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## Taking Exception to Criminal Justice Reforms that Fail to Transform: Using Transitional Justice to End the Carceral State

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## TAKING EXCEPTION TO CRIMINAL JUSTICE REFORMS THAT FAIL TO TRANSFORM: USING TRANSITIONAL JUSTICE TO END THE CARCERAL STATE

*By Angela A. Allen-Bell\**

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### I. INTRODUCTION

Conversations surrounding criminal justice reform have become the latest national obsession. There is a troubling degree of consistency where approaches are concerned. Espoused solutions have become predictable. They are often reactionary, and they tend to focus on some trendy aspect of the problem but never the problem

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itself. Conversations have vacillated between mandatory minimum sentences to juvenile life sentences to “woke” or progressive prosecutors to the latest monomania, which is a call to remove the Exceptions Clause from the Thirteenth Amendment of the United States Constitution. The Thirteenth Amendment tolerates slavery and indentured servitude when a convicted person is being punished for the commission of a crime. Those who champion removal of the Exceptions Clause view it as a bolt on the door to a just system.

These advocates are correct in deeming this Exceptions Clause repugnant and offensive to notions of good government. They are even correct in their assertions that the Exceptions Clause renders the amendment impotent because the inclusion of the Exceptions Clause sanctions what the law sought to end: slavery and involuntary servitude. I support the effort but fear reforms involving only the Thirteenth Amendment’s Exceptions Clause suffer from shortsightedness.<sup>1</sup> I advocate for a more holistic and comprehensive approach that aims to dismantle the carceral state—all the formal institutions of the criminal justice system and the accompanying ideology that espouses punitive measures as a response to social challenges and transgressions. Because the carceral state is more than mass incarceration and because it involves ideologies and approaches that unnecessarily embrace punitive responses, removal of the Exceptions Clause will likely leave the carceral state unscathed. I look to international law for aid in dismantling the carceral state and the systemic racism that it shelters.

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<sup>1</sup> In 2022, efforts to remove the Exceptions Clause were underway in Alabama, Louisiana, Vermont, Oregon, and Tennessee. I support labor schemes that can help reintegrate a justice-impacted person back into society or that can incentivize behavior modification, so I oppose an outright ban on work for those in custody. In 2018, Colorado became the first state since Rhode Island in 1842 to ban slavery and involuntary servitude outright. Two years after a failed attempt to change their law, Coloradans voted 66% to 34% for an amendment reading: “There shall never be in this state either slavery or involuntary servitude.” Utah and Nebraska removed the language in 2020. The failed November 2022 ballot initiative in Louisiana read: “Do you support an amendment to prohibit the use of involuntary servitude except as it applies to the otherwise lawful administration of criminal justice?” Language consistent with Colorado’s is what I advocate.

“Modern international human rights law is the phoenix that rose from the ashes of World War II and declared global war on human rights abuses.”<sup>2</sup> It is the offspring of colossal aims and grand intentions:

Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed. While states were historically the main subjects of international law, it has long-since evolved from this state-centric template. The past 70 years have . . . transformed international law and made the individual an integral part of this legal domain. . . . [I]nternational law now works not only to maintain peace between states, but to protect the lives of individuals, their liberty, their health, and their education.<sup>3</sup>

When systemic abuses that are prolonged and pervasive have existed and a jurisdiction plagued by them wishes to emerge from this pattern, transitional Justice (TJ) is often used because the normal justice system is not equipped to respond to such a need. It provides a means of transitioning from an oppressive regime toward peace, democracy, the rule of law, and respect for individual and collective rights. In making such a transition, societies must confront the root causes of conflict and repressive rule as well as address any violations of economic, social, political, civil, human, and cultural rights that may have occurred. TJ has “crystallized into an international norm and is today firmly grounded in international institutions, case law and international relations.”<sup>4</sup>

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<sup>2</sup> *Nevsun Resources, Ltd. v. Teckle*, [2020] S.C.R. 5, 6 (Can.).

<sup>3</sup> *Id.*

<sup>4</sup> JEREMIE BRACKA, *TRANSITIONAL JUSTICE FOR ISRAEL/PALESTINE TRUTH-TELLING AND EMPATHY IN ONGOING CONFLICT* 106 (2021) (citations omitted).

TJ is underused in the United States. I seek to change that. The central purpose of this article is to promote the use of TJ to transform (not just reform) the criminal justice system by dismantling the carceral state and its associated ideologies that, reflexively, respond to poverty and transgressions punitively. This article proceeds in eight parts. Part II of this article explains TJ and its five pillars: (1) truth-seeking, (2) memorialization, (3) prosecutions/justice, (4) reparations, and (5) legal and policy reforms/the guarantee of non-recurrence. The sections that follow demonstrate how work is done under each of these pillars and how these five pillars are interrelated and must be pursued simultaneously to achieve transition from a place that abuses human rights to one that respects them.

Specifically, Section III examines, for purposes of truth-seeking, how race intersects with the carceral state and how that intersection violates international law. Section IV demonstrates how transformational work can be accomplished under the memorialization pillar by honoring Blacks who have invoked United Nation (U.N.) processes while simultaneously examining the fidelity that the United States has demonstrated to human rights tenants and the accompanying U.N. processes. Section V considers how the prosecutions pillar can be used to chisel away at the carceral state. Section VI evaluates how the reparations pillar can be used to dismantle the carceral state. One consideration is shifting the focus from the Thirteenth Amendment's Exceptions Clause in Section 1 to the enforcement clause in Section 2. Section VII of this article considers law and policy reforms that could aid in ending the carceral state, as well as prevent the reoccurrence of any semblance of it.

## II. ABOUT TJ

TJ has become the globally dominant method used in countries seeking to redress the legacies of trauma, violence, oppression, or massive human rights abuses following periods of conflict and repression. TJ “is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse[s].”<sup>5</sup> “[T]he practice and theory of

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<sup>5</sup> *What is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUST. 1 (2009).

transitional justice ha[s] consolidated the claim that meaningful transition requires due regard for justice and a carefully conceived process to re-establish the rule of law, human rights . . . address the plight of victims and provide accountability for perpetrators.”<sup>6</sup> TJ seeks to create a platform of justice to account for past abuses and injustices.<sup>7</sup>

The five TJ pillars are interrelated. For example, work under the truth-seeking pillar offers “victims and communities a platform to publicly share their experiences, contributing to a public record and a transformational and shared narrative for the future.”<sup>8</sup> The memorialization pillar is the infrastructure upon which the TJ process is built because it constructs the memories of the past that serve as the catalyst for the other needed changes. Work under the reparations pillar “provide[s] victims and communities some means to change the conditions that hold them back.”<sup>9</sup> Legal and other reforms can prevent the recurrence of abuses and, in so doing, achieve equity peace and harmony between people and government and a reverence for civil and human rights.<sup>10</sup>

The work under the five pillars of TJ must be complementary if the transition is to be successful. Each pillar ensures the success of the others, and they all collectively ensure the success of the transition. None of the measures are as effective on their own as when combined with the others.<sup>11</sup> “The many problems that flow from past abuses are often too complex to be solved by any one action.”<sup>12</sup> Some question the timing, wondering if a TJ effort must happen after a regime change or if it can be effective as one is in progress. Insights from experts at the International Center for TJ suggest that waiting on a change in

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<sup>6</sup> BRACKA, *supra* note 4, at 106.

<sup>7</sup> *See id.* at 115.

<sup>8</sup> U.N. Secretary-General, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 8, U.N. Doc. A/HRC/49/39 (Jan. 12, 2022) (citing General Assembly resolution 67/1, ¶ 21; S/2004/616, ¶ 8).

<sup>9</sup> *Id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See* INT’L CTR. FOR TRANSITIONAL JUST., *supra* note 5.

<sup>12</sup> *Id.*

leadership is not as important as acting when there is an outcry for change:

[O]ver the past decade, the general understanding of transitional justice has evolved; initially conceived as a set of approaches to achieve justice and redress in the aftermath of war or authoritarian regimes, it is now seen as relevant to established democracies and has been increasingly applied in them to address legacies of abuse and historical injustices.<sup>13</sup>

The success of TJ attempts is contingent on several factors. These are primarily related to the design and implementation of specific TJ policies and programs. Such factors include the extent to which the programs are context-specific (considering local challenges and opportunities), comprehensive (seeking progress regarding all... components of transitional justice), coordinated with overlapping policy areas, and nationally owned (considered legitimate by victims and broader society), and whether there is a sustained commitment to a long-term plan (with short-medium-long term goals set).<sup>14</sup>

TJ seeks to change how citizens interact with one another and with state officials to reduce structural inequities and eliminate normalized wrongdoing. For change to be effective, it must be based on an accurate understanding of why relationships are unequal and what enables normalized wrongdoing. TJ is not a formula nor is it linear. It allows for a range of processes and mechanisms to be employed—both judicial and nonjudicial. The goal is to use these pillars to heal wounds, mitigate trauma, and contribute to social reconstruction. What follows is a closer look at ways each of the five pillars can be used to dismantle the carceral state and transform the justice system.

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<sup>13</sup> Virginie Ladisch & Anna Myriam Roccatoello, *The Color of Justice: Transitional Justice and the Legacy of Slavery and Racism in the United States*, INT'L CENT. FOR TRANSITIONAL JUST. 2 (April 2021), [chrome-extension://efaidnbnmnibpcajpcgglefindmkaj/https://www.ictj.org/sites/default/files/ICTJ\\_Briefing\\_TJ\\_US\\_Race\\_0.pdf](chrome-extension://efaidnbnmnibpcajpcgglefindmkaj/https://www.ictj.org/sites/default/files/ICTJ_Briefing_TJ_US_Race_0.pdf).

<sup>14</sup> See U.N. Secretary-General, *supra* note 8, at 12.

### III. TRUTH-SEEKING PILLAR: RACE, THE CARCERAL STATE & HUMAN RIGHTS

TJ provides a means of transitioning from oppressive regimes. It demands deep exploration into the causes of societal conflict, and it requires that, in the transition, violations of economic, social, political, civil, human and cultural rights be remedied. For purposes of TJ, “the past is viewed through the prism of moving forward,”<sup>15</sup> making discourse around TJ both future-oriented and retrospective.<sup>16</sup> “Thus, it is assumed that narrating a full account of a traumatic past is interlinked with the achievement of justice, reconciliation, social repair, healing, and institutional reform.”<sup>17</sup>

The truth-seeking pillar seeks to document and acknowledge human and civil rights violations and to understand the causes of strife as a conflict resolution strategy. To be effective, the effort must: be comprehensive; be concerned with more than specific cases; include the voices and stories of those whose rights have been violated (known as narrative truth); and be followed by a commitment to use the information gathered to implement transition and change. The prescribed truth-seeking process goes beyond simply transcribing stories. It “requires an analysis of human rights violations, including the actors, structures and resources used to perpetrate them; the reasons for perpetrating them; and the effects of such violations on victims and society.”<sup>18</sup>

“[T]ruth-seeking also helps create the political will and public support for reparations and institutional reform.”<sup>19</sup> The effort cannot be superficial. It is “about creating a platform of justice to account for past abuses and injustice.”<sup>20</sup> For Blacks, the intersection of race and justice was formed during the chattel slavery era, so this becomes the starting point for this discussion. The Thirteenth Amendment, which many contend ended slavery in the United States, was ratified on

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<sup>15</sup> BRACKA, *supra* note 4, at 108.

