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Abolish Gang Statutes With the Power of the Thirteenth Amendment: Reparations for the People

Fareed Nassor Hayat

ABSTRACT

The abolitionist movement seeks to fundamentally dismantle the prison industrial complex. Modern abolitionists recognize that mass incarceration of Black and Brown people is twenty-first century slavery. True abolition, they note, cannot be realized by merely tinkering with the carceral state. Instead, the complete elimination of modern-day badges and incidents of slavery must occur. The U.S. Supreme Court has held that § 2 of the Thirteenth Amendment grants the U.S. Congress the power to pass legislation to eradicate any "badges and incidents" of slavery. By passing federal antigang legislation and failing to outlaw similar state statutes, which are modern badges of slavery themselves, Congress abdicates its duty to enforce the Thirteenth Amendment. The Reconstruction Amendments' legislative history suggest that in the absence of Congressional action, federal courts are the last resort for striking down state laws that perpetuate the institutions of slavery and white supremacy. Thus, this Article calls upon the United States Supreme Court to exercise its duty and join the abolitionist movement to target antigang statutes as but one institutional legacy of slavery that must be toppled.

Part I of this Article engages Thirteenth Amendment scholars' writings and adopts a prominent position that the intent of the Thirteenth Amendment, to eradicate all forms of slavery, is applicable to many modern-day instances of oppression. This Part adds to other abolitionist scholars' efforts by demonstrating that Black Codes, Jim Crow-era vagrancy laws, and gang injunctions have evolved into the sophisticated antigang statutes of today, and they were initially intended to be—and still are—"badges" and "incidents" of slavery. Part II identifies the specific individuals who drafted, advocated for, and facilitated the passing and the enforcement of the first gang statutes in this country. Those individual drafters' racist ideologies and objectives will be exposed by way of their writings, public statements, and campaigns then challenged to upend their justification for gang statutes. Part III gives some sense of the economic cost of gang prosecution, the human toll on gang members and the communities from which they come and how gang statute prosecutions violate the plain language of the U.S. Constitution. In addition to the economic cost of gang enforcement regimes—which are almost impossible to fully calculate—this Part highlights how gang prosecutions do not address the public safety concerns of largely Black and Brown communities. Part IV applies an abolitionist framework to gang statutes and explores solutions that not only make better use of economic resources and restore integrity to constitutional due process, but actively work towards an abolitionist horizon. This Article offers a proposal for the reallocation of funds towards antiracist structural change and a centering of community justice based in the power of the Thirteenth Amendment.

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The United States was founded on genocide and white supremacy, but the Reconstruction Amendments presented an opportunity for the country to start again. By revisiting the legislative history of the Thirteenth Amendment, the abolitionist intent behind it, and the way in which white supremacists have thwarted such intentions, this Article argues that the present social climate is ripe for redressing Thirteenth Amendment jurisprudence, beginning with the total eradication of antigang statutes.

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INTRODUCTION

In June 2021, a meme depicting a white child stretching his legs to ascend a staircase while skipping multiple steps began trending on social media[1] in reaction to the signing of legislation commemorating Juneteenth.[2] With his left foot planted at the bottom of the staircase, the child bypasses steps labeled "talking about race in schools," "voting rights," "stop police violence," and "reparations," as his right foot reaches instead to a top step marked "making Juneteenth a national holiday."[3] Juneteenth is the celebration of the arrival of Union troops in Galveston, Texas in June 1865, notifying enslaved Africans of the Emancipation Proclamation.[4] President Abraham Lincoln issued the proclamation two years prior in the midst of the American Civil War to provoke rebellion and chaos in the Confederate States of America. Many enslaved people were already aware of the proclamation but remained on Texas plantations due to the fictitious import of the declaration.

In one tweet, the meme is accompanied by a purported quote from Malcolm X that reads, "[t]he white man will try to satisfy us with symbolic victories rather than economic equality and real justice."[5, 6] In much the same vein, Robert A. Brown, professor of media and social justice at Morehouse College, writes that "[t]here is a growing discontent in the African American community with symbolic gestures that are presented as progress without any accompanying economic or structural change."[7] He goes on to state that "[l]awmakers have been

1. *See, e.g.*, Etan Thomas (@etanthomas36), TWITTER (June 18, 2021, 7:21 AM), https://twitter.com/etanthomas36/status/1405848070923894786 [https://perma.cc/3KCC-58GA]; Viola Davis (@violadavis), TWITTER (June 18, 2021, 5:26 PM), https://twitter.com/violadavis/status/1406000340206456832 [https://perma.cc/SC8U-KCW2].
2. Juneteenth National Independence Day Act, Pub. L. No. 117–17, 135 Stat. 287 (2021).
3. *See* sources cited *supra* note 1.
4. Emancipation Proclamation, Jan. 1, 1863; Presidential Proclamations, 1791–2016; General Records of the United States Government, Record Group 11; National Archives Building, Washington, D.C.
5. Davis, *supra* note 1.
6. This Article has been unable to verify that the purported quote actually came from Malcolm X.
7. Robert A. Brown, *Juneteenth as a National Holiday Is Symbolism Without Progress*, NPR (June 19, 2021), https://www.npr.org/2021/06/19/1008123408/juneteenth-national-holiday-symbolism-without-progress-opinion [https://perma.cc/9GGM-WXWA]; *accord* Robin Washington, *What Really Happened on Juneteenth—and Why It's Time for Supremacists and Their Sympathizers to Surrender*, FORWARD (June 18, 2021), https://forward.com/opinion/471597/juneteenth-what-really-happened/ [https://perma.cc/ED2M-NVVA].

more willing to engage in performative symbolism than passing laws to make substantive change."[8] Juneteenth becoming a national holiday is just the kind of symbolic gesture presumptively alluded to by Malcolm X and further critiqued by Professor Brown.

While Juneteenth focuses on the two-and-a-half-year delay before enslaved Africans in Texas acted on the Emancipation Proclamation, the Thirteenth Amendment,[9] which was ratified in December 1865,[10] has no commemorative holiday. Nor does the Juneteenth holiday acknowledge the Thirteenth Amendment's true economic intent and attempt at achieving real justice. The history of Juneteenth is well documented[11] and, with this new national holiday, widely celebrated. But the Emancipation Proclamation on which it is based did little to provide true emancipation to Africans enslaved in this country.[12] Contrary to revisionist histories, enslaved Africans were aware of the Emancipation Proclamation prior to Juneteenth and had already moved toward emancipating themselves throughout American history.[13]

Unlike the Emancipation Proclamation, the Thirteenth Amendment envisioned accompanying economic and structural change to eradicate chattel slavery—its vestiges, badges, and incidents.[14] So while Reconstruction, civil rights, and reparations have never been truly realized for formerly enslaved Africans and

8. Brown, *supra* note 7. *See also* Robin Givhan, *Congress's Kente Cloth Spectacle Was a Mess of Contradictions*, WASH. POST (Jun. 9, 2020, 9:40 AM), https://www.washingtonpost.com/lifestyle/2020/06/09/congresss-kente-cloth-spectacle-was-mess-contradictions [https://perma.cc/3G86-B2MJ] (critiquing congressmembers' gesture of kneeling in the Rotunda of the U.S. Capitol and wearing traditional Ghanaian kente cloth in a moment of silence for George Floyd); Black Lives Matter DC (@DMVBlackLives), TWITTER (Jun. 5, 2020, 6:53 AM), https://twitter.com/DMVBlackLives/status/1268903712581464066 [https://perma.cc/KM2S-L9LA] (critiquing the mayor of D.C.'s painting of a Black Lives Matter mural on 16th street as a "performative distraction . . . to appease white liberals").
9. U.S. CONST. amend. XIV.
10. True freedom was not realized by enslaved Africans until the U.S. Congress actually made it law.
11. *See, e.g.*, CONG. RSCH. SERV., JUNETEENTH: FACT SHEET (2023), https://crsreports.congress.gov/product/pdf/R/R44865/8 [https://perma.cc/SJ9R-CDD8].
12. The Emancipation Proclamation was not only potentially unenforceable but, even if it was enforceable, it only applied to the eleven Confederate States. *See* Emancipation Proclamation, *supra* note 4.
13. As early as the American Revolutionary War, historians estimate that as many as 100,000 enslaved Africans escaped to the British side in exchange for their freedom. *See* BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 18 (1st ed. 2007). Even with the loss of the Revolutionary War, thousands realized freedom in Canada.
14. *See infra* Part I.A.

their descendants, the Thirteenth Amendment, unlike the Emancipation Proclamation and our newly-cemented Juneteenth national holiday, at least had the intent of true economic equality and justice. The enforcement power of the Emancipation Proclamation only became viable upon the arrival of the Union troops. Not until their presence in Texas and actual force was given to Emancipation, was there true basis to celebrate. In the end, it was not that enslaved Africans did not know about the Emancipation Proclamation, they simply understood that it did not change their position as enslaved.

Proponents of the Confederacy and white supremacy then and now, with help from the U.S. Supreme Court, have effectively reimagined the Thirteenth Amendment into an empty proclamation, limiting the scope of the Amendment to cover only modern-day examples of chattel slavery.[15] They argue that "everything has some historic connection with slavery."[16] Thus, instead of undoing modern forms of oppression, they suggest accepting social ills as integral to American fabric.[17] These scholars have artfully argued in support of the spirit of the Thirteenth Amendment, while declaring that it has no function in the modern American experiment.[18]

Yet many structural and economic changes demanded by abolitionists today were originally envisioned by the largely antislavery U.S. Congress of 1865.[19] Specifically, reparations, civil rights, and individual liberty were debated and

15. *See* Gail L. Heriot & Alison S. Simon, *Sleeping Giant?: Section Two of the Thirteenth Amendment, Hate Crimes Legislation, and Academia's Favorite New Vehicle for the Expansion of Federal Power*, FEDERALIST SOC'Y (Feb. 12, 2013), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/5IRGfuh1CFUnq4ZmAm2jM4vjEtSw03toCP6dXkRK.pdf [https://perma.cc/K45B-9E4H].
16. *Id.* at 31, 34.
17. *Id.* at 34 ("Everything, large and small, good and bad, would be different in ways we can barely imagine. There are relics and vestiges of slavery everywhere, just as there are relics and vestiges of the struggle to end it and of every other significant chapter in history."). *See also id.* at 34 n.39 ("Deeply rooted federalist doctrines regarding the importance of protecting individuals from the long reach of a powerful central government also counsel for reading Section 2 at least as narrowly as Section 5.").
18. Most notably, Professor Jennifer Mason McAward advanced this argument in her writings, such as in her article *Defining the Badges and Incidents of Slavery*, which I discuss at greater length *infra* Part I.B. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561 (2012).
19. When Southern states seceded from the Union, the entire congressional delegation from the South was absent from the 38th Congress, giving the antislavery radical Republicans control of both chambers. *See* Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1589 (2004). Moderate members of Congress hoped to maintain the Union and understood that slavery, at least in the form of the chattel institution, had outlived its usefulness. *See* Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697 (2012).

advocated in the structuring and ratification of the Thirteenth Amendment.[20] Abolitionists fought to include § 2 of the Thirteenth Amendment and provide Congress with the power to make such legislation in order to truly abolish slavery and all of its iterations.[21] That sentiment, the nineteenth century spirit of abolition that envisioned a new framework of American governance—one truly capable of embodying the principles of life, liberty, property, and equality for all as promised in the U.S. Constitution—continues today.

The modern abolitionist movement embodies these nineteenth century principles and seeks to fundamentally dismantle the prison industrial complex.[22] True freedom, safety, and justice cannot be realized by merely tinkering with the carceral system by investing in police training, mandating body cameras, and decriminalizing marijuana. Instead, abolition requires the complete elimination of laws that have disparate racial impacts, defunding of the police, and reparations for communities targeted by the carceral state. This Article offers a proposal for the reallocation of funds towards antiracist structural change and the centering of community justice based in the power of the Thirteenth Amendment.

While over time some of the legal weapons used to further white supremacy pursuant to the Thirteenth Amendment loophole[23]—in which slavery continued to exist for those duly convicted of a crime through Slave Codes and Black Codes—have been found unconstitutional, most either persist to this day or have simply mutated into more insidious forms.[24] Highly militarized police forces found in

20. *See* BRUCE LEVINE, THADDEUS STEVENS: CIVIL WAR REVOLUTIONARY, FIGHTER FOR RACIAL JUSTICE (Unabridged ed., 2021).

21. *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007).

22. *See* Jen Jenkins, *Pu'uhonua Not Prisons, A Manifesto*, 46 N.Y.U. REV. L. & SOC. CHANGE 103 (2022) ("Chronicles how the Prison Industrial Complex, as a capitalist and white supremacist tool, has oppressed Native Hawaiian culture and people throughout its colonial history and into the present.").

23. *See generally* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 924–25 (2019). Michele Goodwin writes:

> Th[e] original proposal prohibited slavery completely but sanctioned "involuntary servitude" as a punishment for a crime—implying that those who might be sentenced to hard labor were not being doomed to lifelong enslavement . . . Senator Charles Sumner, . . . objected to the Punishment Clause . . . urging legislators to reject the Punishment Clause and "clean the statute book of all existing supports of slavery, so that it may find nothing there to which it may cling for life."

Id.

24. *See* Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women's Reproductive Rights*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 117, 170 n.84 (2013) (citing Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871)). Alexandria Gutierrez writes:

today's cities were nonexistent until the mid-twentieth century, yet they are derivative of nineteenth century slave patrols. Today's gang cops and gang prosecutors are the present-day slave catchers. So too, a particular species of criminal laws—antigang statutes—have a clearly traceable genealogy from Slave Codes to the post-Civil War Black Codes, Jim Crow-era vagrancy laws, and gang injunctions,[25] and ultimately to the California Street Terrorism Enforcement and Prevention (STEP) Act and the myriad of laws that has followed in its footsteps.[26]

> For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.

Id.

25. *See* DAVID LEVINSON, 2 ENCYCLOPEDIA OF HOMELESSNESS 585 (Sage Publishing 2004). ("Vagrancy laws after the Civil War kept the formerly enslaved in a state of quasi slavery.")

26. Twenty-eight states and the District of Columbia require only one predicate act. Arizona: "any felony act" AZ ST §13-2321 (B); California: Cal. Penal Code §186.22 (West) substantive crime and enhancement of sentence require only one predicate act; Delaware: the participation offense requires the accused assist with only one act, but that the gang has participated in two or more predicate acts in Del. Code Ann. tit. 11 § 616 (West); District of Columbia: (b)(1) It is unlawful for any person who is a member of or actively participates in a criminal street gang to knowingly and willfully participate in any felony or violent misdemeanor committed for the benefit of, at the direction of, or in association with any other member or participant of that criminal street gang. D.C. Code Ann. § 22-951 (West); Florida: any act in furtherance of a gang—Fla. Stat. Ann. § 874.10 (West) carries a life sentence and the enhancements under 874.04 require only one act to apply, but also Florida Racketeer Influenced and Corrupt Organization (RICO) law requires more than one predicate offense. Chapter 874 is the Criminal Gang Enforcement and Prevention Act while Chapter 895 is offenses concerning racketeering and illegal debts; Georgia: any offense in furtherance of a gang. Ga. Code Ann. § 16-15-4 (West); Idaho: Idaho Code Ann. § 18-8502 (West) enhancement for one act; Illinois: 720 Ill. Comp. Stat. Ann. 5/25-5. Illegal participation tied together with 740 Ill. Comp. Stat. Ann. 147/15 Creation of civil cause of action. However, the gang and RICO statute requires at least 3 occurrences of predicate activity that are in some way related to each other and that have continuity between them, and that are separate acts 720 Ill. Comp. Stat. Ann. 5/33G-3.; Indiana: Ind. Code Ann. § 35-45-9-3 (West) Illegal participation in a criminal organization; Iowa: Iowa Code Ann. § 723A.2 (West); Kentucky: (enhancement) Ky. Rev. Stat. Ann. § 506.160 (West); La. Stat. Ann. § 15:1403 Louisiana; Maryland: Ann. Md. Code, Crim. Law § 9-804 (West). Participation in criminal gang prohibited; Michigan: Mich. Comp. Laws Ann. § 750.411 (West); Minnesota: Minn. Stat. Ann. § 609.229 (West) (separate RICO charges); Mississippi: Miss. Code Ann. § 97-44-19 (West) (enhancement); Missouri: Mo. Ann. Stat. § 578.425 (West) (enhancement); Nevada: Nev. Rev. Stat. Ann. § 193.168 (West) enhancement Nevada Racketeering charges Nev. Rev. Stat. Ann. § 207.390 requires 2 or more for racketeering activity; New Jersey: N.J. Stat. Ann. § 2C:33-29 (West) "crime of gang criminality"; North Carolina: N.C. Gen. Stat. § 14-50.15 Enhancement 7. North Carolina Continuing criminal enterprise N.C. Gen. Stat. § 14-7.20 requires more; North Dakota: N.D. Cent. Code Ann. § 12.1-06.2-02 (West); Ohio: Ohio Rev. Code § 2923.42; Oklahoma: Okla. Stat. tit. 21, § 856.3 (West); Rhode Island: Racketeering only requires one act for this crime 11 R.I. Gen. Laws § 11-57-1 (West); South Dakota S.D. Codified Laws § 22-10A-2 enhancement; Texas: Tex. Penal Code Ann. § 71.02 (West); Utah: Utah Code § 76-3-203.1 (West)

The pedigree of today's antigang statutes demonstrates that they are badges and incidents of slavery repugnant to the intent of the Thirteenth, Fourteenth, and Fifteenth Amendments, also known as the Reconstruction Amendments.

Gang membership othering, policing, prosecuting, and imprisoning outspends and defunds education resources, poverty eradication programs, drug abuse treatment centers and job development spending. Nationwide, state agencies spend billions of dollars annually prosecuting, caging, and monitoring accused gang members using a peculiar set of legal standards, authorized through gang statutes, that violate the plain language of the Constitution.[27] In addition to the economic cost of gang enforcement regimes—which are almost impossible to fully calculate—the state of California's longterm project of policing and criminalizing gangs is punitive, ineffective, costly, an incident of slavery, and a violation of the Thirteenth Amendment of the U.S. Constitution.

This is the first Article to challenge the constitutionality of antigang statutes under the Thirteenth Amendment. Within this Article, I posit that modern-day abolitionist further their objective by using this constitutional amendment as a tool of liberation. Because of growing up during the 1980s in South Los Angeles, fantasizing about gang involvement, being a public defender, and representing accused gang members, I have seen how labeling and criminalizing Black and Brown youth furthers white supremacy and mass incarceration—and is a form of modern-day slavery.[28] I have documented the many ways that gang prosecutions

enhancement; Virginia: Va. Code Ann. § 18.2-46.2 (West), however the RICO offense requires two or more predicate acts, and even includes the word criminal street gang; West Virginia: W. Va. Code Ann. § 61-13-3 (West) Anti-Organized Criminal enterprise act. Arkansas: "2 or more predicate offenses" Arkansas Criminal Gang, Organizations, or Enterprise Act. Ark. Code Ann. §5-74-104 (West); Connecticut: under CORA it's 2 or more predicate acts Conn. Gen. Stat. Ann. § 53-395 Def; Kansas: Kann. Stat. Ann. § 21-6329 (West) (RICO); Montana: Mont. Code Ann. § 45-8-405 (West). Pattern of Criminal Street Gang Activity; New Mexico Racketeering: N.M. Stat. Ann. § 30-42-4 (West); New York: NY baby RICO, N.Y. Penal Law § 460.20 (McKinney); Oregon: Racketeering Or. Rev. Stat. § 166.720 (West); Pennsylvania: Racketeering 18 Pa. Stat. and Cons. Stat. Ann. § 911 (West); Tennessee RICO: Tenn. Code Ann. § 39-12-204 (West); Washington: Wash. Rev. Code §§ 9A.82.001 (West) Criminal profiteering act requires 3 or more; Wisconsin: Wis. Stat. § 946.83 Wisconsin RICO & Continuing Criminal Enterprise (CCE).

27. *See* VERA INST. OF JUST., CHRISTIAN HENRICHSON & JOSHUA RINALDI, COST-BENEFIT ANALYSIS 4 (2014).

28. Although the specific forms of institutional oppression that Black and Brown people have experienced may differ, the objective of Brown oppression is also a relic of the U.S. slave system. The slave system was justified by a white supremacist ideology that held that nonwhite people were innately inferior and deserving of subhuman treatment. Capitalism in the Americas thrived by reducing human beings to chattel; their labor was deemed property and not their own, making them expendable and they were treated as disposable. The means justified the

violate constitutional rights, almost exclusively Black and Brown youth, and have argued that they must be tinkered with by legislatures or reinterpreted by courts to restore due process protections guaranteed by the Constitution.[29] But in this Article, like Justice Harry Blackmun in his dissenting opinion in *Callins v. Collins*,[30] I "no longer shall tinker with the machinery of death" and oppression. I now argue from an abolitionist framework that these gang statutes cannot be fixed and simply need to be abolished entirely. No amount of tinkering can correct a fundamentally flawed system.

The U.S. Supreme Court has held that § 2 of the Thirteenth Amendment grants Congress the power to pass legislation to eradicate "badges and incidents" of slavery. Legal scholars have argued, supported by the historical record, that while Congress is empowered to enforce the Thirteenth Amendment and may "be the better branch of government to define what conditions amount to badges of slavery, it is not the only branch practically equipped or constitutionally empowered to do so."[31] Enforcement of the Thirteenth Amendment extends

ends, thus creating an economic system that approved the oppression of nonwhite people by instilling a false sense of superiority in white people.

29. *See* Fareed Nassor Hayat, *Killing Due Process: Double Jeopardy, White Supremacy and Gang Prosecutions*, 69 UCLA L. REV. DISC. 18, 21 (2021) [hereinafter Hayat, *Killing Due Process*] (arguing that "the dismantling of Fifth Amendment double jeopardy protection is the product of white supremacy, couched in a legislative intent narrative, for the purpose of expanding the carceral state"). To revive due process and comply with the Double Jeopardy Clause, we must extend the protections of the Fifth Amendment to all Black and Brown people, including gang members charged under state gang statutes. Fareed Nassor Hayat, *Two Bites at the Apple: Requiring Double Jeopardy Protection in Gang Cases*, 73 RUTGERS U. L. REV. 1463, 1464 (2021) [hereinafter Hayat, *Two Bites at the Apple*] (arguing that "gang prosecutions violate classic double jeopardy when predicated on a single previously adjudicated criminal offense," "violate collateral estoppel where criminal defendants are found not guilty of a substantive criminal act," then "found guilty of the same act in furtherance of the gang," and when defendants are "punished consecutively under a gang statute and conspiracy to violate the same gang statute"). *See also* Fareed Nassor Hayat, *Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196, 196 (2021) (arguing that "Police gang expert testimony should only be admitted [in criminal trials] after the underlying criminal matter has been proven beyond a reasonable doubt, and even then, only if the police gang expert testimony abides by clearly defined rules of evidence"); Fareed Nassor Hayat, *Preserving Due Process: Applying* Monell *Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129, 138 (2019) (advocating for the use of the Monell bifurcation standard in gang prosecutions to separate gang allegations from substantive criminal acts to ensure criminal defendants, including gang members, due process of law).

30. 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

31. Carter, *supra* note 21, at 1319 (arguing that both Congress and the U.S. Supreme Court can enforce the Thirteenth Amendment).

beyond Congress and includes the primary enforcer of the Constitution, the Supreme Court of the United States.[32]

Yet, when Congress passes antigang legislation or fails to outlaw similar state statutes, the legislative histories of which evince an intent to impose badges and incidents of slavery, Congress abdicates its duty to enforce the Thirteenth Amendment. If Congress abandons its enforcement power, federal courts are the last resort for striking down statutes that effectively perpetuate the institution of slavery through white supremacy. Thus, this Article calls for the abolitionist movement and the U.S. Supreme Court, as the enforcer of the Constitution, to target antigang statutes as but one pillar of the prison industrial complex—a modern day badge of slavery—that must be toppled.[33]

In Part I of this Article, I explore scholarly writing on the Thirteenth Amendment and particularly highlight § 2 and its import in modern times.

32. *See id.*

33. Many scholars of constitutional law would be quick to compare any standard for interpretation of the Thirteenth Amendment to the voluminous case law that has developed eroding the Fourteenth Amendment to suggest that the Thirteenth Amendment should be similarly limited. The Supreme Court's Fourteenth Amendment jurisprudence has two distinct branches: (1) what does the Fourteenth Amendment *prohibit* Congress or any state from doing, and (2) what does § 5 of the Fourteenth Amendment *permit* Congress to do? Under the first branch, Congress may not pass any law that creates an express race-based classification unless it can surmount strict scrutiny, showing that the law is narrowly tailored to advance a compelling government interest. If the racial classification is not express (as is the case with many antigang statutes), then a challenger must show that the law had both discriminatory intent and discriminatory impact. Washington v. Davis, 426 U.S. 229 (1976). When it comes to Congress's powers under the Fourteenth Amendment, the Court has held that § 5 allows for "remedial legislation." The Court will look at the scope of the right claimed under the Fourteenth Amendment (as defined by the Court, and not Congress) and then determine whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 63 (2000) (citing City of Boerne v. Flores, 521 U.S. 507, 520 (1997)). There is no reason to think that the Supreme Court's Fourteenth Amendment jurisprudence should in any way limit what is possible under the Thirteenth Amendment, given the fact that the Fourteenth Amendment was only enacted to fill a potential gap in the Thirteenth Amendment. *See*, Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 42 (2012) (discussing how Thirteenth Amendment scholars believe that interpreting the amendment to cover disparate impact aligns with the framers' intent. Scholars like William M. Carter Jr., Rebecca E. Zietlow, and Darrell A. H. Miller support using the amendment to address practices with discriminatory impact). The legacy of white supremacy in the Supreme Court that has led to this Fourteenth Amendment doctrine should in no way control a legitimate interpretation of the framers' intent behind the Thirteenth Amendment. *See*, Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 41–42 (2011) (introducing a "survey of the historical and jurisprudential background of the Thirteenth Amendment indicates that Boerne's congruent and proportional test is inapplicable to the judicial review of Thirteenth Amendment enforcement authority").

