premised upon the racial disparities in the federal drug sentencing laws and the discriminatory practice of racial profiling—both of which are directly traceable to the institution of slavery. Racial disparities in incarceration are directly traceable to the institution of slavery. Thus, not only should the descendants of slaves be compensated, and affirmative action

⁴⁸ See Butler, *supra* note 12, at 865.

⁴⁹ I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L.L. REV. 1, 52 (2011).

⁵⁰ Raza, *supra* note 4, at 164.

⁵¹ *Id.*

in education should function as forms of reparation,⁵² as other reparationists have argued—race-conscious remedies should be employed in the criminal justice system as a form of reparations. African Americans are victims of both past, and more importantly, present racial discrimination in the context of the criminal justice system and that is why racial preferences are appropriate.

A. Racial Profiling and the Slave Codes

This subsection examines the historical parallel between the Slave Codes and the discriminatory practice of racial profiling. Racial profiling is an incident of slavery because it is a manifestation of the historical stigmatization of Blackness as indicative of one’s propensity towards criminality.⁵³ This stigma, William M. Carter, Jr. contends, is a continuing effect of slavery.⁵⁴ Carter argues that the discriminatory practice of racial profiling⁵⁵ arose out of slavery, because like the slaves who “were denied freedom of movement based on their race,” today, law enforcement officers stop, search, and seize African Americans on the basis of race.

Like the discriminatory practice of racial profiling, for example, in South Carolina, Blacks “were subjected to scheduled searches and seizures every fourteen days, under the presumption of slaves’ propensity for criminality.”⁵⁶ Today, police may conduct warrantless searches even in the absence of probable cause so long as they have reason to believe that criminal activity is afoot.⁵⁷ This authority was derived from the United States Supreme Court case of *Terry v. Ohio*, where the Court articulated the “reasonable suspicion” requirement, which supplants probable

⁵² Mosley, *supra* note 39, at 353.

⁵³ Carter, *supra* note 48, at 21.

⁵⁴ *Id.*

⁵⁵ *Id.* at 18 (“Law enforcement officers’ use of race to single persons out for criminal suspicion (‘racial profiling’)...”).

⁵⁶ Capers, *supra* note 48, at 41.

⁵⁷ ALEXANDER, *supra* note 5, at 64.

cause.⁵⁸ However, the requirement of reasonable suspicion has been eviscerated. Today, police officers use minor traffic violations as a pretext to search for drugs in the absence of any evidence of illegality.⁵⁹ In addition to pretextual stops, an officer may conduct a search in the absence of any evidence of illegal activity so long as the person gives consent.⁶⁰ The people who are subject to these arbitrary procedures are not informed that they have the liberty to refuse.⁶¹ When a person is confronted by an officer they will more likely than not submit to the officer's show of authority, and because they do not know that they are free to refuse, they will consent to a search.⁶²

The incidence of racial profiling has resulted in a disproportionate number of African Americans being stopped, frisked, and seized in violation of the constitutional guarantees provided by the Fourth Amendment. Studies have revealed that even though a disproportionate number of Blacks are stopped and searched compared to their white counterparts, Blacks are less likely to be found in possession of drugs or weapons. For example, professor Ian Ayres conducted a study of the Los Angeles Police Department, which revealed that even though the police stopped Blacks at disproportionately high rates and were 127% more likely to conduct searches of stopped blacks in comparison to stopped whites, police were 37% less likely to find weapons and 23% less likely to find drugs on searched Blacks than on searched whites.⁶³ Although whites are stopped and searched at substantially lower rates than their Black and Latino counterparts, the rate at which contraband will be seized from searched whites is statistically identical to the likelihood that contraband will be seized from searched blacks and

⁵⁸ *Id.* at 63.

⁵⁹ *Id.* at 67.

⁶⁰ *Id.* at 64.

⁶¹ *Id.*

⁶² *Id.* at 64-66.

⁶³ Capers, *supra* note 48, at 15.

Latinos.⁶⁴ The disproportionate number of African Americans incarcerated is not an accurate representation of the race that does the bulk of offending the drug laws, and therefore, there is no other explanation for this disparity other than discriminatory policing, which is directly traceable to the Slave Codes.