<sup>16</sup> *See id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See* U.N. Secretary-General, *supra* note 8.

<sup>19</sup> Ladisch & Roccatello, *supra* note 13, at 6.

<sup>20</sup> BRACKA, *supra* note 4, at 115.



December 18, 1865 by the legislatures of twenty-seven of the thirty-six states. The amendment was enacted over 200 years after the arrival of the first enslaved person to the U.S. The Amendment was not the first attempt to end chattel slavery in the United States. It was the end of an exhaustive and prolonged effort involving many players over many years. From the inception of chattel slavery, the enslaved, clergy and religious organizations, members of the Free Labor Movement, and other abolitionists did much to unsteady the institution. Yet, chattel slavery grew in size and demand.

The country and international community were invested in slavery. “From the 16th through the 19th centuries, most colonial economies in the Americas were dependent on human-trafficking and the use of enslaved African labor for their survival.”<sup>21</sup> By 1860, nearly 4 million enslaved people existed in the United States. “On the eve of the Civil War, slaves represented the largest concentration of property in the United States, with an aggregate value that exceeded the combined total of all American banks, factories, and railroads.”<sup>22</sup> It is false to suggest the North was a zone of abolitionists. Economic interests in the North and amongst the international community caused some—but not all—to oppose the end to slavery.

In the South, everyone did not own slaves or support the continuation of slavery. Many did, however, and they acted with a fervor to protect their agricultural economies and desires for cheap labor. In 1860, President Abraham Lincoln was elected. At the time, fifteen of the thirty-four states were slave states with supreme authority over their affairs. The national government could provide little to no protection for individuals inside state lines. This was a coveted reality for southern states who responded to President Lincoln’s election by withdrawing from the Union and adopting a Confederate Constitution that supported slavery and state’s rights. Despite this treasonous act,

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<sup>21</sup> Thirteenth Amendment Commemorative Coin Act, H.R. 2978, 114th Cong. (2015).

<sup>22</sup> Eric Foner, *Abraham Lincoln, the Thirteenth Amendment and the Problem of Freedom*, 15 *GEO. J. L. & PUB. POL’Y* 59, 59 (2017).

an 1861 legislative effort was undertaken to lure the Confederate states back.

Congress assured Confederates that there would be no constitutional amendment granting the federal government the power to abolish or interfere with slavery.<sup>23</sup> This attempt at courtship failed. The idea of abolishing slavery as a war measure was not the route desired. Before the Civil War began in April 1861, there were numerous efforts to legislatively end slavery and avoid doing so by military means. In his 1862 annual message to Congress, President Lincoln called for a constitutional amendment that would authorize Congress to appropriate funds for any state that provided for abolition by 1900. President Lincoln also proposed that the enslaved be colonized outside of the United States and that the former owners be compensated.

That same year, President Lincoln signed the District of Columbia Compensated Emancipation Act, requiring the immediate emancipation of enslaved people in exchange for \$300.00 for each freed person payable to former slave owners. The Compensated Emancipation Act also authorized the payment of \$100.00 to formerly enslaved people but only if they were willing to repatriate to Africa. In addition, in 1862, Congress criminalized attempts by the military to enforce the Fugitive Slave Clause.<sup>24</sup> President Lincoln further issued a preliminary Emancipation Proclamation, warning that the proclamation would go into effect if southern states did not cease their rebellion by January 1, 1863. The South did not cease.

The year 1863 started with the issuance of the official Emancipation Proclamation, a war measure that applied to named states and parts of states in rebellion against the United States. The

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<sup>23</sup> The Corwin Amendment, proposed by Thomas Corwin, read: “No amendment shall be made to the Constitution which will authorize or give Congress the power to abolish or interfere within any state, with the domestic institutions thereof, including that of persons held to labor of service by the laws of said state.” The Amendment was signed and ratified by three states. *See* J. Res. 13, 36th Cong., 2d Sess., 12 Stat. 251 (1861).

<sup>24</sup> *See* An Act to Make an Additional Article of War, ch. 40, 12 Stat. 354 (1862).

Proclamation did not allude to slaves held in the loyal states. In issuing it, President Lincoln exploited the legal status of the enslaved by reasoning that, as Commander-in-Chief in a time of war, he could seize “property” during battle. Attempts to end slavery expanded, contributing to a combustible state of affairs. After being reelected in 1864, President Lincoln reinvigorated his failed campaign to ban slavery through a constitutional amendment.

At this point, his intensity was partly due to fears that the Emancipation Proclamation might be declared unconstitutional by the courts, partly because the Proclamation exempted many slaves and partly because the Proclamation emancipated but failed to remove the legal status of the enslaved as slaves. More would be needed. On this attempt, the Amendment passed, but not because the representatives collectively caught the humanitarian flu.<sup>25</sup> Some supported the Thirteenth Amendment because, in their view, it was a just and moral course. Others had succumbed to pressure from abolitionists and international forces.<sup>26</sup> Then there were those who supported it because

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<sup>25</sup> The Thirteenth Amendment was passed by the congress succeeding the one that proposed the initial amendment. Many of the members of both houses were the same. The atmosphere has been described accordingly:

The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the constitution itself. These elements of discord grew in intensity . . . Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction.

United States v. Rhodes, 1 Abb. U.S. 28, 788 (1866).

<sup>26</sup> The slave trade was condemned by treaty in the Additional Articles to the Paris Peace Treaty of 1814 between France and Britain. By 1823, the British created the Anti-Slavery Society. In 1885, the General Act of the Berlin Conference on Central Africa formally denounced slave trading.

they opposed the monopoly of labor that slavery created.<sup>27</sup> For the rest, the winds of inevitability had blown their way, and they knew the notion of owning human capital was on its death bed. It did not hurt that Republican majorities dominated both houses of Congress when the votes were cast this time.

The vote to adopt the Thirteenth Amendment was the product of a contentious eight-day debate.<sup>28</sup> The debates of the Amendment capture a range of conflicting concerns and sentiments raised but rarely settled. Some questioned if the Amendment would confer equality upon the newly freed people and, in so doing, make women equal to men and children equal to parents. There was a lack of unanimity as to what emancipation meant in the minds of these men. Some wondered if emancipation would confer civil rights or political rights.<sup>29</sup>

To some, the Amendment extended personal liberties—as a means of granting only liberty. Others, such as Senator Trumbull, Chairman of the Senate Judiciary Committee, interpreted the Amendment as a grant of freedom. Mr. Trumbull observed that the task was to “abolish slavery, not only in name but in fact.”<sup>30</sup> Federalism provided an additional undercurrent, as some feared that the

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<sup>27</sup> OUSMANE K. POWER-GREENE, *AGAINST WIND AND TIDE: THE AFRICAN AMERICAN STRUGGLE AGAINST THE COLONIZATION MOVEMENT* 181 (2014) (discussing the views of the Free Soil Party, which was that lands of the west were reserved for whites and that slavery undermine their labor market); LAURENCE A. GLASCO, *THE WPA HISTORY OF THE NEGRO IN PITTSBURGH* 163 (2004) (discussing how Pittsburg laborers opposed slavery because of how “a large body of slave labor kept wages down.”); ROBERT C. WILLIAMS, *HORACE GREELY: CHAMPION OF AMERICAN FREEDOM* 99 (2006) (distinguishing the abolitionists movement from the antislavery movement, the latter being built upon concerns relative to the labor market).

<sup>28</sup> The debates began on January 6, 1865 and ended eight days later. The vote on the amendment was postponed to January 28, 1865. *See* CONG. GLOBE, 38th Cong., 2d Sess. 138 (1865).

<sup>29</sup> Political rights were viewed as the right to serve on juries, to hold elected office, and the right to cast a vote.

<sup>30</sup> *See generally* Robert M. Ireland, *The Reconstruction Amendments’ Debates*. Edited by Alfred Avins, 25 WASH. & LEE L. REV. 354 (1968); CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

enforcement language granted Congress too much power.<sup>31</sup> Others concurred with ending slavery but dissented as to whether enforcement language was needed given the fact that Congress, as they saw it, had power to act pursuant to the Necessary and Proper Clause.<sup>32</sup>

There were even those who believed the Thirteenth Amendment suffered a constitutional shortcoming because ending slavery amounted to an unconstitutional “taking” (in the form of Congress taking property from a state or individual in a state). There were also concerns about southern underrepresentation in Congress. The verbiage proved to be yet another source of contention. The representatives settled on existing language and avoided the challenges that an entirely new piece of legislation could prompt. Using the language from the Northwest Ordinance of 1787,<sup>33</sup> they sought inspiration from the states within the limits of the Northwest Territory that prohibited involuntary servitude but required labor upon public roads and allowed the sale of convicts to private individuals.

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<sup>31</sup> “In some Northern states . . . intense debates over the expansion of federal power preceded the eventual vote to ratify the amendment . . . South Carolina tried to find a middle course, reluctantly voting to ratify with a resolution approving section 1 of the amendment but not section 2.” George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 170 (Alexander Tsesis ed., 2010).

<sup>32</sup> *See id.*

<sup>33</sup> The Northwest Ordinance, authored by Thomas Jefferson, chartered a government for new territory towards the Pacific Ocean, and provided a method for admitting new states. It created a legal structure for the settlement of land in five present-day states: Ohio, Indiana, Illinois, Michigan, and Wisconsin. It also established rules for the admission of its constituent parts as states into the union. Under the ordinance, slavery was forever outlawed from the lands of the Northwest Territory, freedom of religion and other civil liberties were guaranteed, the resident Indians were promised decent treatment, and education was provided for. The ordinance of 1787 for the government of the Northwest Territory declares: “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted.” In *Foryth v. Nash*, 4 Mart. (o.s.) 385, 387-8 (1816), there is reference to this same exception in a 1797 congressional ordinance.

The Thirteenth Amendment is brief but broad in its scope. It reads:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

With this very significant development, it appeared equality had been established as an ideal in the country for the first time.<sup>34</sup>

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<sup>34</sup> On February 1, 1865, Illinois became the first state to ratify the proposed Thirteenth Amendment; it was joined by 17 other states by the end of the month. Georgia ratified on December 6, 1865, becoming the 27th of 36 states to approve the Amendment, thus achieving the constitutional requirement that it be ratified by three-fourths of the states. Secretary of State William Seward declared the Thirteenth Amendment to be part of the Constitution on December 18, 1865.

Though enacted with the African American enslaved population in mind, the Thirteenth Amendment has been applied to other groups. *United States v. Hatch*, 722 F.3d 1193 (2013) illustrates this. In 2013, individuals charged with a hate crime questioned Congress' authority to enact the Hate Crime Act pursuant to §2 of the Thirteenth Amendment. The *Hatch* court held that Congress properly exercised its authority to legislate against slavery's badges and incidents when it enacted the Hate Crimes Act. The court observed that "Congress's enforcement power under Section two . . . extends to eradicating slavery's lingering effects . . ." *Hatch*, 722 F.3d at 1197. Of note, the court endorsed the three-part analysis employed by congress as it deciphered whether kidnapping a mentally disabled Navajo man and branding a swastika into his arm constituted a badge-and-incident of chattel slavery: [T]he racial violence provision focuses on "three connected considerations: (1) the salient characteristic of the victim, (2) the state of mind of the person subjecting the victim to some prohibited conduct, and (3) the prohibited conduct itself." *Hatch*, 722 F.3d at 1205.

