WHITE-ON-BLACK CRIME: REVISITING THE CONVICT LEASING NARRATIVE

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Between 1880 and 1915, the Southern criminal legal system enslaved and re-enslaved legally emancipated Black persons. Under the conventional account of this period, the law facilitated and legitimatized these practices, however odious and racially discriminatory. This view—one that critiques as it accepts the legality of the system—provides an explanation for a significant number of cases in which a Black person was convicted and sent to forced labor.

And yet, there is growing evidence that many convictions were not facilitated by law but rather the result of criminal conspiracies to traffic Black victims. County-level arrest data indicates "convictions" occurred in lockstep with the labor demands of businesses that contracted with local state actors. Numerous personal accounts from victims and their families indicate that arrests occurred in the absence of any criminal suspicion. This empirical data suggests many Black "convicts" were instead victims of human trafficking. Because completing these White-on-Black crimes required coordination among multiple parties, a criminal conspiracy was formed that implicated White participants in kidnapping, false imprisonment, perjury, peonage, reckless endangerment, and reckless homicide.

This Essay examines archival evidence that suggests the criminal trafficking of Black men was a common, if not widespread, practice between 1880 to 1915. Under this alternative view the term "convict leasing" is over-inclusive and mislabels these victims of human trafficking. Under the alternative view the historical Black crime rate is not only inflated but fabricated; conversely, the historical White crime rate omits a significant amount of criminal activity. This alternative view centers the criminal conduct of White beneficiaries, inviting a close accounting of their crimes and ill-gotten gains.

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INTRODUCTION

Between 1880 and 1915, the Southern criminal legal system enslaved and re-enslaved legally emancipated Black persons.[1] Under the conventional account, convict leasing was facilitated by the Thirteenth Amendment, which permitted enslavement of anyone "duly convicted" of a crime.[2] Those convicted who could not pay their fines were leased to businesses, which promised to pay the prisoner's debt in exchange for labor.[3] Under the conventional account, expansively worded vagrancy laws permitted law enforcement officers to articulate probable cause as they targeted Black persons for arrest.[4] Under this account, however discriminatory the enforcement practices, those convicted were factually and legally guilty.[5]

Based on empirical data, this Essay challenges this conventional account to contend many Black persons sent to forced labor were not "duly convicted" but were victims of White-on-Black crimes such as kidnapping, perjury, false imprisonment, peonage, reckless endangerment, and reckless homicide. Accepting this alternative account has significant repercussions. First, the term "convict leasing" becomes over inclusive; it transforms Black victims into criminals as it erases the underlying White-on-Black crime. Second, the alternative view discredits the historical Black crime rate because it includes crimes that were in fact committed by White perpetrators. Third, the alternative view centers White beneficiaries, inviting a close analysis of their criminal conduct and a forensic accounting of ill-gotten gains. Fourth, in the face of

1. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

2. BLACKMON, *supra* note 1, at 53 (quoting U.S. CONST. amend. XIII, § 1).

3. *Id.* at 62, 66.

4. *Id.* at 53. *See also City of Chicago v. Morales*, 527 U.S. 41, 54 n.20 (1999) (noting that "vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery" and had "especially harsh consequences on African-American women and children"). For a discussion of specific vagrancy laws in Mississippi, South Carolina, and Alabama, see THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 68, 75–76 (1965).

5. *See* BLACKMON, *supra* note 1, at 69.

doctrinal efforts to erase the state's responsibility for racism, the alternative view highlights the state's role in constructing and maintaining racial subordination.

I. ORIGINS AND DESIGN OF CONVICT LEASING

There was a strong pre–Civil War foundation for using the criminal system as a post–Civil War pathway for enslaved labor. A leasing market for forced labor had developed by the 1850s, when the criminal system was not a necessary intermediary because slavery was legal. During down times in the agricultural cycle, plantations began to lease out chattel slaves to industrial concerns.[6] Businessmen began to purchase chattel slaves for the sole purpose of participating in the growing market for forced-labor leasing. A network of agents formed to broker deals between chattel slave owners and businesses.[7] By the 1850s, enslaved persons were cutting timber, mining coal, building railroads, and manufacturing iron.[8] Railways, for example, used 20,000 enslaved persons by the onset of the Civil War.[9]

After emancipation, the Thirteenth Amendment nevertheless permitted the enslavement of persons who were "duly convicted," signaling a continued national commitment to slavery and designating the criminal system as a critical site of racial subordination.[10] Convicting free Black men and condemning them to hard labor reduced the financial costs of cruelty (a lessor that damaged chattel was required to compensate the owner, whereas no such compensation for injury or death was owed under the convict leasing system). As industrial and agricultural concerns demanded more forced laborers, governments obliged. In 1871, for example, "Tennessee leased its nearly eight hundred prisoners, nearly all of them black" to a railroad company.[11]

In the South, following the exit of federal troops in 1877, businesses increasingly struck deals with government to serve as sureties for the debt of convicted persons.[12] Those convicted were required to pay off

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6. *See id.* at 34, 49 ("Slave owners were keen to maximize the return on their most valuable assets . . . .").

7. *Id.* at 43.

8. *Id.* at 47.

9. *Id.*

10. *Id.* at 53 (quoting U.S. CONST. amend. XIII, § 1). Indeed, many of the agricultural and industrial endeavors were funded or owned by Northern investors and companies. *See, e.g.*, *id.* at 88–89; JAMES C. COBB, INDUSTRIALIZATION AND SOUTHERN SOCIETY 1877–1984, at 18–19 (2d ed. 2004).

11. BLACKMON, *supra* note 1, at 55.

12. *See* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1606 (2015).

debt to these businesses through forced labor.[13] These businesses included mining and smelting operations, logging concerns, lumber mills, railroad companies, brick factories, turpentine production, and plantations.[14] Proceeds of these lease agreements funded the livelihoods of White judges, deputies, witnesses, and court staff, as well as the legal system's physical infrastructure.[15] A financial market formed around the system, in which lenders paid a percentage of the lease's value to state actors, assuming the risk of not receiving full payment at the end of the lease term.[16]

Those subject to forced labor were predominantly Black persons. Of Alabama's county-processed convicted persons sent to forced labor, ninety-seven percent were Black.[17] In "Arkansas, Texas and Virginia, Florida and Georgia, North and South Carolina, Louisiana and Mississippi, the convict populations were overwhelmingly black. Of South Carolina's 431 state prisoners in 1880, only 25 were white; of Georgia's 1,200 state prisoners in that year, almost 1,100 were [Black]."[18] Many of these convictions were for vagrancy.[19]

This system distributed money and power to White people and caused emotional and physical suffering, disfigurement, and loss of life for Black persons. Black men were chained to each other by the neck, starved, tortured, and killed by gunshot, whipping, disease, or exhaustion.[20] A significant number of Black men faced indefinite enslavement due to expenses for shelter, food, and medical care that the lessor attached to the debt.[21]

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13. *Id.*; BLACKMON, *supra* note 1, at 56–57.