B. The Slave Codes, Black Codes, and the Crack/Powder Sentencing Disparity

This subsection traces the disparities in the federal drug sentencing laws to the Slave Codes and the Black Codes. Both the Slave Codes and the Black Codes are incidents of slavery to which the federal drug sentencing laws can be traced since like the Codes, African Americans are treated unfavorably. The federal drug sentencing laws differ from the Codes only in the sense that they are not explicitly racist. However, because the federal drug sentencing laws punish offenses involving cocaine prepared as crack more severely than offenses involving cocaine in powder form, and African Americans are more likely to use crack, it is clear that the difference in the treatment of offenses is designed to have a disparate impact on Blacks.

Whites have been treated more favorably than African Americans in the criminal justice system since slavery.⁶⁵ During slavery, race determined the punishment of the offender.⁶⁶ The Slave Codes punished Blacks more harshly than whites.⁶⁷ For example, in Virginia, “[s]laves could receive the death penalty for at least sixty-eight offenses, whereas for whites the same conduct was either at most punishable by imprisonment or was not a crime at all.”⁶⁸

⁶⁴ *Id.* at 41.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

Following the abolition of slavery, white lawmakers racialized the criminal law “to effectively return the freedmen to a condition of slavery in fact.”⁶⁹ The Black Codes were enacted after the passage of the Thirteenth Amendment.⁷⁰

Under the Codes, vagrancy and similar laws were used as a pretext to maintain control over the freedmen. For example, when African Americans were convicted of vagrancy under the Black Codes and were unable to pay the fine, they could be leased out to anyone willing to pay the fine.⁷¹ If the prisoner attempted to escape this *de facto* slavery by quitting or leaving, he was guilty of a criminal offense.⁷²

There were offenses that only Blacks could be charged with and convicted of under the Black Codes.⁷³ Comparing this history to the disparity in the federal drug sentencing laws, the selective enforcement of the law accomplished through racial profiling and other discriminatory procedures, reveals that the racial disparities in incarceration are attributable to selective enforcement and not disproportionate offending.⁷⁴

The disproportionality is evidenced in the federal drug sentencing laws. First, regarding the decision to punish offenses involving cocaine prepared as crack more severely than offenses involving cocaine in powder form, take this into perspective: “African Americans are more likely to use crack, while white drug users are more likely to use powder cocaine.”⁷⁵ Now, consider this example: the sale of five hundred grams of cocaine and the sale of only five grams of crack carry the same five-year mandatory prison sentence.⁷⁶ Accordingly, the federal drug sentencing laws have a disparate impact on Blacks because African Americans are more likely to use crack and offenses involving crack are punished more severely than offenses involving cocaine.

⁶⁹ *Id.* at 65.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ John Pittman, The Case for Abolition and the Reality of Race, in *Discretion, Community, and Correctional Ethics*, in *DISCRETION, COMMUNITY, AND CORRECTIONAL ETHICS*, 75 (John Kleinig & Margaret L. Smith, 2001).

⁷⁴ Nunn, *supra* note 6, at 396.

⁷⁵ *Id.*

⁷⁶ ALEXANDER, *supra* note 5, at 112.

In addition to the disproportionality evidenced in the federal drug sentencing laws, it is evidenced in the way that drug arrests are made.⁷⁷ Despite comprising over eighty percent of the total drug arrests in many states, it is implausible that Blacks are committing drug offenses at a greater rate, considering that the majority of drug users in the United States are white.⁷⁸ Interestingly, according to the U.S. Public Health Service Substance Abuse and Mental Health Services Administration, in 1992, there were 62% more white drug users in the United States than there were African American drug users.⁷⁹ So, why do African Americans comprise over 70% incarcerated for drug offenses?⁸⁰ Why do Blacks and Latinos comprise three-fourths of those incarcerated for drug offenses?⁸¹

Because Blacks are more likely to use crack, for which they receive harsher sentences, the federal drug sentencing laws have the effect of the Black Codes. Although the laws appear to be racially neutral, examining the historical context in which these laws were implemented coupled with historicizing its disparate impact with the Slave Codes and Black Codes, reveals that they were specifically influenced by race and the desire to maintain white supremacy. This demonstrates that current practices in the criminal justice system are directly traceable to the institution of slavery, and since African Americans are adversely affected by the continuing effects of slavery, they are entitled to reparations. An examination of the historical context in which these laws were implemented takes us directly to the War on Drugs.