The attackers of the mentally disabled Navajo man were white. As to the first consideration, Congress concluded that color and race were synonymous in the 1860s. Pursuant to this reason, it felt that the first consideration was met. For the second consideration, Congress looked to whether the act was committed because of the victim's race. Finally, the court agreed that "Congress could rationally conclude that physically attacking a person of a particular race because of an animus toward or a desire to assert superiority over that race is a badge or incident of chattel slavery."

President Lincoln was alive when the legislature adopted the Thirteenth Amendment, but he did not live to witness its final ratification. He was assassinated on April 14, 1865. The next day, his successor, former slaveholder Andrew Johnson, became President. What followed was his contrary vision for America. Congress knew that the label “citizen” would not be enough to change the mindset of the Confederates, so measures were implemented to safeguard the transition of the formerly enslaved.<sup>35</sup> Through the Military Reconstruction Act of 1867, Congress declared the governments in Confederate states illegal. Federal military administrations took their place.

Congress placed conditions upon Confederate states in an effort to force the implementation of Reconstruction ideals. Congress would not seat these representatives until they adopted constitutions guaranteeing the vote to the newly emancipated population, ratified the Thirteenth and Fourteenth Amendments, and repudiated ordinances of secession as well as their war debt. Toward these ends, constitutional conventions were called in 1868. For former Confederate states, the threat of federal enforcement was a major concern. They went through the motions. To some, southern compliance with dictates served as evidence of a war victory and irrefutable proof that social change had been achieved. Time has revealed this thinking to be the intellectual conceptions of the naïve.

The Confederate mentality was not defeated in the Civil War, and the federal government had grossly underestimated the Confederates’ commitment to Southern ideals—the normalization of human trafficking, family and cultural destruction, labor exploitation, racism, white supremacy, sexual exploitation, brutality, and oppression.

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*Hatch*, 722 F.3d at 1205.; *see also* *In re Sah Quah*, 31 F. 327 (D. Alaska 1886) (applying the Amendment to enslaved Indians of the Thlinket or Kalosian race); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent., Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (explaining that the court refused to extend the Amendment to five orca whales or to non-humans).

<sup>35</sup> *See* First Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867), Second Reconstruction Act of 1867, ch. 6, 15 Stat. 2 (1867), Third Reconstruction Act of 1867, ch. 30, 15 Stat. 14 (1867), and Fourth Reconstruction Act of 1868, 15 Stat. 11 (1868).

The federal government momentarily lost sight of the procedural prowess of the South that Senator Henry Wilson often spoke of:

[T]his is not a struggle for the re-admission of the rebel States into the Union, but a struggle for the admission of rebels into the legislative branches of the government; not a struggle to put rebels under the laws of the country, but a struggle to enable rebels to frame the laws of the country. A loyal people see that the Confederate States, reconstructed since the surrender of the rebel armies, are as completely in the hands of rebels now as on the day Jeff. Davis was incarcerated at Fortress Monroe.<sup>36</sup>

If only the federal government had recalled that the Southern psyche was in the room when the Constitution was shaped and that the South successfully engineered the Three-Fifths Clause, which ensured sufficient representation to guard their slaveholding interests. They also did not calculate that this Clause aided the South in selecting a president who would remain loyal to their interests. There would be grave consequences to follow these misjudgments. The world would soon see that the passage of the Thirteenth Amendment would prove easier than the achievement of its aims.

An 1865 report on the condition of the South after adoption of the Thirteenth Amendment exposed the gap between intent and reality:

[T]here appears to be a popular notion prevalent in the South. . . . It is that the negro exists for the special object of raising cotton, rice and sugar for the whites and that it is illegitimate for him to indulge . . . in the

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<sup>36</sup> ELIAS NASON, *THE LIFE AND PUBLIC SERVICES OF HENRY WILSON, LATE VICE-PRESIDENT OF THE UNITED STATES* ch. 18 (2016). In a speech, Representative Wilson observed that “Slavery organized conspiracies in the Cabinet, conspiracies in Congress, conspiracies in the States, conspiracies in the Army, conspiracies in the Navy, conspiracies everywhere for the overthrow of the Government and the disruption of the Republic.” MARION MILLS MILLER, *GREAT DEBATES IN AMERICAN HISTORY: THE CIVIL WAR* 371 (1913).



pursuit of his own happiness in his own way. Although it is admitted that he has ceased to be the property of a master, it is not admitted that he has a right to become his own master . . . The whites esteem the blacks their property by natural right . . . they still have an ingrained feeling that the blacks at large belong to the whites at large, and whenever opportunity serves, they treat the colored people just as their profit, caprice, or passion may dictate . . . An ingrained feeling like this is apt to bring forth that sort of class legislation which produces laws to govern one class with no other view than to benefit another.<sup>37</sup>

This report proved prophetic. It would soon be revealed that the text of the Thirteenth Amendment politely concealed the collision between the grand ambitions of abolitionists and the steadfastness of the Confederates.

Following adoption of the Thirteenth Amendment, southern legislatures adopted sentencing schemes that brought clarity to inclusion of the words “except as a punishment for crime whereof the party shall have been duly convicted.” One tactic was through the use of vagrancy laws that would prompt an arrest if the newly freed person was without housing or employment. Another was the use of extreme sentences for petty thefts that were associated with poverty, such as theft of cattle. What awaited, post-conviction, was a system of convict-leasing that would place the newly freed person in penal custody, working for free again without the enjoyment of life or liberty. In other words, the people who were freed by one part of the Thirteenth Amendment were enslaved by another part.

Blacks had “entered into a relationship with the state unmediated by a master.”<sup>38</sup> The Reconstruction Amendments were being reduced to hollow expressions. Blacks “were divested of their

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<sup>37</sup> Ireland, *supra* note 30, at 89.

<sup>38</sup> Angela Y. Davis, *Racialized Punishment and Prison Abolition*, in *A COMPANION TO AFRICAN AMERICAN PHILOSOPHY* 363 (1988) (citations omitted).

status as slaves in order to be accorded a new status as criminals.”<sup>39</sup> The U.S. Supreme Court has acknowledged this and scholars have affirmed.<sup>40</sup> Even more compelling, the Reconstruction debates bear the evidence of this:

The emancipation of the slaves is submitted to only in so far as chattel slavery in the old form could not be kept up. But although the freedman is no longer considered the property of the individual master, he is considered the slave of society, and all independent State legislation will share the tendency to make him such. The ordinances abolishing slavery passed by the conventions under the pressure of circumstances, will not be looked upon as barring the establishment of a new form of servitude.<sup>41</sup>

A Freedmen’s Bureau official also made a plea two years after adoption of the Thirteenth Amendment that the formerly enslaved not be “confined . . . within the walls of the penitentiary which has been filled to overflowing by reason of the sudden emancipation—a large number . . . reduced to vagrancy and theft—but to sell them for a limited time into involuntary servitude. . . .”<sup>42</sup> These pleas and concerns would soon yield to circumstances. The number of

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<sup>39</sup> *Id.*

<sup>40</sup> *See Rhodes*, 1 Abb. U.S. at 794 (noting that “[a]lmost simultaneously with the adoption of the amendment this course of legislative oppression was begun”); *See generally* C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913* (1951); MARK T. CARLETON, *POLITICS AND PUNISHMENT THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* (1971); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* (2008); MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); DENNIS CHILDS, *SLAVES OF THE STATE BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY* (2015).

<sup>41</sup> Ireland, *supra* note 30, at 93.

<sup>42</sup> *Id.* at 265; On March 3, 1865, the Bureau of Refugees, Freedmen and Abandoned Lands (also known as the Freedman’s Bureau) was established by Congress in the War Department in the closing year of the Civil War. The Freedman’s Bureau was created to provide the newly emancipated people with employment, wages, health, housing, legal and educational assistance. *See* Freedmen’s Bureau Act, 13 Stat. 507-509 (1865). A second Freedmen’s Bill was enacted in 1866. *See* Freedmen’s Bureau Act of July 16, 1866, 14 Stat. 173-177 (1866).

imprisoned Blacks increased “from less than one percent before 1861 to as much as 90 percent in certain counties and states after 1865.”<sup>43</sup> In addition to recreating slavery through criminal convictions, another Southern ploy was the use of child apprenticeship laws. Upon the declaration of a judge that service was in the best interest of the child, the child would be placed in the custody of a landowner and apprenticed until the age of eighteen if female or twenty-one if male.

Many of these children were the very children who were freed by the Thirteenth Amendment or the offspring of those who were. Parental consent often wasn’t required. These adult landowners were frequently former slave owners. The judges were compensated by the landowners who were awarded these children. By 1877, Jim Crow laws, laws that enforced segregation, were introduced. After the Democrats regained control of Congress and the White House in 1894, Reconstruction Era laws were swiftly repealed and policy priorities changed. The Reconstruction Era would end with only military emancipation having been accomplished and unfulfilled promises having been delivered.

The Thirteenth Amendment accomplished a change in legal status for the formerly enslaved. On paper, it had converted them from property to citizens. However, reality collided with these written protections. Official sources suggest that the Reconstruction Period began in 1863 and ended in 1877. I challenge the notion that Reconstruction ended—Reconstruction was abandoned. After roughly 4 million enslaved people were emancipated, slavery was simply “replaced with Black Codes governing free black people—making the criminal-justice system central to new strategies of racial control.”<sup>44</sup> By March 8, 1965, President Lyndon B. Johnson, by way of his Law Enforcement Assistance Act, inserted the federal government

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<sup>43</sup> DENNIS CHILDS, *BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY* 9 (2015).

<sup>44</sup> Bryan Stevenson, *The 1619 Project*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html>; To undo the Black Codes, Congress passed the Civil Rights Act of 1866 and, later, the Fourteenth Amendment.

into local police operations, court systems, and state prisons, starting the United States' first "War on Crime."

"President Johnson saw the urban policeman as the 'frontline soldier' of this mission, and, as a result, the administration focused on building the weapons arsenal of local law enforcement."<sup>45</sup> A seismic shift in law enforcement practices, priorities, budgets and power was underway. "The 1965 legislation created a grant-making agency within the Department of Justice, which—with \$30 million at its disposal, or \$223 million in today's dollars—purchased bulletproof vests, helicopters, tanks, rifles, gas masks and other military-grade hardware for police departments."<sup>46</sup> One result was the Omnibus Crime Control and Safe Streets Act of 1968, the last major piece of domestic legislation Johnson passed, which gave the Department of Justice a new degree of influence over social policy by enlarging the grant-making agency into the Law Enforcement Assistance Administration (LEAA).<sup>47</sup>

President Johnson created a Commission on Law Enforcement and Administration of Justice. Their 1967 final report called for sweeping changes in policing, the courts, and corrections.<sup>48</sup> Their call did not fall upon deaf ears. In 1968, Richard Nixon's campaign for the Presidency emphasized the rising crime rate throughout the country and presented demands for "law and order." In 1970, President Nixon ordered Attorney General John Mitchell to devise a ten-year "Long-Range Master Plan" for American corrections with the idea of it serving as a model to the states.<sup>49</sup> "The Crime Commission—which was started by [President] Johnson—start[ed] making projections of prison populations based on what the black

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<sup>45</sup> Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015), <https://time.com/3746059/war-on-crime-history/>.

<sup>46</sup> *Id.*

<sup>47</sup> *See id.*

<sup>48</sup> *The Challenge of Crime in a Free Society*, PRESIDENT'S COMM'N ON L. ENF'T & THE ADMIN. OF CRIM. JUST. (1967), <https://assets.documentcloud.org/documents/3932081/Crimecommishreport.pdf>.