14. *See* Lynn Weinstein, *The Convict Leasing System: Slavery in Its Worst Aspects*, LIBR. CONG. BLOGS: INSIDE ADAMS: SCI. TECH. & BUS. (June 17, 2021), https://blogs.loc.gov/inside_adams/2021/06/convict-leasing-system/ [https://perma.cc/E2W4-FEHG].

15. Birckhead, *supra* note 12, at 1606; BLACKMON, *supra* note 1, at 64–69.

16. BLACKMON, *supra* note 1, at 65.

17. OSHINSKY, *supra* note 1, at 77.

18. *Id.* at 63.

19. *See* BLACKMON, *supra* note 1, at 302. Whenever emancipation occurred in a jurisdiction (beginning in the North before the Civil War), police turned to vagrancy laws to control increasing populations of free Black persons. Vagrancy arrests of Black residents in Baltimore, for example, increased by over 1,900 percent in the ten years following emancipation in Maryland. ADAM MALKA, THE MEN OF MOBTOWN: POLICING BALTIMORE IN THE AGE OF SLAVERY AND EMANCIPATION 231 tbl.7.1 (2018).

20. BLACKMON, *supra* note 1, at 52, 57, 277, 288–89.

21. *Id.* at 68.

II. CONVENTIONAL UNDERSTANDINGS OF CONVICT LEASING

The conventional narrative understands the law to have facilitated and legitimized convict leasing. Vaguely worded statutes and ordinances criminalized ordinary conduct. In Florida in 1906, for example, the following persons could be found guilty of the crime of vagrancy: "[r]ogues and vagabonds, idle or dissolute persons," "persons who neglect their calling," and "all able bodied male persons over eighteen years of age who are without means of support."[22] Such expansive definitions of criminal conduct granted officers broad discretion to arrest. The racially disparate enforcement of these generally applicable laws did not run afoul of the Constitution. Upon being "duly" convicted under these laws, Black persons were often condemned to forced labor, a punishment permitted by the Thirteenth Amendment.[23]

In an example of this conventional account of convict leasing, Professor David M. Oshinsky in *Worse than Slavery* opens the chapter on post-emancipation Southern life with a story of a Black person who "was caught stealing a pig."[24] This choice, to open with what is claimed to be an actual crime committed by a Black person, reinforces the perception that such convictions were justified under the law. Oshinsky continues: "With freedom, 'black crime' moved well beyond the plantation. Stealing was the most common offense. From Florida to Virginia, from the Carolinas to Texas, came reports of ex-slaves' looting 'pigs, turkeys, chickens, melons, and roasting ears' from white families who seemed perilously close to poverty themselves."[25]

In this telling, Oshinsky emphasizes the moral wrong of thefts committed by Black persons, pointing to the harm it caused to poor White persons. He implicitly suggests the "reports" of theft ought to be believed. Oshinsky reinforces the validity of theft allegations by suggesting theft was a cultural feature of Black life, stating "hunger did not explain it all. Stealing had always been common among slaves," and that "stealing would become a way of life for many ex-slaves."[26]

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22. FLA. STAT. § 3570 (1906).

23. Southern jurisdictions for a limited time also legally enforced Black Codes, which required Black persons to carry proof of employment. If any Black refugees were unable to produce proof, they were subject to arrest. LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 367 (1979).

24. OSHINSKY, *supra* note 1, at 31.

25. *Id.* at 32.

26. *Id.* at 32–33. Notably, such historiographies that discuss theft committed by slaves do so without acknowledging the legal impossibility of chattel committing a crime—with no legal rights or obligations vis-à-vis the master, an enslaved person could not commit a theft on the plantation. GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 10

Oshinsky observes that pig laws, which made petty theft of an animal akin to grand larceny, were designed to target Black thieves.[27] But this critique leaves intact the underlying assumption that Black persons were in fact committing these crimes.[28] And to the extent that survival for Black refugees depended on theft, this understanding is incomplete due to the underreporting of White crime. Because Black persons were the main subject of the criminal legal system, the incidence of unprosecuted White crime fades away as Black crime remains centered, doing its corrosive work under the "objective" awning of incomplete crime data.

Acknowledging racialized enforcement practices, Oshinsky writes that "[c]onvict leasing was not about justice, equal treatment, or making the punishment fit the crime."[29] But critiquing motive and proportionality does not disrupt assumptions of Black guilt. In fact, Oshinsky states, "[b]oth races seemed to agree that crime was rampant, brutal, and rising among [Black persons] at this time,"[30] and that "[n]o one who examined the Delta at close range ever doubted the enormous volume, or violent nature, of [Black] crime."[31] In this telling, whether convictions were a result of disparate enforcement practices or poverty, they had a factual basis. This view permits the conclusion that vagrancy convictions, along with the prosecution of more serious crimes, represented "duly convicted" persons sent to hard labor. This account asserts that the

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(2d ed. 1858) ("The subject is one doomed in his own person and his posterity to live without knowledge and without the capacity to make any thing his own, and to toil that another may reap the fruits. Such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. . . . The power of the master must be absolute to render the submission of the slave perfect." (quoting *State v. Mann*, 2 Dev. 263, 266 (N.C. 1829) (enslaved person at issue))).

Jurisdictions' recognition of slaves' personhood for the sole purpose of subjecting them to criminal law is irreconcilable with deeming a slave to be chattel and should not be legitimatized by historiographies that implicitly accept this impossible legal construct. *See, e.g.*, *Baker v. State*, 15 Ga. 498, 503 (1854) (enslaved person at issue) ("It is true, that slaves are chattels, for most purposes. It is equally true, that they are not so for all; for many, they are persons. The Act of 1770, (*Cobb's Dig*. 971,) declares, that [Black persons] shall be 'absolute slaves, and shall be taken and deemed, in law, chattels, personal, in the hands of their respective owners or possessors, to *all* intents and purposes, whatsoever'. But it also contains many provisions which, nevertheless, treat slaves as persons—as beings capable of committing crimes, and worthy to be punished by form of law for crimes, when committed; and no beings, except persons, are thus capable and worthy.").

27. OSHINSKY, *supra* note 1, at 31–33.

28. *See id.* at 32–33.

29. *Id.* at 78.

30. *Id.* at 127–28.

31. *Id.* at 130.

racially disparate enforcement of vagrancy laws during 1880 and 1915, however problematic, was legal.

This account of convict leasing is consistent with critiques of the criminal legal system's role as a critical site of racial subordination. As Professor Paul Butler contends, the racially predatory nature of criminal legal system defines "how the system is supposed to work."[32] This critical legal scholarship understands the law to facilitate and legitimatize the racially predatory practices of the criminal system.[33] The conventional account of convict leasing coheres with this theory of social control and racial predation.