Additionally, I summarize what many abolitionist legal scholars have explained—first, that the origin of the modern prison industrial complex emerged from chattel slavery and second, that seventeenth-century slave patrols are the prototype for twenty-first century police forces. What this Part adds to this history is an account of how Jim Crow–era vagrancy laws evolved specifically into the sophisticated antigang statutes of today. I discuss the ways in which gang statutes have been repeatedly subjected to flimsy legal challenges and how legislatures have consistently found new ways to morph them around constitutional strictures. This tinkering of gang statutes is representative of the ways in which white supremacy mutates into insidious new variants as harmful, or even more harmful, as their past iterations on communities of color.

Part II offers a case study of the California STEP Act—the first modern antigang statute, which provides the boilerplate for most gang statutes that have since followed in this country. This Part explores the history of criminal street gangs in California, with a focus on Los Angeles, the law enforcement officials and politicians behind the effort to enact the STEP Act, and the furtherance of white supremacy couched in tough on crime rhetoric.

Behind the veil of the facially neutral rhetoric of the STEP Act lies a carefully constructed Thirteenth Amendment violation. Three elected officials, Kenneth Hahn, Ira Reiner, Alan Robbins, and the appointed chief of the Los Angeles Police Department (LAPD), Daryl Gates, orchestrated a quintessential incident of slavery. Together these men advocated for and knowingly implemented a series of legal weapons[34] built on Slave Codes, post–Civil War Black Codes, Jim Crow–era vagrancy laws, and gang injunctions, in order to control and subjugate Black and Brown people back to the condition of slave.[35] Like its precursors, their weapon—the gang statute—gave "law enforcement" the ability to monitor and occupy Black

34. This Article rejects the word "tools" as a way to describe the purpose of complex criminal statutes such as RICO, gang statutes, and CCE. Here, I use the word "weapons" as opposed to the word "tools" (a term often used in other writings) because the expansion of criminal liability has been used to weaponize criminal statutes to further mass incarceration. Tools fix problems while weapons are used to wage war, including unsuccessful ones like the war on drugs or the war on poverty. RICO does little to correct structural problems of class, education, economics, and racism. RICO, gang statutes, and other complex criminal statutes are weapons thus used primarily against Black and Brown people.

35. *See* Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999) (describing vagrancy laws passed by most Southern states during the Jim Crow era as part of a regime of official white supremacy).

communities, arbitrarily criminalize Blackness, evade constitutional protection, monetize Black bodies, and punish beyond the strictures of law.[36]

Additionally, Part II reveals how the STEP Act spread beyond California in the 1990s and sparked a pandemic of antigang legislation. The STEP Act effectively erased the racist history of such forms of prosecution and rationalized punishment in violation of the Constitution based on a "super predator" myth.[37] The narrative of Black dangerousness and criminality resurfaced repeatedly, finally culminating in the nation's capital with the signing of the 1994 Violent Crime Control and Law Enforcement Act (Crime Bill), which included the first federal antigang statute.[38]

Part III attempts to give some sense to the economic cost and human toll of it all. Nationwide, state agencies spend billions of dollars annually prosecuting, caging, and conducting surveillance on alleged gang members using a peculiar set of legal standards, authorized through antigang statutes, that violate the plain language of the Constitution. In addition to the economic cost of gang enforcement regimes—which are almost impossible to fully calculate—I share statistics on how these statutes disparately impact communities of color and drain state resources. To shed light on this, I highlight how gang prosecutions do not address the public safety concerns of largely Black and Brown communities.

Part IV applies an abolitionist framework to gang statutes and explores solutions that make better use of economic resources through reparations and restore integrity to constitutional due process by actively working towards an abolitionist horizon.[39] This Part proposes the reallocation of funds toward antiracist structural change and a centering of community justice based in the power of the Thirteenth Amendment.

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36. *See id.* at 805 ("The myth of Black criminality is part of a belief system deeply embedded in American culture that is premised on the superiority of whites and inferiority of Blacks. Stereotypes that originated in slavery are perpetuated today by the media and reinforced by the huge numbers of Blacks under criminal justice supervision.").

37. *See* Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, MARSHALL PROJECT (Nov. 20, 2020), https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [https://perma.cc/D7JA-2DYP] (explaining "John J. DiIulio Jr. coined the term [superpredator] for a November 1995 cover story in The Weekly Standard," arguing that "30,000 young 'murderers, rapists, and muggers' would be roaming America's streets, sowing mayhem. 'They place zero value on the lives of their victims, whom they reflexively dehumanize as just so much worthless 'white trash.'").

38. *See* Public Papers of the Presidents of the United States: William J. Clinton, 1994, Book II, 1539–41 (Sept. 13, 1994), *available at* https://www.govinfo.gov/content/pkg/PPP-1994-book2/html/PPP-1994-book2-doc-pg1539.htm [https://perma.cc/N4AT-7JNB].

39. *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781 (2020).

By revisiting the legislative history of the Reconstruction Amendments,[40] specifically the Thirteenth Amendment, the abolitionist intent behind it, and the way in which white supremacists—from Chief Justices John Rutledge to John Roberts—have thwarted such intentions, I argue that it is essential to redress Thirteenth Amendment jurisprudence, beginning with the total eradication of antigang statutes and the reallocation of carceral funding. Since Congress has the will to pass a national holiday in commemoration of the liberation of African people in America, notwithstanding the unprecedented times of an international pandemic and racial unrest where real demands of structural change have been made,[41] I suggest that now is the time to pass legislation designed to eradicate a chief vestige, badge, and incident of slavery—antigang statutes.

I. THE THIRTEENTH AMENDMENT EMPOWERS CONGRESS AND THE U.S. SUPREME COURT TO ERADICATE VESTIGES, BADGES, AND INCIDENTS OF SLAVERY

This Part explores the landscape of recent scholarship on the Thirteenth Amendment and particularly highlights § 2 and its importance in modern times. The Thirteenth Amendment was passed by Congress on January 31, 1865, signed by President Abraham Lincoln the next day, and ratified by the required number of states, which was then twenty-seven out of thirty-six, by December 6, 1865.[42] The text of the Amendment in its entirety is as follows:

40. *See* Andrew E. Taslitz, *Slave No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709 (1999) (arguing that the Thirteenth, Fourteenth, and Fifteenth Amendments rejected the idea of a Black incapacity so extreme as to be unable to comprehend politics or responsibly exercise the vote).

41. *See Policy Platforms: The Preamble*, MOVEMENT FOR BLACK LIVES (Jun. 19, 2020), https://m4bl.org/policy-platforms/the-preamble/ [https://perma.cc/V4Q2-YG7C]. The Preamble to the Movement for Black Lives' Policy Platforms states:

> We Demand: End the war on Black youth; End the war on Black communities; End the war on Black women; End the war on Black trans, gender nonconforming and intersex people; End the war on Black health and Black disabled people; End the war on Black migrants; End all jails, prisons and immigration detention; End the death penalty; End the war on drugs; End the surveillance of Black communities; End pretrial detention and money bail; End militarization of law enforcement; End the use of past criminal history.

Id.

42. *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, NAT'L ARCHIVES (May 10, 2022), https://www.archives.gov/milestone-documents/13th-amendment [https://perma.cc/9SVC-25SS].

> § 1: 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.[43]
>
> § 2: Congress shall have power to enforce this article by appropriate legislation.[44]

Despite its brevity, these words were packed with deep meaning and the abolitionist aspiration of the drafters that they might have far-reaching consequences for the lives of millions. At the same time, those who opposed the Thirteenth Amendment remained committed to subverting and limiting its scope, despite having lost the Civil War[45] and the ratification process. Notwithstanding a vocal minorities' support for maintaining racial subjugation through the institution of chattel slavery, the Thirteenth Amendment, "the first of the Reconstruction Era Amendments, represented the Union's deep-seated commitment to end the 'badges and incidents of servitude.'"[46] As a result of ratification and the hard-fought struggle against white supremacy, the plain language of the Thirteenth Amendment emerged expansive enough to have the "tremendous potential . . . to be a powerful battering ram against any persistent vestiges of servitude"[47] as the drafters intended.

On its face, § 1 of the Amendment does not so much abolish slavery as explain under which circumstances slavery is still legal. It stipulates that slave labor may continue for those convicted of a crime, creating an incentive for whites in power to arrest Black people to exploit their labor and prevent their entry into wage labor and political power[48] for the purpose of maintaining white supremacy.[49]

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43. U.S. CONST. amend. XIII, § 1. Thaddeus Stevens fought against the loophole in the Thirteenth Amendment permitting involuntary servitude as a basis of punishment for a crime because he recognized how it was intended to uphold slavery.
44. U.S. CONST. amend. XIII, § 2.
45. *See generally* KENNETH STAMPP, THE CAUSES OF THE CIVIL WAR: A HISTORY (1992). Although multiple theories persist, it is undeniable without the South's desire to regulate, further, and preserve the institution of chattel slavery, the Civil War would not have occurred.
46. Alexander Tsesis, *The Problem of the Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 542 (2002). Specifically, Tsesis argues that "Congress had attempted to 'do away with the incidents and consequences of slavery' and to replace them with 'civil liberty and equality.'" *Id.* at 580. Moreover, "Instating [B]lacks to the 'full enjoyment' of civil rights was a chief aim of abolishing slavery." *Id.*
47. *Id.* at 542–43.
48. *See generally 13th*, directed by Ava DuVernay (Netflix 2016).
49. *See generally* Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1706 (2012). Zietlow argues that the Court embraced Thirteenth Amendment's labor vision in cases like *Pollock v. Williams*. The court interpreted "involuntary servitude" broadly and struck down a Florida law criminalizing wage advances trapping workers with exploitative employers, citing Thirteenth Amendment and Anti-Peonage Act violation. Justice Robert

Section 2 extends the power of the Amendment to eradicate slavery. From a textual perspective, the drafters furnished § 2 with clear statutory language to elucidate their intentions. The phrase "Congress shall have power to enforce"[50] removes any ambiguity regarding the scope of the amendment and clarifies which branch of government possesses plenary power under it.[51] Any confusion about separation-of-powers limitations or federalist concerns of overstepping Article I authority were foreclosed with ratification of three-fourths of the member states.

Additionally, it is well established that a constitutional amendment *should* be simple. As Chief Justice Marshall admonished in *McCulloch v. Maryland*,[52] "we must never forget that it is a Constitution we are expounding."[53] The Constitution was meant to be a general outline—a structure designed to endure for centuries. Thus, the importance of § 2 of the Amendment and other similar sections of the Constitution is that they grant broad powers to Congress to act. An originalist reading of any constitutional document requires, more than with any other form of legal interpretation, looking to the historical context that led to its ratification and the intent of the drafters.[54]

Jackson's opinion emphasized worker autonomy, aligning with free labor Thirteenth Amendment interpretation.

50. Carter, *supra* note 21, at 1328.

51. A plenary power or plenary authority is a complete and absolute power to act on a particular issue, with no limitations. It is derived from the Latin term *plenus*, meaning full or complete. *See also* Gabriel Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 281–82 (2000) ("[P]lenary powers mean that Congress 'has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals in respect thereof'" (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 251–52 (1964) (quoting Civil Rights Cases, 109 U.S. 3, 18 (1883))).

52. 17 U.S. 316 (1819).

53. *See also* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment As A Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 52n.245 (1990) (citing United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866). Douglas L. Colbert writes:

> In deciding that the 1866 Civil Rights Act was a constitutional exercise of congressional power under the Thirteenth Amendment, Justice Swayne cited McCulloch v. Maryland: "Let the end be legitimate, let it be within the scope of the constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional." In making his decision, Swayne also referred to article 1, section 8, cl. 18—the necessary and proper clause of the constitution.

Id. (citations omitted).

54. *See* Carter, *supra* note 21 (arguing that originalism varies, and versions considering framers' intent or historical context acknowledge support for the "badges and incidents of slavery" interpretation of the Amendment.). In contrast, *see* Peter J. Smith, *Textualism and Jurisdiction*,

In his article *Race, Rights, and the Thirteenth Amendment*, William M. Carter Jr. frames the historical context of the Thirteenth Amendment vis-a-vis its drafters' original intentions.[55] As he explains, the Thirteenth Amendment was the first redraft of the Constitution in response to a nearly failed state.[56] The drafters' intent was clearly to "remov[e] every vestige of African slavery from the American Republic" by "obliterat[ing] the last lingering vestiges of the slave system; its chattelizing [sic], degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it."[57] Everything connected with it or pertaining to it—reaching through time to capture today's modern-day forms, including antigang statutes.

As I will show below, gang statutes are clearly connected with slavery, as they are a vestige of African slavery, the slave system, and its barbarizing spirit. The legislative history of the Thirteenth Amendment supports the power of both Congress and the courts to redress such badges and incidents of slavery. If true, this interpretation of the Amendment requires an obliterating of the lingering effect of the system of African slavery. Slave Codes, the historical ancestor of gang statutes, were invalidated immediately upon adoption of the Thirteenth Amendment.[58] Their abolition signified the expansive reach of the Thirteenth Amendment to abolish the badges of slavery absent congressional legislation. "Any other interpretation belittles the great amendment and allows slavery still to linger among us in some of its insufferable pretensions."[59]

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108 COLUM. L. REV. 1883, 1899–1900, (2008) ("Textualism, in contrast, is an approach to statutory interpretation that accords dispositive weight to the meaning of the statutory text. It maintains that in interpreting statutes, courts must 'seek and abide by the public meaning of the enacted text, understood in context." (citing ANTONIN SCALIA, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 14–37 (Amy Gutmann ed., 1997) (arguing that federal courts should adopt textualist approach to interpreting statutes))). *See also, e.g.*, Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means.").

55. *See* Carter, *supra* note 21.

56. *Id.* at 1339 ("[t]he system . . . almost died, and more than half a million people did die") (quoting AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 360 (2005)).

57. *Id.* (quoting Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 29 CAL. L. REV. 171, 177 (1995) (citing CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1319, 1321, 1324 (1864) (statements of Sen. Wilson of Massachusetts))).

58. The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("The power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all *badges and incidents* of slavery in the United States.") (emphasis added).

59. CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872).

A. The Proponents' Intent: James M. Ashley, Thaddeus Stevens, and Charles Sumner

Radical Republican members of Congress intended to end the institution of chattel slavery and rid the country of political, economic, and cultural vestiges of slavery. They were the "foremost among the champions of rights for [B]lacks."[60] The struggle for the Thirteenth Amendment's passage in the U.S. House of Representatives was led by Representative James Ashley of Northwest Ohio, the document's original drafter and a lifetime opponent of slavery. The Thirteenth Amendment, according to Ashley and his antislavery allies—including Thaddeus Stevens and Charles Sumner—not only put an end to slavery but also created essential human rights for freed slaves and other Americans.[61]

Ashely believed slavery required racial and class subjugation. Restoring a wide variety of fundamental human rights that had been infringed upon by slavery and eradicating the class and race-based subordination that made slavery possible would remedy the evils of slavery.[62] Ashley[63] believed that the Thirteenth Amendment would create a more egalitarian society. He believed in the need to address the intersection of race, class, and gender to combat subordination.[64] For Ashley, the Thirteenth Amendment and the abolition of slavery clearly extended well beyond chattel slavery. To him, economic, sexist, and cultural exploitation were badges of slavery. "Ashley expressly espoused the philosophy of antislavery constitutionalism, believing that slavery was unconstitutional even before the Thirteenth Amendment . . . ."[65]

60. Zietlow, *supra* note 49, at 1708.
61. *Id.* at 1697.
62. *Id.*
63. In addition, James Ashley also supported the right of women to vote and "James Ashley's insight believed in the intersectionality of racial equality and workers' rights." *Id.* at 1699.
64. *Id.* at 1728 ("Critical race theorists have written extensively about the phenomenon of intersectionality--the confluence of characteristics, including race, class, gender, and sexual orientation, that make up a person's identity and influence the way in which he or she is perceived by others."); *id.* at 1728 n.185 (citing to Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (discussing interplay of race and sex, as well as other identities in legal doctrine); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (same); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001) (same); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 107.). *Id.* at 1728 ("James Ashley expressed this insight in his critique of slavery over 150 years ago, when he noted that slavery was a system of caste--class oppression enabled by racial classifications.").
65. *Id.* at 1715.

Rebecca E. Zietlow argues that James Ashley saw the connection between the exploitation of labor and the practice of racial discrimination.[66] As a result, he called for a synthesis of the free labor and equality goals envisioned by the Thirteenth Amendment.[67] He claimed that abolishing slavery would restore those rights, not just to free Black people and laborers of all races, but also to slaves who had been enslaved in the past. Ashley was of the opinion that the fundamental rights that would be restored by freedom included both the rights of workers and the freedom from discrimination based on race, and that all of those rights required enforcement in order for any of them to be effective.[68] Ashley believed that the freedom of the workers would be restored.[69]

Thaddeus Stevens "was among the first to recognize and embrace the Civil War's profound significance and to demand that the Union act accordingly."[70] He pushed members of his party to challenge and reject a compromise view in eradicating slavery. He believed that "[w]e must treat this as a radical revolution." Stevens called for confiscating the large slaveholders' estates and dividing them among the former slaves.[71] He understood that racial justice required economic security and opportunity. As an advocate, he insisted upon § 2 of the Thirteenth Amendment to empower Congress to pass legislation to deal with badges and incidents of slavery. Stevens is famously remembered for arguing that the "United States should make reparations to the former slaves by providing them with homesteads and creating laws to protect their property rights."[72]

Charles Sumner[73] was one of the members of Congress who was known for speaking his mind the most, and his speeches were extensively published and read. Sumner was a consistent and vocal advocate for racial equality. When advocating for abolishing slavery prior to the Thirteenth Amendment, Sumner argued that the proposed Amendment would provide all persons "equal[ity] before the law." His equal protection language failed to garner the support to be included in the

66. *Id.* at 1712.
67. *Id.*
68. *Id.* at 1713.
69. *Id.* at 1728.
70. LEVINE, *supra* note 20, at 8.
71. *Id.*
72. Lance S. Hamilton, Note, *Ethnomiseducationalization: A Legal Challenge*, 100 YALE L.J. 1815, 1820 n.19 (1991).
73. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 504–05 (1988) [hereinafter FONER, RECONSTRUCTION] (noting Sumner proposed civil rights measure that would have given Black people equal access to churches, public accommodations, jury service, public schools, and cemeteries).

Thirteenth Amendment but was later included in the Fourteenth Amendment.[74] After the Civil War, Sumner continued to advocate for broad rights relating to racial equality, including the "social" right to be free of racial discrimination in places of public accommodation.[75] Sumner proposed a civil rights measure that would have given Black people equal access to churches, public accommodations, jury service, public schools, and cemeteries.[76]

These abolitionists and their supporters in Congress, on the battlefield,[77] at the podiums,[78] and on the Underground Railroad,[79] sought a new America that could truly live up to her promise. They conceived of their mission as reversing the permanent disabilities that the institution of slavery inflicted in perpetuity upon an identifiable and stigmatized group, where those injuries were inflicted in furtherance of maintaining slavery and subordination. In other words, they wanted to make slavery obsolete by reversing the effects of slavery. They had high hopes of eradicating the caste system that was established as a result of slavery and making certain that castes of this kind would not exist in the future.[80]

B. The Court's Enforcement of the Thirteenth Amendment vs. Congressional Enforcement: the Current Disputes Over "Badges and Incidents" of Slavery

The Supreme Court precedent interpretating and applying the Thirteenth Amendment are limited. Even more limited is the Court's precedent in deciding the application of judicial versus congressional enforcement power to eradicate badges and incidents of slavery.[81]

74. *See* Carter, *supra* note 21.
75. Zietlow, *supra* note 49, at 1708.
76. *See generally* Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 874 (1966).
77. *See* JAMES M. MCPHERSON, FOR CAUSE AND COMRADES: WHY MEN FOUGHT IN THE CIVIL WAR 114 (1997).
78. *See generally* FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (1845) (Frederick Douglass spoke to a large gathering through the United States at podium advocating the abolition of slavery).
79. *See generally* CATHERINE CLINTON, HARRIET TUBMAN: THE ROAD TO FREEDOM (2004) (Harriet Tubman notoriously led hundreds of enslaved Africans through passage of the underground railroad to freedom during the slavery era in the United States).
80. *See* Carter, *supra* note 21, at 218 n.15 (citing Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093 (2004)).
81. *Id.* at 1342 ("The conclusion that the Thirteenth Amendment is limited to conditions of literal enslavement may or may not be objectively correct, but it certainly is not dictated by any actual Supreme Court holdings on the subject.").

Today, more than a century and a half after its ratification, legal scholars continue to debate the scope of slavery's badges and incidents under the Thirteenth Amendment. Some scholars, like William M. Carter Jr.[82] and Alexander Tsesis,[83] believe that the judiciary has concurrent power with Congress to define and offer redress for the badges and incidents of slavery.[84] Other scholars take an extremely narrow approach, like Jennifer Mason McAward, who believes that Congress's enforcement power under § 2 is limited to prophylactic measures to prevent a retrogression to chattel slavery.[85] These two competing takes on the Thirteenth Amendment's breadth are unmistakably the intellectual descendants of those who lost the war and opposed ratification versus those who wrote the Amendment and prevailed in its ratification.

Those, like Carter and Tsesis, who adopt an approach that endorses and applies the intent of the Thirteenth Amendment's drafters, acknowledge that nowhere in the text of the Amendment do the words badges and incidents appear. Instead, they rely on historical records and the Supreme Court's first attempt to consider the constitutionality of the Thirteenth Amendment in *The Civil Rights Cases of 1883*.[86] They argue that the Court recognized that slavery extended beyond the chattel institution and begrudgingly proclaimed, "the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all *badges and incidents* of slavery in the United States."[87]

Some scholars have attempted to distinguish badges from incidents of slavery. McAward's article, *Defining the Badges and Incidents of Slavery*, provides a review of the antebellum and postbellum but pre-*Civil Rights Cases* meanings given to "incidents" and "badges."[88] To summarize, the word "incident" in the phrase "incident of slavery" has a similar meaning to the use of the word "incident"

82. William M. Carter Jr. is a Thirteenth Amendment expert and a Professor of Law at the University of Pittsburgh School of Law.
83. Professor Alexander Tsesis is a Thirteenth Amendment expert at the Florida State University College of Law. He teaches constitutional law, First Amendment, civil procedure, and seminars devoted to civil rights issues and constitutional interpretation. He has written extensively on the Thirteenth Amendment.
84. Carter, *supra* note 21, at 1319 (arguing that both Congress and the Supreme Court can enforce the Thirteenth Amendment).
85. *See* McAward, *supra* note 18, at 624. Professor Jennifer McAward's teaching and research interests focus on civil rights, constitutional law, and habeas corpus.
86. 109 U.S. 3 (1883).
87. *Id.* at 20 (emphasis added).
88. *See* McAward, *supra* note 18, at 570.

in other areas of law.[89] One antebellum legal dictionary defined incidents as anything "depending upon, appertaining to, or following another, called the principal."[90] In this sense, an "incident of slavery" includes "any legal right or restriction that necessarily accompanied the institution of slavery"—in other words, the "aspects of property law" applicable to or "civil disabilities" imposed on enslaved persons as property.[91] For instance, one incident of slavery might have been the prohibition on the right to testify or own property.[92]

Badges, on the other hand, has been given a broader definition and used more metaphorically. Initially "badges" referred to "indicators, physical or otherwise, of African Americans' slave or subordinate status."[93] With the end of slavery, the term came to refer to "ways in which [S]outhern governments and white citizens endeavored to reimpose upon freed slaves the incidents of slavery or, more generally, to restrict their rights in such a way as to mark them as a subordinate brand of citizens."[94] As McAward points out, Lyman Trumbull—the senator from Illinois who co-authored the Thirteenth Amendment, championed it as chair of the U.S. Senate Judiciary Committee, and sponsored the Civil Rights Act of 1866—defined a badge as "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens."[95]

While the definitions of badges and incidents are largely interchangeable, Senator Trumbull's definition, "any statute which is not equal to all," and other characterizations of badge are most applicable to antigang statutes. Antigang statutes are badges of slavery insofar as they are not equally applied to all and they deprive citizens of civil rights which are secured to other citizens in such a way as to mark them as subordinate.[96] The ultimate aim[97] of the antigang statute—the badge—is to subordinate Black and Brown people, to ensure a permanent caste

89. *Id.* at 571.
90. *Id.* at 570–71 (quoting BOUVIER'S LAW DICTIONARY (7th ed. 1857)).
91. *Id.* at 575.
92. *Id.* at 573.
93. *Id.* at 575.
94. *Id.* at 577–78.
95. *Id.* at 578 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull)).
96. *See, e.g.*, Colbert, *supra* note 53. Senator Trumbull addressed both the antebellum laws and the Black Codes statutes during the debate: "[A]ny statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited." *Id.* at 45 n.211.
97. This is not hyperbole. I will discuss the aim and intent behind these statutes below, but when a certain result is the natural and probable consequence of one's deliberate and knowing actions, the law must infer an intent or aim to cause said result.

system, to cage them, and perpetuate mass incarceration through punitive, protracted prison sentences, thus reimposing the incidents of slavery.