<sup>49</sup> *See* Timothy Shenk, *Booked: The Origins of the Carceral State*, DISSENT MAG. (Aug. 30, 2016), <https://www.dissentmagazine.org/blog/booked-origins-carceral-state-elizabeth-hinton>.

youth population would be, and prison construction [was] planned accordingly.”<sup>50</sup>

By the 1970’s, with law enforcement having license to engage in more direct contact with citizens vis-a-via stops justified by only reasonable suspicion, arrests and incarceration rates increased. The response from the federal government was fiscal support to states for prison construction.<sup>51</sup> By 1975, the racial dynamics of incarceration had transitioned from majority white to majority Black and Latino.<sup>52</sup> Between 1969 and 1973, the federal government’s law enforcement budget tripled; federal aid to state and local law enforcement grew from \$60 million to almost \$800 million.<sup>53</sup> The LEAA was one of the principal conduits for these funds. The War on Crime of the 1970s was premised upon the belief “that crime is really a problem of a specific population, so policymakers and officials thought: if we can identify that population and put them in prison for petty crimes before they go on to commit more violent crime, we will deal with the problem.”<sup>54</sup> Sting operations metastasized. “By the 1980s, during the crack era, you begin to get mass arrests in the thousands.”<sup>55</sup>

Contrary to popular lore suggesting that the Reagan administration “spearheaded the rise of urban surveillance and mass incarceration, federal policymakers had already dedicated a total of \$7 billion in taxpayer dollars (roughly \$20 billion today)

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<sup>50</sup> *Id.* (discussing President Johnson’s views as having been shaped by Daniel Patrick Moynihan, who felt that Black poverty is the product of behavior patterns and not larger socioeconomic issues. As a result, President Johnson initiated job training and equal opportunity programs, and for the symptoms of poverty that manifest through crime he puts more police on the streets).

<sup>51</sup> *See id.*

<sup>52</sup> *See id.* (discussing President Johnson’s views as having been shaped by Daniel Patrick Moynihan, who felt that Black poverty is the product of behavior patterns and not larger socioeconomic issues. As a result, President Johnson initiated job training and equal opportunity programs, and for the symptoms of poverty that manifest through crime he puts more police on the streets).

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

to crime-control programs before Reagan took office in 1981.”<sup>56</sup> The groundwork for today’s carceral state was laid generations and administrations ago. “Large crime policy projects, like the War on Drugs and the War on Crime that were mounted in the 1980s and 1990s, involved thousands of agencies including state legislatures, police departments, prosecutors, and prison authorities.”<sup>57</sup> The result was structural inequities, which were not produced by any one stage of the system but are the combined product of each stage in the sequence.<sup>58</sup> These detrimental policies and practices joined with the already existing Exceptions Clause, which became wedded to years of harmful legislation, such as mandatory minimum sentences, automatic life sentences, extreme sentences, sentencing enhancements, cash bail, non-unanimous juries, and the privatization and monetization of prisons.

As of 2021, Black Americans were imprisoned at a rate that is roughly five times the rate of white Americans.<sup>59</sup> Over 5 million people were under supervision by the criminal legal system.<sup>60</sup> Nearly 2 million people, disproportionately Black, are living in jails and prisons instead of their communities, a 500% increase since 1973.<sup>61</sup> This was not an unexpected development. It was a manifestation of estimates made by President Johnson’s Crime Commission years earlier. This truth-seeking excursion removes obstructions and allows one to properly identify the almighty carceral state, its disposition toward punitive responses—and the systemic racism associated with it—as the culprit to be confronted.

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<sup>56</sup> Hinton, *supra* note 45.

<sup>57</sup> NAT’L ACADS. OF SCIS., ENG’G AND MED., REDUCING RACIAL INEQUALITY IN CRIME AND JUSTICE: SCIENCE, PRACTICE, AND POLICY VIII (2022).

<sup>58</sup> *See id.*

<sup>59</sup> *See* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/>.

<sup>60</sup> E. Ann Carson, *Prisoners in 2020—Statistical Tables*, U.S. DEP’T JUST. (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

<sup>61</sup> Nellis, *supra* note 59.

This carceral state that I speak of is the product of the discriminatory structures that sustained chattel slavery and “policies created by a dominant . . . culture that insists on suppression of others.”<sup>62</sup> The carceral state enables formal institutions and economies of the criminal justice system—police, lawyers, correction officers, the incarcerated, and those paid to house their bodies—to exert their bias and power over people of color. But this, alone, is not all it is. The carceral state encompasses “logics, ideologies, practices and structures that invest in . . . punitive orientations to difference, to poverty, to struggles for social justice and to the crossers of constructive borders.”<sup>63</sup>

Professor Ruby Tapia explains the breadth and depth of carcerality in a way few have considered:

[C]arcerality captures the many ways in which the carceral state shapes and organizes society and culture through policies and logic of control, surveillance, criminalization, and un-freedom . . . ‘punitive orientation’ that revolve around the ‘promise and threat of criminalization’ and the ‘possibility/solution of incarceration.’ The carceral state, operating through these punitive orientations, functions as an obstacle and a substitute for ‘humane solutions to social problems’ such as poverty, racism, citizenship status, and other forms of inequality and discrimination. The carceral state, and its punitive processes of criminalization and control, operate in highly discriminatory ways and have both produced and reinforced massive inequalities along lines of race, class, gender, sexuality, and other identity categories.<sup>64</sup>

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<sup>62</sup> See *id.*; NAT’L ACADS. OF SCIS., ENG’G AND MED., *supra* note 57, at S-11 (“The historical legacy of racial exclusion and structural inequalities in housing, education, and socio-political forces forms the social context for racial inequalities in crime and criminal justice.”).

<sup>63</sup> Ruby Tapia, *What Is the Carceral State?*, STORYMAPS (Oct. 3, 2018), <https://storymaps.arcgis.com/stories/7ab5f5c3fbca46c38f0b2496bcaa5ab0>.

<sup>64</sup> *Id.*

The carceral state is a colossal human and civil rights violation, and the United States, when it comes to race and the lingering effects of chattel slavery, is one and the same with a country in transition following a period of conflict, such as one transitioning from an abusive dictatorship to a democracy. The mere removal of words from a law will leave the system that espouses punitive orientations to social challenges and transgressions in tack. The application of TJ approaches could produce systemic change by finally confronting the bias, racism, and the insatiable appetite for punitive responses to poverty and transgressions that is sutured into the carceral state. As this work is done, removal of the Exceptions Clause will become an imperative, as well as a consequential act. This, along with analogous reforms under this pillar, will finally accomplish the long-term vision for peace amongst people of color, state and federal systems, and officials as envisioned by human rights tenants.

This truth-seeking excursion finally casts a light on a class of victims who the suppressed history and the disoriented context surrounding criminal justice reform conversations have kept hidden. It also suggests that significant breaches of international standards exist. Under international law, crimes against humanity are not only prohibited, but there is also an obligation to prevent them and an obligation to respond when they are found to exist. The General Assembly of the U.N. has “enshrined . . . condemnation of colonialism in its human rights system. . . .”<sup>65</sup> And it has taken a robust stance against discrimination,<sup>66</sup> racism, forced labor, cruel and inhuman treatment, torture, slavery, and or slave-like conditions, which the U.N. recognizes as crimes against humanity. Despite this, descendants of those born of chattel slavery remain oppressed under the “badges and incidents” of chattel slavery. Because work under the TJ pillars is

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<sup>65</sup> U.N. Secretary-General, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, 8, U.N. Doc. A/74/321 (Aug. 21, 2019).

<sup>66</sup> The right to be free from discrimination is a human right. Article 2 of the Universal Declaration of Human Rights outlines, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The Universal Declaration of Human Rights G.A. Res. 217 A(III), U.N. Doc. A/810 (1948).



interconnected, attention turns to the way memorialization can complement work under this initial pillar to ultimately bring an end to the carceral state and, in the process of so doing, accomplish the removal of the Thirteenth Amendment's Exceptions Clause.

#### IV. MEMORIALIZATION PILLAR: HONORING BLACKS FOR INTERNATIONAL EFFORTS & DOCUMENTING THE U.S.' LACK OF FIDELITY TO THE UN PROCESS

“Memorialization is a process that satisfies the desire to honor those who suffered or died during conflict and as a means to examine the past and address contemporary issues.”<sup>67</sup> In this regard, memorialization is the infrastructure upon which the TJ process is built. According to United Nations Expert Fabian Salvioli, “without the memory of the past, there can be no right to truth, justice, reparation, or guarantees of non-recurrence.”<sup>68</sup> Memorialization is, therefore, “a stand-alone and a cross-cutting pillar, as it contributes to the implementation of the other . . . pillars and [] a vital tool for enabling societies to emerge from the cycle of hatred and conflict and begin taking definite steps towards building a culture of peace.”<sup>69</sup>

The voices of victims must play a clear role in the construction of memory. This, Salvioli says, grants dignity to

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<sup>67</sup> Judy Barsalou & Victoria Baxter, *The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice*, U.S. INST. PEACE 1 (2007), <https://www.usip.org/publications/2007/01/urge-remember-role-memorials-social-reconstruction-and-transitional-justice>.

<sup>68</sup> See U.N. Secretary-General, *Memorialization Processes in the Context of Serious Violations of Human Rights and International Humanitarian Law: The Fifth Pillar of Transitional Justice Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶21, U.N. Doc. A/HRC/45/45, (July 9, 2020).

<sup>69</sup> *Id.* (“Remembering the crimes and wrongs of the past, wherever and whenever they occurred, unequivocally condemning its racist tragedies and telling the truth about history are essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity.”). This U.N. document cites to the Durban Declaration and Program of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, adopted in Durban in 2001.

victims, alleviates tensions, allows for peaceful coexistence, and avoids the harms to follow denial.<sup>70</sup> It also establishes a dialogic truth, which can create the conditions for a debate within society on the causes and consequences of past crimes and violence and on the attribution of direct and indirect responsibility.<sup>71</sup> Memorialization projects document atrocities, dignify and honor the victims, capture the heroism and resistance of the survivors, spark initiatives for justice and reparations, and promote healing and reconciliation. The methods for memorialization overlap with some truth-seeking and reparations approaches.<sup>72</sup>

Memorialization can be accomplished through archiving of state records, archiving proceedings of commissions, public memorials or monuments, establishing national days to honor victims, maintaining interpretive sites or museums, integrating historical events into school curricula, videos or online documentation literature, the arts, academia, museums, renaming of public facilities, and truth commissions. An ideal starting point for work under this pillar is with an attempt to construct a proper memory of efforts made by Blacks in the United States to have their human and civil rights grievances addressed on a domestic front.

Black women have fought a valiant fight against the carceral state since the 1800s. In 1897, Selena Sloan Butler submitted “The Chain-Gang System” paper to be read at the National Association of Colored Women meeting.<sup>73</sup> And in 1893, Ida B. Wells published a

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<sup>70</sup> See *Memory Is a Key Pillar for Healing, Democracy and Peace*, U.N. OFF. OF HIGH COMM’R FOR HUM. RTS. (Oct. 5, 2020), <https://tinyurl.com/bdfn68t6>.

<sup>71</sup> See U.N. Secretary-General, *supra* note 68, at ¶ 36.

