

# THE YALE LAW JOURNAL

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## Prisons as Laboratories of Antidemocracy

**ABSTRACT.** Prisons are woefully ineffective as tools to protect society from violence and exploitation, yet America's prison population exploded in the twentieth century. On the outside, this devastated Black communities, Black opportunities, Black economic power, and Black voting power. Yet a similarly insidious development came from inside prison walls: prison administrators honed antidemocratic techniques for constraining and oppressing incarcerated persons, techniques that would later be deployed against the ostensibly free population. Jeffrey Bellin's *Mass Incarceration Nation* provides a robust analysis of the ways state and federal policies have combined to create an explosion in the scope of American prisons in the late twentieth century. This Book Review explores how prisons have served as laboratories of antidemocracy to perfect tactics to suppress access to information, protest, and bodily autonomy.

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## INTRODUCTION

We run,  
 We run,  
 We cannot stand these shadows!  
 Give us the sun.  
 We were not made  
 For shade,  
 For heavy shade,  
 And narrow space of stifling air  
 That these white things have made.  
 We run,  
 Oh, God,  
 We run!  
 We must break through these shadows,  
 We must find the sun.

—Langston Hughes<sup>1</sup>

On the morning of September 9, 1971, over a thousand incarcerated men revolted, seizing hostages and taking control of much of New York’s Attica Correctional Facility.<sup>2</sup> After the initial burst of violence, the uprising quickly initiated democratic processes to advocate for changes to the brutal and racist conditions of their incarceration.<sup>3</sup> The incarcerated men of Attica had demanded that the state remedy overcrowding, unsanitary living conditions, the routine use of solitary confinement, and racist attacks by the all-white prison staff.<sup>4</sup> The negotiations with state officials looked promising until one of the guards died of injuries

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1. Langston Hughes, *Shadows*, ACAD. AM. POETS, <https://poets.org/poem/shadows> [<https://perma.cc/Z9CN-6GWR>].
  2. See Dave Davies, *How the Attica Prison Uprising Started—and Why It Still Resonates Today*, NAT’L PUB. RADIO (Oct. 27, 2021, 1:57 PM ET), <https://www.npr.org/2021/10/27/1049295683/attica-prison-documentary-stanley-nelson> [<https://perma.cc/YD7M-76NY>] (“On Sept. 9, 1971, tensions boiled over as more than 1,000 prisoners, including Harrison, revolted, seizing 39 guards as hostages and gaining control of the prison.”).
  3. See *Timeline of Events of the Attica Prison Uprising of 1971 and Subsequent Legal Actions*, N.Y. STATE ARCHIVES, <https://www.archives.nysed.gov/research/topic-attica-timeline> [<https://perma.cc/CY62-BQFG>] [hereinafter *Timeline of Events*] (“September 10, 1971—Prisoners elect representatives and citizen observers are permitted to enter D Yard to aid in negotiations.”).
  4. See Asha Bandele, *After the Attica Uprising*, NATION (Sept. 9, 2011), <https://www.thenation.com/article/archive/after-attica-uprising> [<https://perma.cc/Q3Z6-48HC>] (describing the complaints of people incarcerated in Attica leading up to the uprising).

he sustained in the initial violence.<sup>5</sup> The state's negotiators were willing to agree to almost all of the reforms, but amnesty for participating in the uprising was off the table.<sup>6</sup> On the fifth morning of the uprising, the state police and National Guard retook the prison, killing thirty-nine people, including ten of the hostages.<sup>7</sup>

The incarcerated men who seized control of Attica advanced a democratic vision, one where even convicted criminals would have a say in ensuring that the conditions of their captivity were just and humane. Indeed, the legislative response to the Attica uprising resulted in the vast majority of their demands being enacted as law.<sup>8</sup> Yet the forces of the carceral state took other lessons from the uprising. Rather than building humane institutions to house incarcerated people, prisons have become more secretive through technology, management, and public-relations efforts.<sup>9</sup> The risk of violence is minimized, but more importantly to these efforts, the risk of attracting public sympathy is almost negligible.<sup>10</sup> Where the Attica uprising once sparked prominent demonstrations in

5. See *The Rockefeller: Attica Prison Riot*, PBS (Oct. 16, 2000), <https://www.pbs.org/wgbh/americanexperience/features/rockefellers-attica> [<https://perma.cc/ZY7N-9836>] (“I thought we had closure on all 25 items. And then unfortunately one of the prison guards died from injuries during the attack, the uprising. That changed the whole picture.” (quoting Robert Douglass, Counsel to Gov. Nelson A. Rockefeller)).
6. See *id.* (“And the other was general amnesty, which the governor had no power to grant. He could grant a pardon, but that’s after a conviction.”); Davies, *supra* note 2 (“The one demand that everything hinged on was amnesty, because the prisoners . . . wanted amnesty for anything that was done in the rebellion, because there was a real fear that all of the prisoners would be tried *en masse* for everything.”).
7. See *Timeline of Events*, *supra* note 3 (“During the assault to retake the prison, 29 inmates and 10 hostages are killed, and many more are wounded. Of the 43 deaths at Attica, four were at the hands of inmates. Of those four victims, all but one, Correction Officer Quinn, were fellow inmates.”); Bandle, *supra* note 4 (“Then, without warning, the shooting began, the bullets as indiscriminate as the expanding cloud of poison.”); Leslie Gornstein, *It’s Been 50 Years Since the Infamous Attica Prison Riot*, CBS NEWS (Nov. 4, 2021, 5:26 PM EDT), <https://www.cbsnews.com/pictures/attica-prison-riot-50-years-later> [<https://perma.cc/5UNJ-7F26>] (“After a 10-minute bloodbath that would eventually leave at least 43 people dead, the five-day prison rebellion was over.”).
8. See Justin Brooks, *How Can We Sleep While the Beds Are Burning? The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-Five Years Later*, 47 SYRACUSE L. REV. 159, 161 (1996) (“In May of 1972, New York State Assemblymen approved twelve million dollars for reforms in the New York State Prison System, and by September of 1972, twenty-four of the twenty-eight original demands of the Attica inmates had been met.”).
9. See Bandle, *supra* note 4 (“Today’s prisons are designed to ensure that the Attica brothers’ central concern to be seen, heard and treated as human beings is not so much met as effectively neutralized.”).
10. See *id.* (“Where forty years ago civil rights leaders and journalists showed up at the request of prisoners to document what happened, no flag-bearers arrived to support the hunger strikers this summer or the prisoners in Georgia.”).

support of incarcerated people,<sup>11</sup> few today hear of prison organizing, and fewer still care. The Attica dream of democracy in American prisons is gone, and anti-democracy has filled in the space it left behind as mass incarceration drove a rapid expansion of prison populations.

Mass incarceration was not the consequence of a single event, but the cumulative effect of several policies. Beginning in the 1970s, American prison populations expanded dramatically, rising to levels out of proportion when compared to other wealthy democracies.<sup>12</sup> Today, there are nearly two million people in America's prisons and jails, with over three million more on probation and parole.<sup>13</sup> Black and Brown Americans are incarcerated at higher rates than their proportion of the American population.<sup>14</sup>

Jeffrey Bellin's *Mass Incarceration Nation*<sup>15</sup> explores the social and legal factors driving mass incarceration, showing how they came to dominate prison policy so as to keep prison populations rising even as crime fell. Bellin's analysis teems with statistics, providing a thorough account of how concurrent trends in discretion within the legal system, excessive criminalization, sentencing, and vanishing parole and pardon systems have converged to bring about a modern crisis. Yet Bellin shies away from discussing the role of racism in fomenting all these other trends, leaving his analysis incomplete by failing to say what's obvious to even a casual observer. The result is somewhat anemic: a view of mass incarceration as a failure of democracy rather than its deliberate subversion by antidemocratic forces.

I should pause briefly to explain how I will contrast democracy and antide-mocracy in this Book Review. Democracy, broadly considered, is the ability of the people to participate meaningfully as equals in the decisions that shape their lives.<sup>16</sup> Democracy is necessarily more than simply voting and taking the

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11. See Gornstein, *supra* note 7 (“A group of demonstrators march behind a banner that reads ‘Avenge Attica’ and sign that states ‘Feel for your brothers and sisters in jail,’ sometime in the early 1970s.”).
  12. See James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/B2Z3-WGHY>].
  13. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> [<https://perma.cc/E877-AZ7Q>].
  14. See *id.*
  15. JEFFREY BELLIN, *MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER* (2023).
  16. See Tom Christiano & Sameer Bajaj, *Democracy*, STAN. ENCYC. PHIL. (Mar. 3, 2022), <https://plato.stanford.edu/entries/democracy> [<https://perma.cc/ELA9-QB69>] (“The term ‘democracy’, as we will use it in this entry, refers very generally to a method of collective

preferences of majorities as law, as democracy's commitment to political equality demands some measure of respect for minority positions.<sup>17</sup> To preserve a democracy, the people must remain vigilant against the creep of oligarchy and retain some mechanism to wrest control when power becomes too concentrated.<sup>18</sup> Antidemocracy, by contrast, seeks to accelerate and solidify this concentration of power through the subversion of democratic institutions.<sup>19</sup> Antidemocracy sustains hierarchical inequality by suppressing the political and economic power of disfavored groups to entrench the power of an oligarchic elite.

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decision making characterized by a kind of equality among the participants at an essential stage of the decision-making process.”); Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 160 (2021) (“[Democracy is] planted whenever people treat one another as political equals, allowing everyone in the community, or *demos*, to share in exercising power, or *kratos*.”); see also W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 182-89* (The Free Press 1998) (1935) (discussing the push by leading abolitionists to ensure that emancipation came with the necessary education, civil rights, and economic resources for formerly enslaved Black people to become full citizens and voters in a new social and political order).

17. See *Democracy*, COUNCIL EUR., <https://www.coe.int/en/web/compass/democracy> [<https://perma.cc/L8UC-3PUM>] (“Properly understood, democracy should not even be ‘rule of the majority’, if that means that minorities’ interests are ignored completely. A democracy, at least in theory, is government on behalf of all the people, according to their ‘will’.”).
18. See Ganesh Sitaraman, *Countering Nationalist Oligarchy*, DEMOCRACY J. (2019), <https://democracyjournal.org/magazine/51/countering-nationalist-oligarchy> [<https://perma.cc/6XAG-ZCND>] (“The challenge we face today is . . . nationalist oligarchy. This form of government feeds populism to the people, delivers special privileges to the rich and well-connected, and rigs politics to sustain its regime.”); Camila Vergara, *Towards Material Anti-Oligarchic Constitutionalism*, 46 REVUS: J. CONST. THEORY & PHIL. L. 141, 142-43 (2022) (“Political power is today *de facto* oligarchic. In almost all representative democracies, the people who get to decide on policy, law, and the degree of protection of individual rights . . . tend to have the same interests and worldview of the powerful few who benefit most from the status quo.”); Megan Gannon, *Ancient Greeks Voted to Kick Politicians out of Athens If Enough People Didn't Like Them*, SMITHSONIAN MAG. (Oct. 27, 2020), <https://www.smithsonianmag.com/history/ancient-athenians-voted-kick-politicians-out-if-enough-people-didnt-them-180976138> [<https://perma.cc/VZA6-3E92>] (discussing the process of ostracism by which Athenians removed citizens who posed a threat to their democratic civil order).
19. See Bowie, *supra* note 16, at 161 (“[L]ike an herbicide to protect property from the ‘excess of democracy,’ *antidemocracy* has sustained social hierarchies from the spread of political equality. Whether it comes in the form of violent repression, vetoes of legislation by unelected officials, or practically unamendable constitutional restrictions, *antidemocracy* has had a long half-life.”); Katherine Stewart, *The Claremont Institute: The Anti-Democracy Think Tank*, NEW REPUBLIC (Aug. 10, 2023), <https://newrepublic.com/article/174656/claremont-institute-think-tank-trump> [<https://perma.cc/86RD-CC3S>] (“Over the past five decades, wealthy conservatives have conducted a grand experiment in American political discourse by investing heavily in organizations and think tanks that have sought to shift the center of public debate in a direction favorable to their interests and privileges.”).

Mass incarceration presents considerable opportunities for antidemocratic actors. First, incarcerated people are typically excluded from voting.<sup>20</sup> Prison gerrymandering uses these disenfranchised people in redistricting to bolster white, rural voting power at the expense of diverse cities.<sup>21</sup> Incarcerated people are subjected to the last legal vestiges of involuntary labor, forced to work for the institutions that imprison them or even for for-profit corporations at less than minimum wage.<sup>22</sup> Convictions also carry a wide range of collateral consequences that rob individuals of essential dignity interests and cause lingering harm to their communities.<sup>23</sup> These burdens fall disproportionately on marginalized communities.<sup>24</sup> All of this serves to reinforce America's most fundamental hierarchy: the racialized caste system that persists as a lingering echo of slavery.<sup>25</sup> Political elites driving the march of antidemocracy today are largely descended from their

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20. See Christopher Uggen, Ryan Larson, Sarah Shannon & Robert Stewart, *Locked out 2022: Estimates of People Denied Voting Rights*, SENT'G PROJECT (Oct. 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights> [<https://perma.cc/8LNL-4P3T>] (estimating that 4.6 million Americans are denied the right to vote as a consequence of felony convictions); *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (“[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . .”).
  21. See Garrett Fisher, Taylor King & Gabriella Limón, *Prison Gerrymandering Undermines Our Democracy*, BRENNAN CTR. FOR JUST. (Oct. 22, 2021), <https://www.brennancenter.org/our-work/research-reports/prison-gerrymandering-undermines-our-democracy> [<https://perma.cc/3L87-PB8G>] (“[Areas whose residents are incarcerated elsewhere] see their representation in legislative bodies diluted, while areas with prisons receive more than their fair share. This practice is known as prison gerrymandering, and it turns inequities in our criminal justice system into representational inequities.”).
  22. See Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 3 (2019) (“[P]rison labor for little or no pay to produce goods and services for the government or private entities is not a new phenomenon and has grown with the prison population.”).
  23. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 464-65 (2010) (“[T]he United States’ harsh collateral consequences, particularly those that are unrelated to the underlying crime, continue to degrade individuals once they have completed their sentences.”).
  24. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1789-90 (2020) (“Police violence is (1) authorized by law, (2) takes various, interconnected forms, (3) that occur in routine and common place ways, that are (4) targeted along the dimensions of race, class, and gender, and (5) constitute and produce our political, economic, and social order.”).
  25. See Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261, 268 (2021) (“[T]he racial divide and caste system traumatizes its victims, while also undermining the promise of constitutional equality, civil liberties, and civil rights.”).

predecessors who held other human beings in bondage.<sup>26</sup> It should come as little surprise that the political and economic descendants of slaveholders – and their ideological allies – would support slavery and racial caste in their modern transformations.

Yet, prisons hold another benefit for antidemocracy. They offer a proving ground for new antidemocratic policies. Where Justice Brandeis famously hailed the ability of a state to act as a laboratory of democracy,<sup>27</sup> prisons, by contrast, have become the laboratories of antidemocracy. Antidemocratic actors can exert all manner of abuses on incarcerated people, far from the condemnation of courts and the voting public. While prisoners challenge such policies in court, they often face an unsympathetic court and resource disadvantages, leading to precedents favoring the prisons' policies.<sup>28</sup> Such decisions then stand as support and justification for politicians interested in broader social control, allowing the spread of antidemocratic policies to the public at large.<sup>29</sup> Even when politicians do not explicitly cite to such cases, the cases have already served to demonstrate the roadmap for defending such policies. While the well-documented harms of

26. See Philipp Ager, Leah Boustan & Katherine Eriksson, *The Intergenerational Effects of a Large Wealth Shock: White Southerners After the Civil War*, 111 AM. ECON. REV. 3767, 3768 (2021) (“Emancipation resulted in the loss of material resources, without disrupting other potential advantages, such as specific skills and training, social networks or political connections. The recovery of the descendants of slaveholders suggests a remarkable persistence of these other advantages even in the face of large declines in financial wealth.”); Tom Lasseter, Lawrence Delevingne, Makini Brice, Donna Bryson, Nicholas P. Brown & Tom Bergin, *America’s Family Secret*, REUTERS (June 27, 2023, 10:00 AM GMT), <https://www.reuters.com/investigates/special-report/usa-slavery-lawmakers> [<https://perma.cc/AM6D-SSWB>] (“In researching the genealogies of America’s political elite, a Reuters examination found that a fifth of the nation’s congressmen, living presidents, Supreme Court justices and governors are direct descendants of ancestors who enslaved Black people.”); Julie Zauzmer Weil, *Their Wealth Was Built on Slavery. Now a New Fortune Lies Underground.*, WASH. POST (Dec. 1, 2022, 7:00 AM EST), <https://www.washingtonpost.com/history/2022/12/01/coles-hill-virginia-slavery-uranium> [<https://perma.cc/SV4W-TPY6>] (“Coles, 84, is one of countless Americans who still benefit from the wealth accumulated by America’s 18th- and 19th-century slaveholders.”).
27. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
28. See *infra* Section II.D.
29. Compare *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) (rejecting a detainee’s complaint for failing to give detailed facts supporting allegations of discriminatory intent), with *Jones v. Hosp. Corp. of Am.*, 16 F. Supp. 3d 622, 628-36 (E.D. Va. 2014) (applying the *Iqbal* standard to reject a pharmacist’s complaint for workplace discrimination), and *McCauley v. City of Chicago*, 671 F.3d 611, 615-19 (7th Cir. 2011) (rejecting a wrongful death action against city and state government defendants who failed to enforce a protective order for pleading insufficient facts under *Iqbal*), and *Shaw v. Villanueva*, 918 F.3d 414, 418-19 (5th Cir. 2019) (applying the *Iqbal* standard to reverse a denial of qualified immunity in a civil rights case).



our carceral state sit uncomfortably with our concept of democracy, prisons' roles in developing antidemocratic policies could represent an even greater threat. This Book Review is the first piece of scholarship to explore the connection between antidemocratic policies in prison and their subsequent counterparts among the free population.<sup>30</sup>

Black scholars and activists have long opposed prisons—especially in their modern incarnation—as tools of an antidemocratic order. Prisons by their very nature are an aberration within a democracy, but their potential as laboratories of antidemocracy presents an even greater threat. The lessons of the Attica uprising resonate today, as prisons still fail to provide adequate medical care, censor material on ideological grounds, refuse to pay minimum wage, and incarcerate people for decades at a time.<sup>31</sup> While a surge of reform followed the uprising, mass incarceration has exacerbated the problems, and meaningful changes were fleeting.

