

## CASE STUDY

### RACE, THE CRIMINAL LEGAL SYSTEM, AND STATEGRAFT: THE CALIFORNIA RACIAL JUSTICE ACT (2020)

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Introduction .....	49
I. Stategraft and Racial Inequality in the Criminal Legal System .....	50
II. Undoing Racial Disparities as a Means of (Unwittingly) Undoing Some Forms of Stategraft .....	53

#### INTRODUCTION

After decades of unabated growth in mass incarceration, the number of incarcerated adults began to decline following the Great Recession.<sup>1</sup> Changes in sentencing, policing, pre-trial diversion, and the recategorization of offense levels, among other strategies, helped reduce the number of persons under carceral control.<sup>2</sup> While the lifetime risks of incarceration and imprisonment have declined from all-time highs,<sup>3</sup> the routine imposition of monetary sanctions (fines, fees, court costs, penalty

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1. See PETER K. ENNS & DELPHIA SHANKS-BOOTH, *THE GREAT RECESSION AND STATE CRIMINAL JUSTICE POLICY: DO ECONOMIC HARD TIMES MATTER?* 1 (December 2015), <https://inequality.stanford.edu/sites/default/files/great%20recession%20criminal%20justice.pdf> [https://perma.cc/2XKG-JHEH]

2. See Pew Charitable Trusts, *State Reforms Reverse Decades of Incarceration Growth* (March 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth> [https://perma.cc/UK7W-FMXP].

3. BECKY PETTIT, *INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS* 17 (2012); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 *AM. SOCIO. R.* 151, 162 (2004); Bryan L. Sykes & Becky Pettit, *Mass Incarceration, Family Complexity, and the Reproduction of Childhood Disadvantage*, 654 *ANNALS AM. ACADEM. POL. & SOC. SCI.* 127, 136 (2014); Alexander F. Roehrkasse & Christopher Wildeman, *Lifetime Risk of Imprisonment in the United States Remains High and Starkly Unequal*, 8 *SCI. ADVANCES*, 2 Dec. 2022, at 1, 3.

assessments, etc.) have continued to proliferate in the criminal legal system.<sup>4</sup>

The imposition of these monetary sanctions represents an immediately recognizable form of *stategraft*.<sup>5</sup> In this essay, we argue that mass incarceration, and its attendant racial disparities in sentencing, is a form of stategraft that, in some cases, illegally transfers predominantly Black, Latine, and poor white bodies from control of oneself to control of the state. In doing so, the state appropriates the differential time and labor-power of persons under carceral control to illegally profit from racial inequality in mass incarceration and sentencing disparities.

### I. STATEGRAFT AND RACIAL INEQUALITY IN THE CRIMINAL LEGAL SYSTEM

The theory of stategraft describes “when state agents transfer property from persons to the state in violation of the state’s own laws or basic human rights.”<sup>6</sup> According to this theory, either or both national and international law may apply, including basic human rights, international instruments that the United States has either signed or ratified.<sup>7</sup> Stategraft requires a state agent, an act of transferring property from persons, a benefit to the state, and a violation by the state of its own laws.<sup>8</sup> Stategraft distinctively focuses on the illegality of state predation.

Racial inequality in mass incarceration and sentencing disparities meets the criteria for stategraft because 1) the state agents are criminal justice personnel; 2) the property transferred is the body, time, and labor-power of the confined person; 3) the state benefits from capitalizing on the racial inequality it produces by charging people for their own incarceration (“pay-to-stay” fees),<sup>9</sup> including on the difference in time spent between Black, Latine, and white inmates convicted of the same offense, as well as by devaluing carceral labor that is often paid less than minimum wage;<sup>10</sup> and 4) racial disparities in mass incarceration and

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4. Alexes Harris, Mary Pattillo, & Bryan L. Sykes, *Studying the System of Monetary Sanctions*, RUSSELL SAGE FOUND. J. SOC. SCIS., Jan. 2022, at 1.

5. See Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. Rev. 1, 3 (2023).

6. *Id.*

7. *Id.*

8. *Id.*

9. See Lauren-Brooke Eisen, *America’s Dystopian Incarceration System of Pay to Stay Behind Bars*, BRENNAN CTR. FOR JUST. (Apr. 19, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/americas-dystopian-incarceration-system-pay-stay-behind-bars> [<https://perma.cc/4UZ4-6TZ7>].