C. The War on Drugs

⁷⁷ Nunn, *supra* note 6, at 394.

⁷⁸ *Id.*

⁷⁹ ALEXANDER, *supra* note 5, at 394.

⁸⁰ Butler, *supra* note 12, at 884-85.

⁸¹ *Id.* at 1048.

This subsection discusses the War on Drugs, which was declared in October of 1982, by President Ronald Regan,⁸² during a time when less than 2 percent of the public was concerned about drugs,⁸³ and thus, its declaration was seemingly more about race, and a direct response to the Civil Rights gains of the 1960's and the end of the Jim Crow era in order to create a new form of racial subjugation—mass incarceration.⁸⁴

The end of Jim Crow marked the end of legalized discrimination in employment, housing, public benefits, and public accommodations. However, the War on Drugs created a new system of legalized discrimination akin to that which perpetuated the social, legal, and economic inferiority of African Americans during the Jim Crow era, provided that they are convicted felons. The striking similarities between Jim Crow and the mass incarceration of African Americans⁸⁵ reveal that the United States continues to enslave African Americans.

The systematic mass incarceration of African Americans is attributed to the War on Drugs.⁸⁶ More people are currently incarcerated for just drug offenses than were incarcerated for all other offenses before the declaration of the War on Drugs.⁸⁷ The War on Drugs was declared during a time when predominantly Black inner city communities suffered economically as a result of globalization and deindustrialization.⁸⁸ Prior to the economic collapse, during the 1970's most Blacks attended racially segregated schools and lacked college educations thereby rendering them incapable of adapting to those economic changes.⁸⁹ The rate of African American unemployment and the decline in employment opportunities for which most Blacks were

⁸² Nunn, *supra* note 6, at 387.

⁸³ ALEXANDER, *supra* note 5, at 191.

⁸⁴ *Id.* at 58.

⁸⁵ *Id.* at 191.

⁸⁶ Nunn, *supra* note 6, at 393.

⁸⁷ ALEXANDER, *supra* note 5, at 60.

⁸⁸ *Id.*

⁸⁹ *Id.*

qualified, encouraged those residing in impoverishment communities to sell drugs, particularly crack-cocaine.⁹⁰

Black suffrage is what connects the Jim Crow era to the War on Drugs, which precipitated the mass incarceration of African Americans, from which we can conclude is directly traceable to slavery. During the Jim Crow era, Black suffrage was largely illusory notwithstanding the passage of the Fifteenth Amendment, because it did not prohibit the states from imposing poll taxes, literacy tests, and grandfather clauses, which effectively prevented Blacks from exercising the franchise.⁹¹ Today, felon disenfranchisement laws are illustrative of this new system of racial subjugation since more African American men cannot vote because of their status as convicted felons than when the Fifteenth Amendment was passed.⁹²

In addition to discrimination in the context of voting, the drug laws enacted during the War on Drugs legalized discrimination in housing and in the receipt of governmental assistance. The Anti-Drug Abuse Act of 1986 imposed mandatory minimums for drug offenses and created the crack/powder sentencing disparity.⁹³ The New Anti-Drug Abuse Act of 1988 disqualified persons convicted of drug offenses from receiving federal benefits and student loans, and authorized the evictions of tenants involved in drug related activity on public housing grounds.⁹⁴ Today, African Americans are subject to the same legal discrimination in employment, housing, and public benefits that they suffered during the Jim Crow era, provided they are convicted felons.

⁹⁰ ALEXANDER, *supra* note 5, at 50-51.

⁹¹ *Id.* at 29-30.

⁹² Butler, *supra* note 12, at 1047.

⁹³ *Id.* at 53.

⁹⁴ *Id.*

It is clear from the War on Drugs that the disproportionate incarceration of African Americans is traceable to slavery and Jim Crow. Because it seems that the War on Drugs was a response to the Civil Rights gains of the 1960's, which put an end to Jim Crow, the War on Drugs—through the mass incarceration of African Americans has served to functionally replace Jim Crow, like Jim Crow sought to functionally replace slavery, and therefore, mass incarceration has been used to continue the enslavement of African Americans.