This Book Review proceeds in three parts. Part I reviews Bellin's *Mass Incarceration Nation*, exploring the consequences of Bellin's meticulously detailed research into the many causes of mass incarceration. It also uses Bellin's book to probe the question his work implies: Is mass incarceration compatible with democracy? Part II then discusses various antidemocratic policies in place in American prisons, including antilabor practices, censorship, restrictions on bodily autonomy, and limits on legal recourse for official misconduct. Part III discusses the analogs of these antidemocratic policies which are developing in more general applications outside the prison walls. It also addresses the difficulty of proving a direct link between antidemocratic practices and their antecedents in prisons. The final section of Part III examines the necessity of radically reimagining our criminal legal system to preempt these threats to democracy. Mere reform may be sufficient to mitigate mass incarceration, but prison's antidemocratic effects cannot be resolved without abolitionist interventions.

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30. Other scholars have observed the peculiarities of prison legislation and jurisprudence. See generally Rebecca Cooper, Caroline Heldman, Alissa R. Ackerman & Victoria A. Farrar-Meyers, *Hidden Corporate Profits in the U.S. Prison System: The Unorthodox Policy-Making of the American Legislative Exchange Council*, 19 CONTEMP. JUST. REV. 380 (2016) (discussing the role of private-industry advocacy in shaping prison policy); Emma Kaufman & Justin Driver, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515 (2021) (discussing the permissive and often contradictory standards at play in prison litigation).

31. Cf. Attica Liberation Faction, *Manifesto of Demands and Anti-Depression Platform*, FREEDOM ARCHIVES (1971), [https://freedomarchives.org/Documents/Finder/DOC510\\_scans/Attica/510.Prisons.AtticaManifesto.pdf](https://freedomarchives.org/Documents/Finder/DOC510_scans/Attica/510.Prisons.AtticaManifesto.pdf) [<https://perma.cc/Y2DC-7HZ5>] (explaining that proper medical care, uncensored access to media, fair pay, and reduced sentence lengths were all among the Attica prisoners' demands).

## I. THE STATE OF MASS INCARCERATION

Free labor's the cornerstone of U.S. economics.

— Killer Mike<sup>32</sup>

The United States incarcerates a higher percentage of its population than any other country today.<sup>33</sup> This large percentage represents over two million people at any given time.<sup>34</sup> State and federal prisons are ill-equipped to confine so many people.<sup>35</sup> The burdens of our extreme reliance upon incarceration fall disproportionately on Black people.<sup>36</sup> Michelle Alexander has documented the devastating impact of mass incarceration on Black Americans: “When the War on Drugs gained full steam in the mid-1980s, prison admissions for African Americans skyrocketed, nearly quadrupling in three years, and then increasing steadily until it reached in 2000 a level more than twenty-six times the level in 1983.”<sup>37</sup> Collectively, all the above trends are the phenomena that make up the core of mass incarceration.

Bellin's *Mass Incarceration Nation* provides an exhaustive analysis of the state of mass incarceration in America and the policies that brought us to this point. His thesis is that no single policy created mass incarceration. Rather, a constellation of policies — accelerated by the public's fear of crime and appetite for punishment — drove parallel processes that must be dismantled individually if mass incarceration is to end. None of this is particularly new information, though Bellin presents the material with an uncommon thoroughness, demonstrating each

32. KILLER MIKE, *Reagan, on R.A.P. MUSIC*, at 02:19 (Williams Street Records 2012).

33. See Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1591 (2019) (providing a chart comparing the United States and its closest competitors in incarceration rate).

34. See *id.* at 1580 (“The United States has less than 5% of the world's population but 20% of the world's prison inmates. There are 2.1 million people behind bars in this country, which is almost one in every 100 adults.” (footnotes omitted)).

35. See Jonathan Simon, *Ending Mass Incarceration Is a Moral Imperative*, 26 FED. SENT'G REP. 271, 271 (2014) (“Mass incarceration predictably and reliably creates conditions of overcrowding that, combined with grossly inadequate medical and mental health care provision and an incarcerated population with a very heavy chronic disease burden, result in degrading conditions and the risk of torture.”).

36. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22 (2012) (“Today, black men are imprisoned at 6.5 times the rate of white men.”). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (10th anniversary ed. 2020) (exhaustively discussing the racial causes and consequences of mass incarceration).

37. ALEXANDER, *supra* note 36, at 123.

policy choice's contribution to the trend through a wealth of statistical evidence. The conclusions that Bellin reaches are aimed at anyone who would seek to end mass incarceration, whether reformist or abolitionist.<sup>38</sup> Mass incarceration cannot be undone with a single policy change, or even a cluster of policy changes. Those policy changes must be implemented together, along with serious efforts to reduce violence and shift popular attitudes away from retribution.

But once his analysis veers away from the historical problem of mass incarceration and general requirements for its reversal, Bellin's prescriptions begin to fall short. While Bellin acknowledges racial disparities in incarceration rates, he typically confines discussions of race to areas where it becomes statistical information. This elides both the role of racism in driving the policies that make up mass incarceration and the reality that America's prisons were racist institutions even before mass incarceration. Bellin's thrust toward returning to 1970s rates of incarceration fails to address the racial implications of such a remedy. This failure partially explains his ambivalence between reformist and abolitionist remedies. Divorced of a serious examination of pre-1970 incarceration rates' racial disparities and the forces that led to them, a return to the incarceration rates of that time sounds like a solution. It is not. Mass incarceration arose in an era when modern racial disparities in criminal enforcement and sentencing had already taken root, with Black Americans several times more likely to be incarcerated than their white counterparts.<sup>39</sup>

Yet, even with such flaws, *Mass Incarceration Nation* succeeds at conveying the scope of our modern prison system and its entrenchment. It also raises a critical question: Are prisons compatible with democracy?<sup>40</sup> This Part proceeds in three Sections. First, Section I.A reviews Bellin's work and its analysis of mass incarceration's past and present. Second, Section I.B addresses the flaws in this analysis with an eye toward improving his remedial recommendations by viewing them under a Critical Race Theory lens. Finally, Section I.C examines prison's democracy deficiency, analyzing American incarceration's incompatibility with democracy in terms of both degree and character. This final Section

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38. Reformist proposals largely leave the power dynamics of modern capitalism and its support from the state in place, while abolitionist proposals seek to dismantle those power structures, whether gradually or immediately. See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98-106 (2020).

39. See Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, 139 DAEDALUS, Summer 2010, AT 8, 9 (2010) ("By the late 1960s, at the zenith of civil rights activism, the racial disparity had climbed to its contemporary level, leaving African Americans seven times more likely to be in prison or jail than whites.").

40. While Bellin does not directly state the question, it is raised through his comparisons of American mass incarceration to other wealthy democracies and his discussion of the ways mass incarceration is driven by the use of criminal punishments to pursue public-policy priorities. See, e.g., BELLIN, *supra* note 15, at 12-14, 24-25.

serves as a jumping-off point for the remainder of this Book Review's exploration of antidemocracy in American prisons.

A. *Mass Incarceration: An American Tragedy by the Numbers*

Bellin breaks *Mass Incarceration Nation* into four principal parts. The first sets out to define mass incarceration and several related terms. Bellin traces mass incarceration to the period when America's reliance on prisons sharply diverged from that of other wealthy, Western nations.<sup>41</sup> While he doesn't point to a simple percentage or raw number of inmates that would represent the end of mass incarceration, he instead describes mass incarceration's characteristics: a large, upward deviation from historical trends, a departure from the incarceration rate of other countries, and incarceration out of proportion to the prevalence of crime in society.<sup>42</sup> He also makes a distinction between the use of criminal law to address serious harms to others and their property ("criminal justice") and the use of criminal law to enforce policy preferences ("the criminal legal system").<sup>43</sup> Between these definitions, Bellin devotes brief chapters to the harms of incarceration and its prevalence across the country.

With that foundation in place, Bellin turns to the history of mass incarceration in his second part. He posits that the impetus that allowed longstanding characteristics of American society to fuel mass incarceration was a crime surge lasting from the 1960s to some time in the early 1990s.<sup>44</sup> He points to well-documented statistics showing the increase and subsequent decrease in the crime rate.<sup>45</sup> Then, almost as an aside, he references studies showing how the prevalence of guns and gun violence in America, relative to our peers, fuels our violent-crime rates.<sup>46</sup> Predictably, this crime wave drove cycles of media sensationalism, populist outrage, and opportunistic political responses.<sup>47</sup> The resulting legislation steadily increased sentencing and enforcement while drastically curtailing

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41. *Id.* at 11.

42. *Id.* at 12-14.

43. *Id.* at 24-25.

44. *Id.* at 33.

45. *Id.* at 34-35.

46. *Id.* at 36; see also Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086, 1104 (2001) ("Taken together, the results in this section provide strong support for the hypothesis that increases in gun ownership lead to future increases in the homicide rate.").

47. See BELLIN, *supra* note 15, at 37-47; see also Wanda Parham-Payne, *The Role of the Media in the Disparate Response to Gun Violence in America*, 45 J. BLACK STUD. 752, 756 (2014) ("As part of their coverage, local news stations have actively engaged in the incorporation and propagation of portraying Blacks as criminals and Whites as the victims.").

parole.<sup>48</sup> But this harsh legislation proved largely ineffective at reducing crime.<sup>49</sup> Even when crime is reported, police are usually unable to identify definitively and arrest a suspect.<sup>50</sup> Taking the analysis even further, the chances of (say) a robbery resulting in a criminal conviction are around five percent.<sup>51</sup> As Bellin recognizes, “American criminal courts are not in a position to deter crime on a broad scale.”<sup>52</sup> At this point, Bellin briefly addresses the role of racism in fueling mass incarceration. He sees its influence as undeniable<sup>53</sup> but disputes Michelle Alexander’s characterization of mass incarceration as an incarnation of America’s racial caste system.<sup>54</sup> Instead, he sees racism’s influence as dominant in areas where legal actors have the greatest discretion, namely prosecutions within Bellin’s conception of “the criminal legal system.”<sup>55</sup> Bellin’s larger thesis rests on the complexity of mass incarceration’s origins and mechanisms, and he views racism as playing a variable role within those origins.

In the third part, Bellin looks in detail at the mechanics of mass incarceration. The police officers hired as part of the response to the crime wave predictably made more arrests but kept making them even when serious crime went down.<sup>56</sup> Rather than clearing a higher percentage of serious cases, though, police shifted to a greater focus on crimes that are easier to detect and prove, primarily drug and assault charges.<sup>57</sup> With the shift to more arrests focused on more easily proven charges, prosecutors have largely accepted the policy decisions of legislators and police and obtain convictions for a consistently high proportion of drug

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48. See BELLIN, *supra* note 15, at 48–66; see also Thomas B. Marvell & Carlisle E. Moody, *Determinate Sentencing and Abolishing Parole: The Long-Term Impacts on Prisons and Crime*, 34 CRIMINOLOGY 107, 107 (1996) (“Determinate sentencing, with the abolition of parole, is one of the most important sentencing trends in recent decades.”).
49. BELLIN, *supra* note 15, at 68; see also Marvell & Moody, *supra* note 48, at 123 (“The laws are not likely to affect crime rates appreciably.”).
50. BELLIN, *supra* note 15, at 68–69.
51. *Id.* at 71.
52. *Id.* at 76.
53. *Id.* at 77–79.
54. *Id.* at 79. See generally ALEXANDER, *supra* note 36 (describing mass incarceration as a method of racial subjugation).
55. BELLIN, *supra* note 15, at 82–83.
56. *Id.* at 95; see also Ndjuoh MehChu, *Policing as Assault*, 111 CALIF. L. REV. 865, 899 (2023) (quoting Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 806 (2021)) (describing New York, Chicago, and Baltimore as communities in which policing is exercised independently of actual crime rates).
57. See BELLIN, *supra* note 15, at 97; see also Katherine Beckett, *Diversions and/as Decarceration*, 86 LAW & CONTEMP. PROBS. 103, 107 (2023) (“[T]he number of drug arrests nearly quadrupled—from just over a half a million in 1981 to a peak of nearly 1.9 million in 2006.”).

arrests.<sup>58</sup> With easily proven cases representing a higher proportion of arrests, prosecutors have increased their conviction rates, even as arrests surged.<sup>59</sup> Judges then compound the problem by applying longer sentences to this higher volume of convictions.<sup>60</sup> These lengthier sentences have consistently resulted in longer time served.<sup>61</sup> Even in cases resolved with plea bargains, judges retain discretion over the ultimate resolution and can drive sentences up or down.<sup>62</sup> That discretion to drive sentences down, however, is often constrained by legislation.<sup>63</sup>

Judges have also used their interpretive discretion largely against defendants in the mass-incarceration era, driving up conviction rates and sentence lengths.<sup>64</sup> Legislatures have driven sentence lengths even higher through harsh punishments for repeat offenses.<sup>65</sup> Even when offenders do not receive lengthy prison sentences, they often find themselves subject to invasive probation and parole systems that lead to frequent reincarceration.<sup>66</sup> The same political pressures that led legislatures to implement harsh criminal laws have also drastically reduced the use of executive clemency — a process whose normalcy was taken for granted in the early days of the republic.<sup>67</sup> These trends have not only filled our prisons

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58. See BELLIN, *supra* note 15, at 110–11; see also Carissa Byrne Hessick, Robert F. Wright & Jessica Pishko, *The Prosecutor Lobby*, 80 WASH. & LEE L. REV. 143, 205–06 (2023) (arguing that prosecutors exercise significant political capital in opposing initiatives to recategorize drug crimes as misdemeanors).

59. BELLIN, *supra* note 15, at 120.

60. *Id.* at 121; see also Audrey Felderman, *Overbroad and Overreaching: How a Broad Interpretation of “Controlled Substance Offense” Diminishes Uniformity and Enhances Federal Criminal Sentences*, 108 IOWA L. REV. 1885, 1912 (2023) (“[I]ncarceration lengths for drug offenses, on average, are roughly thirty months longer than the average for any other federal crime.”).

61. BELLIN, *supra* note 15, at 123.

62. *Id.* at 125–26; see also Vida B. Johnson, *White Supremacy from the Bench*, 27 LEWIS & CLARK L. REV. 39, 53 (2023) (“Unfortunately, we know that judges have demonstrated biases by sentencing Black, Native, and Latino people more harshly than their white counterparts.”).

63. See BELLIN, *supra* note 15, at 128.

64. See *id.* at 130–40; see also Johnson, *supra* note 62, at 54 (“Judges also sentence Black defendants to longer prison terms than white defendants.”).

65. See BELLIN, *supra* note 15, at 141–46; see also William W. Berry III, *Unconstitutional Punishment Categories*, 84 OHIO ST. L.J. 1, 35 (2023) (“Similarly, the movement towards penal populist, tough-on-crime regimes led to the adoption of harsh recidivist punishment schemes, imposing significant premiums on sentences for repeat offenders.” (citation omitted)).

66. See BELLIN, *supra* note 15, at 147–52.

67. See BELLIN, *supra* note 15, at 153–56; see also Teddy Okechukwu, Comment, *Disenfranchisement, Democracy, and Incarceration: A Legislative End to Felony Disenfranchisement in United States Prisons*, 170 U. PA. L. REV. 1303, 1325–26 (2022) (detailing the restrictions imposed by the Florida Clemency Board that resulted in only approximately ten percent of applicants successfully restoring their right to vote between 2011 and 2017).

but also led to an explosion of our jail population, both for pretrial detainees and people serving short sentences.<sup>68</sup> Just as the causes of mass incarceration were complex and interlocking, its mechanisms build upon each other and intensify each other's effects.