In the context of convict leasing, however, this account is incomplete. Archival findings suggest that many of the Black men sent to forced labor were not duly convicted, but victims of human trafficking. Under this alternative view, state actors enriched themselves and achieved racial control through illegal means. Professor Bernadette Atuahene calls this phenomenon "stategraft": when state actors use extralegal means to routinely extract something of value from vulnerable communities.[34] In understanding how systems of racial oppression function, the concept of "stategraft" joins the debate over how we understand the state to mediate the racial order. Where stategraft identifies *extralegal* predation, Butler and others reveal how much of the criminal legal system's racial predation is *facilitated* by the law, not in spite of it. Applying the stategraft lens to the convict leasing practices of 1880 to 1915 can help identify extralegal predation that coexists with legal systems of racial predation.

III. AN ALTERNATIVE VIEW: WHITE-ON-BLACK CRIME

An alternative theory deserves consideration: that criminal system actors illegally conspired to falsely convict thousands of Black men, condemning them to hard labor. Obviously, there is a subset of actual crimes committed, from vagrancy to homicide. But those who were "duly convicted" potentially represent a minority in these cases.

The work of Douglas Blackmon provides archival data essential to this inquiry. Searching for records related to arrest, conviction, and

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32. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016).

33. *See, e.g.*, *id.*; Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 363–64 (2015); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1609–11 (2017).

34. *See* Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 170 (2020).

enslavement, he found information buried in courthouses across the South. This discovery—an estimate of "millions of mostly obscure entries in the public record [that] offer details of a forced labor system of monotonous enormity"—reveals much more archival research needs to be done.[35] The picture is incomplete, but what that begins to emerge suggests the conventional framing of the period is overinclusive and harmful.

A. Perpetrator of Crime or Crime Victim?

Blackmon opens his book, *Slavery by Another Name*, with the arrest of Green Cottenham in 1908 for "vagrancy" and states: "Cottenham had committed no true crime[;]" rather, his offense "was blackness."[36]

Statistics drawn from county-level archives support the contention that a significant number of Black men were sent to forced labor as a result of a White-perpetrated criminal conspiracy. For example, in the year that Shelby County, Alabama, entered into an agreement to furnish convict labor to surrounding mines, the county's "crime rate" spiked 1,100 percent in just one year.[37] Before this arrangement, the county averaged twenty convictions each year, with few fines assessed.[38] After its agreement to furnish Black convicts to industrial concerns, the county register indicates at least twenty convictions each month.[39] In the first month that commissioners agreed to supply nearby mines and coal works with forced laborers, "the jail suddenly filled with forty-five prisoners."[40] In another example of mass arrests made to meet labor demands, Oshinsky unearthed county-level records in Leon County, Florida, where local officials were determined to meet the needs of the Putnam Lumber Company (a Wisconsin-based concern). Within six months, "[v]agrancy arrests shot up by almost 800 percent."[41]

In such jurisdictions, "[a]rrests surged and fell . . . in tandem to the varying needs of the buyers of labor."[42] The number of criminal allegations was in lockstep with labor demands. These demands could be met in real time as "courts had become a conveyor belt" for Black workers.[43] So coordinated were arrangements that "[t]he span of time

35. BLACKMON, *supra* note 1, at 7.
36. *Id.* at 1.
37. *See id.* at 69–70, 79.
38. *Id.* at 69.
39. *Id.* at 79.
40. *Id.*
41. OSHINSKY, *supra* note 1, at 74.
42. BLACKMON, *supra* note 1, at 65–66.
43. OSHINSKY, *supra* note 1, at 69.

from arrest to conviction and judgment to delivery at a slave mine or mill was often *no more than seventy-two hours*."[44]

Two competing inferences can be drawn from these scenarios: one, the counties stepped up enforcement of vagrancy and theft violations to meet labor needs; or two, state actors fabricated criminal allegations to meet labor needs. Some will reflexively land on the first inference, concluding that an evidentiary basis for guilt supported these arrests and convictions. The latter inference, however, is best supported by the evidence. Arrests were made to ensure that the industrial or agricultural concern would continue to rely on the county for labor supply. A county entering this market was not alone. If the county failed to provide convicts, these business concerns could go elsewhere. In Alabama, "nearly seventy individual local governments . . . parceled thousands" of laborers "to a hundred or more other buyers."[45] If state actors were looking for anything in particular to meet calls for more forced laborers, it was not criminal suspicion but rather able-bodiedness.[46]

These statistics are further contextualized by personal accounts that attest to false arrests and convictions.

> In 1903, as to her "fourteen-year-old brother, James" who "had been abducted a year earlier and sold to a plantation," Carrie Kinsey wrote that he had done "nothing for them to have him."[47]
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> John Davis was travelling to care for his ill wife. A White man that Davis *had never met* demanded money that he claimed Davis owed. Davis refused. The constable arrested Davis on a warrant for theft. Within a day, he was convicted and sent to a plantation.[48]
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> Note Turke travelled from Birmingham to visit home. He was abducted by White men. They took him to a judge, who refused to process the criminal allegations. They then took Turke to another judge, who processed the allegations, whatever they were. Turke was immediately sent to a plantation.[49]

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44. BLACKMON, *supra* note 1, at 66 (emphasis added).

45. *Id.* at 288.

46. *Id.* Though able-bodied men were preferred by industrial concerns, by 1906, in Alabama, the state inspector of convicts wrote "[t]he demand for labor and fees has become so great that most [convicted persons] . . . are unfit for such labor." *Id.*

47. *Id.* at 8.

48. *Id.* at 123–27.

49. *Id.* at 148–51.

> Five teenagers left their work at a mill. They were stopped by White men (not from the mill) and brought to the mayor, who held proceedings on allegations of failing to pay for their lunch. Within a day, all five teens were forced laborers at a plantation. When two attempted to escape, they were criminally charged for breaking a contract and sentenced to a term of hard labor.[50]
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> Green Cottenham walked to the local train station, as he did daily. It was the location where he waited with other Black men for White men to offer day labor jobs. He was arrested on allegations of riding a train without a ticket, which was later amended to vagrancy. Nine other Black men, also seeking day labor, were arrested and convicted. All ten were put in irons, chained together at the neck, and condemned to forced labor in a mining operation in need of more workers.[51] A few months later, Cottenham was dead.[52]
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> J.C. Powell, a White man who worked for a turpentine and resin concern reported that, "it was possible to send a [Black person] to prison on almost any pretext."[53]

Is there any reason we should not credit these accounts attesting to innocence? Indeed, this question emphasizes the work that the criminal system has done to elevate White credibility and diminish Black credibility. Further, even as more personal accounts are discovered, these protestations of innocence will remain underrepresented due to the legacy of laws prohibiting Black persons from obtaining literacy and because records were most often produced by White state actors and businesses. By drilling down into individual stories, we can start to piece together what Blackmon refers to as an "archetypal story."[54] In these personal accounts, there was no vagrancy or theft; there was only a White man sending a Black man to servitude on false allegations.

Empirical data that suggests widespread false arrests of Black victims aligns with a physical infrastructure that could create as much supply as was demanded. A network of White men and constables spanned the countryside.[55] Because courts could obtain official standing

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50. *Id.* at 151–54.