Identifying the badges and incidents of slavery necessitates an assessment of the connection between group history and the nature and origin of the harm or condition that is being complained of.[98] Carter argues that to be reasonably considered a badge or event of slavery, the nature of the harm must have a stronger connection to the system of slavery as the group's connection to slavery wanes.[99] In this way, the constitutional command to eliminate the badges and incidents of slavery remains tethered to the actual historical facts of American slavery and its particular victims. Accordingly, because of how race, power, and group status interacted under the institution of slavery, "the Thirteenth Amendment should be expressly defined in terms of race, power, and group status."[100]

In application, Carter and Tsesis reject those who seek to limit the Thirteenth Amendment to conclusions that "remedying the badges and incidents of slavery should be left to Congress." Through a case-by-case analysis of Supreme Court precedent, they find that the court has never definitively found such a limitation in the Thirteenth Amendment. They conclude any holding that the Amendment provides "explicit empowerment of Congress to legislate against the badges and incidents of slavery limits judicial power to conditions of actual enslavement" is misguided.[101] Carter argues that the power of the Court to strike down badges and incidents of slavery comes from the Court's own legislative history.[102] After reviewing historical records, he finds that there was little "congressional debates reveal[ing] . . . disagreement over separation of powers" and what the "concurrent power of Congress, the judiciary, and the executive branch to enforce the freedmen's rights.[103] The "Amendment's advocates would have seen no need for a

98. Carter, *supra* note 21, at 1318.
99. *Id.*
100. *Id.*, at 1311, 1318. "[R]ace, power, and group status" are central elements to the discussion *infra* in Subpart II.B, regarding the Playboy Gangster Crips and the city officials' desire to get them out of the neighborhoods of Los Angeles. *See* Ana Muniz, *Maintaining Racial Boundaries: Criminalization, Neighborhood Context, and the Origins of Gang Injunctions*, 61 SOC. PROBS. 216 (2014). Once labeled with the group status of gang member, defendants accused of crimes lose power and constitutional protections. *See* Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 213, 222, 253–66 (1994)) ("Critics fear that injunctions inappropriately take advantage of both the lower level of procedural protections (no right to counsel) and the lower burden of proof in civil actions.").
101. Carter, *supra* note 21, at 1341.
102. *Id.* at 1342–47.
103. *Id.* 1344–45. *See also id.* at 1345 n.127 ("The historical context reveals that Congress, in enacting the Reconstruction Amendments, intended that it, and not the judiciary, have the primary

specific authorization for the judiciary in a proper case to enforce the Amendment's prohibition of the badges and incidents of slavery. Advocates assumed that such judicial power existed under commonly understood principles of judicial review."[104] Moreover, "[b]arring such conclusive evidence, we should not lightly assume that the Thirteenth Amendment, unlike all other constitutional protections of individual rights, requires deviation from the settled principles of judicial review under which both the courts and Congress have concurrent power to enforce the Constitution."[105] Carter concludes that [t]he Thirteenth Amendment confers authority on the courts and on Congress to make amends for the legacy of inequality left behind by the slave system in the United States.[106]

In contrast to Carter and Tseis, McAward's article *Defining The Badges and Incidents of Slavery* expounds on her position that the Thirteenth Amendment is limited in its scope.[107] In rejecting the historical record, she concludes that the abolitionist intent is not compelling and that the power to eradicate slavery is largely, if not exclusively, vested in Congress. She believes to constitute a badge and incident of slavery, a modern-day form of subjugation, must satisfy two criteria: "First, the conduct must mirror a historical incident of slavery. Second, the conduct must pose a risk of causing the renewed legal subjugation of the targeted class."[108] She concludes, "[s]lavery and involuntary servitude are the touchstones of the Thirteenth Amendment enforcement power, not racial injustice writ large."[109] She continues that limiting the power of the Thirteenth Amendment to the "prophylactic purpose of § 2, Congress may not remove its focus too far from the reality of slavery when it attempts to classify conduct as a badge and incident of slavery."[110] She argues that for modern conduct to rise to the level of a badge of slavery, the "conduct in question not only must have a historical link to slavery, but also must have serious potential to lead to future violations of § 1 of the Thirteenth Amendment."[111]

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authority to interpret and enforce the Amendments' guarantees. This is not the same, however, as asserting that the Amendments' framers intended that Congress be the *exclusive* repository of the power to interpret and enforce the Amendments.") (citations omitted).

104. *Id.* at 1346.
105. *Id.* at 1347.
106. William M. Carter Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.–C.L. L. REV. 17 (2004).
107. *See* McAward, *supra* note 18.
108. *Id.* at 622.
109. *Id.* at 628.
110. *Id.*
111. *Id.* at 624.

The problem with her approach—and why her suggestion leaves out those subjected to modern forms of slavery—is that in her view, only those that are relegated to the old form of chattel slavery are protected by the power of the Thirteenth Amendment. She believes that slavery as an institution is unimaginable in today's America. Specifically, she writes that "at this point in our nation's history, it is mercifully difficult to envision any racist act—alone or in combination—that abridges such fundamental liberties that one could reasonably fear the return of an entire race (or even a single individual of that race) to slavery or legally subordinate status."[112] Clearly, McAward knows not of the conditions in prisons, inner city communities, and fruit plantations and the mental slavery that accompanies those conditions across our nation. She knows not of the impact of gang prosecutions and the clear linage to chattel slavery. McAward is unaware of Chris Smith, a forty-three-year-old mentally disabled Black man that was forced to work in a kitchen without pay for over five years. At the hands of his modern-day enslaver, Paul Boddy Edwards, Smith was branded with hot grease, beat, subjected to racist insult, and not allowed to see his family.[113]

This Article rejects McAward's conclusions. She creates a historical record where her positions are ahistorical, or at least the history she tells is incomplete. Her positions echo the dissents of the slavery sympathizers who did not vote for the Thirteenth Amendment, supported slavery, and diligently tried to prevent fundamental change in this country in the first place. Her conclusions are extremely dangerous not only to Black and Brown people subjected to gang statutes but also to the fundamental principles of what it means to be American after the American Civil War.[114] McAward's desire to curb the Thirteenth

112. *Id.* at 626.

113. Camila Domonoske, *S.C. Man Pleads Guilty to Enslaving Mentally Disabled Man*, NPR NEWS (June 7, 2018, 3:55 PM), https://www.npr.org/2018/06/07/617911813/s-c-man-pleads-guilty-to-enslaving-mentally-disabled-man [https://perma.cc/5E3R-M24E]. *See also* Lateshia Beachum, *Black Man Enslaved by White Restaurant Manager Should be Awarded More Than $500,000, Court Says*, WASH. POST (May 3, 2021, 3:49 PM), https://www.washingtonpost.com/nation/2021/05/02/south-carolina-black-enslaved-restaurant. [https://perma.cc/2L5W-NHGW].

114. *See* McAward, *supra* note 18, at 604 (arguing that the *Jones* Court's grant to Congress of substantive interpretive power runs afoul of the principles of separation of powers, judicial supremacy, and federalism that drove the Court in *City of Boerne*). The Court's decision in *City of Boerne* was driven by a desire to limit section 5 of the Fourteenth Amendment. That desire does not necessary extend to the Thirteenth Amendment. *See*, Tsesis, *supra* note 33, at 59 ("The history of the Thirteenth Amendment and the Court's long-established interpretation of Congress's power to enforce its provisions raise significant doubts about the claim that the Court is likely to interpolate Boerne's congruent and proportionality test into Thirteenth Amendment jurisprudence.").

Amendment's import and impact on relics of the past is a continuation of the efforts of the Confederacy of the nineteenth century. McAward's assertion that the Thirteenth Amendment has no usefulness beyond the literal and prophylactic prohibition to modern day forms of chattel slavery[115] is disingenuous and dangerous. McAward, members of the Federalist Society,[116] and those who covertly desire to "Make America Great Again,"[117] envision an America where the Civil War was not lost by the South, the Reconstruction Amendments were never passed by Congress and ratified by the states, and racial castes were maintained as the order of the day. McAward repeatedly refers to the arguments made by those exact members of Congress who did not support abolition, did not vote for the Thirteenth Amendment, and performed pivotal roles preventing reparation and true American reconstruction.[118]

Notwithstanding McAward's position, the Reconstruction Amendments represented a fundamental shift in constitutional structure. The drafters of the Amendment explicitly gave enforcement power to *Congress*, not just to the judiciary or the executive branch, because those branches alone could not be trusted with it. Congress can make laws to prohibit these badges—and the

115. McAward, *supra* note 18, at 605 (". . . Congress's Section 2 power to address the badges and incidents of slavery is prophylactic in nature. In other words, Section 2 permits Congress to pass "pure" enforcement legislation that remedies actual violations of Section 1 of the Thirteenth Amendment (i.e., enslavement and involuntary servitude) as well as "prophylactic" legislation that targets otherwise constitutional conduct in order to deter violations of Section 1."). In McAward's view, legislation that targets badges and incidents of slavery as described in *Jones* is too liberal a reading of the Amendment. *See* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. U.L. REV. 77, 135–36 (2010) (arguing that neither the text nor historical context substantiates this expansive interpretation of Section 2 power where enforcement can cover more than the "restrictive" approach and that Thirteenth Amendment framers never envisioned or supported Congress having such broad interpretive authority).

116. The Federalist Society is notorious for both its immense influence on federal courts and its ultra-conservative agenda. This agenda tends to privilege the first ten constitutional amendments over all of the amendments that followed under the guise of concerns for federalism, which surely would have been satisfying to the Confederate legal philosophy that was defeated in the American Civil War. *See, e.g.*, Lynn Adelman, *Laundering Racism Through the Court: The Scandal of States' Rights*, DISSENT MAG. (Summer 2018), https://www.dissentmagazine.org/article/laundering-racism-through-court-scandal-states-rights-federalism [https://perma.cc/X27V-W64X].

117. Donald J. Trump Presidential Campaign, 2016, quoting Ronald Reagan for President Campaign, 1980 ("Let's Make America Great Again"). *See* Reagan Foundation, *Ronald Reagan for President "Let's Make America Great Again," 1980*, YOUTUBE (July 9, 2021) https://www.youtube.com/watch?v=SBfzwycHOcY [https://perma.cc/6965-YTJV].

118. *See* McAward, *supra* note 18 (citing Senator Edgar Cowan, where he maintains, "[t]he Amendment, everybody knows and nobody dare deny, was simply made to liberate the Negro slave from his master. That is all there is of it.").

Supreme Court also has a duty to do so. When the Supreme Court does not, white supremacy is made stronger and more protected, and its aims are furthered. In short, in passing the Thirteenth Amendment, Congress not only ended sanctioned involuntary chattel slavery, but provided through § 2 to destroy all vestiges, badges, and incidents. Modern day gang statutes are vestiges, badges, and incidents of slavery. From Slave Codes to Black Codes to vagrancy statutes to gang injunctions to gang statutes, the Supreme Court through its enforcement power must eradicate these badges and incidents of slavery.

This Article adopts the conclusions of Professors Carter and Tsesis that § 2 of the Thirteenth Amendment protects against modern day badges and incidents of slavery. Specifically, "[t]he Thirteenth Amendment provides both courts and Congress with the authority to remedy this legacy of inequality arising from the slave system in the United States."[119] Gang statutes, like the Confederate flag[120] and racial profiling,[121] are used to subjugate the descendants of enslaved Africans to the condition of slave. The U.S. Supreme Court is obligated under its enforcement duties to find such badges and incidents unconstitutional and thus abolish them.

C. Evolving Badges of Slavery: From Slave Patrol to Night Watchmen, Black Codes to Vagrancy Laws, Gang Injunctions to Gang Statutes

This Subpart summarizes what many abolitionist legal scholars before me have explained—first, that the origin of the modern prison industrial complex emerged from the institution of chattel slavery and second, that seventeenth century slave patrols are the prototype for twenty-first century police forces. This Subpart will add to other abolitionist scholars' efforts by demonstrating that Black Codes, Jim Crow era vagrancy laws, and gang injunctions have evolved into the sophisticated antigang statutes of today and were intended to be—and are—badges of slavery.

Throughout this Subpart, I trace the hallmarks of what makes something a badge of slavery. We can think of these as elements which are carried through to each successive stage of the badge, with minor tweaks along the way. There are three consistent elements: (1) a de jure state action, such as a statute or an

119. Carter, *supra* note 106, at 17.

120. Tsesis, *supra* note 46, at 543 ("Confederate symbols on official state property should be prohibited pursuant to the Thirteenth Amendment to the U.S. Constitution. The Thirteenth Amendment prohibits all relics of servitude, including state sponsored displays meant to laud a breakaway republic which idealized and waged war to perpetuate Black slavery.").

121. Carter, *supra* note 106, at 17 ("[R]ace as a proxy for criminality is also a badge and incident of slavery in violation of the Thirteenth Amendment.").

injunction, (2) targeted towards Black people,[122] (3) with the intent of subjugating Black people to a state of carceral servitude. This last element, in its most obvious form, is incarceration or prolonged sentencing, but it could also be surveillance or restrictions on freedom of movement and association.

Highly militarized police forces found in today's cities were nonexistent until the mid-twentieth century, yet they are derivative of nineteenth century slave patrols. Today's gang cops and gang prosecutors are the present-day slave catchers. So too, a particular species of criminal laws—antigang statutes—have a clearly traceable genealogy: from Slave Codes to the post-Civil War Black Codes, to vagrancy laws, to gang injunctions, and ultimately to the California STEP Act and the myriad of laws that have followed in its footsteps.

1. Origins of law Enforcement: Slave Patrols

Badges and incidents of slavery like antigang statutes evolve in tandem with the public and private actors who enforce them. Any explanation of how Slave Codes transformed into something akin to the California STEP Act begins with looking at the roots of modern-day policing and law enforcement. This history of policing in the United States follows two distinct branches that ultimately merged: the use of civilian "night watches"[123] and colonial slave patrols.[124]

Slave patrols were privately and publicly organized militias most prevalent in the South who were tasked with enforcing Slave Codes, meting out brutal punishments to violators, suppressing rebellions of enslaved people, and employing slave catchers pursuant to fugitive slave laws.[125] Indeed, in many

122. This targeting does not need to be expressly or facially race-based, but its implementation demonstrates otherwise. Intent to be racially discriminatory is not required, although in most cases, a clear intent to discriminate is present. In addition, other marginalized communities may also be targeted without vitiating the definition of a badge.

123. Publicly employed night watchmen can be traced back to eleventh century England where "Shire Reeves"—the early prototype of sheriffs—were appointed by the King to carry out his business in shires (analogous to counties) across the countryside. McMillian v. Monroe County, Ala., 520 U.S. 781, 793 (1997).

124. Taslitz, *supra* note 40, at 741 ("[E]very Southern state but Delaware established legislation to create and regulate county-wide slave patrols. The primary duty of these patrols was to keep order among slaves and specially to prevent runaways and thefts.").

125. *See* CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA (2021) (demonstrating that slave patrols' oppressive power expanded after the passage of the Thirteenth Amendment and became the primary enforcer of the badges and incidents of slavery by preventing Black ownership of guns).

Southern states, police patrols beyond slave patrols were deemed unnecessary.[126] The first slave patrol in the Colonies was established in 1704 in Carolina.[127]

American anarchist author Kristian Williams describes the function of slave patrols:

> Patrollers would gather from time to time and as instructed by the law, ride from plantation to plantation, and into any plantation, within the bounds or precincts, as the General should see appropriate, and pick up any slaves which they shall find outside of their master's plantation who do not have a permit or ticket from their masters, and the same punish them.[128]

By the end of the century, every slave state had slave patrols. "Slave patrols accomplished several goals: apprehending escaped slaves and returning them to their owners; unleashing terror to deter potential slave revolts; and disciplining slaves outside of the law for breaking plantation rules."[129] Slave patrols were a "government-sponsored force [of about ten people] that was well organized and paid to patrol specific areas to prevent crimes and insurrection by slaves against the white community" in the antebellum South.[130] Without warrant or permission, slave patrols could enter the home of anyone—Black or white—suspected of sheltering escaped slaves. In modern times, this would be a clear violation of the Fourth Amendment and constitute an illegal search.[131] This was also a precursor to gang injunctions and gang statutes that are authorized to circumvent due process and constitutional protection if the defendant is labeled a gang member, or the crime is allegedly in furtherance of the gang.

126. MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION, 37–38 (1980). *See also* KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA, 41 N.79 (2015) ("As long as Charlestonians believed that [B]lacks were the sole threat to order, [w]hite supremacy served in lieu of a police force. In such a racially stratified society, with few legal rights accorded to the [B]lack man, every [w]hite person, by virtue of his skin, had sufficient authority over [B]lacks.").

127. LARRY K. GAINES & VICTOR E. KAPPELER, POLICING IN AMERICA 68 (7th ed. 2011).

128. WILLIAMS, *supra* note 126, at 40–41.

129. Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of U.S. Policing*, 46 HUM. RTS. MAG. (2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish [https://perma.cc/Y53N-XD3Y].

130. *Id.*

131. *See generally* Taslitz, *supra* note 40 (arguing that the drafters of the Fourteenth Amendment were concerned with protecting Republican and abolitionist critics of slavery and of the post-slavery reactionary policies of the Southern regime, whose governments had subjected those critics to abusive searches and seizures to silence dissent).

After the Civil War ended, the slave patrols developed into Southern police departments. "Part of the early police's post-Civil War duties was to monitor the behavior of newly freed slaves, many of whom ended up working on plantations owned by whites if not given their own land, and to enforce segregation policies, such as the era's new Black Codes and Jim Crow laws."[132]

2. Antebellum Slave Codes to Post-Civil War Black Codes

Between 1865 and 1868, as the Civil War ended and the possibility of abolishing slavery became a near certainty, the survival of the institution of chattel slavery had its most pivotal transformation.[133] Through converting slave patrols to police forces, transposing the Slave Codes into Black Codes,[134] and providing a constitutional loophole in the Thirteenth Amendment for involuntary servitude as a punishment for crime, slavery itself, not merely its badges and incidents, was preserved in American society. Douglas L. Colbert writes in his article *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges* that the purpose of Black Codes was "to make Negroes slaves in everything but name."[135] Colbert further describes that Black Codes "restored white control over the mobility and working conditions of free [B]lacks . . . ."[136]

Examples of Black Codes that furthered the institution of slavery after its abolition included prohibitions on unemployment and loitering. Some laws, as seen in Louisiana, for example, went so far as to require, "Every negro is required to be in the regular service of some white person."[137] Black Codes and their modern-day iteration, antigang statutes, were designed to not only further racist ideology of Black criminality and literally make laws to make poverty or

132. Hasset-Walker, *supra* note 129.
133. ANDERSON, *supra* note 125.
134. Colbert, *supra* note 96.
135. *Id* at 41–42. "The Black Codes represented a legalized form of slavery and were characterized by apprenticeship laws, labor contract laws, vagrancy laws, travel restrictions, and a legal system that denied civil and legal rights to Blacks while imposing extremely harsh criminal penalties against them." *Id*. at 42 n.194.
136. *Id.* at 42.
137. *See also* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 53 (2018) ("In the immediate wake of emancipation, the Alabama legislature swiftly passed a measure under which the orphans of freed slaves, or the children of Blacks deemed inadequate parents, were to be 'apprenticed' to their former masters."). *See also* Laura A. Hernández, *The Constitutional Limits of Supply and Demand: Why A Successful Guest Worker Program Must Include a Path to Citizenship*, 10 STAN. J. C.R. & C.L. 251, 292 (2014) (citing S. Exec. Doc. 39-2, at 93–94 (1865)).

sometimes simply Blackness criminal, but to place blame on Black people for their subjugation instead of the very effective system of modern-day slavery.

The transformation from chattel slavery to the carceral system of today did not begin with the passing of the Thirteenth Amendment. Efforts to evolve and maintain social, political, and economic control were well underway at least 150 years before the Amendment's ratification.[138] The mechanism for re-enslaving Black people was codified in the very same Black Codes that criminalized their status as free.[139] But even if they did not commit any of these crimes, the Black Codes mandated that Black people must be under the regular employment of a white person or a former owner, who would be accountable for the behavior of the formerly enslaved; thus, effectively criminalizing Blackness.[140] Black Codes, deriving their power from the chattel institution of the past, imposed exploitive economic incidents of slavery upon the formerly enslaved and branded badges of servitude into their future because of their Blackness.

3. Post-Civil War Black Codes to Jim Crow–Era Vagrancy Laws

In *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Antigang Civil Injunctions*, Gary Stewart writes:

> As the paradigmatic caste of 'undesirables,' [B]lack people have historically been targeted by vagrancy ordinances. This was especially true after the Civil War, when [S]outhern legislators sought innovative ways to constrain [B]lack populations that were then technically free. With the help of broad vagrancy ordinances that enforced the provisions of most of the former Confederate states' 'Black Codes,'

138. *See generally* Goodwin, *supra* note 23.

139. *See, e.g.*, Mississippi Black Codes (1865): An Act to Punish Certain Offenses Therein Named, and for Other Purposes. This Section of the Black Codes states:

> If any freedman, free negro, or mulatto, convicted of any of the misdemeanors provided against in this act, shall fail or refuse for the space of five days, after conviction, to pay the fine and costs imposed, such person shall be hired out by the sheriff or other officer, at public outcry, to any white person who will pay said fine and all costs, and take said convict for the shortest time.

Id.

140. *See, e.g.*, ST. LANDRY PARISH, LA., AN ORDINANCE RELATIVE TO THE POLICE OF NEGROES RECENTLY EMANCIPATED WITHIN THE PARISH OF ST. LANDRY ("[E]very negro is required to be in the regular service of some white person, or former owner, who shall be held responsible for the conduct of said negro. But said employer or former owner may permit said negro to hire his own time by special permission in writing, which permission shall not extend over seven days at any one time.").

> [S]outhern officials attempted to reestablish control over their former property.[141]

Post-Civil War Black Codes evolved into Jim Crow–era vagrancy laws. Like Black Codes, vagrancy laws were designed to subjugate Black people back into an economic, social, or educational status equivalent to the condition of slave. Vagrancy laws served as an iteration of a badge of slavery and often produced attendant instances of slave conditions. Under vagrancy laws, Black people were not allowed to travel the streets, be in the company of white people (especially white women) and were subject to harsh and often arbitrary punishment at the whims of police. A Black person could be arrested and jailed for juggling, walking, looking in cars, not having a car, driving a car, not working, or appearing to look like they were about to steal.[142] Anything and everything a Black person did in a neighborhood in which they were not welcomed became the basis of punishment. Vagrancy laws were like Black Codes, created incidents of slavery, branded badges of slavery upon the Black body and, when enforced, constituted a violation of the Thirteenth Amendment.[143]

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141. Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Antigang Civil Injunctions*, 107 YALE L.J. 2249, 2258–59 (1998).

142. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972). Jacksonville Ordinance Codes 26–57 provided at the time of these arrests and convictions as follows:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

Id.

143. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 472–73 (1968). The Court in *Jones* reasoned that:

> when those rights which are enumerated in this bill are denied to any class of men on account of race or color, *when they are subject to a system of vagrant laws* which sells them into slavery or involuntary servitude, which operates upon them as upon no other part of the community, they are not secured in the rights of freedom. If a man can be sold, the man is a slave. If he is nominally freed by the amendment to the Constitution. *They can pass a law* that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold.

Id.

The first tinkering to vagrancy laws came in *Palmer v. City of Euclid, Ohio*.[144] The Supreme Court struck down § 583.01(E) of the Ordinances of the City of Euclid, which made it unlawful for any "suspicious persons," defined as "(a)ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself."[145]

The next month, the Court invalided a Cincinnati ordinance in *Coates v. City of Cincinnati*, which made it a crime for "three or more persons to assemble . . . on any of the sidewalls . . . and there conduct themselves in a manner annoying to persons passing by."[146]

Finally, the Court decided the Jacksonville ordinance was unconstitutional in *Papachristou v. City of Jacksonville*[147] after a white female petitioner, Margaret Papachristou, another white woman, and two Black men were charged with "vagrancy–prowling by auto" after being found driving in a car together by police.[148] The Court unanimously held the ordinance "void for vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and because it encourages arbitrary and erratic arrests and convictions."[149]

In all three cases, the Court understood the racist objectives and the discriminatory enforcement of vagrancy laws.[150] Instead of connecting the vagrancy laws to their historical predecessors of Slave Codes and Black Codes, the Court simply found the statutes unconstitutional under a race neutral rationale of

144. Palmer v. City of Euclid, 402 U.S. 544 (1971) (holding no one shall be held criminally liable for behavior that he could not have rationally understood to be prohibited at the time it occurred).

145. *Id.*

146. Coates v. City of Cincinnati, 402 U.S. 611, 611 (1971). On its face, the ordinance was unconstitutionally vague because it made the exercise of the right to assembly subject to a standard that could not be ascertained. *Id.* at 614. Additionally, the ordinance was unconstitutionally broad because it authorized punishment for the constitutionally protected right to free assembly and association. *Id.*

147. 405 U.S. 156 (1972).