Finally, in his fourth part, Bellin confronts what a solution to mass incarceration could look like. Because Bellin identifies mass incarceration with the elevated rates of incarceration from 1980 to the present, he proposes a return to 1970s levels of incarceration as a minimal end goal.<sup>69</sup> While the steps to reach this goal are necessarily many, Bellin focuses on a few that would have the most dramatic effects. First, he proposes shrinking the federal criminal legal apparatus, returning the U.S. Department of Justice to a role of prosecuting serious crimes that states cannot or will not.<sup>70</sup> He also proposes the abandonment of criminal law as a means of achieving public-policy ends.<sup>71</sup> These first two changes would largely operate by decriminalizing certain behaviors. His third suggestion is broadly to pursue policies that reduce the likelihood of criminal activity.<sup>72</sup> For those acts still punishable as crimes after these reforms, Bellin proposes reducing the use of incarceration as a punishment as well as reducing its length when it is used.<sup>73</sup> He recognizes the fragility of these proposed changes if serious crime were to increase—or be perceived to increase.<sup>74</sup> Still, his package of proposals represents an obvious improvement over the status quo.

Bellin is at his best in *Mass Incarceration Nation* when he breaks down the statistical realities of mass incarceration. Fortunately, this is an ever-present theme throughout the book. Bellin frequently manages to capture the most obvious way that a policy contributes to mass incarceration and then come at it from additional angles, always putting the numbers in historical context. Take, for example, his exploration of the effect of legislatures on mass incarceration by increasing punishment and decreasing rehabilitation. Bellin begins with the dominant sentencing regime prior to the 1970s: indeterminate sentencing, designed to promote the reform of convicted criminals.<sup>75</sup> Under the federal form

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68. See BELLIN, *supra* note 15, at 157–58.

69. *Id.* at 166; see also Sawyer & Wagner, *supra* note 13 (providing statistics related to the growth in the number of incarcerated individuals, including those not convicted).

70. BELLIN, *supra* note 15, at 170–74.

71. *Id.* at 175–78.

72. *Id.* at 179–83.

73. *Id.* at 184–93.

74. See *id.* at 179–80.

75. See *id.* at 49–55; see also Nancy J. King, *Constitutional Limits on the Imposition and Revocation of Probation, Parole, and Supervised Release After Haymond*, 76 VAND. L. REV. 83, 91 (2023) (“In

of this model, the average offender served about fifty-eight percent of the imposed sentence.<sup>76</sup> Under its replacement, the average offender could expect to serve approximately eighty-seven percent of the imposed sentence.<sup>77</sup> But the harm wasn't limited to the portion of the sentence actually served; the new regime allowed legislatures to set longer sentencing ranges and mandatory minimums.<sup>78</sup> This was compounded by the elimination or curtailment of parole.<sup>79</sup> Bellin illustrates this trend with charts from a report to the Texas state legislature showing the effects of decreasing parole rates.<sup>80</sup> Yet Bellin recognizes that this pressure was not limited to the mechanics of sentencing itself. He concludes the chapter with an exploration of how legislatures pressured police, prosecutors, and judges to arrest, charge, convict, and sentence more people to more time in prison.<sup>81</sup> Bellin repeats this pattern throughout *Mass Incarceration Nation*, drawing from a wide variety of state and federal sources to document each of the policies he highlights for its contribution to mass incarceration. The result is a comprehensive view of the scale of the problem and the interlocking systems that created and sustain it.

### B. *What We Miss When We Don't Talk About Race*

Bellin's proposed goal for ending mass incarceration—a return to 1970s incarceration rates—hides a major flaw: American criminal law, even before mass incarceration, had racially disparate outcomes.<sup>82</sup> For Bellin, racism is worth

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[the 1970s], many jurisdictions eliminated the discretion of paroling authorities to release prisoners and adopted defined terms of post-confinement community supervision that the judge was allowed or required to impose at initial sentencing along with the sentence of immediate confinement.”). Under indeterminate sentencing, courts routinely issued lengthy sentences that they did not expect defendants to serve in their entirety. Instead, parole boards were expected to evaluate prisoners on a regular basis and release them once they were considered sufficiently reformed to reenter society at large.

76. BELLIN, *supra* note 15, at 53-54.

77. *Id.* Many states implemented “Truth-in-Sentencing” laws, eliminating the discretion that prison administrators and parole boards had previously enjoyed. See James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration> [<https://perma.cc/8CKD-LPDU>].

78. See BELLIN, *supra* note 15, at 54-55.

79. *Id.* at 55-57.

80. *Id.* at 59-60.

81. *Id.* at 61-66.

82. See *id.* at 80 tbl.9.1; see also Johnson, *supra* note 62, at 56 (“Many judges themselves know that the criminal legal system is racist.”); Elizabeth Hinton & DeAnza Cook, *The Mass*



discussing as a reason to end mass incarceration but not worth treating as a primary cause of the legal regime underpinning it. Yet it is worth considering that mass incarceration is not America's first system for subjecting disfavored groups to complete state control.<sup>83</sup> Chattel slavery and Jim Crow regimes dominated the lives of Black Americans, the mass deportation of migrant farm workers denied those workers the protections of labor law, and involuntary civil commitment deprived people with mental illness – often women – of their civil rights and liberty. And although the deinstitutionalization of mental-health patients was not the primary cause of mass incarceration,<sup>84</sup> the stark disparities between the subjects of mental-health institutions and prisons merit exploration. In the decades leading up to mass incarceration, mental hospitals housed a population that was considerably whiter and more female than prisons.<sup>85</sup> Prior to the rise of mass incarceration, America had already established incarceration – rather than psychiatric treatment – as its preferred method of subjecting Black men to institutional control.<sup>86</sup> So, it is little surprise that mass incarceration, a program aimed at increasing that control, would naturally look to prisons (rather than, for example, mental-health institutions) as its primary tool.

Bellin fails to engage in a thorough inquiry into the role of racism in developing mass-incarceration policies. Some of the political movers who brought about elements of mass incarceration were open or thinly veiled in their

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*Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 270–71 (2021) (discussing how racist policing led to the overcriminalization of Black Americans in the first half of the twentieth century, including how eighty percent of people executed in the South in the century following the Civil War were Black and eighty-six percent of drug charges in Chicago in 1955 were against Black people).

83. See Steven Raphael & Michael A. Stoll, *Assessing the Contribution of Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, 42 J. LEGAL STUD. 187, 188 (2013) (charting the rise and fall of involuntary commitment prior to the beginning of mass incarceration).
84. See *id.* at 190 (positing that deinstitutionalization contributed somewhere between four and seven percent of the rise in incarceration between 1980 and 2000).
85. See *id.* at 199 tbl.5 (charting the demographics of prisons and mental institutions from 1950 to 1980).
86. See Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control,"* FRONTLINE (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control> [<https://perma.cc/47VF-GDWC>] ("It's more about control, power, the relegation of some of us to a second-class status than it is about trying to build healthy, safe, thriving communities and meaningful multiracial, multiethnic democracy."); Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *American History, Race, and Prison*, VERA INST. JUST. (Sept. 2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> [<https://perma.cc/9VQK-H5VV>] (discussing America's pattern of incarcerating racial and ethnic minorities in response to real or perceived increases in crime).

bigotry.<sup>87</sup> Others were not so actively bigoted and perhaps were even unaware that the policies they promoted would have racially disparate impacts. Yet racism, particularly in its structural manifestations, need not rely on the deliberate efforts of willful bigots.<sup>88</sup> Discounting racism as a motivating factor for systemic changes simply because some elements of those changes did not increase racial disparity in outcomes would seem, at the very least, premature. Bellin's statistical focus is tremendously successful when he seeks to describe modern mass incarceration and trace how it has changed criminal-legal outcomes since the 1970s. Yet his reliance upon statistics leaves other historical information underdeveloped, particularly relevant discussions in the political and legislative arenas.<sup>89</sup> Bellin relegates racism to only one cause among many, almost in reaction to what he perceives as Alexander's elevation of racism as the core motivation for mass incarceration. In light of his other findings, perhaps it would be fairer to describe racism as a primary cause – though not the sole cause – of mass incarceration.

Nor is racism's role in mass incarceration a newly discovered phenomenon. Angela Davis's struggle for prison abolition, even before Bellin's proposed start date for mass incarceration, sought to end an inherently racist system aimed at the dehumanization of Black people.<sup>90</sup> James Baldwin also understood the coming scale of human oppression that mass incarceration would entail, even at the dawn of the 1970s:

Only a handful of the millions of people in this vast place are aware that the fate intended for you, Sister Angela, and for George Jackson, and for

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87. Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 654-57 (2021) (recounting the racist origins of the political push for the "War on Drugs").

88. See, e.g., John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIA. L. REV. 1067, 1068 (1998) ("[W]e generally confront issues of race in this country simultaneously on three levels: public policy, institutional, and individual. Transcending these levels, we find that race is highly embedded within our societal organization and cultural understandings.").

89. See generally Brad Miller, *Confessions of a Tough-on-Crime Progressive*, AM. PROSPECT (July 13, 2020), <https://prospect.org/politics/confessions-of-a-tough-on-crime-progressive> [<https://perma.cc/E475-CCFP>] (discussing the political pressures and public perceptions shaping crime policy from the late 1980s to the present).

90. See CHARLENE MITCHELL, *THE FIGHT TO FREE ANGELA DAVIS: ITS IMPORTANCE FOR THE WORKING CLASS 2* (1972) ("Davis struggles especially for . . . the ending of a prison system of which a major aim is to punish people on the basis of their color and their class, a prison system that attempts to dehumanize rather than rehabilitate, a prison system that intensifies the inherent racism of U.S. capitalism.").

the numberless prisoners in our concentration camps – for that is what they are – is a fate which is about to engulf them, too.<sup>91</sup>

The Black Panther Party included an end to the incarceration of Black and poor people among the demands of its Ten Point Program.<sup>92</sup> Even before mass incarceration required the expansion of prisons on an industrial scale, the inmates at Attica recognized the inhumanity of their treatment.<sup>93</sup> Still, opponents of Black liberation like Richard Nixon understood the necessity of prisons to oppress Black people.<sup>94</sup> Bellin’s presentation of the interlocking mechanisms of mass incarceration as something of a perfect storm that was necessary for its emergence disregards the lived experience of Black people in the years before its expansion. Mass incarceration was no perfect storm; it was an inevitable and nearly inescapable consequence of the racism and exploitation coiled in the heart of American society.

After understating racism’s role in the rise of mass incarceration, Bellin largely leaves it unconsidered in his exploration of the mechanics of mass incarceration and his proposed remedies. Ending mass incarceration requires ending the overpolicing of Black and Brown communities.<sup>95</sup> It also requires redressing the economic, educational, and social factors that so often leave Black and Brown defendants at a disadvantage in the criminal legal system. That sort of systemic

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91. James Baldwin, *An Open Letter to My Sister, Miss Angela Davis*, N.Y. REV. BOOKS (Jan. 7, 1971), <https://www.nybooks.com/articles/1971/01/07/an-open-letter-to-my-sister-miss-angela-davis> [<https://perma.cc/SR2B-PFFN>].
  92. *The Black Panther Party Ten-Point Program*, DR. HUEY P. NEWTON FOUND. (May 13, 1972), <https://hueypnewtonfoundation.org/advocacy> [<https://perma.cc/3DYF-QPYD>] (“We believe in the ultimate elimination of all wretched, inhuman penal institutions, because the masses of men and women imprisoned inside the United States or by the U.S. military are the victims of oppressive conditions which are the real cause of their imprisonment.”).
  93. *Compare Attica Liberation Faction*, *supra* note 31, at 1 (“The programs which we are submitted to under the facade of rehabilitation, is relative to the ancient stupidity of pouring water on a drowning man, in-as-much as we are treated for our hostilities by our program administrators with their hostility as medication.”), *with* Brooks, *supra* note 8, at 162 (“Even at Attica, although the state legislature acted on the inmates’ demands, the prison culture in which the Attica riots occurred has not fundamentally changed. In . . . the ‘tough-on-crime’ 1990’s, the culture of prisons across America is disturbingly similar to the culture of Attica at the time of the uprising.”).
  94. See Becky Little, *What the Nixon Tapes Reveal About the Attica Prison Uprising*, HIST. (Sept. 11, 2019), <https://www.history.com/news/nixon-tapes-attica-prison-uprising> [<https://perma.cc/EW4D-SWQ4>] (documenting Nixon and his allies’ paranoia that the Attica Uprising could signal a more widespread Black revolt and state governments’ efforts to spread anti-Black misinformation during and after the uprising).
  95. See Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1121 (2020) (“Increasingly intense and frequent policing of Black communities has predictably resulted in the mass incarceration of Blacks.”).

change is a core feature of abolitionism – a movement Bellin mentions but fails to engage with fully.

Bellin expresses some confusion as to the nature of the disagreement between reformers and abolitionists.<sup>96</sup> The structure of their proposed remedies is revealing. Where reformers seek to change present institutions for the better, abolitionists recognize that an equitable system cannot be made by simply smoothing the edges of deeply inequitable components. Abolitionists rather seek to establish new, just institutions whose flourishing will reduce the old ones to obsolescence.<sup>97</sup> Abolition does not seek the immediate destruction of a harmful system but instead exhorts us to build a better one alongside it. Abolitionists seek to build an abolition democracy to replace our oligarchy in democratic costume: “Abolition democracy is the creation of life- and liberty-affirming institutions that ensure all people have the respect, education, economic security and resources, civil rights, and franchise necessary to be free, informed, and active participants in all significant aspects of public life.”<sup>98</sup> In failing to engage the scope of racism and the goals of abolitionism, Bellin leaves much more to be said about whether prisons have any place in a democracy.

### C. *Is Prison Compatible with Democracy?*

The Black community has long understood that prisons are meant to exclude us from democratic participation.<sup>99</sup> Bellin’s statistical analyses demonstrate that these systems are working as Black people feared they would under mass incarceration. Even without these exclusionary mechanisms, American democracy is limited at best.<sup>100</sup> But prison’s role in American democracy’s shortcomings is not self-evident. Prison and its accompanying disenfranchisement could be

96. BELLIN, *supra* note 15, at 165.

97. See Hasbrouck, *supra* note 95, at 1111 (“Abolition requires that we reimagine public safety and think about transformative, community-based measures.”).

98. Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 689-90 (2022).

99. See *supra* notes 90-93 and accompanying text.

100. See, e.g., Jamelle Bouie, *Where American Democracy Isn’t Very Democratic*, N.Y. TIMES (Feb. 3, 2023), <https://www.nytimes.com/2023/02/03/opinion/police-violence-democracy.html> [<https://perma.cc/6FRK-8D>]7] (contrasting the experience of affluent communities who view government as something in which they participate with the experience of marginalized communities for whom government is something controlling their lives); Sophia Rosenfeld, *Popular Rule: Has the United States Ever Been a Democracy?*, NATION (Jan. 3, 2023), <https://www.thenation.com/article/society/jedediah-purdy-two-cheers-for-politics> [<https://perma.cc/XQ92-5AB8>] (“Pointing out that the country is rife with restrictions on voting and unrepresentative and oligarchic institutions, [leftists] have argued that the United States is still actually far less subject to the rule of the people than most Americans like to think.”).

consequences of antidemocracy, underlying conditions exacerbating antidemocracy, or tools of antidemocratic forces. Parts II and III advance the argument that the latter is the case. Depending on the relationship between prison and antidemocracy, democracy's proponents might answer the question of whether prison is compatible with democracy anywhere from a cautious acceptance to an abolitionist mandate.

On a certain level, the question of whether prison is compatible with democracy invites an obvious answer. All real-world democracies utilize some form of incarceration. Even the Netherlands, which sentences extremely few people to prison—and typically only for brief stays—still maintains prison as a potential intervention in criminal cases.<sup>101</sup> The Dutch system favors alternatives, such as fines, ankle monitors, and inpatient psychiatric treatment.<sup>102</sup> The Netherlands also possesses a model democracy, ranking seventh on the Democracy Matrix's 2020 ranking.<sup>103</sup> The Netherlands and the six countries ranked ahead of it on the Democracy Matrix all share remarkably low incarceration rates at less than seventy-five incarcerated persons per 100,000 population, compared with 629 incarcerated persons per 100,000 population in the United States.<sup>104</sup> Nor do any of those countries permit the death penalty.<sup>105</sup> As the abolitionist Ruth Gilmore Wilson has said of countries with shorter sentencing practices, "Where life is precious, life is precious."<sup>106</sup> Advanced democracies might retain some role for

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101. See Senay Boztas, *Why Are There So Few Prisoners in the Netherlands?*, GUARDIAN (Dec. 12, 2019, 2:00 AM EST), <https://www.theguardian.com/world/2019/dec/12/why-are-there-so-few-prisoners-in-the-netherlands> [<https://perma.cc/3XNQ-MXAH>] ("Half of the people in Dutch prisons have received a one-month sentence, she says, and almost half entering detention in 2018 were actually awaiting trial.").