D. The Convict-Lease System and the Prison-Industrial Complex

This subsection examines the historical parallel between the convict-lease system and mass incarceration, which are strikingly similar insofar as the United States is profiting tremendously from cheap convict labor. The current state of incarceration, the prison-industrial complex, is traceable to the convict-lease system. Thus the legacy of slavery can be found in today's prison system which is embodied in the prison boom, which precipitated the formation of the prison-industrial complex (PIC).⁹⁵ Scholars introduced the term “prison industrial complex” as a way of attributing the increase in incarceration to racism and economic benefits, thus challenging the belief that increased levels of crime caused the increase.⁹⁶

Prior to the abolition of slavery, “the criminal justice system was almost ‘exclusive to whites.’”⁹⁷ Post-emancipation, the convict-lease system emerged primarily to reconstruct the South after the Civil War and it served as the functional equivalent of slavery.⁹⁸ The convict-lease system provided a source of cheap labor; enabling those who were adversely affected by the abolition of slavery to maximize profits, and more importantly, preserve the racial caste by

⁹⁵ Pittman, *supra* note 70, at 75.

⁹⁶ Raza, *supra* note 4, at 164.

⁹⁷ *Id.*

⁹⁸ *Id.*

perpetuating the social, legal, and economic inferiority of African Americans.⁹⁹ Under the convict-lease system, prisoners were placed under the charge of official private contractors, namely, industrialists and capitalists, who paid a fee and entered into lease agreements with the states in the South in exchange for convicts.¹⁰⁰ The southern states profited from their prisoners not only through the leasing of convicts to private companies, but prison labor was used for public work projects to build and strengthen infrastructure.¹⁰¹

After slavery was abolished, the criminal justice system was used as a means to perpetuate the social, legal, and economic inferiority of African Americans.¹⁰² In fact, there are currently more Blacks involved in the criminal justice system than there were slaves.¹⁰³ Scholars have argued that the convict-lease system, which emerged after slavery was abolished, effectively replaced slavery since it forced Blacks into a system of control by whites and provided whites with cheap convict labor.¹⁰⁴ Accordingly, the current state of incarceration embodied in the PIC, namely, the mass incarceration of African Americans is traceable to the convict-lease system.¹⁰⁵

The current state of incarceration embodied in the PIC is traceable to the convict-lease system, and therefore, is a direct consequence of slavery. Scholars have described the PIC as “a multifaceted system, maintained through cooperation between government and industry that designates prisons as a solution to social, political, and economic problems.”¹⁰⁶ Like the convict-lease system, the PIC plays a pivotal role in strengthening collapsed economies by providing

⁹⁹ *Id.* at 164-165.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² ALEXANDER, *supra* note 5, at 32.

¹⁰³ Butler, *supra* note 12, at 1047.

¹⁰⁴ Raza, *supra* note 4, at 164.

¹⁰⁵ *Id.* at 161

¹⁰⁶ *Id.*

opportunities for employment in the prisons; it also profits tremendously from cheap convict labor.¹⁰⁷

The disproportionate number of African Americans incarcerated is not a reflection of racially disparate crime rates; it is a reflection of selective law enforcement evidenced in the discriminatory practice of racial profiling, and differences in the treatment of offenses, namely, the imposition of harsher penalties for crimes that African Americans are more likely to commit. African Americans have suffered and continue to suffer race-based injuries in the criminal justice system. Racial justice can be achieved only if the aforementioned injustices are rectified by employing race-conscious remedies in the criminal justice system, like my prescribed solutions to mass incarceration articulated in part IV.

IV. Race-Conscious Remedies in the Criminal Justice System

I have presented a total of three proposals. Although my proposals involve cost-effective ways of reducing criminal recidivism and the number of persons incarcerated overall, this paper specifically proposes solutions to the mass incarceration of African Americans as a form of reparation, and thus they are to be the primary beneficiaries should any of my proposals be adopted. My proposal involves race-conscious remedies as a form of reparation, but differs from Paul Butler's proposal insofar as it undertakes to connect historical discrimination to the mass incarceration of African Americans as a substantiating basis.