<sup>72</sup> “Successful memorialization draws upon specialists from many fields—transitional justice experts, historians, museum designers, public artists, trauma specialists, and human rights activists, among others—who traditionally have not worked together or are not viewed as having concerns in common. . . . Those involved in truth commissions and tribunals need to consider how their documentary collections can be made accessible to those involved in memorial projects.” Barsalou & Baxter, *supra* note 67, at 2.

<sup>73</sup> This was done in 1897 at a meeting held in Nashville, Tennessee. She grew up in Thomasville, Georgia and witnessed the prisoners working on the roads there.

chapter entitled “The Convict Lease System” wherein she spoke of the harmful racial dimensions of the system.<sup>74</sup> Soon after, Mary Church Terrell wrote “Peonage in the United States: The Convict Lease System and the Chain Gang,” arguing that “the chain gang system in the South was a continuation of slavery.”<sup>75</sup>

Two Black female authors are to be credited with starting modern conversations about racial inequities in the criminal justice system: Angela J. Davis (*Arbitrary Justice: The Power of the American Prosecutor*, first published in 2007) and Michelle Alexander (*The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, first published in 2010). In the 2000s, Black women took the lead in demanding state-level criminal justice reforms. Louisiana is home to at least three. Retired Justice Bernadette Johnson, former Chief Justice of the Louisiana Supreme Court, relentlessly wrote unprecedented dissents and media releases exposing systemic racism when she saw it on display. This author is one of the founding members of the advocacy team that successfully ended the use of non-unanimous juries in Louisiana (through the adoption of new legislation), a racist scheme that fast-tracked people into state custody from 1898-2018.<sup>76</sup>

Professor Andrea Armstrong, leading national expert on prison and jail conditions, founded IncarcerationTransparency.org, an online database designed by Professor Judson Mitchell, that tracks deaths in Louisiana prisons. The site was created because there was no reliable source to track this information.<sup>77</sup> Her research showcases high

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<sup>74</sup> This was published in 1893.

<sup>75</sup> In 1907, Terrell published her essay in the magazine *The Nineteenth Century*; *Black Women Reformers*, Colored Conventions Project. *Black Women Reformers*, COLORED CONVENTIONS PROJECT, <https://coloredconventions.org/carceral-states/black-women-reformers/> (last visited Feb. 25, 2023).

<sup>76</sup> See generally Angela A. Allen-Bell, *How the Narrative About Louisiana's Non-Unanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South*, 67 *MERCER L. REV.* 585 (2016); Angela A. Allen-Bell, *These Jury Systems Are Vestiges of White Supremacy*, *WASH. POST* (Sept. 22, 2017), <https://tinyurl.com/yuc8mdt7>.

<sup>77</sup>

Like other states, Louisiana is supposed to report such data to the federal Bureau of Justice Assistance, but advocates complain that

rates of death at the pre-trial stage, which means the deceased person was never convicted of anything and is, therefore, presumed innocent. In *Slaves of the State*, by Dennis Childs, and *Just Mercy*, by Brian Stevenson, these two Black male scholars present riveting historical accounts of the incalculable ways Blacks have been traumatized, victimized, exploited, and abused by the carceral state.

Finding little redress domestically, Blacks brought their grievances to the world stage. Memorialization efforts must also establish a clear record of the uninterrupted pattern of attempts by Blacks to document human rights abuses with the U.N. because the U.S. either caused them or refused to end them. These grievances span from the inception of the U.N. to the present—beginning with the 1946 National Negro Congress Petition followed by the 1947 “Appeal to the World Petition” by the National Association for the Advancement of Colored People, then the 1951 “We Charge Genocide Petition” by the Civil Rights Congress. In 1967, Whitney Young and the caucus of Black participants participated in and presented a resolution at the International Conference on Human Rights, which was the first such conference on human rights to be held since the founding of the U.N.<sup>78</sup> Not long after, in 1977, Black Panther Party member Larry Pinkney self-authored a petition to the U.N. (decided in 1984).

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there are few repercussions for failing to comply, and the raw numbers gathered by the bureau are not made public. The bureau also does not consistently disaggregate state data by facility and by factors such as race and sex, making it easy to mask disparities. Frustrated that no public database existed, Armstrong decided to create one, with the help of her law students at Loyola. Under her guidance, the students filed public-records requests with every jail, prison, and detention center in Louisiana.

Eyal Press, *A Fight to Expose the Hidden Human Costs of Incarceration*, THE NEW YORKER (Aug. 16, 2021), <https://www.newyorker.com/magazine/2021/08/23/a-fight-to-expose-the-hidden-human-costs-of-incarceration>.

<sup>78</sup> TO CONTINUE ACTION FOR HUMAN RIGHTS: THE PRESIDENT’S COMMISSION FOR THE OBSERVANCE OF HUMAN RIGHTS YEAR, 1968, FINAL REPORT 40-42 (1969).

And throughout the 1990s and 2000s, Blacks have lodged countless complaints of environmental racism, police brutality, capital punishment, solitary confinement, and other criminal injustices. These collective efforts alleged human rights violations, such as racism, torture, discrimination, colonialism, slavery, and slave-like conditions. Not only should this memorialization effort chronicle these prolonged domestic and international efforts, it must also record the actual—not promised—commitment of the U.S. to human rights ideals.

On December 10, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) affirming that “all human beings are born free and equal in dignity and rights.” As observed by President Lyndon Johnson, “much of the leadership in the drafting and adoption of the Declaration came from a great American, Mrs. Eleanor Roosevelt.”<sup>79</sup> Appallingly, what the country has done since has both caused and sustained the carceral state. Following World War II, the U.S. found itself in a perplexing position. It was a new global power entangled in an ideological struggle with the Soviet Union. “As the U. S. tried to convince countries to join its sphere by taking up democracy and liberal values, the U.S. government was competing with the Soviets . . . [when a] wave [of] African countries [were] declaring independence from white colonial rulers.”<sup>80</sup>

While lynching and Jim Crow segregation were in full force, the U.S. found itself in the perplexing position of having to confront or suppress its human rights shortcomings. Due to fears of being exposed as a hypocrite on a world stage by its Cold War enemies, the U.S. elected to divert its attention to civil rights remedies in the country as opposed to confronting its human rights shortcomings.<sup>81</sup> In the

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<sup>79</sup> Proclamation No. 3814, *Human Rights Week and Human Rights Year* (Oct. 11, 1967).

<sup>80</sup> Julia Ioffe, *The History of Russian Involvement in America's Race Wars*, THE ATLANTIC (Oct. 21, 2017), <https://www.theatlantic.com/international/archive/2017/10/russia-facebook-race/542796/>. Russia even attempted to persuade the United Nations to move its headquarters out of the United States in response to the country's racist laws. See Erin Blakemore, *The Racist Diplomatic Incidents that Embarrassed JFK Abroad*, HISTORY (Feb. 26, 2019), <https://www.history.com/news/african-diplomat-segregation-scandal-jfk>.

<sup>81</sup>

1960s, when Black diplomats visited the U.S. and were denied housing, lodging, meals, and transportation because of segregation laws and policies, the U.S. could have acted consistently with human rights tenants. Instead, the U.S. State Department chose to create the Special Protocol Service Section, a division designed to protect African diplomats from discrimination. This division acted as a troubleshooter while segregation continued.

The League of Nations pre-dated the United Nations. In drafting the Covenant outlining the obligations of League members, the U.S. rebuffed the suggestion that member states should be prohibited from discriminating on the basis of race or nationality against foreigners and opposed incorporating human rights obligations into the Covenant.<sup>82</sup> The U.S. undertook the added step of putting barriers in place that would prevent the U.N. from investigating human rights abuses involving Blacks, such as using its influence to insert “the domestic jurisdiction clause in the UN Charter. . . .”<sup>83</sup>

Even more detrimental was the U.S.’ successful effort to shape human rights priorities that ignored economic and social rights (in favor of political and legal rights) and limited the ability of the U.N. to hold transgressors accountable.<sup>84</sup> The U.S. has also delayed and refused

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In 1932, . . . Dmitri Moor, the Soviet Union’s most famous propaganda poster artist, created a poster that cried, ‘Freedom to the prisoners of Scottsboro!’ It was a reference to the Scottsboro Boys, nine black teenagers who were falsely accused of raping two white women in Alabama, and then repeatedly—wrongly—convicted by all-white Southern juries. The case became a symbol of the injustices of the Jim Crow South, and the young Soviet state milked it for all the propagandistic value it could.

*Id.*

<sup>82</sup> See DAVID WEISSBRODT, ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 7 (4th ed. 2009).

<sup>83</sup> CAROL ANDERSON, EYES OFF THE PRIZE THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955 47 (2003).

<sup>84</sup> See *id.* at 201; see WEISSBRODT ET AL., *supra* note 82, at 11-13 (discussing the 1948 adoption of a Universal Declaration of Human Rights limited by broad

ratification of covenants that could aid in the elimination of racism and bias or allow individual complaints to the U.N. human rights treaty bodies or to the Inter-American Court of Human Rights.<sup>85</sup> In 2001, the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban I) was held in Durban, South Africa. At Durban I, Member States denounced the brutality of colonialism, calling for its condemnation and the prevention of its recurrence.

Afterwards, the Declaration and Program of Action of Durban was adopted. The U.S. was one of two nations to withdraw over objections to a draft document equating Zionism with racism.<sup>86</sup> “In negotiating the Durban Declaration, the U.S. also resisted calls for an

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exclusions, the omission of monitoring and enforcement provisions, and a willful effort to weaken the structure of the newly formed United Nations).

<sup>85</sup> U.N. Secretary-General, *Report of the Working Group of Experts on People of African Descent on its Mission to the United States of America*, 4, U.N. Doc. A/HRC/33/61/Add.2 (Aug. 18, 2016).

The United States has ratified two of the international instruments related to the fight against racial discrimination: the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. Despite having also signed other relevant instruments, such as the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities, which could enhance the protection and recognition of the rights of people of African descent, the internal processes for ratification of these instruments have been stalled for a long time.

<sup>86</sup> George H. W. Bush said “to equate Zionism with the intolerable sin of racism is to twist history and forget the terrible plight of Jews in World War II and indeed throughout history.” Ben Cohen, *Anti-Zionism is Racism*, S. FLA. SUNSENTINEL (Nov. 17, 2015), <https://www.sun-sentinel.com/fl-jjps-cohen-1118-20151117-story.html>. The final Declaration and Program of Action did not contain the text that the U.S. and Israel had objected to, that text having been voted out by delegates in the days after the U.S. and Israel withdrew.

apology.”<sup>87</sup> Alternatively, the U.S. would only agree to an expression of regret and a commitment to future progress.<sup>88</sup> To be sure its position was understood, the U.S. delegation walked out of the conference. At the Regional Conference of the Americas, in preparation for the World Conference Against Racism, participating nation-states adopted an acknowledgment that:

[E]nslavement and other forms of servitude of Africans and their descendants and of the indigenous peoples of the Americas, as well as the slave trade, were morally reprehensible . . . [And] these practices have resulted in substantial and lasting economic, political and cultural damage to these peoples and that justice now requires that substantial national and international efforts be made to repair such damage.<sup>89</sup>

The U. S. opposed inclusion of this language.<sup>90</sup> More recently, in 2018, the Trump administration withdrew from the U.N. Human Rights Council.