102. See *id.*

103. See Democracy Matrix, *Ranking of Countries by Quality of Democracy*, JULIUS-MAXIMILIANS-UNIVERSITÄT WÜRZBURG (2020), <https://www.democracymatrix.com/ranking> [<https://perma.cc/M9C4-2D2Z>].

104. Compare *id.* (listing the top scoring democracies as Denmark, Norway, Finland, Sweden, Germany, Switzerland, and the Netherlands, all with ratings of at least 0.93, compared to the United States, in thirty-sixth place with a rating of 0.811), with *Incarceration Rates by Country 2023*, WORLD POPULATION REV. (2023), <https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country> [<https://perma.cc/PGN9-CQUP>] (providing incarceration rates of seventy-two for Denmark, fifty-six for Norway, fifty for Finland, seventy-three for Sweden, seventy for Germany, seventy-three for Switzerland, and sixty for the Netherlands).

105. See *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR. (2023), <https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries> [<https://perma.cc/7K83-5MUY>].

106. Rachel Kushner, *Is Prison Necessary? Ruth Gilmore Wilson Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/QU9B-Z99F>].

prison, but its use differs significantly in both quantity and quality from the American model.

The common thread among these advanced democracies is their commitment to prison as a rehabilitative tool. For some small number of dangerous individuals who cannot or will not safely participate in society, prison remains an option beyond that rehabilitative function.<sup>107</sup> Accordingly, the policies of these advanced democracies focus on rehabilitation and incapacitation. The Netherlands and similar countries focus on alternatives to prison to achieve most of their rehabilitation and incapacitation goals.<sup>108</sup>

As Bellin notes, prison is not particularly effective at rehabilitation<sup>109</sup> or incapacitation<sup>110</sup> in America. American prisons have largely abandoned these goals, focusing instead on harsh, punitive sentencing.<sup>111</sup> Even before this shift, the racially inequitable application of rehabilitation standards in American parole systems created a justice gap<sup>112</sup> with their European counterparts. Rather than serving public safety, American prisons function to make those who break the rules suffer for those transgressions.<sup>113</sup> Yet the rules and their enforcement are easily tailored to inflict disproportionate harm on politically disfavored groups – Black people, trans people, Indigenous people, Muslim people, etc. – compounding their marginalization. This harshly retributive use of prison clearly conflicts with the values of societies capable of building and maintaining such a democracy. America is an outlier, long pushed toward retributivism by political and cultural forces.<sup>114</sup> American criminal law even manages to twist the

107. See generally Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2010 (2022) (discussing the challenge for prison abolitionists in how to account for those individuals who are dangerously violent and would remain so even in ideal material circumstances with robust rehabilitative treatment).

108. See Boztas, *supra* note 101.

109. BELLIN, *supra* note 15, at 51–52.

110. *Id.* at 192.

111. See *supra* notes 75–80 and accompanying text.

112. By “justice gap,” I mean the difference between American and European systems’ ability to affect the equitable application of the law to differently positioned individuals.

113. See Henry Gass, Jessica Mendoza & Samantha Laine Perfas, *Punishment or Rehabilitation? Why America Locks People Up.*, CHRISTIAN SCI. MONITOR: PERCEPTION GAPS (Aug. 31, 2020), [https://www.csmonitor.com/Podcasts/Perception-Gaps/Season-2-Locked-Up/perception\\_gaps\\_s2\\_ep\\_05](https://www.csmonitor.com/Podcasts/Perception-Gaps/Season-2-Locked-Up/perception_gaps_s2_ep_05) [<https://perma.cc/M86V-VCTU>] (discussing the American prison system’s focus on retribution and incapacitation while largely failing at rehabilitation and deterrence).

114. See James Q. Whitman, *When the Focus Is Retribution*, N.Y. TIMES (Jan. 21, 2011, 12:16 PM), <https://www.nytimes.com/roomfordebate/2011/01/20/who-qualifies-for-the-insanity-defense/when-the-focus-is-retribution> [<https://perma.cc/36QR-G42X>] (“Contemporary American law is unique among advanced industrial countries in its focus on blame and retribution.”).

Netherlands' favored alternative solutions into tools of antidemocratic subjugation.<sup>115</sup> The implementation of fines, remote monitoring, and psychiatric treatment in American criminal law demonstrates one of the key shortcomings of reformism: the system itself is rotten with antidemocracy, and the rot will spread to attempts to graft reforms onto it.

Even if a humane form of incarceration, minimally applied to confine only the few truly dangerous individuals within a predominantly restorative framework of criminal justice, could be compatible with a democratic society, the utilization of prison as a retributive tool bears the stain of antidemocracy. Changing American prisons to be compatible with democracy, even in its limited American practice, would require rejecting both the retributive character of American criminal law and the scope of mass incarceration. The antidemocratic elements of American prisons are not uniquely American. Antidemocratic actors will always seek to employ such an effective means for enforcing control within a society. Yet, they do serve to distinguish the American criminal legal system from those of other democratic societies.

While mass incarceration itself is a form of antidemocracy, its attendant circumstances provide additional opportunities for antidemocratic forces. These fall most immediately and obviously on the individuals who are incarcerated. All but two states practice some form of felon disenfranchisement, for instance, depriving prisoners of participation in democratic systems, often for long after their release.<sup>116</sup> Prisoners are frequently counted as residents of the communities where they are imprisoned during redistricting, allowing for the creation of districts that often transfer the representation of Black and Brown urban people to

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115. See C.R. Div., *Investigation of the Ferguson Police Department*, U.S. DEP'T OF JUST. 2 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/B84N-H455>] (discussing the City of Ferguson's use of fines and monetary penalties to drive racist policing); Kate Weisburd & Alicia Virani, *The Monster of Incarceration Quietly Expands Through Ankle Monitors*, L.A. TIMES (Mar. 15, 2022, 3:00 AM), <https://www.latimes.com/opinion/story/2022-03-15/electronic-monitoring-pretrial-bail-mass-incarceration> [<https://perma.cc/9TU7-NBUC>] (“[J]udges seem to be defaulting to electronic monitoring, perhaps for people who would . . . otherwise be free. For people who would otherwise be in jail, monitoring may be preferable. But for people who are monitored instead of being released on their own recognizance, monitoring reflects a[n] . . . expansion of the carceral state.”); Trevor Hoppe, Ilan H. Meyer, Scott De Orio, Stefan Vogler & Megan Armstrong, *Civil Commitment of People Convicted of Sex Offenses in the United States*, UCLA SCH. L. WILLIAMS INST. (Oct. 2020), <https://williamsinstitute.law.ucla.edu/publications/civil-commitment-us> [<https://perma.cc/9M7Z-GECV>] (detailing how the racial inequalities of mass incarceration are replicated in the civil commitment of persons deemed sexually violent predators).

116. See Uggen et al., *supra* note 20.

white rural voters.<sup>117</sup> The collateral consequences of conviction frequently undermine a person’s economic opportunities after release, dramatically restricting their practical freedom long after the completion of their sentence.<sup>118</sup>

American prisons also serve to undermine American democracy by providing government actors with a politically uncontroversial space to implement new antidemocratic tactics. The courts then legitimize such tactics, allowing them to expand gradually out into general use. The remainder of this Book Review explores the patterns involved in developing such tactics in prison and applying them against the body politic.

## II. PRISON’S EXPERIMENTS IN ANTIDEMOCRACY

The arena’s mainframe for the obedience disks have been deactivated and the slaves have armed themselves.

Oh, stop. I don’t like that word.

Which? Mainframe?

No. Why would I not like ‘mainframe’? No, the ‘S’ word.

Sorry, the prisoners with jobs have armed themselves.

—Topaz and the Grandmaster in *Thor: Ragnarok*<sup>119</sup>

Prisons require at least some measure of antidemocracy to operate. On a fundamental level, prisons cannot operate fully democratically because incarcerated persons are inherently unable to participate in certain decisions affecting their lives. Even in Scandinavian open prisons—where people are held in conditions relatively close to normal life, without high walls and with the ability to participate in society outside the prison—incarcerated people are constantly aware of their confinement.<sup>120</sup> American prisons embrace a much greater form of

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117. See Fisher, King & Limón, *supra* note 21 (“Prison gerrymandering turns disparities in incarceration into disparities in representation; electoral maps do not reflect the true size of the largely Black and Latino urban communities.”).

118. See Ed Lyon, *Collateral Consequences of Mass Incarceration*, PRISON LEGAL NEWS (Feb. 1, 2021), <https://www.prisonlegalnews.org/news/2021/feb/1/collateral-consequences-mass-incarceration> [<https://perma.cc/249W-399S>].

119. THOR: RAGNAROK (Marvel Studios 2017), at 1:27:59.

120. See Doran Larson, *Why Scandinavian Prisons Are Superior*, ATLANTIC (Sept. 24, 2013), <https://www.theatlantic.com/international/archive/2013/09/why-scandinavian-prisons-are-superior/279949> [<https://perma.cc/5HBD-CYFA>] (“This is the polished glass nightmare. Every emotional discomfort, every moment of remorse that you might try to cover with resentment of the system, everything you try to grip onto to crawl away from personal responsibility slides back into the pit of the self.”).



antidemocracy, often approaching the conditions of slavery.<sup>121</sup> The institutional interest in security and order often takes precedence over the rights of incarcerated people.<sup>122</sup> American courts are largely content to take a deferential approach to the review of antidemocratic conditions in prisons.<sup>123</sup>

This Part explores the antidemocratic policies that prison administrators and legislators have enacted to oppress incarcerated people. First, Section II.A deals with the regimes that prisons utilize to prevent labor organizing among incarcerated people. Next, Section II.B addresses prisons' efforts to restrict access to literature. Then, Section II.C explores prisons' assaults on bodily autonomy, focusing on reproductive and transgender rights. Finally, Section II.D discusses some of the legal regimes that prison administrators rely upon to curtail remedies for official misconduct. These policy areas are particularly useful demonstrations of antidemocratic prison policies both because of how they cut to the heart of the meaningful participation and dignity at the core of democracy<sup>124</sup> and because of their prominence in recent antidemocratic policymaking outside of prisons. Antilabor practices and restrictions on bodily autonomy represent restrictions on liberty characteristic of neoliberalism's political project of reducing private economic liberty—practically available only to the wealthy—to the only cognizable liberty interest.<sup>125</sup> Access to literature and bodily autonomy are also

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121. See Michael Sainato, 'Slavery by Any Name Is Wrong': The Push to End Forced Labor in Prisons, *GUARDIAN* (Sept. 27, 2022, 6:00 AM EDT), <https://www.theguardian.com/us-news/2022/sep/27/slavery-loophole-unpaid-labor-in-prisons> [<https://perma.cc/N5R8-JJHA>] ("About 800,000 prisoners out of the 1.2 million in state and federal prisons are forced to work, generating a conservative estimate of \$11bn annually in goods and services while average wages range from 13 cents to 52 cents per hour.").
122. See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").
123. See *id.* at 548 ("[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.").
124. It is worth reiterating that voting alone is insufficient to produce or sustain a democracy, and that it instead requires the meaningful participation of all people as political equals. See *supra* notes 16-18 and accompanying text.
125. See Regina Queiroz, *Individual Liberty and the Importance of the Concept of the People*, 4 *PALGRAVE COMM'NS*, art. no. 99, at 2 (2018) ("[T]he philosophical assumptions underlying Hayek's political economy and Nozick's libertarianism allow us to clarify the connection between the exclusion of the people as a political category and neoliberalism's promotion of a servile citizenry.").

key dignity interests necessary to a robust democracy.<sup>126</sup> Access to legal recourse is necessary to ensure the protection of key liberty, equality, and dignity interests. Restrictions in these fields represent some of the core threats of antidemocracy.

### A. *Antilabor Practices*

Antilabor sentiment is nothing new for the forces of American antidemocracy.<sup>127</sup> After all, professional policing in this country began in response to people seeking to exert control over their own labor, whether by escaping slavery or forming unions.<sup>128</sup> American business is no stranger to seeking to use government to solidify the dominance of capital over labor.<sup>129</sup> Labor relations in prison dispense with even the pretense that the employment relationship is a negotiation between parties bargaining for an exchange of labor for money. Incarcerated persons are among the cheapest labor available to private companies.<sup>130</sup> While antidemocratic labor practices are widespread in America, they take a particularly aggressive form in prisons.

Wage and hour protections, collective-bargaining rights, and even the Thirteenth Amendment's prohibition against slavery typically lack federal application to incarcerated persons.<sup>131</sup> Freed from these federal restraints, prison

126. See Josiah Ober, *Democracy's Dignity*, 106 AM. POL. SCI. REV. 827, 827 (2012) ("Self-governance requires . . . [citizens to] be willing and able to act as free citizens. It requires . . . that their standing be high. When citizens live with indignity, or live with the knowledge that by exercising participation rights they risk indignity, they are unable to make effective use of political liberty.").

127. See Bowie, *supra* note 16, at 161-62 (discussing the pattern of antidemocratic labor practices in America).

128. See Gary Potter, *The History of Policing in the United States, Part 2*, EKU ONLINE (July 2, 2013), <https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-2> [<https://perma.cc/T7SV-3UJP>] (discussing the motivation of labor control in the origin of publicly funded police forces in the United States); Hasbrouck, *supra* note 95, 1114-17 (discussing the separate origins of policing in the northern and southern states as a means to exert control over Black labor).

129. See Ria Modak, *Police Unions Are Anti-Labor*, HARV. POL. REV. (Aug. 9, 2020), <https://harvardpolitics.com/police-unions-are-anti-labor> [<https://perma.cc/3298-MBX5>] ("The police, the National Guard and the U.S. Army played an integral role in suppressing the Great Strike of 1877, the Homestead Strike of 1892 and the Lawrence Strike of 1912, to name a few examples. In each of these incidents, the police resorted to extreme violence . . .").

130. See Andrea C. Armstrong, *Beyond the 13th Amendment—Captive Labor*, 82 OHIO ST. L.J. 1039, 1046 (2021) (describing over a billion dollars of prison labor value exploited in 2017 alone).

131. See Tiffany Yang, *Public Profiteering of Prison Labor*, 101 N.C. L. REV. 313, 319 (2023) ("These courts determined that because an incarcerated worker was ultimately controlled and governed by prison officials, it was clear that the worker's labor 'belonged to' the state and could

administrators and state legislators are emboldened to advance novel antilabor policies in prison. Prison administrators won the power to bar key organizing efforts among incarcerated workers in the 1977 case *Jones v. North Carolina Prisoners' Labor Union, Inc.*<sup>132</sup> Since then, they have challenged labor organizing among incarcerated workers even when those workers labor outside of prison walls or for private-sector employers.<sup>133</sup> Companies and government agencies exploiting the labor of incarcerated workers similarly opposed those workers' claims of protection under other federal and state labor laws.<sup>134</sup>

The results are predictable. Incarcerated workers in the federal Prison Industries Enhancement Certification Program net an average monthly pay of about \$304—a sum that often cannot cover the clothing, hygiene products, supplemental nutrition, and communications with home that prisoners must purchase.<sup>135</sup> Some states, particularly in the South, don't require incarcerated people

not qualify as employment for [Fair Labor Standards Act] purposes.”); *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 129 (1977) (“The ban on inmate solicitation and group meetings, therefore, was rationally related to the reasonable, indeed to the central, objectives of prison administration.”); Michele Goodwin, *The Thirteenth Amendment's Punishment Clause: A Spectacle of Slavery Unwilling to Die*, 57 HARV. C.R.-C.L. L. REV. 47, 52 (2022) (“The legal persistence of slavery and involuntary servitude in American prisons and jails brings their shameful past into the unresolved and largely unaddressed present.”).