1. Rehabilitation and Drug Treatment Alternatives to Incarceration

My first proposal involves making the criminal justice system for Blacks less about retribution, and more about rehabilitation, and the nationwide implementation of drug treatment

¹⁰⁷ Pittman, *supra* note 70, at 75.

alternatives to incarceration. The healthcare needs of those who suffer from drug addictions cannot be met adequately in jails or prisons because of the lack of trust between inmates and correctional healthcare staff, and the prisoners' continued access to drugs in correctional facilities.

I agree with Butler's proposal that "[r]ehabilitation shall be the primary justification of punishment of African Americans."¹⁰⁸ African Americans should not serve time in jails or prisons for drug offenses if they are found in possession of drugs for personal use. And even if there is evidence of intent to distribute, African Americans should not serve time so long as the offender can demonstrate that he or she sold drugs to support his or her own addiction. Instead, there should be alternatives to incarceration that focus on treating and rehabilitating offenders since incarcerating those who suffer from drug addictions increases the likelihood that they will recidivate because their experiences while incarcerated may result in psychological trauma, thereby exacerbating their addictions, and making them worse off than they would have been absent incarceration.

Their experiences while incarcerated may make them worse off because they are at an increased risk of violating prison rules because of their continued access to drugs, and violations of prison rules can lead to devastating consequences. Punishment in prison includes solitary confinement; the loss of privileges, like visitation, phone calls, and the receipt of food/clothing packages from friends or relatives; and can sometimes even result in longer prison sentences. The aforementioned criticisms with respect to incapacitating those who suffer from drug addictions reflect a system that is more punitive than rehabilitative. And because the United States is responsible, in large part, for creating the conditions which resulted in a

¹⁰⁸ Butler, *supra* note 12, at 877.

disproportionate number of Blacks incarcerated, like poverty and increased incentives to sell drugs, both of which are direct consequences of the government's failure to pay reparations, the government has a duty to correct the continuing effects of slavery and Jim Crow. That duty can be fulfilled by entitling African Americans to drug treatment alternatives to incarceration.

I propose mandatory nationwide alternatives to incarceration, like The Drug Treatment Alternative-to-Prison (DTAP) program in Brooklyn, New York, created by Kings County District Attorney Charles Hynes, particularly in drug cases, and more specifically, in cases involving offenders who suffer from substance abuse. Charles Hynes's office offers alternatives to incarceration for non-violent chronic drug-addicted offenders. DTAP has proven to be a success; the criminal recidivism rate for graduates is almost half the rate of those who have been incarcerated for similar crimes.¹⁰⁹

Studies have shown that cost-effective programs like DTAP reduce criminal recidivism and decrease the costs of incarceration. The National Center on Addiction and Substance Abuse conducted a five-year evaluation of DTAP, which revealed that the program's graduates had rearrest rates that were 39% compared to 58% and reconviction rates that were 26% compared to 47%, and were 87% less likely to return to prison.¹¹⁰ Furthermore, "DTAP's results are achieved at about half the average cost of incarceration."¹¹¹ The average cost of placing an individual in the program is \$32,975 compared to the average cost of \$64,338 if the individual had been incarcerated.¹¹² In addition to increasing the use of alternatives to incarceration the

¹⁰⁹ *Executive Summary*, brooklynda.org, http://www.brooklynda.org/dtap/exec_summary.html (last visited March 26, 2012).

¹¹⁰ The National Center on Addiction and Substance Abuse (CASA) at Columbia University, *Crossing the Bridge: An evaluation of the Drug Treatment Alternative-to-Prison (DTAP) Program*, 6 (2003), <http://www.casacolumbia.org/articlefiles/379-Crossing%20the%20Bridge%20DTAP%20Evaluation.pdf>

¹¹¹ *Id.* at 11.