10. See Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (April 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/BS2L-ZPV2>].

sentencing are a result of the state violating constitutional due process and equal protection rights of criminal defendants.<sup>11</sup> Our argument is that racial and ethnic inequality in mass incarceration and sentencing disparities constitute stategraft because disparate numbers of Black and Latine persons receive much longer sentences than their non-Latine white counterparts.<sup>12</sup> In doing so, the state confines the body – and transforms, by extension, a person’s time and labor-power – into a commodifiable resource that is extracted for state financial gain. This state financial gain manifests in at least two forms: 1) pay-to-stay fees and 2) carceral labor paid below minimum wage.

First, research on monetary sanctions has focused on revenue generation from fines, fees, court costs, and other pecuniary penalties associated with an underlying offense.<sup>13</sup> Pay-to-stay fees, however, are different. Professors Kirk, Fernandes, and Friedman describe pay-to-stay fees as “financial commitments imposed by the state on incarcerated individuals for the day-to-day cost of their incarceration.”<sup>14</sup> Unlike contemporary fines and fees, pay-to-stay fees for incarceration accrue daily and are driven by sentence length, rather than criminal offense or charge, and these fees are common in more than 40 states.<sup>15</sup> If criminal defendants commit the same crime, are arrested at the same rate, and receive the same sentence within a jurisdiction, then the state has not engaged in stategraft, for the resulting state “profit” is zero. However, the state engages in stategraft when racial disparities in arrests, charging, and sentencing, are combined with monetary sanctions or other legal

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11. See *Due Process: Racial Justice Amicus and Appellate Strategies*, JUVENILE L. CTR., <https://jlc.org/due-process> [<https://perma.cc/9293-98HF>] (last visited Feb. 17, 2024); Aya Gruber, 112 NW. UNIV. L. REV. 1337, 1345.

12. See 2023 *Demographic Differences in Federal Sentencing*, U.S. SENTENCING COMM’N (Nov. 14, 2023), <https://www.ussc.gov/research/research-reports/2023-demographic-differences-federal-sentencing> [<https://perma.cc/F3XM-JDG3>].

13. See ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016); Alexes Harris, Heather Evans & Katherine Beckett, *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOCIO. R. 234 (2011); Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO 1753 (2010).

14. Gabriela Kirk, April Fernandes & Brittany Friedman, *Who Pays for the Welfare State? Austerity Politics and the Origin of Pay-to-Stay Fees as Revenue Generation*, 63 SOCIO. PERSPECTIVES 921, 921 (2020); April D. Fernandes, Brittany Friedman & Gabriela Kirk, *Forcing People to Pay for Being Locked up Remains Common*, WASH. POST. (May 2, 2022, 6:00 a.m. EDT), <https://www.washingtonpost.com/outlook/2022/05/02/forcing-people-pay-being-locked-up-remains-common/> [<https://perma.cc/73F6-R43T>].

15. Kevin Bliss, *Pay-to-Stay Fees Impoverish Prisoners, Increase Recidivism*, PRISON L. NEWS (March 1, 2021), <https://www.prisonlegalnews.org/news/2021/mar/1/pay-stay-fees-impoverish-prisoners-increase-recidivism/> [<https://perma.cc/7FUB-WK98>].

financial obligations (LFOs) that require people to pay for their own incarceration or financial penalties that would not have occurred if they were offered different criminal diversion alternatives. The disparity in sentence lengths between white and Black (or white and Latine) persons who are incarcerated, as well as the disparities in size of these population by race or ethnicity, reveals that the state has engaged in statecraft. Because the state collects more in monetary sanctions or LFOs than it should from persons of color due to racial discrimination, the state violates those incarcerated persons' equal protection and due process rights.<sup>16</sup>

Second, underpaying incarcerated persons violates their basic human rights.<sup>17</sup> In 1977, the United States signed the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 7(a)(1) of the Covenant enshrines the right to “fair wages and equal remuneration for work of equal value without distinction of any kind,”<sup>18</sup>—regardless of the personal attributes of the workers and the locational, environmental, and social contexts of the work being performed—as a human right. Although the United States has yet to ratify this Covenant, it is a signatory to it, and 172 of the 193 U.N. Member States have ratified the treaty.<sup>19</sup> As a result, we argue that the overwhelming number of ratifications has established that fair wages and equal remuneration are a basic human right.<sup>20</sup>

Yet, carceral labor is routinely and widely devalued in the United States, with persons who are incarcerated often earning less than a dollar per hour, despite the U.N. treaty establishing fair wages as a basic human right. A recent study by the Prison Policy Initiative (PPI) found that, in 2017, the average wage for a regular, non-industry job in prison was between \$0.14 (low) and \$0.63 (high) across state and federal prisons.<sup>21</sup>

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16. See *Due Process*, *supra* note 11; Gruber, *supra* note 11.