148. Antimiscegenation laws had only recently been found unconstitutional in *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("[T]he Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.").

149. *Id.* at 162.

150. *See id.* at 167 (citing Winters v. New York, 68 S. Ct. 665, 682 (1948)) ("Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught *who are vaguely undesirable in the eyes of police and prosecution*, although not chargeable with any particular offense.") (emphasis added).

vagueness. Notwithstanding the Court's unwillingness to provide the elemental connection and the legislative intent of these evolved forms of badges and incidents of slavery, the import upon the descendants of the enslaved remained clear.

4. Vagrancy Laws to Gang Injunctions and Gang Statutes

Just as the "ancient law" of vagrancy[151] faced its constitutional demise, civil gang injunctions began to take their place toward the end of the twentieth century. The first civil gang injunctions obtained by the LAPD on July 22, 1982, enjoined seventy-two members of three named gangs: the Dogtown, Primera Flats, and 62nd East Coast Crips gangs. Justice Sandra Day O'Connor's concurring opinion in *Chicago v. Morales*[152] attempted to fix such gang injunctions and antigang statutes to overcome their constitutional deficiency.[153]

Theoretically, civil gang injunctions could seem more palatable than broad, discriminately applied vagrancy laws because, as their proponents purport, they meticulously target only people who commit actual crimes. Civil gang injunctions, however, do not operate this way in reality.[154] Furthermore, as Stewart points out, the very nature of civil gang injunctions entails more police abuse of discretion and graver dangers for minority communities than many post-bellum vagrancy laws.[155]

First, as Justice Antonin Scalia lamented in his dissent in *Madsen v. Women's Health Center, Inc.*,[156] civil injunctions do not provide the same safeguards as generally applicable criminal laws. In other words, a criminal statute applies to the general public, so our democratic processes theoretically provide some additional safeguards to ensure they are not arbitrary or abusive.[157] By contrast, civil gang

151. *See* RISA GOLUBOFF, VAGRANT NATION 310 (2016).

152. 527 U.S. 41 (1999).

153. *See* Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1127–28 (2000) (explaining that Justice Sandra Day O'Connor provides a constitutional road map for lawmakers to follow when drafting a constitutional bill in reenacting the ordinance by sketching out prospective statutory elements that might hold up under court scrutiny).

154. *See* Stewart *supra* note 141, at 2264 ("The amorphous concept of the 'gang' invites discretionary actions that oppress innocent minority youth.").

155. *Id.* at 2265.

156. 512 U.S. 753, 793 (1994) (Scalia, J., concurring in part and dissenting in part) ("The injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards.").

157. Stewart, *supra* note 141, at 2266.

injunctions act as "personal criminal codes"[158] that target individuals who have no recourse to the democratic process to protect against arbitrariness.[159] Second, civil injunctions are a way for police and prosecutors to circumvent the constitutional protections available to criminal defendants.[160] For instance, enjoined gang members have no right to appointed counsel to contest the injunction. And even if they do attempt to contest the injunction, the government need not meet the burden of proof beyond a reasonable doubt. They can label a person as a gang member by a mere preponderance of evidence.[161] And third, under the collateral bar rule, a target of one of these civil gang injunctions is estopped from challenging the constitutionality of the injunction if they violate it.[162]

In 1999, the Supreme Court found Chicago's Gang Congregation Ordinance unconstitutionally void for vagueness[163] in violation of the Due Process Clause of

158. *Id.* at 2267.

159. Not only are the subjects of civil gang injunctions often disenfranchised, but the injunctions are often issued by individuals that are not democratically accountable. As Scalia put it, "[injunctions] are the product of individual judges rather than of legislatures—and often of judges who have been chagrined by prior disobedience of their orders" and "should not lightly be placed within the control of a single man or woman." *Madsen*, 512 U.S. at 793 (Scalia, J., concurring in part and dissenting in part).

160. Stewart, *supra* note 141, at 2266–67.

161. *Id.* at 2267.

162. *Id.* Like Justice Scalia mentions in his *Madsen* dissent, "persons subject to a speech-restricting injunction who have not the money or not the time to lodge an immediate appeal face a Hobson's choice: They must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings." *Madsen*, 512 U.S. at 793–94 (Scalia, J., concurring in part and dissenting in part). As applied to gang statutes, alleged gang members face the same Hobson's choice with respect to an even wider range of perfectly lawful activities beyond speech: wearing certain clothing, being present in certain locations, and visiting certain people.

163. The doctrine of void for vagueness is rooted in the principle that there can be no crime without a statute or ordinance defining the crime. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). Under constitutional law, this principle requires that the statute or ordinance define the prohibited act—the *actus reus*—with a degree of definiteness in order to not violate due process under either the Fifth or Fourteenth Amendments. *Id.* A statute or ordinance is unconstitutionally void for vagueness if (1) it fails to provide fair notice to public about what the prohibited conduct is—that is, it cannot be a net to catch all activity that common persons would think permissible. *Id.* (citing *United States v. Reese,* 92 U.S. 214, 221, 23 L. Ed. 563 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.")). In the case of vagrancy or gang statutes, this at minimum requires either (a) delineated conduct in addition to simply loitering or wandering about vagrant or (b) a specified area of restricted public access. City of Chicago v. Morales, 527 U.S. 41, 60 (1999). Courts emphasize the second prong when determining if a vagrancy or gang

the Fourteenth Amendment.[164] The local ordinance at issue prohibited "criminal street gang members" from "loitering" with one another or with other persons in any public place.[165] Commission of the offense involved four predicates: (1) the police officer had to "reasonably believe that at least one of the two or more persons present in a 'public place' [was] a 'criminal street gang member'"; (2) the persons had to be "loitering," defined in the ordinance as "remain[ing] in any one place with no apparent purpose"; (3) the police officer had to order "all" of the persons to disperse and remove themselves "from the area"; and (4) a person had to have disobeyed the police officer's order.[166]

In a concurring opinion, Justice O'Connor gratuitously mapped out—accounting for ongoing constitutional challenges across the country of antigang injunctions and statutes since the passing of the 1988 STEP ACT—how municipalities could tweak their antigang injunctions and statutes ever so slightly to avoid constitutional challenges. She writes:

> As the ordinance comes to this Court, it is unconstitutionally vague. Nevertheless, there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a 'harmful purpose' from laws that target only gang members, and from laws that incorporate limits on the area and manner in which the laws may be enforced . . . . The term 'loiter' might possibly be construed in a more limited fashion to mean 'to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.'[167]

Justice O'Connor's prescription for correcting gang injunctions intentionally circumvented decades of Supreme Court jurisprudence to strike down laws designed to subjugate descendants of enslaved Africans back to the condition of slave.[168] Justice O'Connor's fix of gang injunctions provided the appearance of race neutrality to this particular iteration of Slave Codes, Black

statute is void for vagueness; a statute cannot simply require a "satisfactory explanation," "lawful" or "apparent purpose," or give police "unfettered discretion." *See e.g.*, Kolender v. Lawson, 461 U.S. 352 (1983).

164. *Morales*, 527 U.S. at 60.
165. *Id.* at 47.
166. *Id.*
167. *Id.* at 67–68 (O'Connor, J., concurring).
168. Luna, *supra* note 153.

Codes, and vagrancy laws. The California STEP Act and the many gang statutes that followed in its footsteps were amended with the proscribed formula crafted by Justice O'Connor to accomplish the same goal of Black subjugation, while maintaining race neutrality.[169] Notwithstanding Justice O'Connor's artful rebranding of a Thirteenth Amendment badge and incident of slavery, the import and impact of civil gang injunctions and gang statutes remains clear. They are unconstitutional.

These badges of slavery were distinct and effectively facilitate the conditions of American chattel slavery without the legal plantation. The Civil War ended the legitimacy of these incidents and the blatant badges of slavery. Post-Civil War efforts effectively recreated the mechanism of subjugation through evolving forms of badges and incidents of slavery. Slave Codes, Black Codes, vagrancy laws, and civil injunctions all served the same purpose. With each constitutional challenge, the old badge morphed to a more racially neutral form—but remained just as destructive to Black people. Modern day antigang statutes are the latest iteration of these badges of slavery. They build on the evolving nature and the legal improvement of its predecessors while justifying gang prosecution by purportedly being limited to street gang members. Gang statutes are just as expansive and destructive and, like their four predecessors, are designed to subjugate Black and Brown people, and thus are a badge of slavery.

II. GANG STATUTES AS A BADGE OF SLAVERY

"The Thirteenth Amendment was intended to eliminate the institution of slavery and to eliminate the legacy of slavery."[170] Gang statutes further the legacy

169. Justice O'Connor writes in concurrence in *Morales*:

> If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued . . . In my view, the gang loitering ordinance could have been construed more narrowly. The term "loiter" might possibly be construed in a more limited fashion to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." Such a definition would be consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court.

Morales, 527 U.S. at 66 (1999). Her directive to the City of Chicago and many gang statutes that were amended thereafter followed the guidance and thus provided an illegal purpose (i.e. a predicate criminal act) to overcome the vagueness challenge.

170. Carter, *supra* note 106, at 21.

of slavery. This Part will present the racist histories and objectives of the drafters of the first gang statute in this country, the California STEP Act. By examining their writings, public statements, and campaigns, this Part will demonstrate that like prior badges of slavery, gang statutes seek to subjugate and reduce Black and Brown people to the condition of slave. This Article upends the drafters' justification for creating gang statutes. This Part examines the history of criminal street gangs in California, focusing on Los Angeles, before discussing the ways in which lawmakers defy the Thirteenth Amendment's constitutional limits.

A. Black Gangs in Los Angeles

The formation of Black gangs in Los Angeles proceeded in two major phases, first arising in the 1940s and later expanding in the 1970s. During the first phase, Black gangs formed in direct response to white violence,[171] akin to the violence imposed on Black people in the Southern states of America after the passage of the Thirteenth Amendment.[172] The second phase occurred during a period of declining investment in war on poverty programs and the rapid disruption of the Black Panther Party at the hands of law enforcement.[173]

The story of gangs in Los Angeles starts with the first wave of Black migration[174] to the city at the turn of the century, comprised largely of skilled workers with education.[175] These migrants were drawn to Los Angeles because the city was considered less overtly hostile to Black people.[176] This notion was quickly dispelled following the next major wave of Black migration to Los Angeles during the Great Migration. Between 1900 and 1920 the Black population in Los Angeles

171. *Organized Crime*, AM. L. & LEGAL INFO., https://law.jrank.org/pages/11947/Organized-Crime-Crips-Bloods-Black-American-gangs-in-Los-Angeles.html [https://perma.cc/5AD-QCyZ].

172. *See* Colbert, *supra* note 53, at 53 (citing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, 426 (1988)). White mobs attacked any African American whom they believed was "impudent" or who resisted behaving in accordance with the former master-slave relationship. *Id.* at 430. Black elected officials were particularly vulnerable; 10 percent of those who served on the state constitutional conventions in 1867 to 1868 were victims of violence, including seven who were murdered. *Id.* at 426.

173. *Id. See* George Percy Barganier III, Fanon's Children: The Black Panther Party and the Rise of the Crips and Bloods in Los Angeles (2011) (Ph.D. dissertation, University of California, Berkeley) (ProQuest).

174. *See* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS (2010) (providing a full discussion of Black migration).

175. Black and Afro-mestizo people were among the earliest *pobladores* in Los Angeles, arriving in 1781. JAMES DIEGO VIGIL, A RAINBOW OF GANGS 64 (2002).

176. For example, Black people could vote and at this time over one-third of the Black families in the city owned their own homes. *Id.*

increased sevenfold.[177] Along with this influx of Black Americans into the Los Angeles area came a proliferation of restrictive housing covenants, white violence, and white flight to the newly created suburbs.[178]

By the 1940s, 95 percent of housing in Los Angeles was restricted from Black people.[179] Meanwhile, a new crop of white gangs began terrorizing Black youth in schools and on the streets, much like their Southern counterparts perpetrated lynching across the South as a means of intimidation and control.[180] In 1942, white serviceman and civilian mobs terrorized Black and Latino men and boys wearing zoot suits for at least five nights, tearing off their clothes, and beating them while police watched.[181] White gangs attacked Black youths and patrolled the city streets

177. Between the 1880s and 1910, large groups of Black Americans migrated to Los Angeles from Texas, Shreveport, New Orleans, and Atlanta to escape racial violence of the South in hopes for better jobs and a less overtly oppressive environment. *Id.* at 65.

178. White Angelenos moved in droves to new tracts of land developed outside of the city, which were under restrictive covenants. *Id.* at 65–66.

179. "In 1917, the Supreme Court ruling of *Buchanan vs. Warley*, declared municipally mandated racial zoning unconstitutional. Unfortunately, the case only dealt with legal statutes, leaving the door open for alternative agreements such as restrictive covenants, which served to perpetuate residential segregation on private properties." Kelly Simpson, *A Southern California Dream Deferred: Racial Covenants in Los Angeles*, KCET (Feb. 22, 2012), https://www.kcet.org/history-society/a-southern-california-dream-deferred-racial-covenants-in-los-angeles [https://perma.cc/E5QS-W3MC].

180. The 1920s saw a rise in the prominence of the Ku Klux Klan across Los Angeles and across the nation. *See* Scott Harrison *From the Archives: Ku Klux Klan Images From 1920s Southern California*, LA TIMES (Oct. 4, 2017), https://www.latimes.com/visuals/framework/la-me-fw-archives-ku-klux-klan-images-from-the-1920s-20170825-story.html [https://perma.cc/66G9-LF4M] ("During the 1920's the Ku Klux Klan was very active in Southern California – especially in the city of Inglewood."). *See also Klan's Tentacles Once Extended to Southland,* L.A. TIMES (May 30, 1999) https://www.latimes.com/archives/la-xpm-1999-may-30-me-42577-story.html [https://perma.cc/9F59-YSTF]. In 1920, they erected a cross at 109th Street and Central Avenue. VIGIL, *supra* note 175, at 67. White gangs in Los Angeles mirrored the behavior of white supremacy organizations like the Ku Klux Klan in the South after the passage of the Thirteenth Amendment by subjecting nonwhites to terror. *Id.* Decades later, legislators would erase the history of Black self-defense efforts as a cause for the formation of Black gangs with the creation of the California Street Terrorism and Enforcement and Prevention (STEP) ACT. Like legislative tactics of the past, legislators "abandoned the use of the rope and faggot for pragmatic reasons," and replaced lynching with a more "[humane] . . . method of racial control" that justified Black punishment to address Black on Black crime and Black dangerousness. Colbert, *supra* note 53, at 80.

181. *See* Robert S. Chang, *Los Angeles as a Single-Celled Organism*, 34 LOY. L.A. L. REV. 843, 845 n.5 (2001) (Arguing that an examination of events like the zoot suit riots is instructive in understanding police and mainstream societal attitudes toward minorities, especially minority youths associated with gangs) (citing MAURICIO MAZÓN, THE ZOOT-SUIT RIOTS: THE PSYCHOLOGY OF SYMBOLIC ANNIHILATION 6–7 (1984) (discussing possible origins of the zoot suit style)). The use of "zoot suit" and "Pachuco" to refer to Mexican Americans was actually a concession by newspapers to the war effort after Mexico declared war on Germany, Italy, and Japan. Worried about international relations, the Office of the Coordinator of Inter-American

seeking to enforce neighborhood boundaries and confine Black people to Black neighborhoods, much like Southern slave patrols had conducted raids, invasions, and attacks in the wake of the passage of the Thirteenth Amendment.[182] White gangs were a "form of terror against those seeking to fulfill the [T]hirteenth [A]mendment's promise of 'universal freedom.'"[183] The first Black gangs and social clubs emerged in Los Angeles as a direct and organic community response to this escalation of white violence against Black Angelenos.[184]

The next major phase of gang formation in Los Angeles occurred in the early 1970s after a steep decline in gang membership and violence associated with local gangs.[185] During the early 1960s, as white flight continued, conflict among Black gangs increased. But dynamics changed dramatically in the aftermath of the 1965

Affairs "urged the newspapers in particular to cease featuring the word 'Mexican' in stories of crime." *See also* Camilo M. Ortiz, *Latinos Nowhere in Sight: Erased by Racism, Nativism, the Black-White Binary, and Authoritarianism*, 13 RUTGERS RACE & L. REV. 29, 47 (2012) ("At the climax of the Zoot Suit Riots, approximately five thousand soldiers, sailors, and civilians took to the streets of Los Angeles seeking to assault not just Mexican Americans, but also Filipinos and African Americans").

182. The Spook Hunters were an all-white gang in Los Angeles that operated in the 1930s and 40s terrorizing Black youth. Alejandro A. Alonso, *Racialized Identities and the Formation of Black Gangs in Los Angeles*, 25 URB. GEOGRAPHY 658, 664 (2004). White mobs rallied in Compton under the slogan "Keep the Negroes North of 130th Street." Josh Sides, *Straight into Compton: American Dreams, Urban Nightmare, and the Metamorphosis of Black Suburb*, 56 AM. Q. 583, 585 (2004).

183. Colbert, *supra* note 53, at 80. Following the return of Black soldiers after the first World War, white mob violence intensified in both the North and South. In 1919, more Black people were lynched than in any of the preceding eleven years, but local law enforcement and all-white juries absolved virtually every responsible white attacker. *Id.* at 79. "Congressional attempts to pass an antilynching statute failed in the early 1920s." *Id.* at 79–80.

184. *See* Zack Saunders, Indiana University Southeast Student Conference: Compton, California: How the City became Notorious for Gang Violence in the 1980s and 1990s (2019). Zack Saunders explains that:

> reacting to the activities of the Spook Hunters, a gathering of young African Americans united to protect themselves from a gang of individuals with European ancestry during the 1950s. Among these individuals, a faction of African American youth acquired brass knuckles and adopted the name "The Brass Knuckle Boys." These early African American gang formations initially emerged as a collective effort driven by a common objective: safeguarding their rights as American citizens. However, over time, these gangs shifted their focus and began engaging in conflicts with each other.

Id. See also VIGIL, *supra* note 175, at 67–68.

185. According to one Los Angeles police sergeant, during the mid- and late-1960s, juvenile gang activity in Black neighborhoods was scarcely visible to the public at large and of minimal concern to South Central residents. Alex Alonso, *Out of the Void: Street Gangs in Black Los Angeles, in* BLACK LOS ANGELES: AMERICAN DREAMS AND RACIAL REALITIES 140 (Darnell Hunt & Ana Christina Ramon eds., 2010).

Watts rebellion.[186] Following the unrest, Los Angeles experienced a surge of Black-led political and community organizing with a specific focus on police brutality.[187] During this same period, the formation of the Black Panther Party galvanized Black youth in the city. The Black Panther Party "offered Black youth vehicles for building self-esteem and self-affirmation, occupying time and energies that might otherwise have been spent engaging in destructive activities."[188] Black youth in Los Angeles became increasingly politically active, often with the support and protection of current and ex-gang members.[189]

By 1968, the Federal Bureau of Investigation (FBI), along with local law enforcement, began dedicating enormous amounts of time and resources to infiltrating and dismantling the Black Panther Party.[190] The FBI led a four-hour assault on the Los Angeles headquarters of the Black Panther Party. A year later, two prominent Los Angeles-based Black Panther Party leaders and University of California Los Angeles (UCLA) Black Student Union student organizers, Bunchy Carter and John Huggins, were assassinated on UCLA's campus.[191] These events dramatically weakened the Black Panther Party in Los Angeles and laid the groundwork for a resurgence of gangs in the city. From 1970 to 1972, gang membership increased as Black youth previously drawn to the Black Panther Party message turned towards the quasi-political messages of street gangs. Throughout the 1970s, the number of gangs and the intensity of rivalries between these gangs

186. *Id.* at 140–67.
187. *Id.*; VIGIL, *supra* note 175, at 64–84.
188. Alonso, *supra* note 185, at 666.
189. "During one protest at a local whites-only drive-in restaurant, it was the arrival of the Slauson gang, based in the Fremont High area, which saved the protestors from an attack by [w]hites." VIGIL, *supra* note 175, at 74. "Ex-gang members such as Ron Wilkins created the Community Action Patrol to monitor police abuses and William Sampson (ex-gang member of the Slausons) along with Gerald Aubry (ex-gang member of the Orientals) started Sons of Watts, whose key function was to "police the police." *Id.* at 74–75.
190. Federal Bureau of Investigations (FBI) Director J. Edgar Hoover issued a memorandum calling on his field agents to exploit all avenues of creating dissension within the ranks of the Black Panther Party. WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS 127 (1990).
191. See *In re* Pratt, 112 Cal. App. 3d 795, 804 (1980). In his habeas corpus petition, Black Panther Party member Geronimo Pratt, aimed to secure his prison release using FBI reports obtained through the Freedom of Information Act that revealed that a crucial trial witness had perjured by denying FBI cooperation, and that the FBI had suppressed evidence backing his alibi. Al Prentice ("Bunchy") Carter and John Huggins, officers of the Black Panther Party, were shot and killed in the Campbell Hall cafeteria on the University of California Los Angeles campus on January 17, 1969. *Id.* at 84. The assassinations of Carter and Huggins were linked to the U.S. organization, and there was a great deal of friction between the Black Panthers and the United States in their efforts to take over the Black Student Union. *Id.*

grew.[192] This coincided with dwindling investments in war on poverty programs and continued white flight from newly integrated schools.[193]

By the 1980s, gangs forming across the country began popularly affiliating themselves with the Bloods and Crips, which originated in Los Angeles, and sparked blood feuds with each other.[194] The Crips and other street gangs in Los Angeles were engaged in dealing crack across Los Angeles.[195] The increase in crime associated with street gangs garnered highly racialized media coverage and an unprecedented police and political response that would lay the foundation for the modern American police state.[196] Yet as sociologist Mike Davis wrote in *City of Quartz*, "like the Tramp scares in the nineteenth century, or the Red scares in the twentieth, the contemporary gang scare has become an imaginary class

192. *See* Alex A. Alonso, Territoriality Among African-American Street Gangs in Los Angeles (1990) (Master's Thesis, University of Southern California). In 1972, there were eighteen Black street gangs in Los Angeles. By 1978, there were sixty. *Id.*

193. CA. CONST. art. 13A. (Ronald Reagan and California Governor George Duekmejian added drastic cuts to social services and jobs trainings).

194. James C. Howell & John P. Moore, *History of Street Gangs in the United States*, 4 NAT'L GANG CTR. BULL. 1, 8 (2010), https://www.nationalgangcenter.gov/content/documents/history-of-street-gangs.pdf [https://perma.cc/A8ZW-HPQQ].

195. Meanwhile, "the war on crack ke[pt] the city's coffers open to police funding requests." MIKE DAVIS, CITY OF QUARTZ: EVACUATING THE FUTURE IN LOS ANGELES 253 (Verso Books 1990). The name Crips stands for Community Resources for Independent People. The group rose up in grassroots form in the wake of the Black Panther movement. *The Crips: History: From Activism to Gangsterism*, GRINNELL COLL.: SUBCULTURES & SOCIO., https://haenfler.sites.grinnell.edu/subcultures-and-scenes/the-crips [https://perma.cc/2299-4XA7].

196. DAVIS, *supra* note 195, at 260. Community Resources Against Street Hoodlums (C.R.A.S.H.) was an offensive program that "assigned eight teams of federal immigration agents to work with the [Los Angeles Police Department (LAPD)] identifying and deporting gang members." *Id.* at 287. Operation HAMMER concurrently sent out elite antigang tactical squads that scoured ten square miles of Southcentral Los Angeles and viciously arrested Black youth. Mike Davis writes:

> Like a Vietnam-era search-and-destroy mission—of which many L.A. police are in fact veterans—the [LAPD] saturated the streets with its "Blue Machine," "jacking up" thousands of local teenagers at random like surprised peasants. Kids were humiliatingly forced to "kiss the sidewalk" or spreadeagle against police cruisers while officers checked their names against computerized files of gang members. 1453 were arrested and processed in mobile booking offices, mostly for petty offences like delinquent traffic tickets or curfew violations. Hundreds more, uncharged, had their names entered on the LAPD gang roster for future surveillance.

Mike Davis, *Los Angeles: Civil Liberties Between the Hammer and the Rock*, 170 NEW LEFT R. 37, 37 (1988). Raids did not result in actual arrests. A Los Angeles Weekly story in April of 1988 reported that just 103 cases were filed out of 1453 processed in one sweep. L.A. WEEKLY (Feb. 22, 1990), https://www.newspapers.com/image/578574184 [https://perma.cc/E6D2-J3QQ].

relationship, a terrain of pseudo-knowledge and fantasy projection."[197] So while contemporary gangs have a troubling impact upon the Los Angeles inner city communities, their histories are illustrious of the youth's attempt at self-defense and preservation gone awry.

B. Four Individuals who Created Gang Statutes

At the center of the police and political response to the influx of gangs in 1980s Los Angeles were three elected officials and the appointed chief of the LAPD. Together these men advocated for and implemented a series of legal weapons that built on a long history of Black control and subjugation. These weapons, specifically the nation's first gang statute—the California STEP Act—functioned like earlier badges of slavery by giving the police powers to monitor, criminalize the noncriminal, and subjugate and occupy Black communities. This Subpart examines the racist statements, views, and actions of these four men: (1) Los Angeles City Attorney James Hahn, (2) Los Angeles District Attorney Ira Reiner, (3) state Senator Alan Robbins, and (4) Chief of the LAPD Daryl Gates.