¹¹² *Id.*

representation of minorities in alternatives programs should be monitored to ensure racial proportionality.¹¹³

2. Adequate Discharge Planning

Second, if we want to reduce criminal recidivism, discharge planning must be adequate. All who are released from jails and prisons must be eligible for Medicaid, food stamps, public assistance, and public housing. Before prisoners are released they should be able to apply for these programs, so that upon their release, they have access to cash assistance, food, and shelter. It is futile and purposeless to expend public funds on incarceration, only to have those who are released recidivate.

Furthermore, parolee's cannot be expected to successfully complete their parole programs if they experience difficulty finding housing. Because the Housing and Urban Development Department is authorized to exclude drug offenders and other felons from public housing as a result of legislation implemented during the Clinton Administration,¹¹⁴ a particular problem is presented to those who are released from prisons, placing them at an increased risk of reincarceration for violating the conditions of their parole. Therefore, these policies must be eradicated.

3. Changing the Conditions of Parole, Post-Release Supervision, and Probation

Because the rate of recidivism is extremely high, particularly for violations of parole or probation—and not the commission of new offenses, my third proposal proposes changing the conditions of parole, post-release supervision, and probation. For example, in 2000, only one-

¹¹³ FLOYD D. WEATHERSPOON, *AFRICAN AMERICAN MALES AND THE LAW* 181 (University of Press of America 1998).

¹¹⁴ ALEXANDER, *supra* note 5, at 145.

third of violations were for the commission of new offenses.¹¹⁵ In a study conducted by the Bureau of Justice Statistics, about 30 percent of those rearrested in its sample occurred within six months of release.¹¹⁶ “Within three years, nearly 68 percent were rearrested at least once for a new offense.”¹¹⁷

Because the rules governing parolee conduct are extremely restrictive, and many parolees return to prison not for the commission of new offenses, but for minor infractions, the conditions must be changed. For example, in 2000, two-thirds of the parole violators were re-incarcerated for failing to keep appointments with a parole officer, failing a drug tests, or failing to maintain employment.¹¹⁸ Because failing to maintain employment is a ground for a violation, felons should not be required to indicate that they have been convicted of crimes on employment applications. The inquiry should be removed from employment applications altogether. Prospective employers would be free to conduct background checks, and it would ultimately be the employer’s prerogative to hire or not hire a person. But this practice would afford felons the opportunity to compete for jobs on an equal footing with those who have no criminal histories, because even though employers are prohibited from discriminating on that basis, oftentimes, once the applicant has indicated that they have been convicted of a crime, the employer chooses not to hire the applicant. Thus, compelling employers to commence the interview process without any mention of the person’s criminal background will enable the employer to make an initial determination based on the applicant’s credentials, and not their convictions. And further, because it is relatively easy for those who suffer from addictions to go back to jail or prison for technical violations of parole or probation because they are subject to constant urinalysis, failing

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 94.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 95.

a drug test should no longer serve as a basis for a violation for both non-violent and violent offenders.

Opponents would argue that race-conscious remedies act as a form of reverse discrimination—discrimination against other racial and ethnic minorities, and even whites. However, unlike the experiences of other racial and ethnic minority groups in the United States, African Americans were enslaved for decades and are victims of both past and present racial discrimination, and that is why Blacks are the primary beneficiaries of my proposals should any of them be adopted.

From a standpoint of fairness, after considering both past and present racial discrimination experienced by African Americans, race-conscious remedies in the criminal justice system should not be perceived as a discriminatory form of reverse racism, but a vehicle to benefit the disadvantaged, thus restoring them to the position that they would have been in absent slavery and Jim Crow. There is a strong possibility that if reparations had been paid, and had there not been segregation, poverty and educational inequality would have eventually phased out over time, thus restoring African Americans to the position they would have been in absent slavery, alongside whites on an equal footing. But because reparations were never paid, and the system of Jim Crow segregation followed, generations to come, inevitably inherited the disabilities of their ancestors. Slavery and the failure to make reparations payments explains the unfortunate plight of African Americans, and the continued enslavement of Blacks through the discriminatory practice of racial profiling, the disparities in the drug sentencing laws, and the prison industrial complex perpetuate their social, legal, and economic inferiority. Accordingly, modern-day inequalities weighed against this historical backdrop, coupled with the

disproportionate number of African Americans incarcerated, justify the differential treatment of individuals who descended from slaves.