132. 433 U.S. at 132 (holding that the prohibition on inmate-to-inmate union solicitation was both reasonable and necessary).
133. See, e.g., *Speedrack Prods. Grp., Ltd. v. NLRB*, 114 F.3d 1276, 1278 (D.C. Cir. 1997) (citing a Department of Corrections (DOC) policy prohibiting incarcerated persons on work-release programs from joining unions); *R.I. Council 94 v. State*, 714 A.2d 584, 592 (R.I. 1998) (vacating an arbitration award which found that the “state’s statutory use of prison labor to accomplish work normally carried out by union members” renders the prison inmates “who are engaged in bargaining-unit labor at the direction” of the DOC “employees of the state within the meaning of the labor contract”).
134. See, e.g., *George v. SC Data Ctr., Inc.*, 884 F. Supp. 329, 334 (W.D. Wis. 1995) (“[W]here remuneration for an inmate’s labor is set and paid by his or her custodian, that prisoner is barred from asserting a claim under the Fair Labor Standards Act because such an inmate is not an ‘employee’ under that act.”); *Williams v. S.C. Dep’t of Corr.*, 641 S.E.2d 885, 886-88 (S.C. 2007) (determining that a company utilizing the services of incarcerated workers is explicitly not their employer under state law); *Prieur v. D.C.I. Plasma Ctr. of Nev., Inc.*, 726 P.2d 1372, 1373 (Nev. 1986) (“Respondent asserted that the minimum wage laws did not apply to prisoners, and that appellants’ complaints failed to state claims upon which relief could be granted.”); *Closson v. Town of Sw. Harbor*, 512 A.2d 1028, 1030 (Me. 1986) (“Since a participant in the work program neither received nor could have expected to receive remuneration or wages for the services that he performs, no employment relationship existed between the Town and the plaintiff that would make the provisions of the [Workers’ Compensation] Act applicable.”).
135. Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 960 (2016); Alex Arriaga, *Why Is Commissary So Expensive? Prices for Everyday Goods*

to be paid for their labor at all.<sup>136</sup> Incarcerated workers at Louisiana’s Angola prison farm receive between four and twenty cents per hour for their labor while working up to sixty-five hours per week and generating millions of dollars in revenue for the company that sells their products.<sup>137</sup> And incarcerated people’s labor typically does not earn them credit toward Social Security benefits.<sup>138</sup> This arrangement benefits many government and corporate parties but does so at the incarcerated person’s expense.<sup>139</sup> Prison labor is slavery transformed for modern legal restrictions and hidden away to avoid the discomfort of looking upon it.<sup>140</sup> Prisons and the legal regimes that support them quietly alienate incarcerated people from as much of the value of their labor as they practically can.

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*in Prison Soar Amid Inflation*, USA TODAY (May 2, 2023, 2:35 PM ET), <https://www.usatoday.com/story/news/nation/2023/05/02/prison-commissary-prices-soar-amid-inflation/70170625007> [<https://perma.cc/T2ZU-GG2X>] (“Incarcerated people often rely on items purchased from commissaries when the state-issued meals and personal hygiene items fall short. People behind bars also pay an additional ‘tax’ on these items, experts said, in the form of unregulated markups that tack on as much as 66% of the price.”).

136. See Armstrong, *supra* note 130, at 1053; Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> [<https://perma.cc/2U2G-JQNK>] (providing a chart showing high and low wages for incarcerated individuals working for prisons themselves versus state-owned businesses in each state).
137. See Laura I. Appleman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WIS. L. REV. 619, 648-49 (describing the business model at the Angola prison farm, which has changed little from chattel slavery).
138. See Stephanie Hunter McMahon, *Inmates May Work, but Don’t Tell Social Security*, 72 S.C. L. REV. 757, 760 (2021) (“[I]nmates may work their entire prison sentence and, yet, on release discover that they no longer have sufficient years left in their working lives to earn the benefits of Social Security for themselves or their dependents.”).
139. See Neveen Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 VA. J. SOC. POL’Y & L. 65, 81 (2019) (“However, there is one key party not benefitting, overlooked by this analysis: the prisoners whose labor and vulnerability is exploited.”).
140. See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 963 (2019) (“There is a sharp and profound distinction between work and slavery. Work implies fair compensation for the labor delivered. Slavery relates to uncompensated labor, bondage, and servitude. Abysmally low prison wage does not fit within the norm of what traditional definitions of ‘work’ convey and more fittingly locates within the slavery contexts.”).

*B. Access to Literature*

Prisons also operate to alienate incarcerated people's minds by restricting their access to literature and other forms of entertainment.<sup>141</sup> The exact policies involved vary wildly from state to state, as well as between states and the federal system, but some trends emerge from a survey of prison censorship policies. Generally, prison censorship policies can be grouped by whether the institution maintains a defined list of banned books or utilizes guidelines to determine whether or not a publication is acceptable.<sup>142</sup> Censorship policies can also be grouped by whether a publication must be approved before it is made available to incarcerated persons or whether the institution must actively forbid it.<sup>143</sup> Regardless of the mechanisms of censorship, American prisons operate to restrict the information available to incarcerated persons.

The rationale for such censorship is typically the necessity to maintain control of the prison environment.<sup>144</sup> Several common subjects—such as means of escape,<sup>145</sup> the manufacture of alcohol or other controlled substances,<sup>146</sup> and

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141. See Clay Calvert & Kara Carnley Murree, *Big Censorship in the Big House—A Quarter-Century After Turner v. Safley: Muting Movies, Music & Books Behind Bars*, 7 NW. J.L. & SOC. POL'Y 257, 270-79 (2012) (discussing federal appellate court cases in which courts upheld prisons' bans on sexually explicit material, the popular roleplaying game *Dungeons & Dragons*, and an abolitionist newsletter critical of the prison system).

142. Compare ALA. DEP'T CORR. ADMIN. REGUL. 448(V)(H)(4) (Oct. 20, 2008) (granting the warden personal discretion in determining whether a book or publication violates prison standards), with Keri Blakinger, Ryan Murphy, Elan Kiderman Ullendorff & Andrew Rodriguez Calderón, *The Books Banned in Your State's Prisons*, MARSHALL PROJECT (Feb. 23, 2023, 10:30 PM), <https://www.themarshallproject.org/2022/12/21/prison-banned-books-list-find-your-state> [<https://perma.cc/WS2K-Z3G3>] (providing a list of books banned in particular states' prisons).

143. Compare COLO. DEP'T CORR. ADMIN. REGUL. 300-26(IV)(B) (Nov. 15, 2023) (implementing a mailroom-review policy for each incoming publication before it can be made available), with IND. DEP'T CORR. POL'Y & ADMIN. PROC. 02-01-103(III)(O) (Aug. 22, 2023) (defining "prohibited property" as any item not specifically permitted by other specific department procedures).

144. See *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

145. See, e.g., DEL. DEP'T CORR. POL'YS & PROCS. 4.5(IV)(A)(6)(b) (Apr. 4, 2015) (prohibiting a publication if it "depicts, encourages or describes methods of escape . . . or contains blueprints, drawings or similar descriptions of DOC institutions").

146. See IDAHO DEP'T CORR. STANDARD OPERATING PROC. 402.02.01.001(4) (Mar. 11, 2018) (prohibiting "[p]ublications or items that describe the manufacture of . . . alcohol and drugs").

information which could assist someone in violent acts<sup>147</sup> – are forbidden under this reasoning. The rationale of control extends much further, though, often encompassing material of a sexual nature,<sup>148</sup> works deemed racist,<sup>149</sup> and information that could encourage or facilitate collective action and resistance.<sup>150</sup> Some even extend the logic to forbid material on anatomy,<sup>151</sup> electronics,<sup>152</sup> and computers.<sup>153</sup> The list of forbidden subjects is at times so extensive as to convey a desire for total control over incarcerated persons.

Our courts have recognized the issue of access to literature as clearly implicating the First Amendment.<sup>154</sup> Yet the extreme deference that prison administrators receive when making censorship decisions renders what would often be one of the most powerful constitutional rights nearly a dead letter for incarcerated people.<sup>155</sup> Since even a single corrections official’s testimony that a

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147. See, e.g., ILL. DEP’T CORR. ADMIN. DIRECTIVE 04.01.108(II)(G)(2)(d) (Aug. 1, 2022) (prohibiting publications that “blatantly encourage[] activities that may lead to the use of physical violence or group disruption”).

148. See, e.g., IND. DEP’T CORR. POL’Y & ADMIN. PROC. 02-01-103(XIX)(H) (Aug. 22, 2023) (prohibiting materials depicting nudity); see also *Cline v. Fox*, 319 F. Supp. 2d 685, 696 (N.D. W. Va. 2004) (enjoining a department directive that prohibited novels by John Updike for being sexually suggestive, while permitting commercial pornography magazines, such as *Playboy*).

149. See, e.g., KAN. DEP’T CORR. INTERNAL MGMT. POL’YS & PROCS. 12-134A (Dec. 6, 2021) (prohibiting publications that “overtly advocate[] or encourage[] . . . racial animus and not merely describe[] the same”).

150. See, e.g., *Visitation, Communication, & Services Reference Guide for Visitors, Families, Friends, & Loved Ones of the Incarcerated*, MD. DEP’T PUB. SAFETY & CORR. SERVS. 13-14 (Oct. 15, 2021), <https://qrco.de/bc83rd> [<https://perma.cc/7BJH-NUBR>] (“Mail and Books Must Not Contain . . . [m]aterials that advocate for or provide instruction in the formation of inmate unions.”); see also *Singer v. Raemisch*, 593 F.3d 529, 531-32, 540 (7th Cir. 2010) (upholding a regulation prohibiting materials related to *Dungeons & Dragons*, which the department deemed a security threat for encouraging gang activity).

151. See, e.g., ARIZ. DEP’T CORR. REHAB. & REENTRY ORD. 914.7.2.18 (Aug. 12, 2022) (prohibiting “[m]edical publications that may contain diagrams of the human anatomy”).

152. See, e.g., CAL. CODE REGS. tit. 15, § 3135(c)(9) (2023) (prohibiting materials that “[c]ontain[] illustrations, explanations, and/or descriptions of how to sabotage or disrupt computers, communications, or electronics”).

153. See, e.g., ARIZ. DEP’T CORR. REHAB. & REENTRY ORD. 914.7.2.10 (Aug. 12, 2022) (prohibiting “[d]etailed illustrations, explanations, and/or descriptions of computers, communications systems or electronics”).

154. See, e.g., *Beard v. Banks*, 548 U.S. 521, 527-28 (2006) (discussing a prison’s restriction on which inmates could possess magazines, photographs, and newspapers in the First Amendment context).

155. Compare *id.* at 531-32 (“The articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, are logical ones. Thus, the first factor supports the Policy’s ‘reasonableness.’”),

restriction would aid in security or discipline may be sufficient to overcome (a slightly modified) rational-basis review, there is almost no censorship that a prison cannot justify.<sup>156</sup> This extraordinary deference gives antidemocratic actors an unparalleled opportunity to implement different combinations of censorship in a controlled environment.

### C. *Bodily Autonomy*

The efforts of antidemocratic actors to replicate the conditions of slavery in prisons are not merely limited to extracting the labor of incarcerated people. Prisons also frequently violate incarcerated people's bodily autonomy. While some of the most horrific examples of this—particularly human experimentation<sup>157</sup>—are largely confined to the past, others continue. This Section discusses two areas where prisons violate incarcerated people's bodily autonomy. First, Section II.C.1 discusses how prisons violate incarcerated people's reproductive rights, whether through denial of access to healthcare, sterilization, or disruption of familial rights. Then, Section II.C.2 discusses how prisons violate the bodily autonomy of incarcerated transgender people.

#### 1. *Reproductive Rights*

Incarcerated people face significant barriers to exercising their reproductive rights. Around four or five percent of incarcerated women are pregnant at the time of their incarceration.<sup>158</sup> Other incarcerated persons become pregnant

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*and Raemisch*, 593 F.3d at 536-37 (“Once the prison officials provided the court with a plausible explanation for the D & D policy, that the game’s structure . . . mimicked that of gangs, and could consequently promote gang development and undermine prison security, the burden shifted to Singer to present evidence to call that explanation into question.” (citations omitted)), *with Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (“Because the Town’s Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, ‘which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.’” (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011))).

156. *But see Hrdlicka v. Reniff*, 631 F.3d 1044, 1051-55 (9th Cir. 2011) (critically examining a jail administrator’s reasoning for refusing to allow distribution of an unsolicited magazine critical of the carceral state and finding the reasoning to be insufficient).

157. See Laura I. Appleman, *The Captive Lab Rat: Human Medical Experimentation in the Carceral State*, 61 B.C. L. REV. 1, 20 (2020) (“The [National] Commission [for the Protection of Human Subjects of Biomedical and Behavioral Research] essentially forbade medical research on prisoners . . . . In theory, the only research that is now permitted in correctional facilities is that deemed minimal-risk.”).

158. See Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women*, 18 UCLA WOMEN’S L.J. 79, 81-82 (2010).

during their time in prison.<sup>159</sup> Incarcerated people who wish to carry their pregnancies to term face difficulties in obtaining proper medical care, which is often left to the discretion of prison administrators or medical contractors.<sup>160</sup> Those who seek to exercise their right to an abortion face additional barriers: abortion care must be obtained at an outside facility and typically at the incarcerated person's expense.<sup>161</sup> This assault on incarcerated people's bodily autonomy directly recalls the core horrors of chattel slavery.<sup>162</sup>

Standard accounts of state sterilization programs couch them as an episode of our shameful past.<sup>163</sup> Yet tubal-ligation surgeries and chemical castration remain in use today.<sup>164</sup> Medical care for incarcerated people all too often fails to satisfy basic informed consent, resulting in patients not even realizing that they

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159. See *id.* at 82 (discussing both opportunities incarcerated persons have for sexual contact and the risk of rape).

160. See *id.* at 83 (“Legislatures are not actively involved in designing medical policies for people in prison. Departments of Correction may develop such policies internally, without public comment or input, leave such decisions to individual prison administrators or personnel, or even defer to private companies and personnel that are paid to provide medical services.”).

161. See *id.* (“The prison itself is a barrier to abortion care, because abortions are not provided on-site and always necessitate a trip outside the jail or prison.”); 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, 142-43 (2013) (“This caveat is significant considering that the cost of an abortion is especially burdensome for inmates, particularly those without a meaningful flow of income or access to financial support.” (footnote omitted)).

162. See Gutierrez, *supra* note 161, at 123 (“Just as female slaves were unwilling participants in chattel breeding, often coerced to have children against their wills, women in prison today are stripped of their reproductive autonomy.”).

163. See Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 104 (2011) (“The decision’s effects were really far more significant than a single hour-long operation, or the Justices’ personal views. By 1933 over 150 million people in the United States lived in states with eugenic laws, or so California’s Human Betterment Foundation, one of the country’s most active eugenic organizations, declared.”).

164. See Rachel Roth & Sara L. Ainsworth, “*If They Hand You a Paper, You Sign It*”: A Call to End the Sterilization of Women in Prison, 26 HASTINGS WOMEN’S L.J. 7, 7-8 (2015) (“More than 100 women incarcerated in California were sterilized by tubal ligation surgery between 2006 and 2010. These procedures did not take place in a setting conducive to informed consent, although informed consent to any surgery is both ethically and legally required.” (footnote omitted)); Chrisiant Bracken, *Tracing Two Modern Branches of Reproductive Rights for Male Prisoners*, 7 NE. U. L.J. 125, 128 (2015) (“Surgical castration as a punishment fell out of favor during the mid-20th century, but the rise of methods of ‘chemical castration’ led to nine states enacting statutes imposing use of anti-androgen medication on individuals convicted of sex offenses.”).



have been sterilized.<sup>165</sup> Unsurprisingly, these abuses disproportionately affect Black and Brown incarcerated people.<sup>166</sup>

When incarcerated people do manage to obtain proper reproductive care and give birth, their parental rights face further assaults. Incarcerated women face a significant stigma in terms of their perceived fitness for motherhood.<sup>167</sup> Incarcerated mothers frequently cannot rely upon a coparent to care for their children in the way that incarcerated fathers tend to, leaving their children in the care of a nonparental relative or the foster system.<sup>168</sup> When children of incarcerated parents are forced into the family-regulation system, the cause is seldom related to the parent's abuse or neglect of the child.<sup>169</sup> The result, however, is often shaped by the lengthy sentences that help drive mass incarceration: states begin termination-of-parental-rights proceedings early in the second year of a child's time in foster care.<sup>170</sup> From there, "the mere factor of incarceration inhibits a woman's ability to comply with court-ordered steps to reunify with their children."<sup>171</sup> Collectively, these assaults on family planning and bodily autonomy replicate core badges and incidents of slavery.<sup>172</sup>

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165. See Roth & Ainsworth, *supra* note 164, at 30 ("She had been diagnosed with an ovarian tumor and consented to surgery for the tumor but not to a hysterectomy. She was stunned to learn several months after the surgery that her uterus had been removed.").

166. See *id.* at 31 ("In addition, the women and transgender men whose cases were documented tended to be people of color, and people as young as 22, with their whole adult lives ahead of them.").

167. See Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2215 (2018) ("As largely poor single mothers (and poor women of reproductive age), they are deemed to be bad mothers whose poor child rearing will inevitably lead to offspring who commit crimes and threaten public order. As such, their reproductive capacities are deemed to be the source of crime, dependency, and disorder.").

168. See Carla Laroche, *The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration*, 12 COLUM. J. RACE & L. 517, 528 (2022) ("When mothers are incarcerated, however, their children are significantly more likely to live with another relative or friend or enter the family regulation system.").

169. See *id.* at 529 ("Only three percent of children referred to the state for investigation occurs because of criminal allegations related to a parent's or other individual's parental child abuse or neglect of a child.").