1. James K. Hahn

> We desperately need to rethink the balance between the constitutional rights of street gangs and the compelling state interest in protecting the innocent victims of gang terrorism. It is time for us to return to reason. It is time for us to use the legal [weapons][198] necessary to reclaim the streets of Los Angeles for the people.[199]

197. DAVIS, *supra* note 195, at 270.

198. *See* Hayat, *Two Bites at the Apple*, *supra* note 25. This Article rejects the word "tools" as a way to describe the purpose of RICO. Here, I use the word weapons as opposed to the word tools as described in other writings because the expansion of criminal liability has been used to weaponize criminal statutes to further mass incarceration. Tools fix problems while weapons are used to wage war, albeit unsuccessful wars. The war on drugs or the war on poverty being examples of failed efforts. *See also* William L. Anderson & Candice E. Jackson, *Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law*, 9 INDEP. REV. 85, 86 (2004) ("Federal prosecutors have discovered that RICO is a powerful weapon. . . . If this tactical weapon fails, a prosecutor faced with a resolute defendant determined to roll the dice at trial can still rest easy, knowing that RICO has stockpiled new procedural weapons in the prosecutor's war chest.").

199. James K. Hahn, *Rethinking Gangs' Rights vs. Our Rights*, L.A. TIMES (Feb. 5, 1988), https://www.latimes.com/archives/la-xpm-1988-02-05-me-27288-story.html [https://perma.cc/SW5L-QZUL].

James K. Hahn, scion of the city's most powerful Democratic political family with deep ties to the Black community, was elected as city attorney of Los Angeles in 1985.[200] Almost immediately, Hahn spent the political capital built by his father over decades in Los Angeles city politics to lead the fight against street gangs.[201] As the city attorney, Hahn authored both the 1987 civil gang injunction against the Playboy Gangster Crips and the nation's first gang statute, the STEP Act—two weapons that operated together to criminalize the very existence of Black and Brown people.

The first of Hahn's legal weapons deployed against Black and Brown youth in Los Angeles was the 1987 civil gang injunction against the Playboy Gangster Crips in the Cadillac-Corning neighborhood of Los Angeles.[202] Civil gang injunctions are civil court orders that use public nuisance laws to criminalize otherwise legal behavior for people deemed by the police to be gang members.[203] Under a gang injunction, suspected gang members can be detained by police and

200. *Hahn a Scion of Los Angeles Political Leader*, CNN (June 6, 2001), https://www.cnn.com/2001/ALLPOLITICS/06/06/la.hahn.bio/ [https://perma.cc/R65W-JN8Y]. James Hahn's father, Kenneth Hahn, served as a powerful Los Angeles county supervisor for forty years. In 1988, he called for mobilization of the California National Guard to combat street gangs. *Street Gang Member Opens Fire on City Bus, Wounds Four*, AP NEWS (Feb. 26, 1988), https://apnews.com/article/94ba037786b1c7c9f40f003082f69418 [https:// perma.cc/7SJQ-Y2KV].

201. Kenneth Hahn was popular with Black Los Angeles voters whose support helped keep him in office. DAVIS, *supra* note 195, at 277–78.

202. Ana Muniz, *Maintaining Racial Boundaries: Criminalization, Neighborhood Context, and the Origins of Gang Injunctions*, 61 SOC. PROBS. 216 (2014).

203. Today, in order to identify someone as a gang member and input them into the gang database, a police officer simply needs to conduct a "field interview" and fill out a card identifying the youth as a gang member. There is no additional proof needed. JOE DOMANICK, BLUE: LAPD AND THE BATTLE TO REDEEM AMERICAN POLICING (Simon & Schuster 2016). As recently as October 2020, LAPD officers have been accused of falsifying field interview record cards to wrongfully identify people as gang members and entering them into the state's gang database. *See*, Fareed Nassor Hayat, *Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196, 233 n.38 (2021); Kevin Rector, Richard Winton & Ben Poston, *Three More LAPD Officers Charged With Falsifying Information in Gang Labeling Scandal*, L.A. TIMES (Oct. 2, 2020), https://www.latimes.com/california/story/2020-10-02/three-more-lapd-officers-charged-with-falsifying-information-in-gang-labeling-scandal [https://perma.cc/6LZV-CXXW] (examining how three Los Angeles police officers face charges for allegedly falsely identifying people as gang members or associates); *3 LAPD Officers Charged With Falsifying Information on Gang Affiliation*, L.A. DAILY NEWS (Jul. 10, 2020), https://www.dailynews.com/2020/07/10/3-lapd-officers-charged-with-falsifying-information-on-gang-affiliation [https://perma.cc/WE2L-GQNZ] (examining how officers Braxton Shaw, Michael Coblentz, and Nicolas Martinez each face one count of conspiracy to obstruct justice, and multiple counts of filing false police reports and preparing false documentary evidence).

charged with criminal contempt for a range of behavior from trespassing, spraying graffiti, wearing certain colors, talking to certain people on the streets of their own neighborhood, being outside after required hours, and even being in the company of others, unemployed, or under employed.[204] These civil injunctions were drafted to withstand the type of void for vagueness challenges that had taken down the previous badges of slavery—vagrancy and loitering laws.[205] And much like their earlier iteration, civil gang injunctions target the descendants of the enslaved, violate their civil and constitutional rights, and relegate members of the Black community to the conditions of slavery because of their skin color and their economic status.[206] In this particular instance, "[p]rosecutors and police targeted Cadillac-Corning" with a civil gang injunction "because the neighborhood had undergone demographic change that threatened the boundaries of racial and class separation and control."[207]

Hahn's choice of the Cadillac-Corning neighborhood of Los Angeles for his first gang injunction reveals his office's true motive to protect the safety and property values of his wealthy white constituents and not the Black communities experiencing most of the gang violence. The Cadillac-Corning neighborhood of Los Angeles was unique during the late 1980s, not because of the area's crime rate or homicide rate—there were places in Los Angeles suffering much higher numbers—but rather because of its proximity to wealthy white neighborhoods.[208]

204. *See How Are Gangs Identified*, L.A. POLICE DEP'T, https://web.archive.org/web/20210803201809/https://www.lapdonline.org/get_informed/content_basic_view/23468 [https://perma.cc/ADV7-34EY].

205. Stewart, *supra* note 141, at 2250, 2273 (arguing that "antigang civil injunctions promise to perpetuate racial stigma and oppression . . . . [They] share with postbellum vagrancy ordinances a repressive effect that stamps minority communities with badges of inferiority," and "antigang civil injunctions invite concerns identical to those that compelled the *Papachristou* Court to repudiate vague public order laws.").

206. *See Court Issues Historic Ruling Against Gang Injunctions in L.A.*, ACLU (Mar. 15, 2018), https://www.aclusocal.org/en/press-releases/court-issues-historic-ruling-against-gang-injunctions-la [https://perma.cc/6KD2-V9M3] (quoting Kim McGill with Youth Justice Coalition, who explains that "Gang injunctions are . . . overly harsh, serve to cut people off from the opportunities and supports they need to succeed, serve as tools of gentrification and displacement, and criminalize thousands of people for non-criminal acts further enforcing racial and economic discrimination in the implementation of public safety.").

207. Muniz, *supra* 202, at 216–36.

208. Los Angeles County District Attorney Ira Reiner explained in a 1986 hearing, "But for those—and it is human nature to be most concerned about what happens close to home, let me point out that everyone is at risk. There are no safe enclaves any longer. Gang activity is no longer limited to the ghetto as perhaps it once was." *Interim Hearing on Juvenile Gang Violence: Hearing Before the Senate Committee on Judiciary*, 1986 Leg., 6 (1986), https://www.ojp.gov/pdffiles1/Digitization/111146NCJRS.pdf [https://perma.cc/A8R5-XWB2]. *See also* Muniz, *supra* note 202, at 222.

The twenty-six square block area is located on the Westside of Los Angeles and directly adjacent to middle-class and wealthy white neighborhoods, specifically Beverly Hills and Beverlywood.[209] As a result of the activities of the Playboy Gangster Crips, who catered to rich white youth seeking to buy drugs, areas of Beverlywood experienced a decline in home prices.[210] Areas experiencing higher levels of violence from street gang activity were passed over because, as an attorney in Hahn's office explained, Cadillac-Corning was deemed "one of the few areas where if you took the gang out of the neighborhood, it would return to normal."[211]

The Playboy Gangster Crips injunction gave Hahn's office a unique opportunity to enforce racial and class boundaries while denying gang members the constitutional protections associated with the criminal legal system.[212] Like Southern Black people under the Black Codes, subjects of civil gang injunctions had very few rights or means to avoid being subjected to the mechanism of enforcement. Defendants in gang injunction cases do not have a right to counsel, they cannot challenge the government's assertion that they are in fact a gang member, nor can they challenge the constitutionality of the injunction as a whole.[213] These characteristics of gang injunctions were specifically cited as appealing by an attorney in Hahn's office, who noted, "[w]hen a gang member comes in on a gang injunction they don't have a right to counsel. They don't have a right to a jury trial. They don't have the right to a speedy—all of those rights that we have to deal with, which I respect. I had a tool that gave me all of these

209. Muniz, *supra* note 202, at 224 ("West LA was one of the safest places in LA during and before the time of the gang injunction.").

210. Paul Feldman, *Judge Raps City Atty.'s Bid to Neutralize Gangs*, L.A. TIMES (Dec. 11, 1987) [hereinafter Feldman, *Judge Raps*], https://www.latimes.com/archives/la-xpm-1987-12-11-me-18830-story.html [https://perma.cc/6HNQ-3L8D]; Paul Feldman, *Drug-Peddling Street Gang Holds Neighborhood in Fear*, L.A. TIMES (Nov. 16, 1987), https://www.latimes.com/archives/la-xpm-1987-11-16-me-14241-story.html [https://perma.cc/UPW4-SKB3].

211. Feldman, *Judge Raps*, *supra* note 210 ("What is normal in this attorney's view? Is normal no more drug abuse. No because the users of the drugs, white middle class residents were not targeted. Nor were any white drug dealers who provided the drugs. Is normal the [B]lack outsider who may or may not be a drug dealer or gang member?").

212. Muniz, *supra* note 202. At one point, white gangs enforced these boundaries, then gang injunctions and gang statutes were enacted to enforce those boundaries.

213. Lindsay Crawford, *No Way Out: An Analysis of Exit Processes for Gang Injunctions*, 97 CAL. L. REV. 161, 176 (2009) (citing Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 213, 222, 253–66 (1994) ("Critics fear that injunctions inappropriately take advantage of both the lower level of procedural protections (no right to counsel) and the lower burden of proof in civil actions.")). *See* Iraheta v. Superior Court of L.A. County, 70 Cal. App. 4th 1500 (1999) (holding that indigent defendants have no right to counsel in injunction proceedings).

advantages. Why give the defendant back so much stuff?"[214] Reminiscent of supporters of the Confederacy, the attorney in Hahn's office adopted the same position as those who objected to the power of the Thirteenth Amendment and refused to extend the promises of the Constitution to the descendants of enslaved Africans.

Hahn's initial request to the judge in the Playboy Gangster Crips injunction did not name specific individuals, but rather "Does 1–300" and included various prohibitions on a variety of otherwise legal behavior for alleged gang members. The request included measures that would have amounted to putting alleged gang members on house arrest, such as, barring them from wearing "gang-style" clothing, congregating in groups of two or more in public places, remaining in public streets for *more* than five minutes, and having visitors in their residences for periods of *less* than ten minutes.[215] Harkening back to Slave and Black Codes, Hahn requested a dawn-to-dusk curfew from juvenile gang members and a "pass law" provision which would subject any "Doe" to arrest unless they could produce a signed letter from a "lawyer, property owner, or employer" authorizing their presence.[216]

The American Civil Liberties Union (ACLU) filed suit against Hahn's injunction.[217] The presiding judge lashed out at the request, calling it "so poorly drafted" that he would not attempt "to narrow the [requested prohibitions] down," yet he also declared that many of Hahn's requested provisions, "violate basic constitutional liberties."[218] Hahn, for his part, was undeterred, declaring, "we're not going to give up . . . . If this doesn't work, we'll try something else."[219] Despite the judge's reservations with Hahn's request, he eventually granted six of

214. Crawford, *supra* note 213, at 229.
215. Compare this language to the examples of Black Codes, *supra* notes 135 and 142 and accompanying text, making it illegal for any Black people to be "found unlawfully assembling themselves together, either in the day or nighttime." *See* Miss. Black Codes § 2 (1865).
216. DAVIS, *supra* note 195, at 280. "Like the Black Codes, gang injunctions criminalize a broad range of mundane activities without in the target community. Anyone who fits the racial profile of gang member is subject to stops, detainments, and enhanced sentencing. Those who socialize with people already classified as gang members are often categorized as gang associates and subject to police harassment and detainment." Muniz, *supra* note 202, at 219.
217. Crawford, *supra* note 206, at 162. *See also* Williams v. Garcetti, 5 Cal. 4th 561 (1993) (Where taxpayers filed a complaint for injunctive and declaratory relief to halt the enforcement of Pen. Code Section 272 amendments (contributing to dependency or delinquency of minor)).
218. Feldman, *Judge Raps*, *supra* note 210.
219. Muniz, *supra* note 202.

the twenty-three prohibitions requested by Hahn.[220] The Playboy Gangster Crips injunction evoked a long history of similarly styled and purposed badges of slavery.

Since Hahn first employed the gang injunction in 1987, it has been weaponized almost exclusively against Black and Brown teenagers.[221] The same type of injunction that Judge Warren Deering once rejected as violating "basic constitutional principles" has now become commonplace.[222] Subsequent iterations of the gang injunction restrict gang members' liberty to congregate with neighbors, carry a flashlight, or even a pager, thus giving local governments the power to more easily take control of public space by subjecting Black and Brown youth to near constant surveillance and harassment.[223] In 1987, Hahn made his motivations explicit, saying that his new gang injunction "will allow the police to be

220. *See* Matthew Mickle Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 414 (1999) (citing People v. Playboy Gangster Crips, No. WEC 118860 (Cal. Super. Ct. L.A. County Dec. 11, 1987) (preliminary injunction)). Judge Deering's order in *Playboy Ganster Crips* stated:

> (1) Do not enter or be present upon the private property of another without permission. (2) Do not damage or deface, or cause others to damage or deface, by spray painting or otherwise, public property or private property not owned by you. (3) Do not block the free egress or ingress to or from any street, driveway, sidewalk, house, building, vehicle or other place. (4) Do not urinate or defecate upon any public street, avenue, alley, park or other public place or in any place open to public view or in any public hallway or public passageway. (5) Do not litter, or cause other persons to litter, upon any public street, avenue alley, park or other public place or in any place open to public view or in any public hallway or public passageway. (6) Do not annoy, harass, intimidate, threaten or molest any resident, neighbor or citizen.

Id.

221. Abené Clayton, *92% Black or Latino: the California Laws that Keep Minorities in Prison*, GUARDIAN, (Nov. 26, 2019), https://www.theguardian.com/us-news/2019/nov/26/ california-gang-enhancements-laws-black-latinos [https://perma.cc/J7FD-F9EG].

222. Matthew M. Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409 (1999). Matthew M. Werdegar writes:

> Judge Deering's order enjoined the gang members from engaging in the following activities in the public area or in public view within a designated 180-square-block zone: a) Do not use or possess any deadly weapon in any public place or in public view, nor remain in the presence of any person who is in possession of a deadly weapon. For purpose of this order a deadly weapon is any object capable of inflicting serious bodily injury. This includes but is not limited to all: 1) firearms and/or ammunition; 2) knives of any length or type; 3) baseball bats; 4) metal pipes or rods; 5) glass bottles or containers; 6) rocks; 7) bricks; 8) chains; 9) tire irons and bumper jacks; 10) screwdrivers and hammers; 11) crow bars; 12) spikes; 13) razors or razor blades; 14) large metal belt buckles; 15) sling shots; 16) bb guns and 17) ball bearings.

Id.

223. Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477 (1994).

involved in activities earlier . . . . [T]hey don't have to wait for a drug deal to go down or a person to be shot."[224]

Hahn's attempt to punish crime before it occurs is based on a belief that all subjects of the civil gang injunction are criminal. Subjects of the injunction are not included because of what they have done, but rather because of where they live, how they appear, and who they associate with—all in accordance with Hahn's historical view of who is criminal and unworthy of rights.[225] As noted by Matthew Mickle Werdegar, "the power of the injunction lies in the expanded authority it gives police to disperse, or stop and frisk, or take into custody enjoined individuals whenever they are seen violating one of the injunction's broad provisions. Injunctions give the police the means to *catch* individuals with the instrumentalities of other, more serious crimes, without any need for probable cause,"[226] and without the need to abide by constitutional safeguards.[227]

The broad discretion that civil gang injunctions grant police and prosecutors has been the source of multiple constitutional challenges.[228] But this has not stopped gang injunctions, modeled after Hahn's original, from being deployed against communities of color across the country.[229] Hahn, who went on to be elected mayor of Los Angeles, has never distanced himself from the practice. In

224. Norma Meyer, *Judge Clamps Down on Gang*, THE NEWS-PILOT (Dec. 12, 1987).

225. Justice Thurgood Marshall quoted Justice Roger Taney, author of the majority opinion in *Dred Scott*, in pointing to how the Framers did not view Black people as counted among "the People" when they drafted the foundational constitutional rights: "[O]n the issue whether, in the eyes of the Framers, slaves were 'constituent members of the sovereignty,' and were to be included among 'We the People': We think they are not, and that they are not included, and were not intended to be included . . . . [A]ccordingly, a negro of the African race was regarded . . . as an article of property, and held, and bought and sold as such . . . . [N]o one seems to have doubted the correctness of the prevailing opinion of the time." Thurgood Marshall, Remarks of Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987) (referencing Dred Scott v. Sandford, 60 U.S. 393, 404–08 (1856)); *see* Hayat, *Killing Due Process, supra* note 29, at 22 n.9.

226. Werdegar, *supra* note 222, at 434.

227. *See* Fareed Nassor Hayat, *Dignity or Death: The Black Male Assertion of the Fourth Amendment*, 83 OHIO ST. L.J. 857, 895–96 (2022) (citing Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 375–76 (1998) ("Police target Black people today in much of the same way as their historical predecessor—slave patrols of colonial America—in excluding Black people from the protections of the Fourth Amendment.")).

228. *See e.g.*, Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 n.15 (1999) (citing Brief of Chicago Alliance for Neighborhood Safety et al. as Amicus Curiae in Support of Respondents, Morales, (No. 97–1121)).

229. *See supra* note 26. The STEP Act was born out of and fueled by prior iterations of badges and incidents of slavery. *See* Roberts, *supra* note 228, at 55 (citing THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH 98–99 (1965)); *see also* ROBERT CRUDEN, THE NEGRO IN RECONSTRUCTION 20 (1969) (describing white Southerners' fear of Negro mobility during Reconstruction).

2005, he vowed to pursue a citywide injunction.[230] In late 2020, the city of Los Angeles was ordered to change deployment of gang injunctions from the current practice of blanketing entire areas to use in a more targeted, deliberate way.[231]

In addition, Hahn is also responsible for authoring and advocating for the STEP Act. Hahn wrote the STEP Act with Ira Reiner, the subject of the next Subpart, and they testified together in support of its passage. When the STEP Act finally passed in 1988, Hahn did not hesitate to employ its most sinister provisions, specifically the statute's so-called "parental liability" of the "bad parent" provision.[232] Hahn brought charges under this "bad parent" provision against a South Los Angeles mother whose son was accused of gang rape. His office, working with police, fed the press a story of a mother "condoning" the gang activity of her son. When reporters looked further into the case, they discovered a hardworking single parent of three and an investigation riddled with errors.[233] After subjecting a South Los Angeles mother to very public criminal charges, Hahn quietly dropped the charges saying, "new evidence" was discovered.[234]

The California STEP Act and Hahn's gang injunctions provided a unique opportunity to impose racial and class borders while denying gang

230. Richard Fausset, *Mayor Vows to Pursue a Citywide Injunction*, L.A. TIMES (Mar. 29, 2005), https://www.latimes.com/archives/la-xpm-2005-mar-29-me-gangs29-story.html [https://perma.cc/6A5N-RADU].

231. James Queally, *Los Angeles Must Change Use of Gang Injunctions Under Court Settlement*, L.A. TIMES (Dec. 26, 2020), https://www.latimes.com/california/story/2020-12-26/los-angeles-gang-injunctions-must-change [https://perma.cc/LV7A-K6PM].

232. In 1989, the American Civil Liberties Union (ACLU) of Southern California sued to block enforcement of the parental liability law used to arrest a South Los Angeles woman as unconstitutionally vague, which allowed for unfairly targeting parents in poor areas and violating their "fundamental liberty interests in directing the rearing of their children." Paul Lieberman & Elizabeth J. Mann, *Antigang Law Hit in ACLU Suit: Measure That Holds Parents Responsible Called Unfair to Poor*, L.A. TIMES (Jul. 21, 1989), https://www.latimes.com/california/story/2020-12-26/los-angeles-gang-injunctions-must-change [https://perma.cc/DSA4-ENX8]. The ACLU lost the case. Williams v. Garcetti, 5 Cal. 4th 561 (1993).

233. A Southwest LAPD detective told the media, "It was obvious that the mother was just as much a part of the problem because she condoned this activity." DAVIS, *supra* note 195, at 283.

234. *See generally* Sharon A. Ligorsky, Williams v. Garcetti: *Constitutional Defects in California's "Gang-Parent" Liability Statute*, 28 LOY. L.A. L. REV. 447 (1994) (arguing that "the Amendment will not accomplish its goal of eradicating gang activity because parental liability statutes do not deter juvenile delinquency. State legislatures should recognize that many factors contribute to a child's delinquency—not just poor parenting. Families with delinquent children need counseling and therapy in order to resolve the problems that disrupt their lives not punishment."). *Id.* at 472.

members constitutional protections associated with the criminal judicial system. Under Hahn's leadership, subjects of civil gang injunctions and the STEP ACT were degraded to the status of slave like Southern Black people under the Black Codes.

2. Ira Reiner

> The objective is to use each occasion that a gang member is arrested for a crime, no matter how minor, as a means to remove him from the streets as long as possible.[235]

In June 1988, Los Angeles District Attorney Ira Reiner submitted testimony to the California Legislature Senate Judiciary Committee. The committee, led by then-Senator Joseph Biden, was meeting on how to tackle the flow of illegal drugs into the United States, and Reiner was consulted as an expert. Reiner took the opportunity to lament what he described as the "lenient" sentencing accorded to first-time offenders for dealing small amounts of drugs, as he tried to sell a myriad of programs his office was pushing, including seeking maximum sentences of six months in state prison sentences for first offenses, no parole for people sentenced to county jail, and no bail for repeat offenders.[236]

As Reiner was pursuing a series of punitive policies within his office, he was also advocating for a much larger bill—the STEP Act. Reiner, who coauthored the bill with Hahn, lobbied Sacramento lawmakers aggressively for the measure, dehumanizing alleged gang members to justify denying them their constitutional rights:

> SENATOR DEDDEH: What do they say? What's their answer? What's their rationale?
>
> MR. REINER: Those are the kinds of questions, Senator, that all of us ask when we first get involved in this, because we can't appreciate, we can't comprehend, we can't understand how people can be so inhuman as to kill so wantonly without concern. And so, we expect some sort of what we consider to be a rational answer. They are angry, or whatever

235. Edwin Chen, *Throwing the Book: Reiner Will Seek Maximum Jail Sentence for Gang Members*, L.A. TIMES (Sept. 20, 1989), https://www.latimes.com/archives/la-xpm-1989–09–20-me-312-story.html [https://perma.cc/5496-FVHH].

236. California Legislature, Senate Committee on Judiciary, Senator Bill Locyer, Chairman, Interim Hearing on Juvenile Gang Violence (October 15, 1986), *available at* https://www.ojp.gov/pdffiles1/Digitization/111146NCJRS.pdf [https://perma.cc/XN8S-ZWPT].

> it is the kinds of human emotions that we can understand, although not acceptable to understand, why it could lead to violence. It's not that at all. They don't care. They are *a-human*. They kill, they murder, and they walk away from murders. They don't even have enough emotion involved in it to run from the murder. They shoot, they kill, they walk away. It is that is perhaps its most frightening aspect it is that commonplace. They are not ordinary human responses redeeming the people so far removed from these others . . ."[237]

In the same boilerplate language of slavery sympathizers of the nineteenth century, Reiner imposed blatant badges of slavery upon gang members without regard to their specific criminal history or action. He evoked a long history of dehumanizing Black and Brown bodies to justify a system of oppression that supports the white supremacist ideology that § 2 of the Thirteenth Amendment intended to obliterate. His racist tropes intend to impose immeasurable punishment upon gang members, and like slavery, justify the inhumane, subhuman, noncitizen treatment of gang members.