51. *Id.* at 300–03.

52. *Id.* at 322.

53. OSHINSKY, *supra* note 1, at 72–73.

54. BLACKMON, *supra* note 1, at 9.

55. *See id.* at 66 ("Across Alabama, northern Florida, and Georgia, a bewildering world of casual judicial process emerged in which affidavits were scribbled on scraps of notebook paper, . . . men were identified and arrested on the basis of meaningless physical descriptions, and hardly anyone could sign their own name."); *id.*

with ease,[56] "half-official judges and strongmen assuming the authority to arrest resided every few miles."[57] It was easy to find a court that would convict the Black victim on perjured testimony, as in the case of Note Turke. When one judge refused to process the allegations of Turke's abductors, they simply went down the road to secure a judgment from another.[58] Business concerns employing their own judge was not uncommon.[59] One plantation, for example, employed its own "judge" (the owner's family member) and witnesses (employees) to criminally process Black persons, many of whom had been abducted.[60] At this plantation, when any lease term was to expire, the plantation would merely fabricate another warrant, arrest, and conviction.[61]

This examination of empirical data, personal accounts, and physical infrastructure suggests the criminal legal system routinely disguised White crime as Black crime. If it is reasonable to infer that many convictions were based on false allegations, another reasonable inference is that many of these convictions were instead White-perpetrated crimes.

B. System Actors as Perpetrators of Crimes

Under the alternative theory, many Black persons were not "duly convicted," but rather victims of White-perpetrated crime. To initiate this criminal enterprise, state actors committed crimes of false imprisonment and kidnapping, perjury, and peonage. Because the completion of this criminal enterprise required coordination with those contracting for forced labor, a conspiracy was formed. As a result, state actors were also liable for the foreseeable crimes of their co-conspirators, such as reckless endangerment and reckless homicide.

False imprisonment and kidnapping. Under the alternative account, a common means to secure a convict leasing agreement was to issue a false warrant or false accusation that led to the arrest of the Black victim. This front-end detention constitutes false imprisonment (the person intends to confine the victim without authority of law, causes the victim's

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at 99 ("The mechanisms of the new slavery reached another level of refinement, as trading networks for the sale and distribution of black [persons] emerged over wide areas.").

56. For example, in Alabama, "'inferior' courts" that had the power to convict misdemeanors were locally elected; by the early 1900s, there were thousands of these "justice[s] of the peace" in "every community and at almost every major crossing of roads." *Id.* at 127–28.

57. *Id.* at 66.

58. *See id.* at 148–51.

59. *See id.* at 7.

60. *Id.* at 136–37, 143, 146, 153.

61. *Id.* at 137–38.

confinement, and is aware of the victim's confinement), but also the more serious crime of kidnapping (the unlawful detention of a person with the motive of obtaining a reward). On the back end of adjudication, the judicial officer who imposes fees to engage in human trafficking, knowing the allegations to be false, also satisfies the elements of false imprisonment and kidnapping.

Perjury. The Black victim's guilt was established by a false affidavit or false testimony. Witnesses signing these affidavits or testifying to details of a fabricated crime committed perjury (the declarant takes an oath to be truthful, makes a statement contrary to that oath, knows the statement was not true, and the statement supported a material fact at issue).[62]

Peonage. The crime of peonage is committed when one holds a person to involuntary service to satisfy a debt obligation.[63] White state actors (as well as contracting businesses) violated this prohibition upon convicting Black persons on pretext to coerce them into forced labor to pay off their indebtedness. It is likely that criminal acts of peonage were especially widespread. This is because, even where there was an underlying basis for a conviction, indebtedness could be constructed through extralegal means. State actors often convicted Black persons for a minor offense with a small fine. But then state actors would impose adjudications fees for *processing* the offense that were so excessive as to require a surety. These adjudication fees could represent *ninety-eight percent* of the actual debt. In 1908 in Shelby County, for example, "Ben Holt, convicted of vagrancy on August 29, 1906, was ordered to pay the county a fine of $1. The costs of his arrest and prosecution, however, totaled $76.28."[64] Such practices arguably satisfy the crime of peonage.[65]

Reckless endangerment and reckless homicide. As to the core element of reckless endangerment and reckless homicide—that one's conduct creates a substantial risk of serious injury or death—the archival record indicates that forced laborers were subjected to "the most

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62. *See, e.g.*, *Nicholson v. State*, 25 S.E. 560, 560 (Ga. 1896); *Williams v. State*, 68 Ala. 551, 555 (1881); *Rhodes v. Commonwealth*, 78 Va. 692, 698 (1884).

63. The Peonage Act of 1867, ch. 187, 14 Stat. 546 (codified as amended at 42 U.S.C. § 1994).

64. BLACKMON, *supra* note 1, at 286 ("Instead of paying, he confessed judgment with a white farmer named James Wharton, who paid the fine and fees and in return owned Holt for a minimum of two hundred days.").

65. State actors also knew Black victims condemned to forced labor for a fixed period were often subject to indefinite enslavement. Alabama inspectors, for example, notified the governor that "[c]onvicts have been hired out and lost sight of, others are in possession of contractors and no bond or contract on file. Others have been found in possession of parties different from those to whom hired." *Id.* at 76. This knowledge would affect sentencing, as it goes to the seriousness of the offense.

atrocious aspects of antebellum bondage" that posed a substantial risk of injury and death by exposure, torture, disease, beatings, and whipping.[66]

In Alabama, records indicate a twenty to forty-five percent annual death rate of forced laborers.[67] Visiting the site of one such mine, Blackmon observed "faint outlines of hundreds upon hundreds of oval depressions still marked in the land."[68] This horrific discovery was under representative; records indicate many bodies had been incinerated.[69] One doctor sent to investigate the "unusual mortality" at a Mississippi plantation—where forced laborers worked in unforgiving heat and slept chained outdoors—wrote: "As long as the state expects to get this work done for less money than it is worth, they will find that at the end of the year they have paid the balance in men."[70] In Mississippi, in 1882, "126 of 735" forced laborers were killed; in that state, not "a single leased convict ever lived long enough to serve a sentence of ten years or more."[71] In 1887, fifteen percent of Mississippi's forced laborers had been killed.[72] In 1906, the president of Alabama's Board of Inspectors of Convicts wrote that forced laborers sent to mines were so unfit that "[i]f the state wishes to kill its convicts it should do it directly and not indirectly."[73] Death by whipping or gunfire was not uncommon. In one account, a forced laborer was killed by being whipped sixty-nine times.[74] In Florida, a young man was whipped at least ninety-five times, killing him.[75] Official reports list such individuals as having perished from illness.[76] Between 1877 and 1879, a railroad operating in South Carolina and Georgia "'lost' 128 of their 285 prisoners to gunshots, accidents, and disease."[77]

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66. *Id.* at 52.

67. *Id.* at 57.

68. *Id.* at 2–3.