A different picture emerges when attention is given to the U.S.’s persistent efforts to hold global partners accountable for human rights commitments and standards. In 2021, the U.S. proudly joined efforts to impose sanctions against Wang Junzheng, the Secretary of the Party Committee of the Xinjiang Production and Construction Corps (XPCC) and Chen Mingguo, Director of the Xinjiang Public Security Bureau (XPSB), under the Global Magnitsky sanctions program for repressing the predominately Muslim Uyghurs and members of other ethnic and religious minority groups in Xinjiang. This followed the U.S.’s

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<sup>87</sup> U.N. Secretary-General, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, 21, U.N. Doc. A/74/321 (Aug. 18, 2016).

<sup>88</sup> See *id.*

<sup>89</sup> *Id.* at 18.

<sup>90</sup> In 2008, the U.S. Congress, by way of a resolution, issued an official apology for slavery. See H.R. Cong. Res. 194, 110th Cong. (2008) (enacted).



conclusion that the People's Republic of China's (PRC) committed genocide and crimes against humanity in Xinjiang.

In taking this action, the U.S. described itself as “committed to playing a strong leadership role in global efforts to combat serious human rights abuses.”<sup>91</sup> That same year, the U.S. Department of State launched a landmark set of policy and foreign assistance initiatives intended to “build upon the U.S. Government’s significant, ongoing work to bolster democracy and defend human rights globally.”<sup>92</sup> The implementation dollars were well into the millions. In 2022, the U.S. formally condemned the Democratic People's Republic of Korea's (DPRK) ballistic missile launch as a “clear violation of multiple United Nations Security Council resolutions” and called on the DPRK to “refrain from further provocations” and “engage in sustained and substantive dialogue.”<sup>93</sup> That same year, the U.S., with an alarmingly high rate of wrongly convicted prisoners, championed the cause of the wrongful convictions and opposed the detainment of political prisoners in its official remarks surrounding the release of U.S. citizen Kyaw Htay Oo from prison in Burma, where he was wrongfully detained for more than fourteen months.<sup>94</sup>

The U.S. even registered its intolerance for corruption by banning former Belizean Minister John Birchman Saldivar, his immediate family, and his minor child from entry into the country.<sup>95</sup> In taking this action,

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<sup>91</sup> Press Release, Anthony J. Blinken, Sec’y of State, U.S. Dep’t of State, Promoting Accountability for Human Rights Abuse with Our Partners (Dec. 10, 2021) (on file with the Dep’t of State).

<sup>92</sup> Press Release, U.S. Department of State, U.S. Department of State Announces Initiatives to Bolster Democracy & Defend Human Rights in Support of the Presidential Initiative for Democratic Renewal (Dec. 10, 2021), <https://tinyurl.com/mwcdjx8m> (last visited March 15, 2023).

<sup>93</sup> Press Release, Ned Price, Spokesperson, U.S. Dep’t of State, DPRK Ballistic Missile Launch (Nov. 18, 2022) (on file with the Dep’t of State).

<sup>94</sup> See Press Release, Anthony J. Blinken, Sec’y of State, U.S. Dep’t of State, Release of U.S. Citizen Kyaw Htay Oo (Nov. 17, 2022), (on file with the Dep’t of State).

<sup>95</sup> This was done pursuant to Section 7031(c), which provides that officials of foreign governments and their immediate family members about whom the Secretary of State has credible information of direct or indirect involvement in

the Department of State explained that it was reaffirming its “commitment to combat[ing] corruption, which harms the public interest, hampers countries’ economic prosperity, and curtails the ability of governments to respond effectively to the needs of their people.”<sup>96</sup> The U.S. verbalized opposition to gender-based violence and supported the use of a hybrid court to obtain convictions against members of the rebel group 3R who were convicted of war crimes and crimes against humanity for severe violence committed in a massacre of at least forty-six civilians in May 2019. The official release explained, “ending impunity is a necessary foundation for peace, prosperity, and rule of law.”<sup>97</sup>

When it comes to honoring human rights principles and holding human rights abusers accountable, the U.S. domestic record is incongruous with its foreign one. The most recent Universal Periodic Review (UPR) proves this. The U.N. does a UPR every four and a half years with each of its 193 member states. It’s supposed to be a rare opportunity for member countries to evaluate each other on their progress toward the global body’s founding principles of human rights. At the same time, each nation-state under review has the opportunity to report on human rights conditions within their own borders, including actions that have been taken to address concerns detailed by other states. The result is a set of recommendations by the evaluating countries. The recommendations to the U.S. were extensive.<sup>98</sup> They included suggestions that several important international instruments be ratified and that: the U.S. close Guantanamo Bay; rejoin the Paris Climate Agreement; lift sanctions on members of the International Criminal Court; and

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significant corruption, or a gross violation of human rights, are ineligible for entry into the United States. See Press Release, Off. of the Spokesperson U.S. Dep’t of State, Designation of Former Belizean Minister John Birchman Saldivar for Involvement in Significant Corruption (Nov. 15, 2022) (on file with the Dep’t of State).

<sup>96</sup> *Id.*

<sup>97</sup> A 3R superior member was held accountable for rapes committed by those under his supervision. See Press Release, Ned Price, Spokesperson, U.S. Dep’t of State, First Trial Judgment by the Special Criminal Court in the Central African Republic (CAR) (Nov. 8, 2022) (on file with the Dep’t of State).

<sup>98</sup> U.N. Secretary-General, *Report of the Working Group on the Universal Periodic Review: United States of America*, U.N. Doc. A/HRC/46/15 (Dec. 15, 2020).

address gun violence, police brutality, various forms of discrimination, and improve conditions for migrants and people of color.

In December 2022, the United Nations Office of the High Commissioner for Human Rights held the first session of the Permanent Forum on People of African Descent. This convening was an outgrowth of a 2021 General Assembly resolution that operationalized this convening as a platform for improving the safety and quality of life and livelihoods of people of African descent. The inaugural session focused on strategies to combat systemic racism, racial discrimination, xenophobia, and related intolerance. The State Department created a new position—Special Representative for Racial Equity and Justice—and Desirée Cormier Smith was present to provide an opening statement and participate.

As these international efforts have unfolded and international rebukes have been transmitted, the U.S. can be found posturing abroad and issuing ritualistic, official domestic statements, such as the proclamation issued by President Lyndon Johnson for the 1967 Human Rights Week where he called “upon all Americans and . . . Government agencies . . . to use th[e] occasion to deepen [U.S.] commitment to the defense of human rights and to strengthen [U.S.] efforts for their full and effective realization both among [U.S.] people[s] and among all the peoples of the United Nations.”<sup>99</sup> And annually, in conjunction with Human Rights Day, the U.S. publicly expresses a commitment to human rights. The U.S. has seemingly reduced the process of international oversight to a farce. What seems to be lacking is fidelity on the part of the U.S. to the ambitions, aims, and intentions of human rights law.

The U.S. has used its enormous power to shield itself from international scrutiny. One way it accomplishes this is by not being a party to the Rome Statute of the International Criminal Court (ICC) and not accepting its jurisdiction over U.S. personnel. The ICC can investigate crimes of countries that have signed onto the ICC’s Rome Statute. The U.N. Security Council can also refer situations to the ICC,

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<sup>99</sup> Proclamation No. 3814, *Human Rights Week and Human Rights Year* (Oct. 11, 1967).

but the U.S. has veto power to stop such a referral. Work under the memorialization pillar records not only the attempts that Blacks have made at achieving equality in the U.S. but also their similar struggles in the international arena. It also chronicles how the U.S. has maneuvered both processes and, in doing so, allowed for the development of systems and structures that reinforce the inequities that provide sustenance for the carceral state. Transformation requires further work under the remaining pillars.

## V. PROSECUTION PILLAR

Prosecuting those who have deprived people of rights, where evidence allows conviction, is a central mechanism for dealing with past violations under a TJ model. The priority under this pillar is identifying those who engaged in abuses and were protected by their position in the former regime and holding them accountable. The motivation is not vengeance. Prosecutions are undertaken because they achieve accountability, build trust in the transition process, deter future violations, establish or reestablish a reverence for the rule of law, and strengthen democratic practices.

When abuses are large-scale and long-term, the focus of prosecutions should be upon planners and organizers. Secondly, the forums should be considered. Prosecutions can be domestic, hybrid (mixed tribunals combining international and national components),<sup>100</sup>

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<sup>100</sup> Hybrid courts “combine the potential advantages of national prosecutions (such as geographical and psychological proximity to victims and positive impact on domestic judicial and prosecutorial processes) with the benefits of international involvement (such as resources, personnel, and security).” Hybrid tribunals can exist as stand-alone jurisdictions, operating outside the domestic justice system, such as the Special Court for Sierra Leone (SCSL), or they can be integrated into and form a part of the national judicial system, but with international judges, prosecutors, and staff, such as the War Crimes Chamber in Bosnia and Herzegovina (BiH). Some are based on bilateral agreements between the UN and the government. Elena Naughton, *Committing to Justice for Serious Human Rights Violations Lessons from Hybrid Tribunals*, Int’l Ctr. for Transitional Justice 9 (2018), [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_Hybrid\\_Tribunals.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf).

and international.<sup>101</sup> The decision to prosecute should not be shortsighted. The obstacles must be carefully contemplated. Is there sufficient manpower and resources to see this process through to completion? Are there impediments to a successful prosecution, such as immunity, destruction of records, absence of evidence, lack of reliable witnesses, and challenges identifying architects from those acting out orders?

When considering work under this pillar, expectations must remain reasonable. Change agents must carefully balance the need to protect victims' rights to justice, truth, and reparations with the counterforces of peace and national reconciliation.<sup>102</sup> Prosecutions were the dominant response to war crimes after World War II. After the Nuremberg trials that followed World War II, it became clear that prosecutions alone could not accelerate a transition. Far more was needed:

The Nuremberg trials . . . did not transform German society on their own. That purpose could not have been accomplished without the additional trials held by the German courts from the 1960s onward and, subsequently, the thousands of books that were published, the thousands of student visits to concentration camps, and the dozens of documentaries and television drama series that were produced about the Holocaust. All this was essential to the task of recognizing the crimes committed by the Nazis and of democratically transforming society.<sup>103</sup>

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<sup>101</sup> In 2002, the International Criminal Court (ICC) was established. Since July 2002, the ICC has investigated and prosecuted individuals responsible for genocide, war crimes, and crimes against humanity committed since in cases where countries are unwilling or unable to do so.

<sup>102</sup> See Rodrigo Uprimny & Mario Paula Saffon, *Transitional Justice, Restorative Justice and Reconciliation. Some Insights from the Colombian Case 3* (2008), [https://www.dejusticia.org/wp-content/uploads/2017/04/fi\\_name\\_recurso\\_55.pdf](https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_55.pdf).

<sup>103</sup> See U.N. Secretary-General, *Memorialization Processes in the Context of Serious Violations of Human Rights and International Humanitarian Law: The Fifth Pillar of*

Another consideration is when foregoing a prosecution is better for the overall aims of transition. In “order for perpetrators of atrocious crimes to accept a peace agreement, there must exist attractive incentives to do so . . . .”<sup>104</sup> Amnesty is often one. Amnesty removes the prospect and sometimes the consequences of a legal proceeding against designated individuals.<sup>105</sup> Pardons are another alternative. Work under this pillar requires thought about who needs to be held accountable for human rights violations associated with the carceral state, if prosecutions are the best means of building trust through transition, and if so, within what jurisdictional structure.