Once the STEP Act passed, Reiner led the state's offensive against street gangs, serving legal notices to nearly four thousand alleged gang members under the newly passed STEP Act. In a press conference that same year, he announced that he was no longer concerned with the rehabilitation of street criminals but only with putting each and every one of these little murderous hoodlums in jail for as long as possible . . . there is no pretense of rehabilitation.[238] Reiner's prosecutors were directed to "aggressively seek harsher sentencing of gang members in every case, irrespective of whether the offense was gang related."[239] By this point, more than 70,000 people in the county had been identified by police as a gang member.[240]

Under Reiner's policy, an alleged gang member caught drinking in a public park—typically a minor offense that would result in a fine—would be prosecuted with a six-month jail term in mind.[241] Reiner was very deliberate in establishing a parallel, more punitive criminal legal process for Los Angeles gang members:

237. *Id.*
238. Chen, *supra* note 235.
239. Edwin Chen, *Throwing the Book: Reiner Will Seek Maximum Jail Sentence for Gang Members*, L.A. TIMES (Sept. 20 1989), https://www.latimes.com/archives/la-xpm-1989-09-20-me-312-story.html [https://perma.cc/F2BL-JA68].
240. Darrell Dawsey, *Gang-Related Killings in County, City Set Record in '89*, L.A. TIMES (Jan. 12, 1990), https://www.latimes.com/archives/la-xpm-1990-01-12-me-257-story.html [https://perma.cc/2HF7-ZR4F].
241. Chen, *supra* note 235.

"We're going to be trying to single out gang members in every case where they appear before the court for far more severe sentence than any other criminal would have received for the identical crime."[242]

Reiner's efforts to criminalize the behavior of Black and Brown youth were seemingly endless. In contrast, white gang members were not subject to prosecution under the STEP ACT.[243] For example, a 1988 pilot program subjected juveniles to arrest and possible jail time with the mission of keeping gang members off the streets. Reiner also pushed his prosecutors to file complaints against repeat curfew violators, including children and, in some cases, their parents. Reiner argued, "I think it's becoming increasingly clear that parental responsibility" is connected to gang activity. Parents could be charged with a misdemeanor and jailed for up to six months if convicted.[244] A year later, Reiner announced that his office would be trying to send truant students to juvenile detention for five days. Again, he would also be targeting their parents. If his office could show that a parent "prevented" their child from attending school, the parent could be put in jail for up to five days. A second conviction of the parent could bring twenty-five days in jail and fines.[245] In 1988, Reiner touted the two efforts on truancy and curfew violations, saying the two "should be seen for what they are—precursors of ultimately serious criminal behavior—and dealt with accordingly."[246]

Years later, Reiner had successfully positioned himself as a nationwide expert on gangs. In 1992, his office released a report that was billed as the most thorough examination of the nation's gang problem in history. The topline findings, reported across national media, were that there were 150,000 gang members[247] in

242. *Id.*

243. Brian W. Ludeke, *Malibu Locals Only: "Boys Will Be Boys," or Dangerous Street Gang? Why the Criminal Justice System's Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 360 (2007). While prosecutors like Ira Reiner have enthusiastically endorsed the STEP Act and its ability to fight gangs, the Act presents problems when it is enforced unequally with respect to gang members of different races. The STEP Act does not explicitly provide for unequal treatment for gang members of different races. The Los Angeles County Sheriff's Department's failure to classify MLO (a categorially white street gang) as a gang under the STEP Act raises the possibility that the Act is failing to meet the constitutional requirement that laws be enforced uniformly with respect to similarly situated people. *Id.*

244. *Police to Crack Down on Curfew*, L.A. SENTINEL (June 2, 1988).

245. *D.A. Proposes to Lock Up Truants*, L.A. SENTINEL (Feb. 16, 1989).

246. Edwin Chen, *Reiner Vows Staff Action on 1st-Time Youth Offenders*, L.A. TIMES (Dec. 6, 1988).

247. *See* Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 118 (2005) (quoting LAPD Commander Dan Koenig's disregard for the illegitimate placement of nongang member in gang databases: "Why would we tell [nongang members] they're on it? Does Schwarzkopf tell the Iraqis? . . . If [nongang members] are not involved in criminal activity why would [nongang members] care about being on it.").

Los Angeles and that half of all young Black men living in Los Angeles were in the state's notorious gang database.[248] In response to the staggering finding, Reiner himself queried, that number may be artificially high . . . . But on the other hand it may not be . . . . It may mean just what it says, that about one out of every two young [B]lack males are involved in gangs.[249] Reiner's lack of distinguishing between actual gang members and Black youth in South Los Angeles demonstrates his racist opinion that gang membership or involvement in gangs is equated with Blackness. His artificially high labeling of one in every two Black men as gang members made all young Black men potential gang members and subjected to harassment, imprisonment, and criminalization. Reiner's approach at gang enforcement prosecution harkens back to the centuries of arbitrary racist punishment of Black bodies and serves as a badge and incident of slavery.[250]

3. Alan Robbins

> Children in strange, unfamiliar neighborhoods are much more prone to violence than they would be in their own neighborhood, close to the safety of their own home, family and friends. And there's always the danger of a child missing the bus, becoming terrified and getting lost, which again multiplies the opportunity for some sick person to make your child the victim of violence.[251]

In 1979, a majority of Californians passed Proposition 1 which amended the California Constitution and stymied court-ordered mandatory school

248. In July 2020, the California attorney general pulled LAPD data, over a quarter of the total information, from the state's gang database after LAPD officers were charged with fabricating evidence to tag people as gang members or associates. Kevin Rector, Richard Winton & Ben Poston, *Three More LAPD Officers Charged With Falsifying Information in Gang Labeling Scandal*, L.A. TIMES (Oct. 2, 2020), https://www.latimes.com/ california/story/2020-10-02/three-more-lapd-officers-charged-with-falsifying-information-in-gang-labeling-scandal [https://perma.cc/U5NW-VZL6].

249. *See* Sheryl Stolberg, *150,000 Are in Gangs, Report by D.A. Claims: Crime: Reiner's Study Says Half of Young Blacks Are Members. But Even Gates Says Numbers May Be Too High*, L.A. TIMES (May 21, 1992), https://www.latimes.com/archives/la-xpm-1992-05-22-mn-282-story.html [https://perma.cc/6G5K-TX4W].

250. *See* JAMES OAKES, THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS 153–90 (1982)(documenting slaveholder obsession with rules governing every aspect of slave life and increasingly cruel penalties for breaches, especially starting in the 1850s).

251. DANIEL MARTINEZ HOSANG, RACIAL PROPOSITION: BALLOT INITIATIVE AND THE MAKING OF POSTWAR CALIFORNIA 120 (2010).

desegregation efforts in the state.[252] Proposition 1, also known as the Robbins Amendment, was written and championed by then-state Senator Alan Robbins, a Democrat from the majority white suburbs outside of Los Angeles.[253] Robbins followed in the footsteps of another California lawmaker, Republican Assemblymember Floyd Wakefield, who successfully passed a similar constitutional amendment in 1972, only to have it struck down in court as a violation of the Fourteenth Amendment's Equal Protection Clause.

But where Wakefield's offensive fell short, Robbins executed a subtler, but no less insidious, campaign. Wakefield complained of "forced integration" and called for a defense of white rights and "freedoms of association," while Robbins appealed to parent's fears that busing would take their children into "unfamiliar neighborhoods."[254] Rhetoric aside, Robbins—a lawyer—crafted his proposition to succeed where Wakefield's failed by insulating the amendment from state and federal constitutional challenges. Robbins spoke in race-neutral terms and recruited Black and Latinos who were weary of busing for very different reasons to speak in support of the measure.[255]

The playbook Robbins developed to pass his antibusing proposition would prove useful a decade later when Robbins championed the STEP Act in the California State Assembly. Like in the busing example, Robbins spoke of the import of the STEP Act in race-neutral terms. The race-neutral terms appealed to the Black and Brown community's anxiety and real fear of gang violence. In 1987, Robbins introduced Reiner and Hahn's co-authored bill and shepherded it through the state Senate. When the California Assembly raised concerns about a part of the bill that would have required forfeiture of property acquired by gang-related activities, he agreed to remove the provision from the bill. Robbins's fellow Democrats expressed concern that the provision would hurt family members who were not involved in gang activities.[256] Although Robbins agreed to strip the

252. Rachel Yamada, *Inventory of the Alan Robbins Papers*, ONLINE ARCHIVE OF CAL. ("In 1979 he authored and successfully helped pass Proposition 1, which was California's landmark anti-busing initiative."), https://oac.cdlib.org/findaid/ark:/13030/c8d50nkf/entire_text [https://perma.cc/5PM3-V664].

253. *Id.*

254. HOSANG, *supra* note 251, at 95–96, 120.

255. "The NAACP's Canson testified at a state assembly hearing on the Robbins Amendment that 'one of the strategies of our opposition is to seek to project individual [B]lack spokesmen, exploit their individual points of view, and trade it off as a massive departure of NAACP from our historic goal of full integration.'" *Id.* at 112.

256. Jeremy Gillam, *Assembly Panel Softens, Approves Antigang Measure*, L.A. TIMES (Aug. 2, 1988).

provision, he vowed to keep trying, stating, "We need to get that (forfeiture of assets) at some point," and "[w]e will try in another bill or in another year."[257]

Despite Democrats, like Bill Lockyer, warning that the bill "would have justified the internment of the Japanese in World War II," it passed easily and with bipartisan support. Three years after Robbins passed the STEP Act, he plead guilty to racketeering and two felony counts of income tax evasion.[258] Thus, Robbins's rejection of constitutional protection for Black and Brown street gang members was an extension of his personal repudiation of the rule of law—laws that he had taken an oath to enforce.

4. Daryl Gates

> It's like having the Marine Corps invade an area that is having little pockets of resistance . . . we can't have it . . . we've got to wipe [the gang members] out.[259]

Daryl Gates's career oversaw an expansive militarization of policing in Los Angeles.[260] Mentored by the former chief of LAPD, William Parker, Gates seemed destined to rise in the ranks of the LAPD.[261] Gates advanced from patrolman in 1949 to patrol area commander, and he was named chief of the LAPD in 1978—he held this highest-ranked position through the passage and implementation of the California STEP Act in the late 1980s.[262] He engaged in special training to handle high-risk situations, and his experience thwarting the Watts rebellion of 1965 was

257. *Id.*

258. Robbins was originally sentenced to five years in federal prison and ordered to pay $475,000 in fines and restitution. Paul Jacobs & Mark Gladstone, *Robbins Gets Five-Year Sentence, $475,000 Fine: Courts: EX-State Senator's Term for Political Corruption Could be Reduced if he Continues to be Helpful to Prosecutors*, L.A. TIMES (May 2, 1992), https://www.latimes.com/archives/la-xpm-1992–05–02-mn-1323-story.html [https://perma.cc/QJS5-AK2B].

259. David Freed, *Gates Blames Drugs, Gangs for 4% Rise in L.A. Crime*, (Dec. 25, 1986), https://www.latimes.com/archives/la-xpm-1986-12-25-me-485-story.html [https://perma.cc/J4H4-JVEX].

260. PBS News Weekend, *What Led to LAPD Restricting Neckholds in 1982? A Doctor Remembers*, PBS (Aug. 2, 2020), https://www.pbs.org/newshour/show/what-led-to-lapd-restricting-neckholds-in-1982-a-doctor-remembers [https://perma.cc/SV8D-W3BC] (remembering that "Chief Gates was a very forceful and aggressive police chief. He actually established what one might think of as a militarized police department.").

261. *Id.*

262. Keith Schneider, *Daryl F. Gates, L.A.P.D. Chief in Rodney King Era, Dies at 83*, N.Y. TIMES (Apr. 16, 2010), https://www.nytimes.com/2010/04/17/us/17gates.html [https://perma.cc/J2CB-7ASB].

regarded as valuable to a police department that was ramping up its riot-control tactics,[263] which functioned to maintain a racist social order. Los Angeles was rife with racial tension after the civil rights movement sparked outcries for racial justice in the 1960s.[264] Many Black and Brown people were already outraged about excessive policing in their communities.[265] Gates exacerbated the tension throughout South Los Angeles.[266] Civil rights lawyer Connie Rice blames Gates for "plung[ing] this city into the biggest riot in (modern) American history."[267]

Gates was "authoritarian" and "ruled from the top down."[268] He was also thoroughly militaristic in his approach. He regularly utilized police helicopters in addition to Special Weapons and Tactics (SWAT) teams with "sophisticated surveillance equipment, assault weapons, and paramilitary skills to neutralize threats."[269] Gates partnered with local U.S. Marine units to militarize the training of LAPD SWAT teams.[270]

Under Gates's leadership, LAPD used a brutal form of restraint—the chokehold—as a means of control and punishment of Black and Brown bodies while executing arrests. The results were horrific, as twelve Black men were killed from police use of chokeholds "[o]ver a period of a few months."[271] Gates was eventually forced to ban the use of the chokehold in 1982.[272] Notwithstanding the Los Angeles Police Commission's ban, Gates continued to assert that Black people "were very susceptible to chokeholds because they had an anatomical defect in the[ir] necks."[273] He suggested that Black people were "not normal . . . and

263. *See* Diane Cecilia Weber, *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments* (Cato Inst. Briefing Paper No. 50, Aug. 26, 1999); Karan R. Singh, *Treading the Thin Blue Line: Military Special-Operations Trained Police Swat Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673 (2001).
264. Weber, *supra* note 263.
265. *Id.*
266. Lou Cannon, *Gates Bids Farewell to LAPD, Leaving Legacy of Controversy*, WASH. POST (June 27, 1992), https://www.washingtonpost.com/archive/politics/1992/06/27/gates-bids-farewell-to-lapd-leaving-legacy-of-controversy/99b049f6–78c8–4c82-b88c-904b6a5bc66b [https://perma.cc/BTS7-4CFZ].
267. Karen Grigsby Bates, *'It's Not Your Grandfather's LAPD'—and That's a Good Thing*, NPR (Apr. 26, 2017), https://www.npr.org/sections/codeswitch/2017/04/26/492848045/-it-s-not-your-father-s-lapd-and-that-s-a-good-thing [https://perma.cc/V648-MGUV].
268. *Id.*
269. *Id. See also* DARYL GATES, CHIEF: MY LIFE IN THE LAPD 110 (1992); ROBERT L. SNOW, SWAT TEAMS: EXPLOSIVE FACE-OFFS WITH AMERICA'S DEADLIEST CRIMINALS 6–7 (1996).
270. Singh, *supra* note 263, at 676.
271. PBS News Weekend, *supra* note 260.
272. *Id.*
273. *Id.*

therefore it was their fault that they were dying . . . ."[274] He described this twisted belief as a "hunch."[275] In an interview with the *Los Angeles Times*, Gates said, "It seems to me that . . . we may be finding that in [B]lacks when it [chokehold] is applied, the veins or the arteries do not open as fast as they do on normal people . . . . I'm having my people look at that very carefully."[276] He also called his own Brown officers "lazy."[277]

In March 1991, a videotape circulated the globe of four LAPD officers viciously beating unarmed Rodney King.[278] Many in the Los Angeles community demanded Gates's resignation, but he had gained the respect of influential officials who defended him.[279] Human rights groups, such as Amnesty International, criticized the LAPD for its excessive use of force, but powerful figures in the government continued to shield Gates, even after the Rodney King beating.[280] In response to a reporter's question on LAPD's racist image immediately after the Rodney King beating, Gates said:

> 'My goodness, here is this [B]lack person who is being beaten. It looks like the Old South.' That's the impression that was given, but a totally false impression, because there was nothing racist about it. No one knew what Rodney King had done beforehand to be stopped. No one realized that he was a parolee and that he was violating his parole. No one knew any of those things. All they saw was this grainy film and police officers hitting him over the head.[281]

Gates spewed racially coded language of the police being at war with Black and Brown communities. He rejected the commonly used statement of protect and serve and spoke candidly about his true opinions of the residents of the communities he policed. He stated publicly that "casual drug users," in his opinion, "should be shot."[282] He referred to casual drug use as "treason," which

274. *Id.*
275. *Coast Police Chief Accused of Racism*, N.Y. TIMES (May 13, 1982), https://www.nytimes.com/1982/05/13/us/coast-police-chief-accused-of-racism.html [https://perma.cc/ UXN2-2N95].
276. *Id.*
277. Cannon, *supra* note 266.
278. *Id.*
279. *Id.*
280. *Id.* ("The [Rodney] King beating ultimately led to the downfall of Gates, who has civil service protection enjoyed by few other U.S. police chiefs.").
281. *Interview With Daryl Gates*, PBS FRONTLINE (Feb. 27, 2001), https://www.pbs.org/wgbh/pages/frontline/shows/lapd/interviews/gates.html [https://perma.cc/HM4U-HRP6].
282. Ronald Ostrow, *Casual Drug Users Should Be Shot, Gates Says*, L.A. TIMES (Sept. 6, 1990), https://www.latimes.com/archives/la-xpm-1990–09–06-mn-983-story.html [https://perma.cc/9SEJ-5W3E].

District Attorney Reiner agreed with in principle.[283] Gates carried this mentality into his implementation of Operation Hammer,[284] as his department aggressively and indiscriminately cracked down on gangs[285] after the passage of the STEP Act.

Police spokesman Bill Frio acknowledged that the police listed as gang members those who "are either known gang members, are on file as gang members, admit to the fact that they are gang members or (wear) gang colors in an area that a gang frequents."[286] Meanwhile, city officials consistently inflated the numbers of gangs from 10,000 to 50,000—and even up to 80,000 with the help of media.[287]

Gates was the hero of his crime-fighting narrative. In a *PBS Frontline* interview, Gates stated, "I will admit, we were a very aggressive police department. We went after crime before it occurred . . . Our people went out every single night trying to stop crime before it happened, trying to take people off the street that they believed were involved in crime. That made us a very aggressive, proactive police department."[288] He vilified gangs and denounced them in combative language, accusing them for the "infiltration of narcotics" in Los Angeles neighborhoods.[289] He lauded his officers as having "done a magnificent job"[290] and attributed any failures to the city council.[291]

Gates embodied the attributes of Southern slave catchers and overseers of the nineteenth century slave system—brutal, racist, and empowered by the remnants of the Old South. Like his historical predecessors, he did to Black and Brown people, gang members or not, what the enforcers of the slave system did to the enslaved for four centuries before. The oppressive, lawless environment he

283. *Id.* ("Reiner, an advocate of stronger penalties against casual drug users, said he agreed with Gates in concept, although not necessarily with his 'colorful choice of language.'").
284. Davis, *supra* note 196. Operation Hammer sent out elite antigang tactical squads that scoured ten square miles of South Central Los Angeles and viciously arrested Black youth. "Like a Vietnam-era search-and-destroy mission—of which many L.A. police are in fact veterans—the Los Angeles Police Department saturated the streets with its 'Blue Machine,' 'jacking up' thousands of local teenagers at random like surprised peasants."
285. Richard Mora, *¡Ya Basta!: Confronting Police Brutality*, 14 BERKELEY LA RAZA L.J. 161, 170 (2003).
286. Robert Stewart & Paul Feldman, *Arrests Top 850 as Antigang Drive Continues*, L.A. TIMES (Apr. 10, 1988), https://www.latimes.com/archives/la-xpm-1988–04–10-mn-1427-story.html [https://perma.cc/BD5E-DZMD].
287. DAVIS, *supra* note 195, at 270.
288. *Interview With Daryl Gates*, *supra* note 281.
289. *Id.*
290. *Id.*
291. *Id.* ("Unfortunately, we were never able to convince the city council that we needed to make [the gang unit CRASH] into a specialized unit that had the kinds of experienced police officers that we needed.").

established as chief of the LAPD, complete with intimidation, brutality, cruelty, and fear, was outside the bounds of the law, a quintessential badge and circumstance of slavery, and a violation of Section 2 of the Thirteenth Amendment.

C. The Expansion of Gang Statutes

This Subpart examines the spread of the STEP Act beyond California and into the panoply of antigang legislation that exists today, focusing particularly on federal gang statutes and Florida's iteration of the STEP Act. The reinvention of old badges of slavery—Slave Codes, Black Codes, vagrancy laws, and gang injunctions—into the STEP Act function to effectively erase the long-held objectives of race and class subordination written into the punishment clause of § 1 of the Thirteenth Amendment.[292] Scholars have noted that the Punishment Clause is "[a]ntithetical" to the purpose of the amendment."[293] In fact, "[t]hrough the [P]unishment [C]lause, the Thirteenth Amendment turned from a shield protecting against one system of racial subordination (chattel slavery) to a sword enabling another (penal slavery)."[294] Chattel slavery and its badges and incidents used a false narrative of laziness, ineptness, intellectual deficiency, non-Christian-ness, abnormality, subhuman-ness, hypersexuality, shiftlessness, and dangerousness to rationalize Black subjugation. Today, the false "super predator" myth espoused by the drafters of antigang statutes is used in the same way, justifying reverting so-called gang members, almost exclusively Black and Brown youth, into penal slavery.[295] This narrative of dangerousness and criminality culminated in the nation's capital with the signing of the 1994 Crime Bill, the legislative origin for the modern carceral apparatus, which included the first federal antigang statute.

Following California's passage of the STEP Act in 1988, one by one jurisdictions across the United States adopted similar legislation. Nearly forty-one

292. Goodwin, *supra* note 23, at 933 (arguing that "whether the Thirteenth Amendment's Punishment Clause preserved penal labor as a longstanding criminal justice norm or not, it has functionally preserved slavery as a means of persistent racial subjugation . . . [S]outhern states almost immediately used the Punishment Clause to systematically 'criminalize and incarcerate Blacks.'").

293. *Id.* at 933 (quoting Alexandria Gutierrez, Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women's Reproductive Rights, 15 BERKELEY J. AFR.-AM. L. & POL'Y 117, 122–23 (2013)).

294. *Id.*

295. *See* Bogert & Hancock, *supra* note 37.

states now have some version of an antigang statute.[296] By and large, these enactments are carbon copies of the California law, furthering the significance and impact of the STEP Act's framers, though some jurisdictions developed the Act further or took it in new directions.[297]

1. The Federal Crime Bill of 1994

Not long after the STEP Act's passage did its influence reach the federal stage, as similar language was subsumed under Congress's notorious[298] Crime Bill of 1994.[299] The federal gang statute employed today, 18 U.S.C. § 521, began as part of Public Law 103–322, Crime Bill. The bill was initially introduced in the House as H.R. 3355 by Representative Jack Brooks of Texas on October 26, 1993. The Crime Bill was an omnibus including thirty-three separate titles that, inter alia, increased federal funding for policing, lengthened criminal sentences, established federal drug courts, expanded the death penalty, provided for controversial gun control measures, and criminalized telemarketing scams that targeted the elderly.[300] The bill initially passed the House with overwhelming Democratic party support on November 3, 1993.[301] A couple of weeks later, the Senate passed the bill by a nearly-unanimous vote.[302] Senator Russell Feingold of Wisconsin was the sole

296. *See* Kathryn Kizer, *Behind the Guise of Gang Membership: Ending the Unjust Criminalization*, 5 DEPAUL J. SOC. JUST. 333, 334 (2012) ("[N]early every state in the United States has enacted some sort of legislation pertaining to gangs or gang activity . . . . [O]ver half of all states impose more severe penalties for criminal activity that is gang related.").

297. *See* H. M. Caldwell, *Reeling in Gang Prosecution: Seeking a Balance in Gang Prosecution*, 18 U. PA. J.L. & SOC. CHANGE 341, 348 (2015) ("Some states, such as Louisiana, Georgia, and Missouri, have enacted legislation that are nearly carbon copies of California's STEP Act, while others—like Florida, South Dakota, and Illinois—have moved in new directions.").

298. *See, e.g.*, S. Thomas Perry, *Slavery, Jim Crow, and Mass Incarceration: Could the Thirteenth Amendment Hold the Key to Racial Equity in Criminal Justice?*, 88 GEO. WASH. L. REV. ARGUENDO 225 (2020) (explaining how the 1994 Violent Crime Control and Law Enforcement Act (Crime Bill) led to the United States's present-day mass incarceration crisis and arguing that the racial disparities in mass incarceration are a badge or incident of slavery).

299. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796.

300. *See* Richard Rosenfeld, *The 1994 Crime Bill: Legacy and Lessons—Overview and Reflections*, 32 FED. SENT'G REP. 147, 147 (Feb. 1, 2020).

301. *See* Record of Vote on H.R. 3355, Nov. 3, 1993. For Congressional debate illustrative of the Representatives' sentiments, *see, e.g.*, 140 CONG. REC. 104 (1994) ("My suburban district in Minnesota has had [twelve] murders since last July. My constituents want more cops, tough measures against violent offenders, more prisons to ensure that violent offenders serve their full sentences . . . they want action now to reform our broken welfare system. They're tired of spending billions on a system that breeds dependency and hopelessness.") (statement of Rep. Jim Ramstad).

302. 140 CONG. REC. 23,802 (1994).

Democratic senator who voted against the bill, citing concern about its expansion of the death penalty and the increased federalization of law enforcement.[303] The Crime Bill was finally signed into law in September 1994 by President Bill Clinton, who supported the bill because "[g]angs and drugs [had] taken over our streets and undermined our schools."[304]

2. The Florida STEP Act

The STEP Act, as it was adopted in Florida, spawned an entire legal drama of its own.[305] The 1990 Florida STEP Act broadened the term of "youth and street gang member" and defined "pattern of youth and street gang activity" to include a broader range of activities. This furthered the California STEP Act's goal of racial subjugation which, in turn, furthered the goal of criminalization of Black and Brown youth.[306] Under the Florida STEP Act, a person could be convicted as a gang member "simply by living in a gang area, associating with known gang members, and being stopped in the company of gang members more than four times."[307] The Florida STEP Act more candidly fulfilled the elemental hallmarks of the Black Codes and the other iterations of prior badges and incidents of slavery. At the time of its passage, the Dade County state attorney was Janet Reno, who went on to join the Clinton administration from 1993 to 2001 as head of the U.S. Department of Justice and was instrumental in the Clinton administration's adoption and implementation of the Crime Bill.[308]

303. *Id.* (explaining he was compelled to vote against the Crime Bill "because of the absurd extension of the death penalty with no real gain coming from it, and because of the greatly increased dangerous trend for federalization of law enforcement").