69. *See id.* at 6–7, 288–89.

70. OSHINSKY, *supra* note 1, at 46 (quoting Report from R. D. Farish, M.D., to the Penitentiary Board of Control (May 23, 1896) (on file with the Mississippi Department of Archives and History, Series 831, Box 1127).

71. *Id.*

72. *Id.* at 50.

73. BLACKMON, *supra* note 1, at 288 (quoting Shirley Bragg, *Report of Convict Inspectors*, *in* OFF. OF THE INSPECTORS OF CONVICTS, SIXTH BIENNIAL REPORT OF THE BOARD OF INSPECTORS OF CONVICTS TO THE GOVERNOR 5, 7 (1906)).

74. *Id.* at 342.

75. *See id.* at 366–67.

76. *See* OSHINSKY, *supra* note 1, at 74 (discussing the case of Martin Tabert, a forced lumber laborer, who "had been overworked, underfed, beaten senseless, and left to die," yet the letter his family received following his death stated that he died of fever).

77. *Id.* at 60. Again, the "disease" category was often used to excuse assaults that resulted in death.

Even if forced labor conditions posed a substantial risk of injury or death, did front-end co-conspirators—those who arrested, committed perjury, and passed judgment—*know* of these conditions? One could make reasonable inferences that these co-conspirators were so aware, given the number of public investigations and hearings throughout the South that exposed these conditions.

In Alabama, an 1889 legislative report found "an 'immense amount of whipping'" of convicted persons: in one mine with 165 forced laborers, 137 whippings were issued over two weeks.[78] An Alabama commission found workplace conditions for forced laborers "'totally unfit for use, without ventilation, without adequate water supplies, crowded to excess, filthy beyond description.' Prisoners were 'poorly clothed and fed . . . excessively and sometimes cruelly punished; there were no hospitals; the sick were neglected.'"[79] Alabama inspectors reported on an "appalling number of maimed and 'disabled men.'"[80] Inspectors were so alarmed that the state did specific outreach to apprise county judges of these conditions. Among reports detailing exposure, lack of nutrition, sleeping in sewage, dysentery, and eighteen-hour workdays were descriptions of "apparatuses of prisoner punishment used throughout the southern prison labor system" that would pose a substantial risk of serious injury, including this practice[81]:

> In a punishment known simply as "the chains," a prisoner was placed in handcuffs attached to the ends of . . . steel bar, which was then hoisted with a pulley until the man [was] suspended "from 50 minutes to two hours." [In a] variation . . . the victim's ankles were cuffed behind his back and then his feet "drawn upward and backward until his whole body is stretched taut in the shape of a bow" and then tied to his wrists.[82]

In Georgia, a fourteen-year-old who was whipped daily testified in a legislative hearing:

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78. BLACKMON, *supra* note 1, at 97, 99.

79. *Id.* at 73 (quoting Rufus Willis Cobb, *History of the Penitentiary*, *in* OFF. OF THE INSPECTORS OF CONVICTS, FIRST BIENNIAL REPORT OF THE INSPECTORS OF CONVICTS TO THE GOVERNOR 348, 357–58 (1886)).

80. *Id.* at 75.

81. *Id.* at 318.

82. *Id.* (footnote omitted) (first quoting ALVARAN SNOW ALLEN, THE STORY OF A LIE: BY CONVICT NO. 2939, HIMSELF FIFTEEN YEARS IN PRISON (1928); and then quoting Harvey R. Hougen, *The Impact of Politics and Prison Industry on the General Management of the Kansas State Penitentiary, 1883-1909*, 43 KAN. HIST. QS. 297 (1977), https://web.archive.org/web/20021118023413/http://www.kancoll.org/khq/1977/77_3_hougen.htm).

> Asked what was the matter with his hand, Long said the camp whipping boss beat it with a leather strap after Long said he was getting cramps . . . . After that, the boy could never open his hand again. . . . [T]he chairman . . . asked Long to take off his shirt . . . . To gasps of horror . . ., the slight young man . . . turned to reveal a back grossly swollen and scarred with stripes from the turpentine camp beatings. . . . One foot was still seriously infected where a whipping had literally removed a piece of skin.[83]

In one account of conditions at an Atlanta-based brickmaking factory, a former guard testified to the legislative committee that the whipping boss "beat fifteen to twenty convicts each day . . . . 'You can hear that any time you go out there. When you get within a quarter of a mile you will hear them.'"[84] Blackmon also found many accounts of waterboarding.[85]

In Mississippi, when a Hinds County grand jury in 1884

> paid a surprise visit to the prison hospital in Jackson, it found twenty-six recent arrivals from the convict railroad camps. "All [bear] marks of the most brutal and inhuman treatment," the jurors reported:
>
> "Most of them have their backs cut in great wales, scars, and blisters, some with the skin peeling off in places as the result of severe beatings. . . . They are lying there dying, some of them on bare boards . . . with live vermin crawling over their [bodies]."[86]

A Mississippi legislative committee in 1884 found instances in which "prisoners had been savagely abused . . . . Some had been murdered by sadistic guards; others, 'unable to work, had been driven to death while fettered in chains.'"[87]

A Texas legislative committee found that forced laborers were worked "until they drop[ped] dead in their tracks" and that in a typical year, "forty or fifty convicts would be killed by gunfire."[88]

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83. *Id.* at 339–40.

84. *Id.* at 345.

85. *See id.* at 319.

86. OSHINSKY, *supra* note 1, at 48–49 (quoting P. T. Ferris, *Cruelty to Convicts. A Mississippi Grand Jury on the State Lease.*, MACON BEACON, July 16, 1887).

87. *Id.* at 48.

88. *Id.* at 61.

In Tennessee, state inspection reports revealed conditions so atrocious that public criticism almost ended the practice of convict leasing.[89]

Based on evidence that brutal conditions were so well-known as to create public concern and legislative inquiries across the South, front-end state actors likely knew of the brutal conditions that presented a substantial risk of serious injury or death to forced laborers.

Even if state actors had notice of these conditions, they would contend they had no part in creating such conditions. Would any theory of criminal liability expose state actors to charges of reckless endangerment and reckless homicide? Yes, if they were found to be co-conspirators in a human trafficking enterprise of which foreseeable outcomes for its victims included the substantial risk of great bodily harm or death.[90]

Here, state actors arguably engaged in a human trafficking conspiracy: they detained and convicted Black victims on false charges, and then trafficked these victims to industrial and agricultural concerns where these victims were held against their will. In the absence of an agreement to falsely accuse and convict Black victims, these persons would not have been subject to false imprisonment by businesses. State actors accepted payment from businesses, constituting an additional overt act in furtherance of the kidnapping conspiracy.[91] Ill-gotten gains from this conspiracy contributed to leasing proceeds that "poured the equivalent of tens of millions of dollars into the treasuries of Alabama, Mississippi, Louisiana, Georgia, Florida, Texas, North Carolina, and South Carolina—where more than 75 percent of the black population in the United States then lived."[92] By 1889, proceeds from convict leasing represented ten percent of Alabama's total tax revenue, and by 1903, twenty-five percent.[93] Localities did well. A grand jury called to assess

89. *Id.* at 74.