The Human Rights and Special Prosecutions Section (HRSP) is a good starting point for this conversation. HRSP is an existing U.S. body that investigates and prosecutes cases against human rights violators and other international criminals. If U.S. federal jurisdiction exists, HRSP can “prosecute human rights violators under the federal criminal statutes proscribing torture, war crimes, genocide, female genital mutilation, and recruitment or use of child soldiers.”<sup>106</sup> HRSP also “prosecutes human rights violators under other statutes as appropriate”<sup>107</sup> including U.S. criminal and civil immigration and naturalization laws to revoke U.S. citizenship or other legal statuses and obtain criminal penalties as appropriate. HRSP also prosecutes war crimes and other cases of violent crimes committed abroad, as well as complex immigration offenses.

As HRSP has pursued its current priorities, the carceral state has swelled. A shift in priorities to assign attention to human rights violations associated with the carceral state could make HRSP’s work useful under a TJ model. By way of example, in January 2023, the U.S. Justice Department (DOJ) determined that the Louisiana Department

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*Transitional Justice: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 10, U.N. Doc. A/HRC/45/45 (July 9, 2020).

<sup>104</sup> Uprimny & Saffon, *supra* note 102, at 3-4.

<sup>105</sup> There are different types of amnesties to consider. Some grant a very broad scope of impunity; others grant a narrower scope of impunity.

<sup>106</sup> *Ensuring Accountability for Human Rights Violations and Extraterritorial Violent Crime*, U.S. DEP’T OF JUST. HUM. RTS. & SPECIAL PROSECUTIONS SECTION, <https://www.justice.gov/criminal-hrsp/about-hrsp> (last visited March 31, 2023).

<sup>107</sup> *Id.*

of Public Safety and Corrections (LDOC) routinely confines people in its custody past the dates when they are legally entitled to be released from custody, in violation of the Fourteenth Amendment. The DOJ determined that LDOC knew of its over detention problem and failed to take adequate measures to ensure timely releases of incarcerated individuals for at least ten years.

Because this is a human rights violation (not only a constitutional violation), an HRSP prosecution could also have been a consideration if the HRSP were using existing federal provisions to end the carceral state. Instead, its focus has been on looking in the direction of other human rights abuses, particularly those that do not involve domestic systems, effectively allowing human rights abuses associated with the carceral state to go unprosecuted. Beyond HRSP, there is also the potential for using existing international criminal courts or hybrid courts. A TJ model requires a commitment to exploring these options and removing obstacles to their use.

## VI. REPARATIONS PILLAR

Reparations are an acknowledgement that an obligation to repair the consequences of violations—either because it directly committed them, or it failed to prevent them—exists. They also communicate a commitment to addressing the sources of past violations and ensuring they do not happen again. When reparations are considered, the exclusive focus is on addressing the victim's situation. There is great latitude when it comes to reparations. Reparations can be implemented through administrative programs or enforced as the outcome of litigation. Monetary reparations are the most known form, but they are not the only form.

Change agents should understand the various types of reparations and appreciate the range of creative ways they can be used, either individually, or in combination, to facilitate transition.<sup>108</sup> But

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<sup>108</sup> Colombia presents an example of various forms reparations being combined to achieve redress for victims. The 2011 Victims' Land and Restitution Law provided comprehensive reparations to victims of the 50-year long internal

they must also “recognize the inherent paradox of reparations, namely that it is impossible to fully repair all past harms,” so reasonable expectations must be set when work is done under this pillar.<sup>109</sup> Reparations can be both material and symbolic.

Reparation measures include:<sup>110</sup>

**Restitution:** Aims to place victims back in their original situation prior to the relevant violations. For example, restoration of liberty, reinstatement of employment, return of property, return to one’s place of residence.

**Compensation:** Seeks to provide appropriate recompense for harm suffered and should be provided for any economically assessable

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armed conflict. With an estimated eight million victims, the scale of the program is enormous and includes monetary compensation, comprehensive psychosocial and health care services, housing and land restitution for qualifying individuals, debt forgiveness, and access to educational training and employment. It also provides collective reparations to communities for infrastructural reforms and to help guarantee non-repetition. National efforts have been ongoing. Representative Shelia Jackson Lee [D-TX-18] introduced H.R. 40, 116th Cong. (2019) to establish a Commission to Study and Develop Reparation Proposals for African-Americans. The commission would “examine slavery and discrimination in the colonies and the United States from 1619 to the present and recommend appropriate remedies.” H.R. 40, 116th Cong., at summary (2019).

Among other requirements, the commission shall identify (1) the role of the federal and state governments in supporting the institution of slavery, (2) forms of discrimination in the public and private sectors against freed slaves and their descendants, and (3) lingering negative effects of slavery on living African-Americans and society.

*Id.* Legislation like this has been reintroduced in Congress numerous times over the past three decades. See DeeNeen L. Brown, ‘Uncomfortable Truth’: The New Push for a Slavery Reparations Commission in Congress, WASH. POST (Feb 10, 2021, 5:40 PM), <https://www.washingtonpost.com/history/2021/02/10/reparations-slavery-congress-hearing-commission/>.

<sup>109</sup> Ladisch & Roccatello, *supra* note 13.

<sup>110</sup> See United Nations, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Dec. 16, 2005), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.



damage, loss of earnings, loss of property, loss of economic opportunities, and moral damages.

**Rehabilitation:** Intended to provide care and services for victims, beyond monetary payments and should include medical and psychological care, legal, and social services.

**Satisfaction:** Includes symbolic acts of reparation, such as apologies, naming/renaming public spaces, memorials, and commemorations, truth-seeking, providing accurate accounts of violations in educational materials, searching for the disappeared person or their remains, recovery, reburial of remains, and judicial and administrative sanctions.

**Guarantees of non-repetition:** Involves reforms ensuring the prevention of future abuses, such as strengthening an independent judiciary, protection of civil service and human rights workers, the overall promotion of human rights standards, and the establishment of mechanisms to prevent and monitor social conflict and conflict resolution.

This proposal envisions the use of the final type of reparations. The Thirteenth Amendment's Enforcement Clause is a sound guarantee against non-repetition. To the enactors of the Thirteenth Amendment, the Enforcement Clause was not an ornamental feature—it was a tactical response. It was included to ensure there would be a means of forever securing the liberty—in its broadest terms—of the formerly enslaved.<sup>111</sup> This aspect of the reform proposal fulfills those aims. It seeks to use the Enforcement Clause to achieve, as collective reparations, a declaration of the carceral state as a “badge and incident” of slavery.<sup>112</sup>

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<sup>111</sup> See THE RECONSTRUCTION AMENDMENTS' DEBATES 97 (Alfred Avins ed., 2nd ed. 1974) (39th Cong., 1st Sess., Dec. 13, 1865).

<sup>112</sup> At least one scholar has even interpreted Section II as allowing Congress to act even in the presence of customs that bear a semblance to slavery and before they are officially declared by a court to be a badge or incident of slavery. See Darrell

Congress intended the Enforcement Clause to be used whenever the badges and incidents of chattel slavery present themselves, not only in the instance of chattel slavery. “The badges, incidents, and relics of slavery are manifestations of slavery’s structural imprint on the nation’s laws, institutions, and collective American consciousness.”<sup>113</sup> The Enforcement Clause should be a consideration whenever those remnants—the residual effects that slavery had on law, custom, policy, and practices in the United States—of chattel slavery are at issue. In enacting the Enforcement Clause, Congress left a vehicle with the keys in the ignition. They did not intend for it to be driven when a short walk could accomplish the distance. They envisioned its use, without hesitation, when a long journey was at issue.

Dismantling the carceral state is not a short walk. Heeding this call to use the Enforcement Clause as part of a larger strategy for ending the carceral state would constitute a form of collective reparations and advance the aims of TJ.

## VII. LEGAL AND POLICY REFORMS PILLAR

This fifth pillar seeks to prevent the recurrence of human rights abuses through institutional or legal and policy reforms. The International Center for Transitional Justice explains this as “the process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents.” This involves actions such as re-writing laws and constitutions or vetting the institutions such as the police, military, and governmental employees for bad actors. Psychological and intellectual reforms must be undertaken as well.

During this process, individuals must unlearn thinking and behavior patterns that cause or contribute to human rights abuses. Systemic institutional reform is necessary for long term change and the non-repetition of the abuses associated with the carceral state. The

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A. H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811, 1844 (2012).

<sup>113</sup> *Id.*

U.N. has personalized these expressions towards the U.S. in the instance of unjustified police violence against Blacks:

[T]he problem is not a few bad apples, but instead the problem is the very way that economic, political and social life are structured . . . . This is a time for action and not just talk, especially from those who need not fear for their lives or their livelihoods because of their race, colour, or ethnicity. Globally, people of African descent and others have had to live the truths of systemic racism, and the associated pain, often without meaningful recourse as they navigate their daily lives. International leaders . . . should . . . take this opportunity to address structural forms of racial and ethnic injustice . . . .<sup>114</sup>

In a second statement, U.N. officials conveyed their concerns in writing to the U.S. and suggested it respect civil and human rights and steer clear of racial and ethnic bias.<sup>115</sup> The U.N. has even called upon offending states “to take appropriate and effective measures to halt and reverse the lasting consequences of racism, racial discrimination, colonialism, xenophobia, and related intolerances.”<sup>116</sup> The U.N. has even spoken more directly to the issue of criminal justice reforms. In 2022, Michelle Bachelet, U.N. High Commissioner for Human Rights, identified criminal justice reform as a global human rights priority. She encouraged nation-states to reimagine justice

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<sup>114</sup> Press Release, U.N. Hum. Rts., Off. of the High Comm’r, Statement on the Protests against Systemic Racism in the United States (June 5, 2020) (on file with the U.N.).

<sup>115</sup> See Press Release, U.N. Hum. Rts., Off. of the High Comm’r, UN Experts Condemn Modern-Day Racial Terror Lynchings in US and Call for Systemic Reform and Justice (June 5, 2020) on file with the U.N.).

<sup>116</sup> World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration, U.N., <https://www.un.org/WCAR/durban.pdf> (last visited Feb. 22, 2023).

systems towards the end of tackling “the discriminatory application of criminal law.”<sup>117</sup>

She further stated: “Racial discrimination in law enforcement and the criminal justice system cannot be separated from systemic racism. Only by addressing both—and the legacies they are built on—can we succeed in eliminating it.”<sup>118</sup> This collective guidance speaks to the carceral state as well because those abuses are also systemic. These insights prompt a conclusion that neither the U.N. nor the U.S. need a lot of convincing about the many ways that the carceral state violates international tenets.

The international community has also been forthright in its assessment of the role states play in sustaining these systemic regimes of slavery, slave-like conditions, colonialism, discrimination, and systemic oppression. In a July 2019 report to the Human Rights Council, the Special Rapporteur on Contemporary Forms of Slavery, astutely observed that violations of the right to be free from slavery and servitude can sometimes “result from public policy” and, at other times, can be “imposed by State authorities.”<sup>119</sup> References to specific state authorities have even occurred, making these discussions more than abstract.

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<sup>117</sup> Press Release, Michelle Bachelet, “*Addressing and Responding to Racial Discrimination in the Criminal Justice System*” (May 18, 2022), <https://www.ohchr.org/en/statements/2022/05/addressing-and-responding-racial-discrimination-criminal-justice-system>.

<sup>118</sup> *Id.*

<sup>119</sup> See Urmila Bhoola, *Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences*, 13, U.N. Doc. A/HRC/42/44 (July 25, 2019). This report also contains insights for jurisdictions wishing to end slavery or slavery-like practices:

[A]nti-slavery efforts will need to become more systematic, in the sense of requiring action at every level and by all actors. This will require systems thinking. Contemporary forms of slavery are complex products of the way our global political, social and economic systems work; to end slavery, the way those systems work must be changed. As causal processes are often multiple and non-linear, responses must be based on an understanding of the complex systems in play.