304. *See* William J. Clinton, *Remarks on Signing the Violent Crime Control and Law Enforcement Act of* 1994, 2 PUB. PAPERS 1539, 1540 (Sept. 13, 1994). President Bill Clinton went on to say, in words reminiscent of "Make America Great Again" rhetoric, "When I sign this crime bill, we together are taking a big step toward bringing the laws of our land back into line with the values of our people and beginning to restore the line between right and wrong." *Id.*

305. *See* Criminal Gang Prevention Act, FLA. STAT. § 874 (1990); Street Terrorism Enforcement and Prevention Act of 1990, 1990 Fla. Sess. Law Serv. 90–207 (West).

306. Street Terrorism Enforcement and Prevention Act of 1990, 1990 Fla. Sess. Law Serv. 90-127 (West).

307. David R. Truman, Note, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683, 717 (1995).

308. *See* Rodrigo M. Caruço, *In the Trenches of Florida's War on Gangs: A Framework for Prosecuting Florida's Antigang Sentence Enhancement Provision*, 14 BARRY L. REV. 97, 102 (2010). Janet Reno served as Dade County's state attorney from 1978–1992. During her tenure, she conducted the first official "study" of Florida gang violence in 1985. *See* TENTH STATEWIDE GRAND JURY, SECOND INTERIM REPORT OF THE TENTH STATEWIDE GRAND JURY: GANGS & GANG-RELATED ACTIVITY § IV (1992).

In 1999, the Florida Supreme Court found the STEP Act unconstitutional on substantive due process grounds.[309] The Act initially allowed for the enhancement of the defendant's sentence if, at sentencing, the judge determined by a preponderance of the evidence that the defendant was a member of a criminal street gang at the time of the commission of the offense.[310] Because the statute did not require any connection between the criminal activity and gang membership, the court found no "rational relationship to the legislative goal of reducing gang violence or activity[.]"[311] After the Act was found unconstitutional, the Florida legislature changed the statute to supply the required nexus between the criminal act and the gang membership. To this day the Florida STEP Act remains alive and well,[312] still subjecting the descendants of the formerly enslaved to unequal treatment and control.

The Florida STEP Act and its forty other incarnations across states effectively disguise the STEP Act's racial origins and the discriminatory intentions of the original drafters while maintaining the same tools of subjugation. Antigang statutes criminalize Blackness in the tradition of Slave Codes, Black Codes, and vagrancy laws. As such, gang statutes are badges and incidents of slavery. When a person can be convicted as a gang member simply by living in an area frequented by a gang or be stopped because they are in the company of gang members, the prior badges and incidents of chattel slavery remain alive and well.

309. State v. O.C., 748 So. 2d 945, 949 (Fla. 1999).

310. The Court's later decision in *Apprendi v. New Jersey* would have similarly been a basis to find the Florida STEP Act unconstitutional. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000). The Court held that the Due Process Clause requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 466. Justice John Paul Stevens wrote for the Court that "[t]he New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Id.* at 497.

311. *Id.* at 946.

312. The Florida STEP Act was amended again in 2008. These amendments were introduced into the Florida Senate by Don Gaetz, former Florida Senate president and father of Matt Gaetz—the Donald Trump sycophant who has claimed that it was Antifa who stormed the U.S. Capitol. *See* Gary Fineout, *How 'Papa Gaetz' Tells You Everything You Need to Know About Matt Gaetz*, POLITICO (Apr. 17, 2021), https://www.politico.com/states/florida/story/2021/04/17/matt-gaetzs-daddy-issues-1375630 [https://perma.cc/GU5V-Q4VD].

III. THE IMPACT OF GANG PROSECUTIONS AS BADGES AND INCIDENTS OF SLAVERY

Gang prosecutions further the legacy of chattel slavery. As demonstrated above, gang statutes in particular are badges and incidents of slavery. They undercut autonomy, safety, and the economic prosperity of inner-city communities. This Part gives some sense of the human toll and the financial drain on state economies and inner-city Black and Brown communities as a result of gang prosecutions. Nationwide, state agencies spend billions of dollars annually prosecuting, separating, caging, and monitoring accused gang members. The use of a peculiar set of legal standards, authorized through gang statutes, violate the Thirteenth Amendment of the U.S. Constitution.

In addition to the economic cost of gang enforcement regimes, which are almost impossible to fully calculate, gang prosecutions do little to improve the life chances of both perpetrators and victims of gang violence. To shed light on this, I juxtapose the unprecedented success of the limited economic resources community organizations have to address gang violence against the enormous resources invested in policing that have, time and time again, failed to make Black and Brown communities safer or more prosperous. This Article rejects the notion that "[m]ost violence is a matter of individual pathology"[313] and instead affirms community organizations' position that most violence is created by social and material conditions. To put it succinctly: "[p]overty drives violence. Inequity drives violence. Lack of opportunity drives violence. Shame and isolation drive violence."[314] This Part will highlight several organizations that break the cycle of violence with very limited economic resources. These organizations truly make inner-city communities safer by addressing the root causes of violence.

On the other hand, California's longterm project of policing and criminalizing gangs has been one of the most punitive and costly, with little success.[315] This form of punishment involves many collateral costs.[316] The criminal legal system touts its public safety strength while offloading thousands of

313. Danielle Sered, *Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration*, VERA INST. JUST.: COMMON JUST 1, 4 (2017), https://www.vera.org/downloads/publications/accounting-for-violence.pdf [https://perma.cc/KP4Z-YEQ5]. *See generally supra* note 27.

314. Sered, *supra* note 313. *See also supra* note 27 and accompanying text.

315. Henrichson et al., *supra* note 27.

316. This Part focuses in-depth on the economic and social burdens gang statutes create. These statutes are responsible for countless other societal burdens including but not limited to quality of life, medical and mental health, business, and other costs.

people of color into jails, prisons, and detention centers. Carceral institutions, in turn, generate conditions that grow gang membership and solidarity.[317]

This Part relies on data produced by the Vera Institute and the Advancement Project. The Vera Institute researches and reports on the overcriminalization of Black and Brown communities in their *Cost-Benefit Analysis* (Vera Report).[318] The Advancement Project supports racial justice movement-building organizations through research, legal, and policy advocacy. The Vera Institute and Advancement Project analyze the costs and consequences of gang policing in California. They provide the empirical data that support the central argument of this Article: gang statutes are badges and create incidents of slavery and thus must be abolished to build safer and freer Black and Brown communities.

A. The Cost of Gang Prosecutions

The exorbitant economic costs of policing and incarcerating people identified as gang-involved by the state are unjustifiably disproportionate. Incarceration is neither a necessary nor effective solution for addressing violent crime.

In the age of mass incarceration, the criminal legal system has focused on methods of punishment that have not curbed the growth of gangs.[319] Instead, many structures within the criminal legal system keep law enforcement agencies steadily arresting gang members, while gangs simultaneously keep their membership just as steady and resilient. In pursuit of eliminating gangs, California allocates generous funding and authorizes expensive weapons for agencies to pursue and incarcerate gang members. Policing, prosecuting, and incarcerating people the state identifies as gang-involved costs California approximately $1.145 billion per year.[320] Based on the Vera Institute's

317. Sara Lynn Van Hofwegen, *Unjust and Ineffective: A Critical Look at California's STEP Act*, 18 S. CALIF. INTERDISC. L.J, 679, 689 (2009) ("[E]vidence suggests that the Act's sentencing enhancement may actually strengthen gangs by increasing gang solidarity, elevating antagonism to law enforcement and authority, heightening individuals' gang involvement as a prison survival strategy, and decreasing the legitimate opportunities for gang members to re-enter society once released from prison.").

318. HENRICHSON ET AL., *supra* note 27.

319. U.S. DEP'T OF JUST., GANG STATISTICS (2020), https://www.justice.gov/archives/jm/ criminal-resource-manual-103-gang-statistics [https://perma.cc/42MB-TLCM] ("Gang violence has risen sharply, especially in large cities. Youth gangs are becoming more violent and increasingly serve as a way for members to engage in illegal money-making activities, such as drug and firearms trafficking.").

320. HENRICHSON ET AL., *supra* note 27.

calculations, there were 6619 gang arrests in California in 2005 and each cost approximately $36,828.[321] These arrests totaled $243,764,532 in costs.

The California Department of Corrections and Rehabilitation (CDCR), a state agency, spends even more than the LAPD. Incarcerating gang-involved individuals cost CDCR adult prisons $524,475,700 annually.[322]

The 6619 arrested is no small figure when discussing the total loss of personal liberty, but the costs of policing those 6619 individuals and incarcerating them is truly staggering. Policing each gang member costs roughly $36,828 and incarcerating each costs $79,237.[323] Thus, well over $116,065 is spent annually on each individual gang member in California.

The salaries and wages of correctional staff and jailers are extremely costly parts of the criminal punishment system too. According to the U.S. Bureau of Labor Statistics, as of May 2020, California employs 37,810 correctional officers and jailers with an annual mean wage of $81,100.[324] Today, $35,425 of the $79,237 it costs to incarcerate a single person is allocated for "security," which includes correctional employment.[325]

Economists and researchers argue persuasively that employment, rather than incarceration and reincarceration, is the key to reducing recidivism. A study focusing on six U.S. cities showed that in states where rates of recidivism ranged from 31 to 70 percent, people who started working immediately after release recidivated at a rate of 3.3 to 8 percent.[326] In Maryland, for example, people who had worked for six months immediately after their release had a 0 percent recidivism rate as compared to the state's 40 percent recidivism rate. On the flip side, 85 to 89 percent of formerly incarcerated people who are rearrested are unemployed and 27 percent of formerly incarcerated people are unemployed.[327]

321. *Id.*
322. *Id.*
323. *Id.*
324. U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGE STATISTICS (2020).
325. LEGISLATIVE ANALYST'S OFFICE, HOW MUCH DOES IT COST TO INCARCERATE AN INMATE? (2018–19).
326. Peter Cove & Lee Bowes, *Immediate Access to Employment Reduces Recidivism*, REAL CLEAR POL. (June 11, 2015), https://www.realclearpolitics.com/articles/2015/06/11/immediate_access_to_employment_reduces_recidivism_126939.html [https://perma.cc/SA9Q-GPFY].
327. *Create a Culture of Employment Readiness and Retention for Incarcerated Individuals*, NAT'L INST. CORRECTIONS, https://info.nicic.gov/cirs/node/39 [https://perma.cc/ATN4-DPXU]; Lucius Couloute & Daniel Kopf, *Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), https://www.prisonpolicy.org/reports/outofwork.html [https://perma.cc/8G69-2G2U].

Young men are most likely to be affected by unemployment.[328] A different study revealed that recidivism rates were nearly half for formerly incarcerated people who had full-time jobs, compared to their unemployed counterparts.[329] Jake Cronin of the Institute of Public Policy at the University of Missouri explains, "[t]his is based on the idea that individuals with a full-time job are more capable of providing for themselves and their families, which raises the opportunity cost of committing a crime."[330]

Upon hearing these statistics, lawmakers should be compelled to ask what costs would be saved by replacing incarceration with other methods for reducing crime. It costs $5000 to place and retain a formerly incarcerated person in an employed position.[331] In contrast, California spends $79,237[332] to incarcerate one person.[333] Employing formerly incarcerated people benefits the people themselves, their communities, and the state's economy.[334] Despite such telling evidence, the state still depends far more on carceral institutions, and calls on their taxpayers to fund them, rather than less punitive options like employment.

Breaking cycles of gang-related recidivism through employment shines a light on an optimistic path toward the abolition of carceral institutions. Evidence demonstrates correlations between gang membership and employment, or a lack thereof. The Journal of Trauma and Acute Care Surgery published findings that concluded, "that the strongest correlates of gang-related homicide at the community level are the proportion employed."[335] Investing in quality

328. *Employment and Recidivism*, EBPSOCIETY, https://www.ebpsociety.org/blog/education/297-employment-recidivism [https://perma.cc/RLN8-GDZH].

329. Jake Cronin, *The Path to Successful Reentry: The Relationship Between Correctional Education, Employment and Recidivism*, HARRY S. TRUMAN SCHOOL PUB. AFF., (Sept. 2011), https://truman.missouri.edu/sites/default/files/publication/the_path_to_successful_reentry.pdf [https://perma.cc/6TY5-SUHT] ("[O]f those who did recidivate, those with a job were able to "remain crime-free for significantly more months before being re-incarcerated.").

330. *Id.*

331. Cove & Bowes, *supra* note 326.

332. HENRICHSON ET AL., *supra* note 27.

333. LEGISLATIVE ANALYST'S OFFICE, *supra* note 325 ("Since 2010–11, the average annual cost has increased by about $32,000 or 58 percent . . . . Significant drivers of this increase in costs were employee compensation, activation of a new health care facility, and additional prison capacity to reduce prison overcrowding.").

334. OFFICE OF THE DEPUTY MAYOR FOR PUBLIC SAFETY, ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA (2011) ("Employing 100 previously incarcerated people will increase their income tax contributions by $1.9 million and boost sales tax revenues by $770,000.").

335. Demetrios Kyriacou, H. Range Hutson, Deirdre Anglin, Corinne Peek-Asa & Jess Kraus, *The Relationship Between Socioeconomic Factors and Gang Violence in the City of Los Angeles*, 46 J. TRAUMA: INJURY, INFECTION, & CRITICAL CARE 334, 339 (1999).

employment and educational opportunities for formerly incarcerated gang members will offer opportunities and incentives that will fulfill the needs of young people, and people in that eighteen to forty-five age range, in ways that gangs cannot.[336] As the organization Prison to Employment Connection put it, the amount of money taxpayers pay to incarcerate each incarcerated person costs more than the tuition of Harvard University for a year.[337] A world that has abolished the badges and incidents of slavery is also a world in which all people, including the young Black and Brown people who are heavily policed and incarcerated en masse, have equal opportunities to pursue their educations and occupations. The mandate for any state committed to reducing incarceration is clear. In the words of activists Peter Cove and Lee Bowes, founder and Chief Executive Officer of America Works, "work reduces recidivism."[338]

B. Systematic Racism in Gang Prosecutions

In any discussion about the criminal punishment system, race should be at the center of it. Professor Cynthia Lee has shown why. Her research explains that "making race salient leads jurors to treat similarly situated defendants the same, whereas not making race salient results in unequal treatment."[339] The same applies to lawmakers.

Colorblind conversations lead to reforms that treat prison as a broken system that needs fixing. Centering race in the conversation requires its enforcers to confront the racist nature of the criminal punishment system and to acknowledge it cannot be fixed.

The heaviest burdens of the criminal punishment system fall on Black and Brown people, as seen in California where 92 percent of people incarcerated in state prisons are Black or Brown.[340] Rather than representing gang demographics, the number of people incarcerated "represents the demographics of the communities in which they are found."[341] Despite this awareness, California's

336. *Employment and Recidivism*, *supra* note 328 ("As evidence indicates, not every type of job, but jobs of higher quality, will influence recidivism. Therefore, employment-oriented programs should focus on building technical skills and knowledge of the ex-prisoners and help them to get jobs that are of higher quality.") (citations omitted).
337. Cove & Bowes, *supra* note 326.
338. *Id.*
339. Cynthia Lee, *Denying the Significance of Race: Colorblindness and the Zimmerman Trial, in* TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE: WRITING WRONG 31, 31 (Kenneth J. Fasching-Varner et al. eds., 2014).
340. Clayton, *supra* note 221.
341. COMM. ON REVISION OF THE PENAL CODE, UPDATES ON POSSIBLE COMMITTEE RECOMMENDATIONS (2020).

CalGang database shows how the police focus on Black and Brown gang-affiliated people makes the 92 percent fact a reality. As seen in Figure 1, the attorney general's 2020 report on CalGang found 9787 individuals tracked in the database were reported to be Black and 30,256 to be Brown.

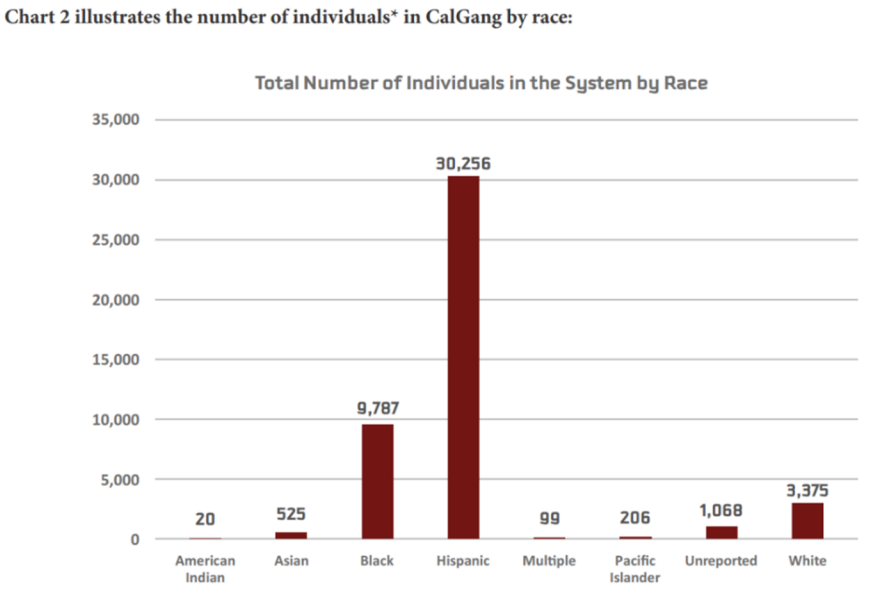

Figure 1. Image from California attorney general's annual report on CalGang for 2020.[342]

Those groups combined result in 88 percent of the total of 45,336 individuals tracked in CalGang. The CalGang database is just one of many gang policing weapons California invests in as part of its pipeline funneling predominantly Black and Brown people into prisons.

A significant redistribution of resources away from carceral institutions and toward abolitionist goals of economic and racial justice is the only way to address the systematic racism in the incarceration in Black and Brown people.

342. CAL. DEP'T OF JUST., ATTORNEY GENERAL'S ANNUAL REPORT ON CALGANG FOR 2020 (2020).

C. Public Safety is a Real Concern for Black and Brown Communities

Proponents of gang statutes argue that these laws are crucial for public safety. Many of the tough-on-crime lawmakers asking this question are rhetorically talking about the safety of white citizens.

Communities of color likewise care about public safety but are often barred from providing their input due to geographic discrimination, racism, and other systemic measures of disenfranchisement. Politicians often exclude Black and Brown communities from their seats at the table. Society is often no kinder to the children of these families. Beth Caldwell writes, "[t]hose who do join gangs are 'primarily those individuals who come from low-income, stress-ridden families and who are most alienated from public institutions, such as schools . . . .' For young people who feel alienated and looked down upon by society, gang membership helps to create an identity with a group in which they find acceptance."[343]

If gang policing is supposed to deter young people from gang activity, then the consistent and ever-growing numbers of gang members signal that gang policing and prosecutions are not the key to reducing gang involvement. Indeed, "[i]n light of social science theories of gang involvement . . . , gang injunctions [] actually fuel gang activity."[344] Data also show that criminalization and incarceration have not actually slowed the growth of gangs. The National Gang Center of the U.S. Department of Justice, Juvenile Justice and Delinquency Prevention, reports that gang membership has almost linearly increased since 2003, when it was at its lowest during the 2000s.[345]

The National Gang Intelligence Center, which focuses on law enforcement of gangs that pose threats throughout the United States, reported in 2011 that gangs are responsible for approximately 48 percent of violent crime in most jurisdictions.[346] But data about violent crime do not tell the whole story—not any more than prisons present a one-size-fits-all solution to addressing violence. "In a Los Angeles study that analyzed the correlation between gang-related violence and

343. Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241 (2010).

344. *Id.*

345. In 2003, the National Gang Center (NGC) estimated there were 20,100 people in active gangs. *National Youth Gang Survey Analysis: Measuring the Extent of Gang Problems*, NAT'L GANG CTR., https://nationalgangcenter.ojp.gov/survey-analysis/measuring-the-extent-of-gang-problems [https://perma.cc/CQ9K-4N9A] [hereinafter *National Youth Gang Survey*]. In 2007, the NGC estimated there were 27,300 people in active gangs. *Id.*

346. NAT'L GANG INTELLIGENCE CTR., NATIONAL GANG THREAT ASSESSMENT (2011).

socioeconomic factors, the strongest correlations with gang violence were employment and income. In fact, communities that experienced unemployment rates between 14 to16 percent had fifteen times as many gang homicides as neighborhoods where the unemployment rate was between 4 to 7 percent."[347] Arthur Kinoy, famed Civil Rights activist, Professor and lawyer,[348] pins the root causes of this kind of violence as "[B]lack poverty, discrimination and second-class citizenship [which] flow directly from the failure to enforce and to implement the national commitment, [one hundred] years old, to abolish the slave system."[349]

The Center for Disease Control (CDC) further challenges common assumptions about gang-related violence: "[f]or homicides and suicides, relationship problems, interpersonal conflicts, mental-health problems, and recent crises were among the primary precipitating factors."[350] The CDC did not identify gang violence in the list but estimated 50,000 people died violently every year. The year the CDC report was published, the National Gang Center reported there were 1975 gang homicides.[351] The CDC's evidence indicates that murders are more often personal or related to mental health. While murder rates were at their highest in the 1970s and high in the early 1990s, murder rates declined sharply and consistently from 1993 on as seen in Figure 2.[352]

347. Thomas A. Myers, *The Unconstitutionality, Ineffectiveness, and Alternatives of Gang Injunctions*, 14 MICH. J. RACE & L. 285, 302 (2009) (citing JUST. POL'Y INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE (May 2009), https://justicepolicy.org/wp-content/uploads/2022/02/09_05_rep_costsofconfinement_jj_pS.pdf [https://perma.cc/92ET-TPD7].

348. *See* Paul Lewis, *Arthur Kinoy Is Dead at 82; Lawyer for Chicago Seven*, N.Y. TIMES (Sept. 20. 2003), https://www.nytimes.com/2003/09/20/nyregion/arthur-kinoy-is-dead-at-82-lawyer-for-chicago-seven.html [https://perma.cc/QPP6-8NHU].

349. Arthur Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 473, 479 (1969).

350. Debra Karch, Linda L. Dahlberg & Nimesh Patel, *Surveillance for Violent Deaths: National Violent Death Reporting System, 16 States, 2007*, 59 CTR. FOR DISEASE CONTROL & PREVENTION: SURVEILLANCE SUMMARIES 1, 1 (2010).

351. *National Youth Gang Survey*, *supra* note 345.

352. In 1993, murder rates were estimated at 9.5 per 100,000 people in the nation. In 2007, murder rates were estimated at 5.7 per 100,000 people in the nation. German Lopez, *Mass Incarceration in America, Explained in 22 Maps and Charts*, VOX (Oct. 11, 2016), https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts [https://perma.cc/7Y3Z-Z6VD].

Figure 2. Graph of national murder rate from Vox.[353]

The public safety focused rhetoric of tough on crime lawmakers and prison reformers aim to make prisons better, rather than divest and redistribute the resources poured into them. The question—what about public safety?—begs another question: what makes the public safe? Where the state's instinct is to answer the public safety question with prosecution and incarceration, gang membership remains steady or rises, so criminalization is not a defensible answer.[354]

353. *Id.*
354. *National Youth Gang Survey*, *supra* note 345.

The sources of violence also reveal the solutions for ending violence. Common Justice founder, Danielle Sered, explains that responses to violence should be safety-driven, but in the current mass incarceration system, responses to violence are punishment-driven.[355] Violence, trauma responses to violence, and fear of future violence are complicated. Safety-driven responses to violence necessitate ensuring survivors' actual safety, healing, and resilience within that complexity. Survivors are otherwise often left out of prosecutions except to serve as witnesses, and they are treated as evidence.[356] Survivors are also majority people of color, whose erasure from criminal legal processes exacerbate the racial injustices underneath the physical and emotional injustices they have suffered. Sered writes, "Nearly everyone who has committed harm has survived it, and few have received any formal support to heal."[357]

Prisons are not the answer to violence. In her article *Accounting for Violence*, Sered quotes a Harvard study of New York City that found that "serious crime fell by 58 percent from 1994 to 2014, while at the same time the combined jail and prison incarceration rate was cut by 55 percent."[358] The study credited the changes to the reduction of penalties, shifts in the New York Police Department's approach to arrests, and other results of advocacy. The lesson, Sered explains, is that "violence and incarceration can decrease at the same time."[359]

In light of evidence that demonstrates that the criminogenic effect of prison makes incarceration "likely to cause, rather than prevent, further crime," the public need not fear that decarceration will let danger loose in their communities.[360] So long as the government redirects existing and future resources toward those same communities, community members who have relied out of habit and necessity on police and prisons can turn to organizations and social service programs that have been developing "promising interventions for violence that . . . could diminish violence in ways that punishment alone never will."[361] These organizations and programs already have the tools, plans, and mission to

355. Sered, *supra* note 313 (noting that Common Justice is a New York-based organization that offers alternatives to incarceration for people charged with violent felonies, victim services, and racial equity advocacy).
356. *Id.* at 7 ("[D]ealing with violence also opens up a range of possibilities not otherwise available . . . . It allows people to center the needs of crime survivors in their vision – not tiptoe around them or engage them in a limited instrumental fashion.").
357. *Id.* at 6.
358. *Id.* at 24.
359. *Id.* at 25.
360. *Id.* at 23.
361. *Id.*

make communities thrive in trust, equity, and security.[362] They have already made strides despite being underfunded, and if given more resources, these organizations could more effectively build safer communities without the violence prisons produce and release disrupting their progress.[363]

Gang policing, a modern-day badge and incident of slavery, is state violence. Gang violence is but a symptom of oppression. Abolishing systematic oppression—therefore, abolishing gang policing—will bring the healing, safety, and freedom necessary to end cycles of violence for generations of people.