170. See Ocen, *supra* note 167, at 2224-25 ("Under the federal Adoption and Safe Families Act ('ASFA'), states institute proceedings to terminate parental rights if a child has been in foster care for fifteen of the previous twenty-two months.").

171. *Id.* at 2225.

172. See Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 148 (2022) (discussing the inclusion of the lack of control over a person's marriage and family among the badges and incidents of slavery named by Congress).

## 2. *Transgender Rights*

Incarcerated transgender people face significant difficulties in prisons, both from the carceral system and other inmates. Prisons frequently house transgender individuals in units that do not match their gender identity.<sup>173</sup> Mismatching incarcerated persons in this way adds further risk to a community that already suffers disproportionately from hate crimes and violence, often leading to mistreatment and sexual assault.<sup>174</sup> Violence, abuse, and harassment in prisons also harm incarcerated transgender people's mental health.<sup>175</sup>

Additionally, prisons frequently frustrate incarcerated transgender people's access to necessary healthcare. Lambda Legal reports that "U.S. prison officials also commonly block the access of incarcerated people to transition-related health care such as hormone therapy or sex reassignment surgery (SRS), even when it's prescribed as medically necessary by a doctor."<sup>176</sup> These denials of care are beginning to face Eighth Amendment scrutiny.<sup>177</sup> Similarly, the Americans with Disabilities Act provides another potential recourse for incarcerated persons with gender dysphoria to assert their rights to medical care.<sup>178</sup> Yet even with these recent glimmers of hope, "[p]rison healthcare is notoriously inadequate, and nowhere is this more evident than in the context of transgender

173. See *Transgender Incarcerated People in Crisis*, LAMBDA LEGAL, <https://legacy.lambdalegal.org/know-your-rights/article/trans-incarcerated-people> [<https://perma.cc/5GKP-8ZLF>] ("In the United States, transgender incarcerated people are still usually housed according to the sex assigned at birth, instead of by gender identity—one's inner sense of being male, female or something else. This policy makes transgender people more vulnerable to harassment or attack by staff or fellow incarcerated people . . .").

174. See *id.*

175. See Erin McCauley, Kristen Eckstrand, Bethlehem Desta, Ben Bouvier, Brad Brockmann & Lauren Brinkley-Rubinstein, *Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail*, 3 *TRANSGENDER HEALTH* 34, 38 (2018) ("These participants felt harassed by their peers, and institutional distrust and lack of institutional response limited their access to support to help deal with the harassment and isolation. . . . [T]he experience of incarceration has detrimental effects on mental health, particularly for people who are harassed or victimized during their imprisonment.").

176. *Transgender Incarcerated People in Crisis*, *supra* note 173.

177. See *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) ("The State does not dispute that Edmo's gender dysphoria is a sufficiently serious medical need to trigger the State's obligations under the Eighth Amendment. Nor could it.").

178. See *Williams v. Kincaid*, 45 F.4th 759, 773 (4th Cir. 2022) ("In light of the 'basic promise of equality . . . that animates the ADA,' we see no legitimate reason why Congress would intend to exclude from the ADA's protections transgender people who suffer from gender dysphoria." (quoting *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 510 (4th Cir. 2016))).

healthcare.”<sup>179</sup> Incarcerated transgender people may have legal recourse for violations of their bodily autonomy, but those violations remain distressingly common.

#### D. Legal Recourse for Official Misconduct

Violence and abuse of incarcerated people are not confined to transgender people, though they do suffer disproportionately. Prisons are brutal institutions, and while their violence can affect any incarcerated person, marginalized people—like transgender people, Black and Brown people, and people suffering from mental-health conditions—tend to bear the brunt of the harsh conditions.<sup>180</sup> Formal prison discipline also demonstrates a racial bias within prisons.<sup>181</sup> Prisons discourage reporting of official misbehavior, tolerate perjury and silence from prison staff, and invoke the shield of qualified immunity to protect their staff from facing consequences for their abuse of incarcerated persons.<sup>182</sup> Prisons also stack the deck against potential litigants through the threat of retaliation and the practical barriers that incarcerated litigants face to bringing their cases to trial.<sup>183</sup> For instance, the Prison Litigation Reform Act requires litigants

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179. Jennifer Levi & Kevin M. Barry, *Transgender Rights & the Eighth Amendment*, 95 S. CAL. L. REV. 109, 159 (2021).

180. See Kevin Medina & Brian Nguyen, *Acknowledged but Ignored: A Critical Race Theory Approach to the Prison Rape Elimination Act*, 2 QUEER CATS J. LGBTQ STUD. 59, 60 (2018) (“Within prison walls, rape becomes a tool to ensure the success of mass incarceration and the potency of white supremacy. More specifically, the criminal justice system uses rape as a means to discipline, divide, and distract those trapped within the system.”).

181. See Katie Michaela Becker, *Racial Bias and Prison Discipline: A Study of North Carolina State Prisons*, 43 N.C. CENT. L. REV. 175, 175 (2021) (reporting that, in a 2020 study, prisons were 10.3% more likely to discipline Black individuals and 13% more likely to discipline Indigenous individuals than their white counterparts).

182. See Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 40 (2009) (“For one, the reporting mechanisms currently in use in prisons tend to discourage disclosure or complaint, as prison reporting regimes are often transparent and can lead to retaliation from guards.”); Kathleen M. Dennehy & Kelly A. Nantel, *Improving Prison Safety: Breaking the Code of Silence*, 22 WASH. U. J.L. & POL’Y 175, 176 (2006) (“[O]ne consequence of the psychological dynamics of being a correctional officer is the tendency to see officers as ‘us’ and all others . . . as ‘them.’ This aspect can play out in many ways, one of which is the institutionalization of a ‘code of silence’ on both macro and micro levels.”); Julie Goldscheid, *Qualified Immunity, Supervisor Liability, and Gender Violence: Barriers to Accountability*, 59 CAL. W. L. REV. 51, 74 (2022) (discussing the availability of qualified immunity to prison supervisors who hired a jail officer from liability for rapes that the officer committed).

183. See David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2021 (2018) (describing the web of structural and procedural

to exhaust administrative remedies before filing suit<sup>184</sup> and to prove physical injury or a sexual act in order to recover damages for mental and emotional injuries.<sup>185</sup>

Courts also operate some remedial programs with little or no direct involvement from at-risk incarcerated people. Judicial interventions after civil-rights lawsuits can vary greatly based on the managerial strategy a judge employs.<sup>186</sup> Judges' deference to prison officials can leave plaintiffs with little recourse to address administrative noncompliance with judicial orders.<sup>187</sup> Other strategies, such as brokering a settlement, can leave the parties' attorneys largely in charge of the outcome, even if the judge is willing to step in to ensure compliance.<sup>188</sup> Some remedial regimes, such as the Prison Rape Elimination Act, decline to create a private right of action, leaving incarcerated persons to rely on outside agencies for enforcement.<sup>189</sup> When legislatures and courts take away incarcerated people's ability to advocate for themselves, they are forced to rely upon institutions that have already proven hostile to them.

Incarcerated people face significant barriers to obtaining legal recourse for harms the prison system does to them. Even if a court will recognize their ability to advance a claim, interlocking systems of immunity act as shields for prison staff. The practical difficulties of research, paperwork, and obtaining counsel alone can prove fatal to their claims. Antidemocracy thrives on such further marginalization of marginalized people, and prison provides extraordinary opportunities for constructing Kafkaesque labyrinths.

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barriers as a "practical immunity" as potent as qualified immunity for protecting prison staff from lawsuits).

184. See 42 U.S.C. § 1997e(a) (2018).

185. See *id.* § 1997e(c).

186. See Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 849 (1990) (categorizing judicial-intervention strategies broadly and in prison cases as those of "deferrer, director, broker, and catalyst").

187. See *id.* at 851 (describing a judge who never scrutinized a defendant's reform plan, never actively monitored compliance, and dismissed a contempt motion without a hearing due to a management style that was extremely deferential to prison officials).

188. See *id.* at 856.

189. See Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 802 (2014) ("Both plaintiffs and defendants invoke [the Prison Rape Elimination Act (PREA)] in litigation, even though PREA does not create a private right of action or affirmative defense."); Kathleen Darcy, *Bringing the Outside in: Organizational Collaboration in Sexual Misconduct Investigations Under the Prison Rape Elimination Act*, 41 WOMEN'S RTS. L. REP. 144, 155-57 (2020) (describing the difficulties associated with the collaborative process between internal investigators and law enforcement that PREA requires).

### III. ANTIDEMOCRATIC POLICIES SPREAD BEYOND THE PRISON WALLS

Punishment, then, will tend to become the most hidden part of the penal process. This has several consequences: it leaves the domain of more or less everyday perception and enters that of abstract consciousness; its effectiveness is seen as resulting from its inevitability, not from its visible intensity; it is the certainty of being punished and not the horrifying spectacle of public punishment that must discourage crime; the exemplary mechanics of punishment changes its mechanisms. As a result, justice no longer takes public responsibility for the violence that is bound up with its practice.

— Michel Foucault<sup>190</sup>

Even if antidemocratic actors were content to confine their abuses to incarcerated people, it would still represent a grave injustice. Yet the goals of antidemocracy require the development of strategies and policies of opposing popular power. Thanks to the often-given blessing of the courts, the antidemocratic experiments behind prison walls provide ample models for oppressing the general public. This Part proceeds in three Sections. First, Section III.A explores the spread of antidemocratic policies from prisons to the public. Then, Section III.B addresses a major potential objection to this description: the forces of antidemocracy have not left detailed notes demonstrating their process. Finally, Section III.C discusses the necessity of breaking antidemocracy's process of developing new modes of oppression and potential strategies for doing so.

#### A. *Corresponding Patterns of Antidemocratic Policy in Prison and Beyond*

The antidemocratic policies pioneered in prisons often provide a pattern for the development of American antidemocracy. While the violent suppression of labor movements can hardly be said to have originated in prisons, the legal tactic of excluding workers from fundamental protection by redefining their employment relationship has seen a broad expansion.<sup>191</sup> The sorts of book bans

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190. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 9 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

191. See Bowie, *supra* note 16, at 196-200 (explaining the drastic effects of *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), on union organization and democratic protections in the workplace).

common to prisons are on the rise in public schools and libraries.<sup>192</sup> Prison proved an easy place to restrict reproductive freedoms before antiabortion extremists succeeded in advancing their policies with legislatures and courts.<sup>193</sup> Incarcerated persons have long been denied access to gender-affirming care, a policy now advanced in general laws in some states.<sup>194</sup> And the sorts of barriers incarcerated persons face in obtaining legal recourse for official misconduct have spread to protect government officials outside of prison walls.<sup>195</sup> American anti-democracy is on the march with a policy program borrowed from an environment where too few voters noticed or opposed it. Prisons' other antidemocratic policies—like voting restrictions, rampant searches and seizures, and authorized violence in the interest of maintaining order—would all pose grave threats to democracy if they migrated outside of prison walls.

### 1. *Antilabor Practices*

Corporate employers have succeeded in replicating some of their successes in avoiding protections for incarcerated workers by classifying workers as

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192. See, e.g., Ark. Proclamation No. 23-05 (Jan. 10, 2023) (allowing the prohibition of any “items” that “conflict with the principle of equal protection under the law or encourage students to discriminate against someone based on the individual’s color, creed, race, ethnicity . . . or any other characteristic protected by federal or state law”); see also Meghan Holden, *From Banned Books to Mail Censorship, Free Speech All But Ends at the Prison Doors*, 42 MITCHELL HAMLIN L.J. PUB. POL’Y & PRAC. 96, 111 (2021) (“[T]here is a substantial risk of prisons inadvertently ‘turning institution-wide norms into an automatic statewide ban [in prisons].’” (quoting *Literature Locked Up: How Prison Book Restriction Policies Constitute the Nation’s Largest Book Ban*, PEN AM. 4 (Sept. 2019), <https://pen.org/wp-content/uploads/2019/09/literature-locked-up-report-9.24.19.pdf> [<https://perma.cc/6VF6-XRCA>])).
193. See Susan Stefan, *Whose Egg Is It Anyway?: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405, 412 (1989) (characterizing the complete lack of agency that incarcerated women experience regarding their reproductive rights and choices).
194. Compare *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986) (holding that a prison was not required to provide hormone treatment after an incarcerated person castrated herself partially, citing perceived disagreement within the medical community regarding the treatment’s efficacy), with H.B. 1570, 93d Gen. Assemb., Reg. Sess. § 2(15) (Ark. 2021) (banning hormone therapy for minors and arguing that the risks outweigh the benefit “at this stage of clinical study on these procedures”).
195. Compare Andrea Jacobs, *Prison Power Corrupts Absolutely: Exploring the Phenomenon of Prison Guard Brutality and the Need to Develop a System of Accountability*, 41 CAL. W. L. REV. 277, 283 (2004) (outlining both Congress’s and the Supreme Court’s efforts to block incarcerated persons from airing grievances against prison officials), with Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1278-80 (1999) (outlining similar judicial barriers to airing grievances against police officers).

contractors rather than employees.<sup>196</sup> The classification strategy relies upon similar legal reasoning. When corporations avoid providing employment protections to incarcerated workers, they can do so because courts have determined those workers not to be employees.<sup>197</sup> Corporate employers, particularly those in the gig economy, rely upon the contractor/employee distinction in much the same way. When their workers are not employees, these corporations can reliably avoid wage, hour, benefit, and other protections owed to employees. The distinction can be particularly lucrative; gig-economy companies funded a massive ballot-initiative campaign to stop California from forcing them to classify workers as employees.<sup>198</sup> Granted, while the gig economy and much contract work are exploitative, they surely fall short of slavery. Still, the tactic of arguing over workers' status is an old and fruitful one, and the likelihood that workers outside of the prison system will largely avoid conditions of de facto slavery is cold comfort.<sup>199</sup> This classification tactic exists against a larger backdrop of employers and courts eroding workers' collective-bargaining rights.<sup>200</sup>

## 2. Access to Literature

While even the current Supreme Court likely wouldn't support an attempt to ban a book outright, antidemocratic policymakers frequently target such bans on one of the few groups whose rights are almost as constrained as incarcerated people: students. Individual schools and school boards have long felt

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196. See *George v. SC Data Ctr., Inc.*, 884 F. Supp. 329, 334 (W.D. Wis. 1995) (“[S]uch an inmate is not an ‘employee’ under that act.”).

197. *Id.*; see also *Williams v. S.C. Dep’t of Corr.*, 641 S.E.2d 885, 887–88 (S.C. 2007) (determining that a company utilizing the services of incarcerated workers is explicitly not their employer under state law).

198. See Irina Ivanova, *Future of Gig Workers Could Hinge on California Ballot Vote*, CBS NEWS (Nov. 2, 2020, 9:56 AM EST), <https://www.cbsnews.com/news/california-proposition-22-gig-workers-ballot-initiative> [<https://perma.cc/2YDV-DS4D>] (“Gig companies have long argued that people who drive for Uber or deliver food for DoorDash aren’t employees but rather are self-employed—a vital legal distinction that allows many internet ‘platforms’ to withhold benefits and take other steps to minimize their labor costs.”).

199. *But see* Goodwin, *supra* note 140, at 919–20 (recounting the story of a Vermont Supreme Court justice who enslaved a woman named Dinah during her working years, then argued that the legal impossibility of slavery in Vermont allowed him to avoid responsibility for her care later in life).