17. See *Atuahene*, *supra* note 5, at 3.

18. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

19. See *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION (Apr. 22, 2024), [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en) [<https://perma.cc/8YL6-CXMJ>].

20. Discussing human rights norms is a common approach in research on prison practices in the United States. Bruce Western, for example, has referenced rules established by the United Nations regarding prolonged solitary confinement as a type of torture. See Bruce Western, *Inside the Box: Safety, Health, and Isolation in Prison*. 35 J. ECON. PERSPS., Fall 2021, at 97, 114–15. Several authors have also argued that principles enshrined in the ICESCR are customary international law. See, e.g., Sophie M. Clavier, *Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals*, 35 FORDHAM INT'L L.J. 385, 401–08 (2012); Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV. 1457, 1464 (2001).

21. Sawyer, *supra* note 10.

In some states, prisons do not pay persons who are incarcerated for their labor.<sup>22</sup> Additionally, incarcerated people who worked for state-owned businesses earned between “33 cents and \$1.41 per hour on average – roughly twice as much as people assigned to regular prison jobs.”<sup>23</sup> In a recent National Public Radio (NPR) exclusive, one person who was incarcerated stated, “I was carefully selected for POA, or prisoner observation aide, after applying for it. There was rigorous screening and training. Prior to the prisoners doing this job, correctional officers had to do it. We’re getting paid \$3.34 per four-hour session. So we’re saving them [the prison/state] money.”<sup>24</sup> A recent lawsuit alleges that the State of Alabama denies Black people parole in order to lease them to make money for public agencies and businesses, in violation of state law.<sup>25</sup> Collectively, these examples make clear that the devaluation of wages from prison work performed by inmates, and failure to compensate people fairly for their carceral labor, is a legalized twin of stategraft under international law; the labor that incarcerated persons perform for prisons – laundry, meal prepping, cleaning, landscaping, and more – enriches the state by saving it millions in wages and benefits that would be required if non-incarcerated correctional employees performed the same tasks. Coupled with racial disparities in incarceration, sentence length, and parole, the problem of wage devaluation, theft, extraction, and exploitation is substantial and arguably in violation of international law that establishes fair wages and equal remuneration a human right.

## II. UNDOING RACIAL DISPARITIES AS A MEANS OF (UNWITTINGLY) UNDOING SOME FORMS OF STATEGRAFT

How does the state undo these forms of stategraft? One possibility is to begin by ensuring equity in criminal charging and sentencing. The California Racial Justice Act (CRJA) of 2020 (A.B. 2542) was approved by the Governor on September 30, 2020, and codified into various areas of the California Penal Code.<sup>26</sup> The CRJA makes clear that the legislative intent is to remedy harm:

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22. *Id.*

23. *Id.*

24. Beth Schwartzapfel, The Marshall Project & Lawrence Bartley, *What People Really Make (and Spend) Behind Bars*, NPR: PLANET MONEY (Aug. 16, 2022, 6:31 a.m. ET). <https://www.npr.org/sections/money/2022/08/16/1117123303/what-people-really-make-and-spend-behind-bars> [https://perma.cc/3L2Q-VTKD].

25. See Complaint at 8, *Robert Earl Council aka Kinetic Justice v. Ivey*, No. 2:2023cv00712, (M.D. Ala., Dec. 12, 2023); Michael Levenson, *Prisoners Sue Alabama, Calling Prison Labor System a ‘Form of Slavery’*, N.Y. Times (Dec. 12, 2023), <https://www.nytimes.com/2023/12/12/us/alabama-prisons-lawsuit-labor.html> [https://perma.cc/3WPR-NYSX].