90. *See Boyd v. United States*, 142 U.S. 450, 455–56 (1892) (noting that if "men agree to do an act which, from . . . the way it is to be done, is an act that will put human life in jeopardy," then all conspirators are responsible for a death that transpires "because of the execution of the enterprise"); *Gibson v. State*, 8 So. 98, 100 (Ala. 1890) (holding that conspirators are liable for "everything done by the confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan").

91. Multiple cases find the acceptance of money related to a conspiracy to be an overt act in furtherance of it. *See, e.g.*, *Clark v. United States*, 265 F. 104, 105–06 (8th Cir. 1920) (holding that acceptance of money in a conspiracy to bribe public officials constituted an overt act in furtherance of the conspiracy, even if the act might be considered, in isolation, an innocent act).

92. BLACKMON, *supra* note 1, at 7–8.

93. *See id.* at 95, 112.

allegations of labor related charges in 1875 found that convict leasing contributed "much to the revenues of the county."[94] Within twenty-five years,

> At the monumental cost of $250,000, Shelby County erected a new courthouse that without exaggeration could be described only as extraordinary. . . . [T]he new building was a temple . . . .
>
> [F]our columns soared fifty feet to an ornate Greek Revival portico. Encircling the roofline on every side, a carved parapet railing framed cupolas of hammered brass leaf on each wing of the building. . . . [T]he building's chiseled west façade, constructed of thousands of tons of yellow limestone quarried from the ridges above the nearby Coosa River, glowed luminescently.[95]

The county's population was around only 25,000.[96]

It is arguable that reckless endangerment and reckless homicide were reasonably foreseeable by state actors to be a natural consequence of the kidnapping conspiracy that involved subjecting its victims to these well-documented, horrific workplace conditions.[97]

Usury. In Southern states, the maximum interest that could be charged in the nineteenth century ranged between 5.7 percent (Virginia) and 13.5 percent (Florida).[98] However widespread the practice of flouting usury laws,[99] lessors of forced laborers evidently were some of the worst offenders.[100]

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94. *Id.* at 55.

95. *Id.* at 282–83.

96. *See* U.S. CENSUS BUREAU, NO. 73798-13-37, SUPPLEMENT FOR ALABAMA 583 tbl.1, https://www2.census.gov/library/publications/decennial/1910/abstract/supplement-al.pdf [https://perma.cc/2XFB-SH6J] (documenting Shelby County's population as 23,684 in 1900 and 26,949 in 1910).

97. *See Pinkerton v. United States*, 328 U.S. 640, 646–68 (1946); Matthew A. Pauley, *The* Pinkerton *Doctrine and Murder*, 4 PIERCE L. REV. 1, 2–3 (2005).

98. Efraim Benmelech & Tobias J. Moskowitz, *The Political Economy of Financial Regulation: Evidence from U.S. State Usury Laws in the 19th Century*, 65 J. FIN. 1029, 1038–39 (2010).

99. CHARLES R. GEISST, LOAN SHARKS: THE BIRTH OF PREDATORY LENDING 4–8 (2017) (discussing the history of usury laws).

100. BLACKMON, *supra* note 1, at 174 ("Workers were forced to buy their own food and clothes from a camp commissary and charged usurious interest rates on the salary advances used to pay for the goods—typically at least 100 percent.").

IV. WHAT WE CAN LEARN FROM APPLYING THE STATEGRAFT LENS

Examining convict leasing through the stategraft lens helps disrupt the understanding that convict leasing was largely facilitated by the law. Rather than conceive of the typical transaction between a White deputy and a Black person on a dirt lane in Mississippi as a targeted but legally valid vagrancy arrest, there is archival support for the conclusion that Black victims were trafficked by White perpetrators. This alternative account centers the actions of White persons as perpetrators and Black men as crime victims and further interrogates the historical crime rate that is increasingly understood to significantly exaggerate Black crime and to undercount White crime.

A. Not Convict Leasing but Human Trafficking

Unlike criminal system interventions that, however predatory, are legal, archival data suggests criminal adjudications between 1880 and 1915 often involved state actors and contracting parties committing human trafficking. To refer to these transactions as "convict leasing" is to erase the underlying White-perpetrated crimes. To call a crime victim a "convict" only causes further victimization. Given these circumstances, the term "convict leasing" should generally be paired with the phrase "and human trafficking of Black persons."

Even with this corrective, the term "convict leasing" is whitewashed, decoupled from the racially targeted enforcement practices perpetrated by a violent White power structure. The term also burdens subjects with an undeserved status given that most of these individuals were convicted of minor crimes, while the term "convict" is associated with a serious offender. An alternative term like "non-chattel slavery" would acknowledge how this period extended slavery well beyond 1863 and would remove the patina of due process and legitimacy that the term "convict leasing" communicates. In any event, a better term waits to be identified. In the meantime, the mention of the Black crime victims who were condemned to forced labor should be included in any description of this period.

B. Undercounting White Crime, Overcounting Black Crime

Under the conventional account, the historical Black crime rate should be understood as a product of targeted enforcement practices, and thus compared to the White crime rate, inflated. But the crime rate, under this view, still purports to reflect the commission of actual crimes. The alternative view would go further in interrogating the historical Black

crime rate, permitting the conclusion that the Black crime rate is not only inflated but also fabricated. This view further permits the conclusion that the White crime rate omits actual crime of which the state was nevertheless aware.

The stakes are high. The Black crime rate at the time was used to legitimize claims of Black criminality and dangerousness. Picking up where phrenologists failed to link race to crime, criminologists used the racially disparate crime rate to "prove" a link between Blackness and criminality.[101] In 1896, Frederick Hoffman relied on census and local data to "show without exception that the criminality of the [Black person] exceeds that of any other race" and that every intervention "has utterly failed to raise the [Black person] to a higher level of citizenship, the first duty of which is to obey the laws and respect the lives and property of others."[102] The country was virtually unified on this sentiment. By the 1890s, the *Nation*, *Harper's Weekly*, the *North American Review*, and the *Atlantic Monthly* regularly printed articles covering the inherent criminal tendencies of persons of color.[103]

The alternative view supplements ongoing efforts to center White-perpetrated crime following the Civil War. White vagrants were largely unprosecuted in the South, resulting in a dramatically under representative White crime rate.[104] White-perpetrated violent crime against Black victims is also largely unaccounted for in the historical White crime rate. Murder, assault, and battery were rampantly committed by White persons against Black individuals and families, with no criminal charges or outcomes resulting.[105] Accounts of immunized White-on-Black massacres were not infrequent.[106] Sexual violence

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101. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 1–5 (2010).

102. FREDERICK L. HOFFMAN, THE RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO 228 (New York, Macmillan Co. 1896).