200. See Lawrence Mishei, Lynn Rhinehart & Lane Windham, *Explaining the Erosion of Private-Sector Unions*, ECON. POL’Y INST. 45 (Nov. 18, 2020), <https://files.epi.org/pdf/215908.pdf> [<https://perma.cc/9QF9-ZG5W>] (“The sharp decline of union representation and new union members in the 1970s—a decline from which workers and the labor movement have never recovered—was due not to worker disinterest but rather to a combination of employer tactics and weaknesses in the law that undermined worker organizing.”).

empowered to exclude particular books from their libraries and curricula in response to even the slightest parental pressure.<sup>201</sup> Recent book bans have moved to state-level efforts, some of them targeting entire subjects.<sup>202</sup> Antidemocratic policymakers target books that question the legitimacy of their power or expose the harm that their policies inflict on marginalized groups. Florida's efforts to ban any material even hinting at the existence of LGBTQ+ people or discussing the facts of structural racism cut to the core of these trends.<sup>203</sup>

Antidemocratic control relies upon a large, compliant, homogenous in-group. Dissent from mainstream gender roles or challenges to religious cohesion threatens that group's status by affirming the possibility of a cohesive, heterogeneous society. Discussing the lived experiences of marginalized people raises the specter of empathy or even solidarity with members of communities beyond the in-group. If the book bans feel Orwellian, it's because they are deliberate attempts to shape society by controlling the range of ideas young people are allowed even to consider. Just as with similar restrictions on incarcerated people, the rhetoric of safety underpinning these book bans disguises a desperate need to preserve power through social control.<sup>204</sup>

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201. See Parker Leipzig, *Requests to Ban Books Hit a 21-Year High. See Which Titles Were the Most Challenged*, CNN (Aug. 27, 2023, 4:00 AM EDT), <https://www.cnn.com/2023/08/27/us/school-library-book-ban-increase-dg/index.html> [<https://perma.cc/WEG7-UD6C>] (comparing past occurrences of parents discussing individual books with librarians or teachers to growing pressure from large parental-rights organizations to ban multiple books); Tovia Smith, *School Book Bans Show No Signs of Slowing, New PEN America Report Finds*, NPR (Sept. 21, 2023, 9:26 AM ET), <https://www.npr.org/2023/09/21/1200725104/book-bans-school-pen-america> [<https://perma.cc/TeXZ-5U3T>] (“[T]he number of books permanently removed from school libraries and classrooms has quadrupled – to 1,263 books in the last school year from 333 the year before.”).
202. See Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html> [<https://perma.cc/L27H-2RVG>] (“Eleven bills explicitly ban lessons based on the 1619 Project, an initiative by The New York Times Magazine exploring the history and continuing legacy of slavery that has been adapted into a classroom curriculum.”).
203. See, e.g., Matthew Crowley & Amy Sherman, *DeSantis Said Not ‘A Single Book’ Was Banned in Florida. Districts Have Removed Dozens*, TAMPA BAY TIMES (June 2, 2023), <https://www.tampabay.com/news/florida-politics/2023/06/01/desantis-book-ban-school-library-challenged-lgbtq-politifact> [<https://perma.cc/V4HD-9MNB>] (“Escambia, in northwest Florida, [has] removed ‘And Tango Makes Three’ by Peter Parnell and Justin Richardson, a book for young children about a baby penguin raised by two males. The teacher who filed the challenge wrote that the book had an ‘LGBTQ agenda using penguins.’”).
204. Compare Andrea Jamison, *Prison Book Bans: A Matter of Safety or Concern*, OFF. FOR INTELL. FREEDOM AM. LIBR. ASS’N: INTELL. FREEDOM BLOG (Feb. 22, 2018), <https://www.oif.ala.org/prison-book-bans-matter-safety-concern> [<https://perma.cc/8PTZ-CGLH>] (discussing prison bans of books on social justice between 2011 and 2018, including in Alabama), *with*



### 3. *Reproductive Rights*

The same logic of control underpins recent assaults on reproductive rights. People forced to carry unwanted pregnancies to term face mental-health risks, loss of economic opportunity, and loss of social status.<sup>205</sup> All of those harms subject them to greater control, whether by employers, abusive partners, or policy-makers.<sup>206</sup> Following the Supreme Court's decision in 2022 to end decades of reproductive rights in *Dobbs v. Jackson Women's Health Organization*,<sup>207</sup> state legislatures rushed to enact new restrictions on abortion.<sup>208</sup> With some states enacting abortion-rights guarantees instead, reproductive freedom remains—for those who can afford to travel.<sup>209</sup> These contrasting policies replicate the

Trisha Powell Crain, *Book Bans Are a Local Affair in Alabama Schools. That Could Change*, AL.COM (May 1, 2023, 7:30 AM), <https://www.al.com/educationlab/2023/05/book-bans-are-a-local-affair-in-alabama-schools-that-could-change.html> [<https://perma.cc/9DN7-C5RH>] (discussing a challenge that removed a book on the Black Lives Matter movement from an Alabama middle school), and Tat Bellamy-Walker, *Schools Banned Books About Black Life. Black Kids Are Reading Anyway*, NBC NEWS (Feb. 2, 2022, 6:02 AM), <https://www.nbcnews.com/news/nbcblk/schools-banned-books-black-life-black-kids-are-reading-anyway-rcna13702> [<https://perma.cc/NB64-XTXE>] (discussing a short-lived ban in a Pennsylvania school targeting books about racial justice by Black authors).

205. See Aria Bendix & Dana Varinsky, *The Biggest Health Risks Women Would Face If Roe v. Wade Is Overturned*, NBC NEWS (May 4, 2022, 4:33 AM EDT), <https://www.nbcnews.com/health/health-news/health-risks-overturning-roe-v-wade-abortion-rcna27109> [<https://perma.cc/9CZJ-PSSF>] (discussing the financial and mental-health consequences of carrying unwanted pregnancies to term).
206. See SARAH S. BROWN & LEON EISENBERG, *THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES* 57-58 (1995) (surveying available studies on the effect of unintended pregnancy on socioeconomic status and finding a significant negative effect); Genevieve LeBaron, Penelope Kyritsis, Cameron Thibos & Neil Howard, *Confronting the Root Causes of Forced Labour: Poverty*, OPEN DEMOCRACY (Mar. 19, 2019, 4:30 PM), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/confronting-root-causes-of-forced-labour-poverty> [<https://perma.cc/RS9Z-QPKM>] (“[W]hen people are compelled to undertake wage labour on bad terms, this can entrench their poverty and vulnerability by preventing them from accumulating wealth or achieving long-term economic security. [These] dynamics . . . are circular, . . . while poverty shapes people’s vulnerability to exploitation, their exploitation also reinforces their inability to escape poverty.”); Stefan, *supra* note 193, at 437 (summarizing state policies and procedures appointing guardians or requiring court orders related to institutionalized women’s reproductive decisions).
207. 597 U.S. 215 (2022).
208. See Gabrielle M. Etzel, *One Year After Dobbs: The Abortion Battle in All 50 States*, WASH. EXAM’R (June 23, 2023, 5:00 AM), <https://www.washingtonexaminer.com/policy/healthcare/states-abortion-legislation-post-dobbs> [<https://perma.cc/74M6-N9QF>] (analyzing each state’s legislative response to *Dobbs*).
209. See Rachel Rebouché & Mary Ziegler, *Fracture: Abortion Law and Politics After Dobbs*, 76 SMU L. REV. 27, 54 (2023) (“After *Dobbs*, by contrast, state lawmakers, together with groups like

conditions developed in prisons, where economic status frequently determines the availability of reproductive freedom.<sup>210</sup> Even for those who can afford to travel, some states with abortion bans have begun to criminalize interstate travel to seek abortions.<sup>211</sup>

This pattern of exporting antidemocratic policies onto reproductive rights is nothing new, though. Prisons were the first proving ground of the American eugenics movement's forced-sterilization programs, beginning with men deemed violent criminals.<sup>212</sup> This effort spread out from prisons to include women and others deemed somehow unfit or undesirable.<sup>213</sup> The program gained the Supreme Court's imprimatur in *Buck v. Bell*,<sup>214</sup> reversing a trend among state courts of ending such programs.<sup>215</sup> The resulting legacy of forced sterilizations was

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the Thomas More Society, have shown an interest in legislation directly prohibiting travel for abortion or applying criminal laws to doctors who perform legal abortions in protective states on patients traveling from places where abortion is a crime.”).

210. See Gutierrez, *supra* note 161, at 142-43 (discussing the financial barriers to care that are often determinative of whether incarcerated persons may access abortions).
211. See, e.g., Moira Donegan, *Idaho's Abortion Travel Ban Is Incredibly Cruel*, GUARDIAN (Mar. 31, 2023, 6:00 AM EDT), <https://www.theguardian.com/commentisfree/2023/mar/31/idaho-abortion-travel-ban-women-girls-social-trust> [<https://perma.cc/7ZZG-B6WG>]; *Alabama's Attorney General Says the State Can Prosecute Those Who Help Women Travel for Abortions*, ASSOCIATED PRESS (Aug. 31, 2023, 4:15 PM EST), <https://apnews.com/article/alabama-abortion-steve-marshall-2157a7d0bfad02aad1ca41e61fe4de33> [<https://perma.cc/U69X-3PFT>]; Nick Robertson, *Conservative Activists Are Pushing 'Trafficking' Laws to Prevent Women from Traveling for an Abortion*, HILL (Sept. 1, 2023, 1:47 PM ET), <https://thehill.com/policy/healthcare/4183130-trafficking-laws-traveling-abortion> [<https://perma.cc/2T7N-T66J>].
212. See Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. TIMES MAG. (June 8, 2022), <https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html> [<https://perma.cc/FH4U-7PUP>] (“Those affected early on were mainly men viewed as criminalistic, including those whose ‘defect’ was supposedly excessive masturbation or homosexuality.”).
213. See Sanjana Manjeshwar, *America's Forgotten History of Forced Sterilization*, BERKELEY POL. REV. (Nov. 4, 2020), <https://bpr.berkeley.edu/2020/11/04/americas-forgotten-history-of-forced-sterilization> [<https://perma.cc/T2JD-G88G>] (“The ultimate goal of the eugenics movement was to ‘breed out’ undesirable traits in order to create a society with a ‘superior’ genetic makeup, which essentially meant reducing the population of the non-white and the mentally ill.”).
214. 274 U.S. 200, 207-08 (1927).
215. See Jasmine E. Harris, *Why Buck v. Bell Still Matters*, BILL HEALTH (Oct. 14, 2020), <https://blog.petrieflom.law.harvard.edu/2020/10/14/why-buck-v-bell-still-matters> [<https://perma.cc/W4HM-NDNX>] (“In less than 1,000 words, Justice Oliver Wendell Holmes, writing for all but one of the Justices of the Court, breathed new life into an otherwise fading public eugenics movement.”); Bongo Thompson, *Buck v. Bell: The Supreme Court Case that Fueled the Eugenics Movement*, TEEN VOGUE (Sept. 21, 2021), <https://www.teen-vogue.com/story/buck-v-bell-supreme-court> [<https://perma.cc/U7WV-V9NW>] (“Although the Virginia Sterilization Act of 1924 granted legal protections to those who performed the procedure, similar state laws had been struck down by the courts.”).

predictably racist, disproportionately targeting Black<sup>216</sup> and Indigenous<sup>217</sup> women. The pattern of developing antidemocratic policies in prisons is perhaps easier to see in the case of forced sterilization because of early twentieth-century jurisprudence's different balance between a stronger police power and less absolute individual rights,<sup>218</sup> but the trend continues even in our rights-forward era.

#### 4. *Transgender Rights*

Antidemocratic policymakers have also taken a page from the impunity with which transgender people are attacked and denied critical care in prisons. The current wave of anti-trans legislation is part of a concerted effort effectively to eliminate transgender people from American society. Lack of access to gender-affirming care greatly increases mental-health risks among transgender people, contributing to disproportionately high rates of suicide, self-harm, and mental illness.<sup>219</sup> As with book bans, the current policies largely target children, who are often unable to advocate for themselves and are dependent on family support to protect their rights – if they even have the support of their families. With many of the recent restrictions overriding even a consensus between a transgender child's parents and doctors, access to gender-affirming care may require a family to relocate across state lines.<sup>220</sup> Attempts to ban drag performances, restrict transgender people's access to and participation in public spaces, and define even the idea of a person's gender identity as a sexual misdeed against any child who becomes aware of it<sup>221</sup> serve to alienate, marginalize, and repress transgender

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216. See Manjeshwar, *supra* note 213 (“In North Carolina in the 1960s, Black women made up 65 percent of all sterilizations of women, although they were only 25 percent of the population.”).

217. See *id.* (“According to a report by historian Jane Lawrence, the Indian Health Service was accused of sterilizing nearly 25% of Indigenous women during the 1960s and 1970s.”).

218. See generally Nourse, *supra* note 163 (discussing *Buck v. Bell* in the context of the dominant jurisprudential models of the *Lochner* era).

219. See Amy Novotney, “The Young People Feel It’: A Look at the Mental Health Impact of Antitrans Legislation, AM. PSYCH. ASS’N (June 29, 2023), <https://www.apa.org/topics/lgbtq/mental-health-anti-transgender-legislation> [<https://perma.cc/V8QP-52CS>] (“Research overwhelmingly shows these bills and laws, which target access to health care, sports participation, and school policies, have resulted in heightened levels of anxiety, depression, and suicide risk among the transgender community.”).

220. See, e.g., FLA. STAT. § 61.517(1)(c) (2023) (granting temporary emergency jurisdiction to courts if “[i]t is necessary in an emergency to protect the child because the child has been subjected to or is threatened with being subjected to sex-reassignment prescriptions or procedures”).

221. See *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2023*, ACLU (Dec. 21, 2023), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023> [<https://perma.cc/GU5U-MSHY>] (documenting over 500 anti-LGBTQ bills introduced across the country in 2023).

Americans further while stirring up reactionary rage against them. The resulting increases in physical and sexual violence against transgender people are not incidental to this – they are the desired effect.<sup>222</sup>

### 5. *Legal Recourse for Official Misconduct*

Antidemocratic actors need to be able to act with impunity to maintain their unearned positions of power. To that end, they have taken cues from the web of policies, legal regimes, and practical barriers that prevent incarcerated people from finding legal recourse for official misconduct. Mandatory arbitration clauses exclude wronged individuals from ever obtaining a fair trial.<sup>223</sup> Barriers to class-action litigation help ensure that many claims simply never progress because lawyers will not take such low-dollar cases.<sup>224</sup> Exhaustion-of-remedies requirements keep litigants out of federal courts.<sup>225</sup> And that’s to say nothing of the web of policy and practical barriers protecting law-enforcement officers who abuse people’s civil rights.<sup>226</sup> Not all of these policies can be traced to prisons –

222. See Ian Thompson, *The Right is Laying the Foundation for Genocide*, SLATE ONLINE (Nov. 1, 2022, 12:00 PM), <https://www.theatlantic.com/article/2022/11/the-right-is-laying-the-foundation-for-genocide> [https://perma.cc/X2JX-PFDP] (categorizing far-right anti-LGBTQ efforts into the ten stages of genocide).

223. Cf. Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW. & CONTEMP. PROBS. 167, 168 (2004) (arguing that the Federal Arbitration Act’s arbitration clauses cannot be interpreted to require the heightened knowing-consent standards that govern jury waiver).

224. See F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 391 (2009) (“[T]he remote possibility of a post-trial (or post-arbitration) fee recovery does not provide enough incentive for most attorneys to take on the risk and expense of a complex individual case against a well-heeled defendant.”).

225. See, e.g., Jacobs, *supra* note 195, at 279 (“[T]he Court took a harsh route and denied an exception to the exhaustion of remedies requirement in the [Prison Litigation Reform Act] for claims of excessive force, finding no difference between egregious prisoner abuse and generic prison condition complaints. Consequently, inmates have been left to struggle within the corrections system.”); Elizabeth H. Belkin, *The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor Unions and Employers*, 55 CHI.-KENT L. REV. 259, 259 (1979) (“Federal courts generally have required that a member of a labor union exhaust internal union remedies before suing a union for breaching its duty of fair representation.”); Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234, 1251-52 (2018) (describing the injustice arising from exhaustion of administrative remedies requirements in immigration cases).

226. See Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1704 (2022) (“While qualified immunity protects government officials when the law deems their behavior ‘reasonable,’ sovereign immunity shields certain governments themselves from constitutional-tort damages under any and all conditions.”).

after all, no state could require an incarcerated person to arbitrate claims against prison staff. But the general structure of a network of barriers to recovery arose and developed in many of the areas of civil litigation that most affect ordinary people after antidemocratic actors honed their techniques in prisons.<sup>227</sup>

### B. *The Lack of a Smoking Gun*

These general antidemocratic policies have generally followed their prison analogs. The distinction is perhaps least clear in labor rights, where many key court decisions affecting both free and incarcerated workers came in the 1970s and 1980s.<sup>228</sup> This Book Review does not seek to argue that *all* antidemocratic policies find their origins in prisons. Antilabor sentiment is among the most well-established areas of antidemocratic policymaking in America. Yet the rise in the use of nonemployee classifications in prisons was established in the 1990s,

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227. Systems of ensuring prisoners could not effectively seek relief originally involved prison officials' near-total control over inmates. After prisoners' rights litigation began to gain traction, alternative systems emerged. While some of the tools of those systems, such as exhaustion-of-remedies requirements, had roots in other bodies of law, their use in an interlocking web of barriers was original to prison litigation. Compare Jamie Harris, *Social Movement Lessons from the US Prisoners' Rights Movement*, SENTIENCE INST. 6-7 (July 21, 2020), <https://www.sentenceinstitute.org/downloads/Social%20Movement%20Lessons%20from%20the%20US%20Prisoners%20Rights%20Movement.pdf> [<https://perma.cc/QLG4-5T8S>] ("The approach of the courts to prison cases before the 1960s [was] 'hands-off.' Before this point, prisoners rarely litigated for their rights, because the main available legal remedy was to petition for a writ of habeas corpus, which could only result in release, rather than the improvement of conditions." (footnotes omitted)), *ACLU History: Prisons*, ACLU (Sept. 1, 2010), <https://www.aclu.org/documents/aclu-history-prisons> [<https://perma.cc/PN8G-63R7>] ("One of the ACLU's first significant cases began with a letter smuggled out of a Virginia prison, describing brutal conditions such as tear-gassing, solitary confinement as punishment for complaints, and a ban on all contact with the outside world, including lawyer visits."), Shapiro & Hogle, *supra* note 183, at 2037 n.133 (tracing the nationwide adoption of extreme deference to prison administrators to *Procunier v. Martinez*, 416 U.S. 396 (1974)), and Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e (2018) (requiring exhaustion of internal grievance procedures prior to seeking relief in court and barring recovery for psychological harms in the absence of physical injury), with Joseph Alton Jenkins, *The Impact of Lincoln Mills on the National Labor Relations Board*, 6 UCLA L. REV. 355, 365-66 (1959) (discussing exhaustion of contractual remedies in labor disputes), and *Clemmons v. Haw. Medical Servs. Ass'n*, 273 F.R.D. 653, 660 (D. Haw. 2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)) (dismissing a national-origin-discrimination claim under a pleading standard developed in prison litigation).