26. A.B. 2542, 2019–2020 Reg. Sess. (Cal. 2020) (enacted).

“Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. **The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant’s case and to the integrity of the judicial system.**”<sup>27</sup>

The CRJA, in short, prohibits prosecutors from seeking or obtaining any criminal conviction or seeking, obtaining, or imposing any criminal sentence on the basis of race, ethnicity, or national origin.<sup>28</sup> Persons who are incarcerated, and those whose cases have yet to be adjudicated, can seek relief, including peremptory relief, under the CRJA if quantitative evidence demonstrates the existence of significant differences in charging, convictions, and/or sentence terms across racial and ethnic groups.<sup>29</sup> If other states emulate California’s example, it could lead to the dissolution of stategraft associated with pay-to-stay incarceration fees by fostering greater racial equity. Inequities in carceral labor are more complicated to remedy under the CRJA. People of color who are incarcerated could, however, file a CRJA motion arguing that being paid less overall and/or paid less for similar work (compared to their white counterparts) constitutes a more severe sentence.<sup>30</sup> States considering the CRJA approach should also include statutory language addressing racial inequality in the conditions of incarceration, or explicitly carceral wages.

It is also possible for people of color who are incarcerated to file Title VII complaints with the Equal Employment Opportunity Commission (EEOC) to seek a remedy in civil court, or they could file Title VI complaints with Civil Rights Division of the U.S. Department of Justice to seek an administrative remedy. First, the EEOC has indicated that persons who are incarcerated can file a complaint against a correctional institution where it is believed that race is used as a factor in allowing persons who are incarcerated to work for outside employers through work release or other programs.<sup>31</sup> For instance, Goodman writes

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27. *Id.* at § 2(i) (emphasis added).

28. Cal. Penal Code § 745 (West 2024).

29. See Ash Kalra, *Assembly Bill 2542: California Racial Justice Act*, <https://wvc.org/wp-content/uploads/archive/files/downloads/AB%202542%20-%20Racial%20Justice%20Act%20Fact%20Sheet%2008.01.20.pdf> [https://perma.cc/5H7U-V6EF] (last visited Feb. 17, 2024).

30. Cal. Penal Code § 745(a)(4)(A) (West 2024).

31. An informal discussion letter posted by the EEOC in May 2016 offers an example of when a complaint *could* be filed by a person who is incarcerated with regards to outside employment, “Title VII would prohibit a correctional institution with 15 or more employees from using race as a factor in allowing inmates to work with outside employers through a work release program.” See EEOC INFORMAL DISCUSSION LETTER, EEOC (May 9, 2016), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-315> [https://perma.cc/LD34-PTZH].

that, “despite the very real dangers and very taxing nature of the work, [California] prisoners are paid only a dollar an hour while fighting fires, and usually less than two dollars a day for the manual labor projects that they must perform when not fighting fires.”<sup>32</sup> This issue is notably why some opponents of the prison industrial complex and some labor scholars assert, “prison labor (1) is bad for society in that it creates fertile terrain for corruption between politicians and corporations that, perversely, benefit from harsher punishment; (2) is bad for companies that do not use prison labor which must compete with companies that do; (3) is bad for non-prisoners whose wages and work conditions are adversely impacted by the forced extraction of labor from prisoners; and (4) is bad for inmates who are often exploited.”<sup>33</sup> Goodman’s work underscores the potential for stategraft when punishment and profits converge in the penal space, in contravention of international human rights laws.

Second, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.<sup>34</sup> In practice, this means that persons who are incarcerated could file an administrative complaint against a correctional institution where it is believed that race is used as a factor in allowing persons who are incarcerated to access better and/or higher paying jobs within a the correctional institution.

Thus, there are several pathways of remedy under the CRJA, Title VII, or Title VI for persons who are incarcerated who have claims of racial bias, employment discrimination, and wage theft. By taking such measures, persons of color ensnared in the criminal legal system who are subjected to these forms of state financial corruption may be able undo forms of stategraft associated with racial and ethnic disparities in mass incarceration and criminal sentencing.

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32. Goodman, Philip, *Hero and Inmate: Work, Prisons, and Punishment in California’s Fire Camps*, 15 J. LAB. & SOC’Y 353, 354–55 (2012).

33. *Id.*

34. Title VI, 42 U.S.C §§ 2000d to 2000d-7.