103. Brian Purnell & Jeanne Theoharis, *Histories of Racism and Resistance, Seen and Unseen: How and Why To Think About the Jim Crow North*, *in* THE STRANGE CAREERS OF THE JIM CROW NORTH: SEGREGATION AND STRUGGLE OUTSIDE OF THE SOUTH 1, 17 (Brian Purnell, Jeanne Theoharis & Komozi Woodard eds., 2019) [hereinafter THE JIM CROW NORTH].

104. LITWACK, *supra* note 23, at 370 (stating, as to vagrancy laws, "although largely enforced against [Black persons], authorities could if they chose enforce [them] against whites").

105. EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876, at 42–55 (2020), https://eji.org/wp-content/uploads/2005/11/reconstruction-in-america-rev-111521.pdf [https://perma.cc/7WRM-MRNR].

106. *Id*. at 52 (describing a massacre in Arkansas in which White persons attacked a Black refugee camp and killed twenty-four Black men, women, and children). Lee W. Formwalt, *The Camilla Massacre of 1868: Racial Violence as Political*

committed against Black women was unaccounted for in White crime data even as "[r]ape, attempted rape, naked whippings, forms of sexual torture, humiliation, and genital mutilation" were perpetrated by the Klan.[107]

This White-on-Black violence was facilitated by law and custom. The criminal system elevated White credibility and status by precluding Black persons from testifying or serving as jurors. Though the Civil Rights Act of 1866 granted the right to testify regardless of the color of one's skin,[108] the Supreme Court for years carved out exceptions as states continued to bar Black testimony.[109] Jurisdictions also barred Black persons from jury eligibility, preventing the possibility that a Black jury might frustrate the assurance of acquittals by all-white juries for acts of White-on-Black violence. And when explicit bans on Black jury service were prohibited in *Strauder v. West Virginia*,[110] counties installed a gatekeeper who determined Black jurors did not have the moral character to serve.[111] These conditions rendered White vigilantes and officers virtually immune from prosecution for the injury or killing of persons of color, rendering life unbearably dangerous for Black persons in any jurisdiction in the country.

As the Equal Justice Initiative states, the "historical record is filled with scattered but consistent and devastating descriptions of

Propaganda, 71 GA. HIST. Q. 399 (1987) (describing a massacre in Camilla, Georgia, in 1868); *United States v. Cruikshank*, 92 U.S. 542 (1875) (describing massacre of hundreds of Black men by White vigilantes); LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008) (describing a massacre in Colfax, Louisiana, in 1873); WILLIAM IVY HAIR, BOURBONISM AND AGRARIAN PROTEST: LOUISIANA POLITICS 1877-1900, at 182–85 (1969) (describing a massacre in Thibodeux, Louisiana, in 1887).

107. TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 28 (2015).

108. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27.

109. *See, e.g.*, 2 KY. REV. STAT. ch. 107, § 1 (1860) (repealed 1872) ("That a slave, negro, or Indian shall be a competent witness in a case of the commonwealth for or against a slave, negro, or Indian, or in a civil case to which only negroes or Indians are parties, but in no other case."); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 592–93 (1871) (finding a Black witness to a murder did not have standing under the Civil Rights Act of 1866 to challenge Kentucky's law).

110. 100 U.S. 303, 309–10 (1879).

111. GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 253 (1910) (surveying jurisdictions across the South and finding that virtually all excluded Black jurors). For example, in a South Carolina county of 18,000 White persons and 41,000 Black persons, the commissioner explained: "[W]e never allow a [Black person] to serve for the reason of general moral unfitness, and general depravity." *Id.* at 267–68. States also passed laws permitting non-unanimous guilty verdicts, a White-supremacist policy to guard against the threat of a holdout Black juror who might be inclined to prevent an all-White jury from unjustly convicting a Black defendant. *E.g.*, LA. CONST. of 1898, art. CXVI.

[White-on-Black] terror and brutality . . . . Quantitative documentation of the violence of this era remains imprecise and incomplete."[112] As historians and organizations work to create a clearinghouse of evidence to measure the enormity of White-on-Black crime, the White crime rate will continue to be revisited and reevaluated. One expects that after sufficient reconstruction of actual conditions, any racial disparity will likely be in the form of a higher rate of White crime, especially violent crime.

C. Centering White Perpetrators and Beneficiaries

Efforts to surface racial harms most often focus on *deprivations*. These critical efforts identify the injury or exclusion caused by the racial order. Another method of inquiry is to focus on *beneficiaries* of the racial order. Measuring benefits that flow to White persons because of racial subordination is also an important mode of analysis.

The alternative view centers White beneficiaries. This shift in focus invites a close examination of the criminal conduct of White state actors and their contracting counterparts. Such a focus also incentivizes archival research to uncover the roles and relationships that White persons had in these criminal conspiracies. Preliminary data reveals a coordinated human trafficking scheme that involves serious and violent crimes, from kidnapping to perjury to reckless homicide. The rewards of this arrangement are no longer repugnantly legal but rather ill-gotten gains from criminal activity. The focus on how White persons and businesses benefitted through the perpetration of criminal acts calls for a forensic accounting of the value of the monetary benefits illegally flowing to state actors, the value of the illegally obtained labor by the White-owned businesses, and the value of the civil damages for pain and suffering and wrongful death that would be owed to the laborers or the families of the deceased.

D. Centering the State in Racial Subordination

Racial subordination requires violence and the threat of violence. Private persons do not have the power to bend others to their will based on skin color. They only have such power if their actions are backed by the state. However implicit the arrangement, the state must be the guarantor of racial coercion. If the state is not aligned with any attempt by a person or a community to engage in racial violence, that attempt to racially discriminate or exclude will likely fail.

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112. EQUAL JUST. INITIATIVE, *supra* note 105, at 43.

Since the Civil War, the Supreme Court has attempted to doctrinally erase the state's role in maintaining the racial order. The *Civil Rights Cases*,[113] for example, relieved states of any affirmative duty to prevent their citizens from racially excluding, harming, or killing others on a widespread basis.[114] This case even pretended that local law enforcement efforts to facilitate these communal practices of racial exclusion and violence did not implicate the state.[115] The Court implicitly rejected the possibility that it was only because of the state's alignment with White racial violence that such discrimination and exclusion could occur.

State alignment with the racial order can manifest in various ways. Two types of alignment surface within the discussion of convict leasing. The first type is the state's direct use of coercion to construct and maintain racial subordination. Within the context of convict leasing, this type of state alignment is embraced by the conventional view: Black persons were disproportionately arrested, convicted, and sent to forced labor under the "duly convicted" exception of the Thirteenth Amendment. The broad discretion granted by underlying laws like Black Codes and vagrancy statutes facilitated this use of direct state violence against Black persons. This view of state alignment is developed by scholars like Paul Butler, who contended that racially predatory criminal system interventions define "how the system is supposed to work."[116]

Between 1880 and 1915, another manifestation of state coercion was the use of extralegal and routine methods to further racial subordination. This "stategraft" lens is applied here as the basis for developing an alternative (at times supplemental) account of convict leasing: that it was not convict leasing at all, but rather a state-sponsored criminal

113. 109 U.S. 3 (1883).