228. Compare, e.g., *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 126, 132-33 (1977) (upholding prison officials' restrictions on the ability of prisoners to form, or solicit membership in, a labor union), with *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304, 310 (1974) (holding that Linden had not engaged in unfair labor practices when it refused to accept evidence of majority status other than the results of a Board election and placing on the union the burden of "taking the next step in invoking the Board's election procedure").

while it only really took off in general labor markets with the rise of the gig economy a decade later.<sup>229</sup> Book bans in both schools and prisons have long shared topics such as sex and drugs, but only in recent years have school book bans expanded to target social-justice topics as divisive – a well-worn justification for such bans in prisons.<sup>230</sup> Forced sterilization began as a practice in prisons before its widespread application following *Buck v. Bell*.<sup>231</sup> Similarly, the practice of erecting official barriers to reproductive care – often to the point of making it cost-prohibitive – was long established in prisons before the recent free-for-all of abortion bans tied access to reproductive choice to the ability to afford interstate travel.<sup>232</sup> Access to gender-affirming care was frequently restricted in prisons long before the recent wave of state laws generally restricting access to such treatment.<sup>233</sup>

Skeptical readers might be quick to point out that even these temporal correlations are not causation. Indeed, the mere pattern alone does not mean that a deliberate process exists. Nor is it likely that antidemocratic actors conceive of a policy they wish to inflict upon the populace, test it in prisons, and then apply the refined policy as a general law. The claim this Book Review seeks to advance is not that extreme.

Rather, the process of antidemocratic policymaking should be understood in more functional and experimental terms. The prison-industrial complex needs to oppress incarcerated people. It has abandoned any reformative goals of punishment, seeking instead only retribution, isolation, and a source for cheap labor. Prison administrators – whether on their own initiative or at the prompting of political actors – frequently try novel methods of exerting control over the people

229. See Taylor Telford, *Biden Wants to Let Gig Workers Be Employees. Here's Why It Matters.*, WASH. POST (Oct. 17, 2022, 10:20 AM EDT), <https://www.washingtonpost.com/business/2022/10/17/gig-workers-contractors-faq> [<https://perma.cc/F5C3-AMW9>].

230. See *supra* note 204 and accompanying text.

231. See, e.g., Sterilization Act of 1917, ch. 279, § 10, 1917 Or. Laws 518, 521 (authorizing the sterilization of persons convicted of repeat offenses); Act of Mar. 11, 1919, ch. 281, §§ 1-2, 1919 N.C. Sess. Laws 504, 504 (authorizing the sterilization of prison inmates).

232. Compare Gutierrez, *supra* note 161, at 142-43 (discussing the financial burdens incarcerated people face when seeking abortions), with Miranda Bain, Naomi Bouchard-Gordon & Anne Ruble, *Restricting Abortion Rights Will Hurt the Most Vulnerable Populations*, JOHNS HOPKINS ALL. FOR A HEALTHIER WORLD (May 6, 2022), <https://www.ahealthierworld.jhu.edu/ahw-updates/2022/5/5/abortion-equity> [<https://perma.cc/Q5AN-UU7Z>] (“Many Texans are unable to navigate the obstacles to obtaining abortion out of state, because of the intersecting issues of poverty, race, migrant status, childcare responsibilities, and youth.”).

233. See Jaelyn Diaz, *Trans Inmates Need Access to Gender-Affirming Care. They Often Have to Sue to Get It*, NPR (Oct. 25, 2022, 5:00 AM ET), <https://www.npr.org/2022/10/25/1130146647/transgender-inmates-gender-affirming-health-care-lawsuits-prison> [<https://perma.cc/WL6N-3FHJ>] (discussing the difficulties that transgender people have long faced in obtaining gender-affirming care in prison).

they incarcerate. Some of these methods prove radically successful, while some are counterproductive to the administrators' aims or even result in official rebuke by the courts.<sup>234</sup> Yet many prove useful and survive judicial review. Such cases provide evidence of the potential limits that courts are willing to impose on constitutional rights and the utility of various methods of oppression. Antidemocratic policymakers can then implement these lessons in a broader context. In other words, prisons demonstrate the realm of possible antidemocratic reforms that can later be applied to the general public.

A skeptical reader might also propose that this Book Review reads the causation in the wrong direction – that antidemocratic prison policies arise from a general strand of antidemocracy in the body politic. There have always been antidemocratic elements in American politics, after all.<sup>235</sup> Yet modern American antidemocracy has a reactionary character born of capitalist backlash to the New Deal and the Warren Court.<sup>236</sup> That backlash found its organizing moment in the Powell Memorandum, a 1971 memo for the U.S. Chamber of Commerce by lawyer (and soon-to-be Supreme Court Justice) Lewis F. Powell, Jr.<sup>237</sup> Yet antidemocracy was already firmly entrenched in American prisons, with policies largely already in their modern forms, by the time of the Attica Uprising the month after Powell drafted his memorandum.<sup>238</sup> The timing of antidemocracy and its policies taking root in modern American politics simply cannot support the proposition that it is the cause of antidemocratic policies in American prisons.

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234. See, e.g., *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 927-31 (D.C. Cir. 1996) (reviewing appropriate remedies for Eighth Amendment violations including sexual harassment, physical restraint of pregnant persons, and unsafe and unsanitary living conditions).

235. See Bowie, *supra* note 16, at 174 (noting that the antidemocratic character of the judiciary was already present when Alexis de Tocqueville commented on the “American aristocracy”).

236. See Cass Sunstein, *Constitutional Politics and the Conservative Court*, AM. PROSPECT (Feb. 19, 1990), <https://prospect.org/justice/constitutional-politics-conservative-court> [<https://perma.cc/BLZ8-2VTS>] (“While the Warren Court achieved historic advances, it also helped to generate a conservative political reaction and raised serious questions about the legitimate role of the judiciary in a democracy.”).

237. See Nitish Pahwa, *Time to Fight: How the Powell Memo Convinced Big Business It Was Losing American Hearts and Minds*, SLATE (Aug. 30, 2021, 1:28 PM), <https://slate.com/news-and-politics/2021/08/lewis-powell-memo-chamber-commerce.html> [<https://perma.cc/T5LL-XMXE>] (“Fifty years later, that vision has come to pass. A right-wing dark money network, financed over the decades by magnates from Bryce Harlow to Richard Mellon Scaife to Joseph Coors, has funded think tanks, media outlets and writers, college programs, legal organizations, and politicians dedicated to advancing pro-business causes.”).

238. See *supra* notes 2-11 and accompanying text.

The forces of antidemocracy are shrewd. They seldom leave a smoking gun for opponents to cite in legal briefs challenging their attacks on civil rights.<sup>239</sup> Even when the clandestine workings of antidemocratic plots do reach the public, it's often through the hard work of investigative journalists.<sup>240</sup> A governor seeking to implement book bans in schools is unlikely to say or write about how the policy draws on previous policies in prisons. A legislature seeking to limit transgender people's access to necessary healthcare is unlikely to make official findings regarding the previous use of such policies in prisons. They may not even be aware that they previously encountered information about antidemocratic prison policies before crafting antidemocratic policies for the general public. Yet the laboratories of antidemocracy still provided working models for those policies, and the pattern of successive implementation is too widespread to ignore. A society that can brand someone an undesirable criminal who deserves restricted rights can easily handle the mental shift to restricting the rights of anyone it considers undesirable. We do not need a smoking gun to make resisting such a process worthwhile.

### C. *How to Break the Cycle*

The most certain way to ensure that the forces of antidemocracy cannot use prisons as laboratories of antidemocracy would be simply to eliminate prisons. Barring that, it would be – to paraphrase a rallying cry of abortion-rights activists – to make prisons humane, transparent, and infrequently used. Mass

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239. *But see* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (“Before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.”); Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html> [https://perma.cc/RN36-JQWV] (“Files on those drives showed that he wrote a study in 2015 concluding that adding a citizenship question to the census would allow Republicans to draft even more extreme gerrymandered maps to stymie Democrats.”). These examples are notable for their rarity; such evidence is usually unavailable to civil-rights plaintiffs.

240. *See, e.g.*, Fred P. Graham, *Powell Proposed Business Defense*, N.Y. TIMES (Sept. 29, 1972), <https://www.nytimes.com/1972/09/29/archives/powell-proposed-business-defense-wrote-a-memo-for-chamber-before.html> [https://perma.cc/SBV4-HKGA] (describing the release of the Powell Memorandum after Jack Anderson published excerpts in his column). The Powell Memorandum laid a blueprint for business interests to expand their influence over American politics and law from the 1970s to the present. *See* Pahwa, *supra* note 237 (“As journalists like Jane Mayer have documented, the strategy has worked all too well: Megacorporations now enjoy fewer regulations, lower taxes, more lobbyists, more businesspeople in power, and the ability to impede policy perceived as hurting their bottom line, whether that be related to climate protections or health care reform.”).



incarceration has relegated incarcerated people to obscurity and reduced the harms they suffer to statistics in the popular imagination. The political will to protect incarcerated people is currently quite weak.<sup>241</sup> Restoring it will require abolitionists and their allies to cultivate empathy for incarcerated people, which will require raising their visibility. Abolitionists need to commit to drawing attention to prison-organizing efforts in their public writing, speaking, and media appearances. This will not, on its own, inspire the public to eliminate prisons, but it is a prerequisite to any further action.

Abolitionists must also advance the argument that mass incarceration is incompatible with democracy. Even converting prison to its more humane, European forms would require radical change to reduce our current incarceration rates. Reducing those rates will require addressing the interlocking web of legal and social factors that Bellin discusses – and more that he does not. To affect this revolution in consciousness, abolitionists must show how mass incarceration results in distortions of democracy, unjustifiable abuses of incarcerated people’s civil rights, and the preservation of white supremacy.

Ultimately, this will require reckoning with the sad reality that comfortable<sup>242</sup> white people can be reliably turned against anyone, no matter how much they saw that person as human in another context, when told that this was someone who did not follow the rules. This prejudice presents the greatest barrier of all to prison abolition, as there is no one whom it is easier to portray as having broken the rules than someone who has been convicted of a crime. Here, again, a radical commitment to empathy is key. Abolitionists must convince comfortable white people to empathize with incarcerated people, and to do so, must model empathy themselves. Abolitionists cannot simply be advocates and theorists; we must take up the challenge of comforting the disturbed and disturbing the comfortable.

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241. Prisoners’ rights have never been especially popular with the public, but support for reform has been great enough in the wake of events like the Attica Uprising to lead to legislative action. See Kim Smith Dedham, *After Attica: Inmate Uprising Leads to Reform*, NIAGARA PRESS-REPUBLICAN (July 17, 2015), [https://www.pressrepublican.com/news/local\\_news/after-attica-inmate-uprising-leads-to-reform/article\\_81cdfb7a-e03a-5e85-9161-4d6f183ef7b5.html](https://www.pressrepublican.com/news/local_news/after-attica-inmate-uprising-leads-to-reform/article_81cdfb7a-e03a-5e85-9161-4d6f183ef7b5.html) [<https://perma.cc/C2HJ-SZKU>] (“Reforms after Attica took major strides to improve conditions for prison inmates and revamped the way what is now called the State Department of Corrections and Community Supervision is monitored.”).

242. “Comfortable,” here, refers not just to their economic circumstances, but also to their comfort in the position that their lives represent the default. See Robin diAngelo, *White People Assume Niceness Is the Answer to Racial Inequality. It’s Not*, GUARDIAN (Jan. 16, 2019, 6:00 AM EST), <https://www.theguardian.com/commentisfree/2019/jan/16/racial-inequality-niceness-white-people> [<https://perma.cc/5484-SMVG>] (arguing that white people’s failure to reckon with the meaning of their own racial identity “creates a culture in which white people assume that niceness is the answer to racial inequality and people of color are required to maintain white comfort in order to survive”).

This change in social attitudes will likely not be possible independent of other radical changes. To this end, it should be conceived as a part of the struggle for an abolition democracy. Abolition democracy is the establishment of life- and liberty-affirming institutions to ensure that all people have the economic, social, and legal resources to allow them to participate in all significant aspects of public life freely, actively, and conscientiously.<sup>243</sup> Abolition democracy would involve novel legal, economic, and social institutions, broadly rebuilding the structures through which we interact with each other and our society. Developing such structures requires lawyers to work in solidarity with liberationist social movements, building toward better institutions even if only gradually through consciousness-shifting or in dissenting opinions.<sup>244</sup> The injustices facilitating our inhumane and oppressive prisons under mass incarceration will likely persist until the project of reconstruction is complete.

## CONCLUSION

[W]hen I arrived in prison I found that by the workings of the prison system society commits every crime against the criminal that the criminal is charged with having committed against society.

– Kate Richards O’Hare<sup>245</sup>

Mass incarceration is fundamentally opposed to democracy. Its establishment is the result of antidemocratic trends and actors; its perpetuation enables the development and implementation of antidemocratic policies on a scale far beyond prisons’ walls. Professor Bellin succeeded in *Mass Incarceration Nation* in documenting the complexity of the mechanisms that enabled the rise of mass incarceration. He failed, however, to address the antidemocratic motivations behind it and the antidemocratic policies it enables. This Book Review addresses

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243. See Brandon Hasbrouck, *Democratizing Abolition*, 69 UCLA L. REV. 1740, 1780 (2023).

244. See Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community Lawyering*, 9 CLINICAL L. REV. 195, 197 (2002) (“In developing these strategies, however, one must be aware that the process of lawyering itself, and the relationship of the lawyer to the community, can determine whether the lawyer is a force of liberation or an agent of domination.”); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989) (“[Counterstories] can open new windows into reality, showing us that there are possibilities for life other than the ones we live.”); Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 635 (2022) (“Rather than simply believing in the power of law to build a better world, as a progressive judge does, a movement judge must be repulsed by inequity and must heartily dissent when the majority creates it.”).

245. Kate Richards O’Hare, *Crime and Criminals*, in PRISON WRITING IN 20TH-CENTURY AMERICA 85 (H. Bruce Franklin ed., 1998).

both, focusing for the first time in legal scholarship on mass incarceration's antidemocratic effects beyond prison walls and their potential remedies. Antidemocratic policies are perfected in prisons, disproportionately on members of our most vulnerable populations. These policies are then implemented outside the prison walls in American society, where they are applied again with a disproportionate focus on our most vulnerable populations. Justice Brandeis may have championed the virtues of the laboratories of democracy, but by joining Justice Holmes's majority opinion in *Buck v. Bell*, he aided in establishing the blueprint for the laboratories of antidemocracy. And as antidemocratic policies take root and gain official sanction, they make way for more of their kind, as we now see waves of antidemocratic decisions and statutes on labor rights, voting rights, reproductive justice, and gender-affirming care.

Black people have warned us about the threat of antidemocracy that prisons pose. The incarcerated men who rose up in Attica warned us that the prison was a tool of antidemocratic political oppression. Moreover, the Black Panther Party warned us that white supremacy's goal in mass incarceration was democracy for me, but not for thee. Prison has severe costs to our democracy itself, and to the human beings caught in its grasp. As I write this, at least 135 people have died in Texas prisons in three and a half months<sup>246</sup> – Texas only imprisons about 135,000 people.<sup>247</sup> To counteract prison's antidemocracy and human costs, the remedy must be abolition – if not the complete elimination of all prisons, then at the very least their replacement with novel institutions that are humane, transparent, and as little used as possible. It is time for opposition to mass incarceration to turn toward an abolitionist horizon.<sup>248</sup> The costs of prison are simply too high to mitigate without establishing the institutions of abolition democracy.

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246. Ryan Chandler, *135 People Have Died in Texas Prisons Since June 1; Families Demand Answers*, KXAN (Aug. 17, 2023, 11:55 AM CDT), <https://www.kxan.com/news/texas/135-people-have-died-in-texas-prisons-since-june-1-families-demand-answers> [https://perma.cc/923J-FXE2].

247. See *Texas 2020*, NAT'L INST. CORR. (2020), <https://nicic.gov/resources/nic-library/state-statistics/2020/texas-2020> [https://perma.cc/4GKK-HGWQ].

248. See Akbar, *supra* note 24, at 1783-85 (discussing a similar abolitionist turn among left social movements opposing police abuses).