IV. REPARATIONS THROUGH THE POWER OF THE THIRTEENTH AMENDMENT

This Part connects the historical attempt of Black people to obtain reparations in America to the necessity of abolishing gang statutes with the power of the Thirteenth Amendment. Black citizenship cannot be conceptualized until the historical import of the slave system is undone. Reparation is a mechanism for undoing past harms causing current inequity.[364] This Part proposes the reallocation of carceral resources to make our communities safer by eradicating a chief vestige of slavery—gang statutes. This Part applies an abolitionist framework to gang statutes and explores solutions that not only make better use of economic resources and restore integrity to constitutional due process, but also actively work towards an abolitionist horizon. This Part offers a proposal for the reallocation of funds towards antiracist structural change and centering community justice through the power of the Thirteenth Amendment.

W.E.B Dubois wrote, in his classic book of short stories, *The Soul's of Black Folks,* "[t]he passing of a great human institution before its work is done, like the untimely passing of a single soul, but leaves a legacy of striving for other men"[365] to

362. This Article will discuss some organizations in California below. Danielle Sered refers to various organizations around the country including the National Network for Safe Communities, Common Justice, Cure Violence, Trauma Recovery Centers, National Compadres, Healing Hurt People, Youth ALIVE, among other grassroots community-led programs. *Id.* at 23, 24.

363. *Id.* at 23 ("[P]rison is a risk factor for violence. This is especially problematic because virtually all incarcerated people—a full 95 percent—come home.").

364. *See* Norrinda Hayat, *A Critique of the Black Commons*, 45 N.Y.U. REV. L. & SOC. CHANGE 370, 404 (2021) (arguing that proposals that advocate for reparations while failing to contemplate the return of equity-generating land to individuals further obfuscate the legacy of economic violence against Black landowners).

365. W.E.B. Du Bois, *Of the Coming of John, in* THE SOULS OF BLACK FOLK Chapter 2, (Oxford Univ. Press 2007) (1903).

describe the unfinished story of reparation. While "forty acres and a mule," is one of the most famous references to disrupted reparations, the full history of Special Field Order No. 15 in far less widely understood.[366] Union General William T. Sherman often receives the credit for issuing the order. Less known is that it was twenty Black Baptist and Methodist ministers who inspired him to do so, as he met with them four days before the Special Field Order was made official.[367] These Black leaders, some of who were formerly enslaved, originally proposed 40,000 freedmen to settle on 400,000 acres of land Sherman seized while advancing into Southern territories during the American Civil War.[368] Reverend Garrison Frazier stated to Sherman, "[t]he way we can best take care of ourselves . . . is to have land, and turn it and till it by our own labor . . . and we can soon maintain ourselves and have something to spare . . . [w]e want to be placed on land until we are able to buy it and make it our own."[369] Sherman understood in issuing Special Field Order No. 15 that the formerly enslaved would have an opportunity to fulfill Frazier's demand of land and a chance at self-determination. Land and resources were understood by all parties involved to be the means of eradicating a quintessential badge of slavery: landlessness.

As a means to address landlessness and other badges and incidents of slavery, those that called for reparations articulate three goals: acknowledgment, redress, and closure.[370] "Acknowledgement is the admission of responsibility for the atrocious acts . . . [r]edress refers to the provision of restitution, most often in the form of monetary compensation . . . [c]losure refers to the acknowledgment by the culpable party that the debt has been paid."[371]

America's first attempt at reparations for the formerly enslaved sought these three goals through the work of the Freedmen's Bureau, also known as the Bureau of Refugees, Freedmen and Abandoned Lands, which was established in 1865.[372]

366. Henry Louis Gates Jr., *The Truth Behind '40 Acres and a Mule'*, PUB. BROAD. SERV., https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule [https://perma.cc/WQ75-8MN4].
367. *Id.*
368. *Id.*
369. *Id.*
370. Hayat, *supra* note 364, at 396 (citing William Darity, Jr. & A. Kirsten Mullen, *Resurrecting the Promises of 40 Acres: The Imperative of Reparation for Black Americans*, ROOSEVELT INST. (June 4, 2020), https://rooseveltinstitute.org/publications/resurrecting-the-promise-of-40-acres-the-imperative-of-reparations-for-black-americans [https://perma.cc/8CJR-PERY]).
371. *Id.*
372. *The Freedmen's Bureau*, NAT'L ARCHIVES, https://www.archives.gov/research/african-americans/freedmens-bureau [https://perma.cc/VM8H-DEYA].

The Freedmen's Bureau charter was meant to help carry out resettlement objectives, including:

> the setting apart of such lands within the 'insurrectionary states' as were abandoned, or to which the United States would have 'title by confiscation or sale, or otherwise,' 'for the use of loyal refugees and freedmen,' and the assigning to each male among them of 'not more than forty acres of such land' for three years at a rental not exceeding six percent of the 1860 tax value.[373]

Some formerly enslaved people attained "the forfeited lands of their masters," and others benefitted from other Bureau functions such as medical treatment and rations.[374] But because Congress failed to pass legislation to fund the Bureau's project at large and slavery sympathizers were doggish in their efforts to maintain a white supremacist social order,[375] fulfilling the promise of the Thirteenth Amendment was not possible.

Once Congress failed to fully fund the Freedmen's Bureau, the reparations that were set into effect did not live long. Instead, Black freedom and autonomy was quickly exchanged for the convenience, reconciliation, and maintenance of a social order of white supremacy.[376] For example, instead of providing Black land ownership, "[a]bandoned lands were leased so long as they remained in the hands of the Bureau, What land Black people gained was largely torn from them, perpetuating the colonial tool of dispossession to maintain racial subjugation.[377]

The Freedmen's Bureau also met other obstacles to implementation of reparations due to a choice by former enslavers—who found their way back within the folds of the Union—and sympathizers to maintain a social system that valued cheap, or outright free labor. After the Civil War, the federal government's priority was to meet a destabilized Southern economy's labor demands. In doing so, the federal government facilitated the contracts of tens of thousands of freedmen, such

373. DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS 1865–1868 (1989), *reviewed by* Howard C. Westwood, 80 COLUM. L. REV. 204, 205 (1980).

374. *See* W.E.B. DuBois, *The Freedmen's Bureau*, ATLANTIC (Mar. 1901), https://www.theatlantic.com/magazine/archive/1901/03/the-freedmens-bureau/308772 [https://perma.cc/HS2V-BGK7].

375. *See id.*

376. *See id.*

377. Dispossession was both economically and physically violent. Many white people lynched Black people in order to take their land. Deborah Archer identifies "exile" as an extension of dispossession and method of achieving permanence. Deborah N. Archer, *Reparations and the Right to Return*, 45 N.Y.U. REV. L. & SOC. CHANGE 343, 348 (2021); *see also* Hayat, *supra* note 364, at 371.

that the organization became a vast labor bureau.[378] Former owners of enslaved people, however, were "determined to perpetuate [slavery] under another name."[379] States adopted laws and structures such as the Black Codes to facilitate labor enforcement, which the Bureau attempted to dismantle.[380]

The federal government, with the support of President Andrew Johnson, dissolved the Freedmen's Bureau before its mission was even partially complete. In 1866, Congress introduced a bill that would strengthen the Bureau as a "military necessity; that it was needed for the proper carrying out of the Thirteenth Amendment and was a work of sheer justice to the ex-slave, at a trifling cost to the government."[381] President Johnson vetoed the bill that would have formally continued the Freedmen's Bureau.[382] Instead of funding reparations through the Freedmen's Bureau, Johnson returned the land to their previous white enslavers.[383]

As W.E.B. DuBois wrote in his reflections on the Bureau in 1901, "[t]he legacy of the Freedmen's Bureau is the heavy heritage of this generation."[384] More than a century later, the heritage remains heavy through badges and incidents of slavery in their modern iterations. Many history textbooks do not teach—and thus generations of Americans have forgotten about—the Freedmen Bureau's original purpose: to provide land and resources for the realization of true freedom after the American Civil War. Nevertheless, abolitionist activists hope for freedom and justice for Black and Brown communities today based on the same justification for the creation of the Freedmen's Bureau.

A. Reparations Through Economic Justice

The dissolution of the Freedmen's Bureau did not undo the constitutional mandate to eradicate slavery and all of its iterations. The Thirteenth Amendment,

378. David Stanley Leventhal, Freedom to Work, Nothing More nor Less: The Freedmen's Bureau, White Planters, and Black Contract Laborers in Postwar Tennessee, 1865-1868 14 (2007) (Master's Thesis, University of Tennessee) (arguing that "[o]stensibly the Freedmen's Bureau used labor contracts to shield freed people from re-enslavement; but these documents actually became legal devices to continue [B]lack subjugation after emancipation. The contract served two hidden purposes for the bureau: it trained [B]lacks to remain subservient to planters and it confirmed freed people's obligation to plantation labor.").
379. DuBois, *supra* note 376.
380. Leventhal, *supra* note 378.
381. DuBois, *supra* note 376.
382. *Id.*
383. *Id.*
384. *Id.*

specifically § 2 and its plenary power to pass legislation to eradicate badges and incidents of slavery, is still the law of the land.

Instead of tinkering with the carceral state, today's abolitionists envision a path toward freedom, safety, and productivity that can only be realized through economic redistribution. They argue that the "correlation between unemployment, lower income, and gang-related crime suggests that community-based economic programs may be more effective than conventional criminal justice suppression tactics."[385] The Thirteenth Amendment—as James Ashley originally intended—provides the constitutional justification for a community-based economic recalibration of resources. Abolitionists understand that reducing violence and gang participation is about providing a viable means to full citizenship.

Innumerable community-oriented organizations are equipped and eager to make the public safe without relying on coercive or carceral means. They are ready to employ, house, and feed Black and Brown people to enable them to build into and build up their communities. Advocacy and direct services organizations assist people in gaining employment, housing, education, and more. Convictions and their attendant consequences, however, have made such forms of security and basic rights legally challenging to attain. Many of these nonprofit organizations are not integrated into broader government infrastructure and lack major resources that would sustain their endeavors.

The legacy of slavery has led the government and its extensions to treat Black communities as if they do not know what to do with resources doled out to them or assume that they will misuse them. To prevent the implementation of reparations from enforcing such racist institutional ideologies, the implementation of reparations must purposefully trust Black communities with stewarding their own resources. "A community that has been harmed is in the best position to determine what form reparations for police violence should take."[386] This is true of economic and other forms of violence Black people have suffered by the institutions that have kept slavery alive. To fulfill the promise of the Thirteenth Amendment and provide reparations to the fullest extent, Black communities must be allowed to spend the resources how they wish—to validate the reparations as not merely symbolic, but as truly their own.

While a broader national conversation about reparations advances slowly through local, state, and federal governments, nongovernmental organizations

385. Myers, *supra* note 347, at 302.
386. Alexis Karteron, *Reparations for Police Violence*, 45 N.Y.U. REV. L. SOC. CHANGE 407, 425 (2021).

dedicate themselves to racial and economic justice for communities harmed by the expansive legacy of slavery. Instead of spending billions of dollars on carceral enforcement, federal reparations to the people to fund community efforts are the most effective way to address gang violence and "abolish the slave system"[387] in its modern iteration.

B. Making Better use of Economic Resources

A state that refuses to see beyond crime and punishment of gang members undermines § 2 of the Thirteenth Amendment and forestalls the eradication of modern-day badges and incidents of slavery. As Myers writes, "[t]he implementation of social programs, such as employment, school programs, and recreational programs provides a better answer to gang violence than heavy-handed suppression tactics such as gang injunctions."[388]

Abolitionists offer visions for reparations and economic justice that do not depend on the existence of the police. Legal scholar Amna A. Akbar is one such abolitionist, and she champions abolitionist strategies such as those advanced by the Movement for Black Lives.[389] Justice can and should be achieved without the carceral state, which Akbar calls "procedural justice."[390] She explains that such administration and regulation of justice is bound to be limited and discriminatory.[391] Putting any agenda of accountability in the hands of those institutions invites investment in their legitimacy and growth.[392] Instead, "reparations is a mode of accountability . . . for . . . the Black freedom struggle."[393] Reparations today, from an abolitionist framework, offers the resources and opportunities for healing from interpersonal and intimate harm that police cannot.[394]

Many communities feel that police are in the way of their safety or directly place them in danger. The Oakland Power Projects interviewed Oaklanders and reported that many individuals seek access to help in areas such as health that they

387. Kinoy, *supra* note 349, at 479.
388. Myers, *supra* note 347, at 305.
389. Akbar, *supra* note 39, at 1833.
390. *Id.* at 1806–07.
391. *Id.* at 1807–09.
392. *Id.* at 1814.
393. *Id.* at 1832.
394. *Id.* at 1833.

"didn't feel they had access to in Oakland without police involvement."[395] Divestment from police departments will remove them from the solution and create accountability, one of the glaringly absent centerpieces of law enforcement institutions.[396] Akbar outlines a vision for reparations through abolition based on the campaigns and even experiments of activists and leaders who are informed by the communities to which they belong.[397] Community organizations have an abundance of ideas of how to build out alternatives to the carceral state that strengthens community solidarity more than relying instinctually and out of necessity on the police.

C. Reallocation of Funds Toward Antiracist Structural Change

Community organizations know how to invest the $1.145 billion that it costs California to police, prosecute, and incarcerate gang-involved people through noncarceral strategies that would more productively thin and eventually defeat the conduits of mass incarceration. While police and criminal legal infrastructure is entrenched in society, many community organizations are building out alternative infrastructure in their communities themselves.

Abolitionists are experimenters. They take radical risks to meet collective needs that the government has neglected and ignored. Abolition is practical, within reach, and a long process that must begin now. Akbar further highlights several examples of organizations that are affecting abolitionist change today that offer tangible examples of noncarceral accountability. A few of these are profiled below.

Creative Interventions was founded by abolitionists including Mimi Kim. The organization founded the StoryTelling and Organizing Project (STOP), a platform for stories about people using community-based responses to end interpersonal violence.[398] Founder Mimi Kim, with her extensive experience supporting survivors of domestic violence and sexual assault, saw that communities needed a centralized resource that brought hope for ending cycles of violence.[399] Creative Interventions also published a toolkit that offers tangible

395. *The Oakland Power Projects*, CRITICAL RESISTANCE, https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b6ab32e70a6ad2f21cf765c/1533719344188/TheOakPowerProj_rept_target1_v3WEB.pdf [https://perma.cc/7DAC-QEGZ].
396. Akbar, *supra* note 39, at 1834–35. *See also id.* at 1787, 1831–32.
397. *Id.* at 1832, 1835.
398. *Story Telling & Organizing Project*, CREATIVE INTERVENTIONS, https://www.creative-interventions.org/stories [https://perma.cc/P282-W24D].
399. Akbar, *supra* note 39, at 1834–37.

strategies for people to stop interpersonal violence when they feel that calling the police is not a safe or effective option for them.[400] Investing in these experiments is crucial, Akbar explains, for moving society from reform-minded repairs of racist systems to fundamentally antiracist, community-driven solutions that will not ignore or exacerbate the problems of communities of color.[401]

Another example of a program that effectively addresses gang violence is the Los Angeles-based organization Homeboy Industries. Homeboy Industries provides job and life skills training and assist former gang members to live productive and meaningful lives. Both organizational data and the stories of the program participants, called trainees, attest that the key to the trainees' success stems from gainful employment, belonging to a collective purpose, and personal development in the context of a supportive community. Despite its tangible and effective success, the organization has to cap program participation due to limited economic resources. Reparations, in the form of a reallocation of state dollars normally used to prosecute and incarcerate, provided to an organization like Homeboy Industries, fulfills the goals of § 2 of the Thirteenth Amendment.

Homeboy Industries represents a community organization that is abolishing carceral approaches to community enhancement and replacing it with generations of trainees from within its own walls, through thriving relationships, professional and economic mobility, and its own noncarceral infrastructure. That infrastructure involves an eighteen-month job training program, anger management training, case management, parenting classes, tattoo removal, therapy, substance abuse support, legal services, and numerous others.[402] The trainees and former trainees who have become case managers and navigators for Homeboy Industries are people who were formerly gang members or previously incarcerated.[403] Former trainee Jorge Dominguez illustrates what this has meant for him, "Training: I got it here. Therapy: I get it here. Support for school: I get it here. And sometimes, just a hug from people who support you with their hearts . .

400. *Creative Interventions Workbook: A Short and Practical Guide to Stop Interpersonal Violence*, CREATIVE INTERVENTIONS (2012), http://www.creative-interventions.org/wp-content/uploads/2020/10/CI-Toolkit-Final-ENTIRE-Aug-2020-new-cover.pdf [https://perma.cc/VD5B-BYE7].
401. Akbar, *supra* note 39, at 1835.
402. *Id.*
403. *Homeboy Industries 2018 Annual Report*, HOMEBOY INDUS. (May 15, 2019), https://issuu.com/homeboyindustries/docs/homeboyindustries_annualreport2018 [https://perma.cc/2RBR-G6U7].

. I get everything. So to me, Homeboy is everything."[404] Homeboy Industries has reported tangible reductions in recidivism. In 2018, 65 percent of trainees reported arrests in the three months prior to joining the program, but only 1 percent of trainees were arrested after joining.[405] Also in 2018, 24 percent of trainees reported using hard drugs thirty days prior to joining the program, whereas 2 percent of trainees reported rarely or never using hard drugs after.[406] These outcomes offer a tangible example of reparations.

California affirmed the powerful effects of Homeboy Industries's successes from more than thirty-three years of community-level change. In July 2021, the state allotted $15 million of its budget to the organization with the intention of supporting its workforce training and reentry program.[407] Providing funds from the state's budget shows governmental recognition and appreciation for the effective ways the organization has created opportunities for community members to lead productive lives that do not involve gang violence.[408] The $15 million is no mere act of charity but represents the beginning of a partnership with the California Workforce Development Board to expand employment opportunities through the organization's business and career placement programs. Assemblymember Wendy Carrillo announced the partnership saying, "Homeboy Industries is the perfect example of a partner uplifting both community resilience and individual agency. Everyone deserves dignity, but without support and second chances, there are few paths to opportunity, wellbeing, and stability for all."[409]

Another organization that provides a framework to address gang violence through an abolitionist approach is the Ella Baker Center for Human Rights. Members of the Ella Baker Center (Center) share and carry forward the vision of Ella Baker and her abolitionist legacy. Ella Baker was an organizer and leader of the civil rights Freedom Movement. The Center is not afraid to demand legislative change of some of the most polarizing criminal and gender justice issues such as

404. *Transformation Story: Meet Jorge Dominguez*, HOMEBOY INDUS. https://homeboyindustries.org/transformation_story/jorge-dominguez [https://perma.cc/BMT2-AVBQ].
405. *Homeboy Industries 2018 Annual Report*, *supra* note 403 (slide 6).
406. *2019 Accomplishments*, HOMEBOY INDUS., https://readymag.com/u1043285517/2197097/9 [https://perma.cc/2BSL-BQWL].
407. *Homeboy Industries Receives $15 Million in Funding to Support Training and Reentry Program*, HOMEBOY INDUS. (July 2021), https://homeboyindustries.org/homeboy-industries-15-million-funding [https://perma.cc/B7JL-C4A3].
408. *Id.*
409. *Id.*

multiple violent felonies and sexual assault.[410] It demands the elimination of enhancements, sentencing reforms for people convicted of felony-murder, and destigmatization of sex offenses.[411] The Center's organizers do not hold back their radical empathy, the very kind which compels society to reimagine a society free of prisons. They connect formerly incarcerated people to resources and opportunities, striving to move away from a future in which society excludes them. Rather, they want to work toward a society that does not fear people, where a person's community is their safety net and is equipped to respond to their diverse needs. Given an allotment of the $1.146 billion, the Center would build more community hubs across the state and train first responders to intervene so people can call familiar people instead of a police precinct in moments of crisis.

Not only do abolitionist organizations know how to use $1.146 billion toward a safer and more just world, but the government should also entrust them with the task of reparations because they have the right to dismantle the conditions of their subordination. It is imperative for the state to distribute reparations funds, then step back, in order for the process of eradicating all badges and incidents of slavery to be morally correct, to grow the organizational strength of communities, and for communities to build meaningful power.[412] Where one of the main tools of the oppressor's wealth accumulation was extraction from Black people, "closing the gap requires *direct* redistribution."[413]

Disrupting the racial hierarchy in the context of Black liberation transcends colonial imagination. Racial justice means economic justice. The oppressor depends on that inferior status, so liberation depends on reparations extinguishing that inferiority. The liberation of Black people will make the world a place in which people can more readily function, organize, and move forward.[414]

410. *See A Resentencing Guide for the Fair and Just Sentencing Reform Act*, ELLA BAKER CTR. FOR HUM. RTS. 1, 4, https://ellabakercenter.org/wp-content/uploads/2020/09/SB1393-PC1170d1-Toolkit-FINALwAppendix-10222019.pdf [https://perma.cc/3XTB-6RFR] ("We created this Toolkit for people with 5-year sentence enhancements for prior felonies and their loved ones.").

411. Unfortunately, the bill is not a full repeal of the enhancement, it was amended to maintain the enhancement for each prior conviction of a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. *Id.* at 18.

412. *See* Kinoy, *supra* note 349, at 476.

413. Hayat, *supra* note 364, at 396 (citing William Darity, Jr. & A. Kirsten Mullen, *Resurrecting the Promises of 40 Acres: The Imperative of Reparation for Black Americans,* ROOSEVELT INST. (June 4, 2020), https://rooseveltinstitute.org/publications/resurrecting-the-promise-of-40-acres-the-imperative-of-reparations-for-black-americans [https://perma.cc/V6LV-V2KQ]).

414. *See* Kinoy, *supra* note 349. Norrinda Hayat also argues that reparations must go beyond solutions such as affordable housing that maintain Black poverty; instead, reparations must "transform the entire lived environment." Hayat, *supra* note 364, at 404.

CONCLUSION

The Thirteenth Amendment provides the constitutional authority for states to accomplish the modern abolitionist's vision. States can constitutionally divest from the police, redistribute their wealth, and still carry out their governmental functions. Power coming from within communities will make those communities safer than police and prisons can. Prioritizing economic justice by investing in Black and Brown communities, rather than the criminal legal system, will free the country of modern-day incidents and badges of slavery. Abolishing gang statutes and the prosecutions, caging, and punishment associated with these modern-day badges and incidents is fundamental to today's abolitionist efforts to make Black and Brown communities safe, just, and prosperous, rather than maintaining a system of oppression that forces the descendants of the formerly enslaved back into a condition of servitude that an entire Civil War was fought to eradicate.

Section 2 of the Thirteenth Amendment granted Congress the power to pass legislation to eradicate any badges and incidents of slavery. Enforcement of the Thirteenth Amendment extends beyond Congress and includes the primary enforcer of the Constitution, the Supreme Court. When antigang legislation passes on a state or federal level, the Supreme Court has a duty to enforce the Thirteenth Amendment by finding those statutes unconstitutional and, as a pillar of the prison industrial complex, finding them to be a modern-day badge and incident of slavery.

Despite facially neutral rhetoric, gang statutes are carefully constructed Thirteenth Amendment violations. They are legal weapons built on Slave Codes, Black Codes, Jim Crow-era vagrancy laws, and gang injunctions are designed to control and subjugate Black and Brown people. The STEP Act effectively erased the racist history of these prior badges and incidents of slavery and rationalized punishment in violation of the Constitution based on a narrative of Black dangerousness and criminality tied directly to the institution of slavery.

The economic cost of gang enforcement regimes disparately impacts Black and Brown communities. Thus, the most effective way to right the wrongs of hundreds of years of oppression is to follow the lead of Black and Brown community organizations that work through an abolitionist framework. Their vision, where economic resources are delivered to Black and Brown communities through the power of the Thirteenth Amendment, restore integrity to constitutional due process by actively eradicating modern day vestiges of slavery in all its forms, including gang statutes. The United States was founded on genocide and white supremacy, but the Thirteenth Amendment and its true

purpose possesses the power to make America live up to its promise of justice and equality—even to inner-city gang members.

Since Congress has the will to pass a national holiday in commemoration of the liberation of African people in America, notwithstanding the unprecedented times of an international pandemic and racial unrest where real demands of structural change have been made, Congress should also pass legislation design to eradicate a chief vestige, badge, and incident of slavery—gang statutes.