114. *See id.* at 13–17.

115. *See id.* at 17.

116. Butler, *supra* note 32, at 1425. The racially disparate enforcement of race-neutral laws between 1880 and 1915 would be legitimatized by the Supreme Court. *Washington v. Davis*, 426 U.S. 229 (1976) (holding constitutional practices that state actors know result in racially disparate outcomes) and *McCleskey v. Kemp*, 481 U.S. 279, 291–99 (1987) (holding same in criminal law context). The Court would also provide constitutional cover for many of the enforcement practices between 1880 and 1915 by way of *Terry v. Ohio,* 392 U.S. 1 (1968) and its progeny. *See, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 884–87 (1975) (permitting race to be a factor for suspicion of criminal activity in certain circumstances); *Minnesota v. Dickerson*, 508 U.S. 366, 372–77 (1993) (creating "plain feel" doctrine that in practice permits searches for contraband during a *Terry* stop); *Whren v. United States*, 517 U.S. 806, 811–13 (1996) (permitting racially pretextual stops so long as an officer can articulate some violation); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (permitting a *Terry* stop based on officer's assessment of furtive movement in a "high crime area"); *Utah v. Strieff*, 579 U.S. 232, 235 (2016) (permitting an illegal detention to be attenuated by running a warrant check and finding an outstanding warrant).

enterprise.[117] This account centers the state as a criminal actor to extract resources from communities of color to benefit the government itself.

Applying multiple lenses to analyze state coercion further reveals the structural nature of racism as it brings into focus the state's essential role in mediating the racial order. A state-centered analysis undermines narratives and legal doctrine that seek to minimize state accountability for racial harm.

CONCLUSION

Under the conventional account, convict leasing was an odious but legally legitimate practice. Recent attention given to the Thirteenth Amendment's "duly convicted" exception helps expose the criminal legal system's critical role in racial subordination.[118] The prevalence of statutes that targeted Black persons or granted broad discretion to arrest also support this account.[119] This conventional view provides an explanation for a significant number of cases in which a person was arrested, convicted, and sent to forced labor.

And yet, there is growing evidence that many convictions were not facilitated by law, but rather the result of conspiracies to kidnap able-bodied Black men. Archival county-level data indicates convictions occurred in lockstep with the labor needs of businesses that contracted with local state actors. In addition, records indicate numerous personal accounts from victims and their families that arrests and convictions occurred in the absence of any criminal suspicion or probable cause. These statistics and testimonials suggest many Black "convicts" were victims of human trafficking. Given the nature of the trafficking—multiple sites of detention and transfer among multiple parties—a criminal conspiracy was formed. Additional crimes such as reckless endangerment and reckless homicide were the natural and foreseeable result of this conspiracy.

Archival research is woefully incomplete, reflecting the social and political commitment to the racial order. Acknowledging racial harms

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117. *See* Atuahene, *supra* note 34, at 170, 174.

118. *See, e.g.*, 13TH (Netflix 2016); Whitney Benns, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/ [https://perma.cc/6BEQ-NDKA].

119. Black Codes made it illegal for Black persons to not have proof of employment. For a short period, these statutes were legally enforced. Soon after the Civil War, federal courts struck them down. Nonetheless, jurisdictions continued to enforce these Black Codes. LITWACK, *supra* note 23, at 367–70. Continued enforcement of facially invalidated laws would add further support for the alternative view that many Black persons were not "duly convicted."

challenges the racial order; erasing racial harm is, conversely, a tool of maintaining that order. One can see this erasure played out today on the national stage, with presidential candidates denying America was ever a racist country.[120] This erasure of the racial order finds doctrinal support: less than twenty years after chattel slavery, and in the midst of debt peonage, lynching, racial terror campaigns, and convict leasing, the Court wrote, "there must be some stage in the progress of a [Black person's] elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws."[121]

Blackmon shared that, before he launched his investigation into convict leasing, historians he spoke with told him that "the details of what really happened couldn't be determined. Official accounts couldn't be rigorously challenged, because so few of the original records of the arrests and contracts under which black men were imprisoned and sold had survived."[122]

But, as Blackmon found during his investigation:

> [I]n the attics and basements of courthouses, old county jails, storage sheds, and local historical societies, I found a vast record of original documents and personal narratives revealing a very different version of events. In Alabama alone, hundreds of thousands of pages of public documents attest to the arrests, subsequent sale, and delivery of thousands of African Americans into mines, lumber camps, quarries, farms, and factories. More than thirty thousand pages related to debt slavery cases sit in the files of the Department of Justice at the National Archives. Altogether, millions of mostly obscure entries in the public record offer details of a forced labor system of monotonous enormity.[123]

That these historical resources have been virtually undisturbed indicates the weak foundations upon which the conventional account of convict leasing sits.

The picture is thus incomplete. Within the area of criminal law, historians and sociologists continue to conduct case studies that reveal a fine-grained understanding of on-the-ground deprivations that help to

120. *See* Chris Cameron, *In New Hampshire, Haley and DeSantis Were Asked About Race in America. It Got Awkward.*, N.Y. TIMES (Jan. 17, 2024), https://www.nytimes.com/2024/01/17/us/politics/haley-america-racist-desantis.html.

121. *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

122. BLACKMON, *supra* note 1, at 5.

123. *Id.* at 6–7.

excavate the topography of racial harm.[124] Such works represent original perspectives based on historical research to uncover what many White academics and commentators for so long could not or did not want to see.[125] There is much research to be done. But the picture that begins to emerge suggests our conventional framing of the period is incomplete if not erroneous: those who were "duly convicted" might more often represent the exception, not the rule.

124. *See generally* Julian Go, *The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century*, 125 AM. J. SOCIO. 1193 (2020); THE JIM CROW NORTH, *supra* note 103; SIMON BALTO, OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER (2019); MALKA, *supra* note 19; ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY (2016); LEFLOURIA, *supra* note 107; DOUGLAS J. FLOWE, UNCONTROLLABLE BLACKNESS: AFRICAN AMERICAN MEN AND CRIMINALITY IN JIM CROW NEW YORK (2020); MUHAMMAD, *supra* note 101.

125. *See* Hettie Williams, *Black Historians, Race, and the Historical Profession*, AFR. AM. INTELL. HIST. SOC'Y: BLACK PERSPS. (Aug. 23, 2022), https://www.aaihs.org/black-historians-race-and-the-historical-profession [https://perma.cc/PS8T-XFTH] (describing Black scholars' achievements in historical scholarship). Those awarded doctorates in the field of history are still predominantly White. *Racial/Ethnic Distribution of Degrees in History*, AM. ACAD. ARTS & SCIS., https://www.amacad.org/humanities-indicators/higher-education/racialethnic-distribution-degrees-history [https://perma.cc/3Z8R-VNBV].

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