Work under this final pillar requires law and policy reforms that can weaken, and ultimately, end the carceral state. One of the immediate reforms involves the limited enforcement powers that international bodies possess. Since the adoption of the UDHR by the General Assembly of the United Nations in 1948, instruments of international human rights law have continuously been developed with corresponding enforcement mechanisms, but they are not sufficient. The existence of the carceral state is proof of that. The principal human rights body, the Human Rights Council (formerly the Commission), satisfies its mandate through decisions and resolutions, providing a discussion forum about emerging rights, and working with states and other U.N. bodies to expand and develop international human rights law.<sup>120</sup>

Treaty bodies provide jurisprudence, both in the form of concluding observations and general comments, which expand upon and develop the content of the law. Unlike the Security Council, human rights bodies do not have enforcement powers. Unlike international financial institutions, the U.N. human rights machinery does not have adequate leverage over states that fail to comply with their obligations. In 2020, the U.S. had its third UPR. Many of the recommendations involve the type of discrimination and bias that caused the carceral state.<sup>121</sup> Recommendations sometimes inspire

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<sup>120</sup> Following criticism of the legitimacy of the UN Commission on Human Rights, the Human Rights Council was created and held its first session in June 2006.

<sup>121</sup> See U.N. Secretary-General, *Report of the Working Group on the Universal Periodic Review: United States of America*, 12, U.N. Doc. A/HRC/46/15 (Dec. 15, 2020).

The periodic review contained the following pertinent recommendations:

- Adopt measures to combat structural discrimination (Argentina);
- Take effective measures to review policies at the federal, state and local levels with a view to preventing racism, racial discrimination, xenophobia and related intolerance (Slovakia);
- Take effective measures to eliminate discrimination on the basis of race, ethnicity, religion and sex and to stop racial profiling by law enforcement agencies (Russian Federation);
- Continue to pay attention to issues related to racial discrimination or hate crime and make efforts to address those issues (Republic of Korea);

corrective actions, but what about when they do not? Ending the carceral state demands that the international community, who has been willing to acknowledge systemic discrimination in the U.S. when U.S. officials have not, have the power to enforce the many human rights violations that the carceral state causes and sustains.

Another reform to consider is the consistency of the international community in confronting human rights abuses when its limited powers are exercised. If the Human Rights Council feels the U.S. has violated a treaty that it is a signatory to, it can make inquiries. In turn, the U.S. would have to both respond and supply actionable

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Continue efforts to combat racism and discrimination against minorities and protect vulnerable groups (Czechia);

Continue the efforts to prevent and combat racism, racial discrimination, xenophobia and all other forms of intolerance (Italy);

Continue efforts to combat all forms of discrimination, racial discrimination and xenophobia (Lebanon);

Continue to put in place measures to eradicate racism, xenophobia and all forms of related intolerance across the country (Lesotho);

Continue to take concrete actions to promote inter-racial and interreligious respect and eliminate discrimination, including by addressing the socioeconomic root causes and strengthening domestic remedies (Singapore);

Continue advancing, through federal policies, towards the elimination of all forms of racism, racial discrimination, xenophobia and related forms of structural, economic, social and cultural intolerance (Chile);

Continue to promote and implement anti-discrimination policies, including those that prohibit racial discrimination and intolerance (Montenegro);

Enhance laws and legislation based on the abolition of all forms of discrimination, racism and hatred (Saudi Arabia);

Develop an action plan to address structural discrimination with clear timelines and milestones (Pakistan);

Consider adopting measures to combat racial discrimination, including adopting a national action plan to combat racial discrimination, as recommended by the Committee on the Elimination of Racial Discrimination (Algeria);

Adopt and promote a comprehensive national plan to combat racism, racial discrimination, xenophobia and related intolerance, including incitement to hatred (South Africa).

steps. This is not the only recourse possible. After countless attempts at intervention, in 2021, the U.N. formed a panel of three experts in law enforcement and human rights to conduct a study of the causes and effects of systemic racism in policing people of African descent in the U.S. The panel's work must consider the legacies of slavery and colonialism and how they may impact the relationship between law enforcement and people of color. The panel has a three-year mandate by which to conclude its inquiry.

The panel will examine excessive use of force, racial profiling, and police handling of peaceful protests to links between racial supremacy movements, the police, and the criminal justice system. Beyond this, in April 2023, U.N. officials agreed to an official mission to address the frequency of complaints about unjustified police violence in the U.S.. The recent brutal deaths of Keenan Anderson and Tyre Nichols prompted the U.N.'s urgency to act. U.N. experts stressed that the force used in both cases appears to have violated international norms protecting the right to life and prohibiting torture or other cruel, inhuman, degrading treatment, or punishment and is also not in line with the standards set out in the U.N. Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>122</sup>

Victims of the carceral state have reason to expect the international community's strong opposition to it, since international law recognizes that colonialism, racism, forced labor, torture, cruel, inhuman and degrading treatment, and or slave-like conditions do not cease when systems of slavery, oppression, and colonialism end. International law recognizes that they live on until they are consciously dismantled, and in the meantime, generations become entrapped in a purgatory of systemic oppression. In its fact sheet on contemporary forms of slavery, the U.N. concludes that:

By suppressing the human rights of entire populations, apartheid and other forms of colonialism have the

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<sup>122</sup> See *United States: UN Rights Experts Gravely Concerned Over 'Brutal Deaths' at Hands of Police*, UN NEWS (Feb. 10, 2023), <https://news.un.org/en/story/2023/02/1133372>.

effect of collective or group slavery . . . the subject peoples have no choice: they are born into a state of slavery and have very little, if any, means of appeal against it.<sup>123</sup>

A 2019 report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance furthers this understanding. It notes that “[T]he formal abolition of slavery and colonialism has not addressed the ongoing racially discriminatory structures built by those practices . . . contemporary manifestations of racial discrimination must be understood as a continuation of insufficiently remediated historical forms and structures of racial injustice and inequality.”<sup>124</sup> As an example, this report cites mass incarceration as one such vestige of slavery.<sup>125</sup> In a 2019 report to the General Assembly, Tendayi Achiume, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, observed that “At the core of transatlantic slavery and the slave trade was the dehumanization of persons on the basis of race; a social construct that to this day shapes access to fundamental human rights.”<sup>126</sup>

The report later conveys that “[o]ne of the persisting legacies of slavery and colonialism remains the unequal application of the law to descendants of historically enslaved and colonized peoples.”<sup>127</sup> Finally, in his 2022 Thematic Report for the 52nd session of the Human Rights Council, the Special Rapporteur on minority issues acknowledged “the world is falling short . . . we are not dealing with gaps—we are dealing with outright inaction and negligence in the

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<sup>123</sup> *Fact Sheet No. 14: Contemporary Forms of Slavery*, U.N. HUM. RTS. OFF. OF HIGH COMM’R, (June 1, 1991), <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-14-contemporary-forms-slavery-archive>.

<sup>124</sup> See U.N. Secretary-General, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, 8, U.N. Doc. A/74/321 (Aug. 31, 2020).

<sup>125</sup> *Id.* at 9.

<sup>126</sup> *Id.* at 6.

<sup>127</sup> *Id.* at 4.



protection of minority rights.”<sup>128</sup> There are no analogous outcries relative to the carceral state. Why, in light of the documented concerns about systemic racism on the part of the U.N. and the world’s awareness of the carceral state, hasn’t a panel of experts with a similar mandate and similar powers been committed solely to the study of human rights abuses associated with the carceral state? And what mechanism exists to ensure an equitable distribution of U.N. resources to address all human rights abuses that are prolonged and systemic? And what system of priorities governs responses to these kinds of systemic abuses? Work under this pillar calls for strategies that avoid inconsistent or disparate outcomes.

Another potential reform is the U.S. adopting human rights standards as a yardstick for best practices and as social and political norms.<sup>129</sup> In so doing, the U.S. could ensure courts interpret the Constitution and other laws in a manner consistent with international law. Many civil rights statutes grant the federal government jurisdiction to bring enforcement actions in defense of fundamental rights that are covered by U.S. treaty and customary international law obligations. Executive branch officials, in the exercise of these enforcement powers could explicitly incorporate U.S. international obligations into their work. If this were done, the tolerance for the Thirteenth Amendment’s Exceptions Clause would dissipate.<sup>130</sup>

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<sup>128</sup> Call for Input, Special Rapporteur on Minority Issues, U.N. Hum. Rts., Off. of the High Comm’r, Thematic Report for the 52nd Session of the Human Rights Council (March 2023) (Dec. 8, 2022) (on file with the U.N.).

<sup>129</sup> See JEREMIE BRACKA, TRANSITIONAL JUSTICE FOR ISRAEL/PALESTINE TRUTH-TELLING AND EMPATHY IN ONGOING CONFLICT 354 (2021) (citations omitted).

<sup>130</sup> I do feel that labor can help reintegrate a person into society and or incentivize beneficial behavior modifications, so I oppose an outright ban on work for those in custody. In 2018, Colorado became the first state since Rhode Island in 1842 to ban slavery and involuntary servitude outright. Two years after a failed attempt to change their law, Coloradans voted 66% to 34% for an amendment reading: “There shall never be in this state either slavery or involuntary servitude.” Utah and Nebraska removed the language in 2020. Language consistent with Colorado’s is what I advocate. The November 2022 ballot initiative in Louisiana reads: “Do you support an amendment to prohibit the use of involuntary servitude

If implementation reservations afflict you, the 1968 President's Commission for the Observance of Human Rights generated a few useful suggestions that should be considered. By way of executive order, President Lyndon Johnson formed this commission in preparation for the twentieth anniversary of the UDHR.<sup>131</sup> The order appointed the Secretary of State, the Attorney General, the Secretary of Labor, the Secretary of Health, Education, and Welfare, the Secretary of Housing and Urban Development, the Staff Director for the Commission on Civil Rights, the Chairman of the Equal Employment Opportunity Commission, and ten other members from public or private life to serve on the Commission.

If players who possess this enormous power over governmental affairs adopted a commitment to human rights and integrated it into their respective branches, an instant shift in legal, policy, political, social, and cultural norms would occur. The human rights abuses that exist in the carceral state would no longer be invisible (while in plain view) nor would they be tolerated. The punitive responses to poverty and transgressions that are trademarks of the carceral state would yield to measures that help achieve peace, nonrecurrence, equity and harmony in society. The Commission was tasked with creating a better understanding of the principles of human rights as expressed in the UDHR, the Constitution, and U.S. federal and state laws. The order urged the Commission to enlist the cooperation of educational institutions, foundations, mass media, civic, labor, and other organizations. In doing this, governmental policy is then disbursed to non-governmental players and, in the process, human rights protections are normalized.

At the close of its term, the Commission issued a report containing a recommendation that is of import. They recommended a program in the U.S. "to increase national awareness of and support for human rights on both the national and international levels."<sup>132</sup> They

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except as it applies to the otherwise lawful administration of criminal justice?" This falls short. A corrective effort awaits.

<sup>131</sup> See Exec. Order No. 11394, Establishing the President's Commission for the Observance of Human Rights Year 1968 (1968).

<sup>132</sup> *Id.*

also suggested the creation of a central mechanism that would build on and sustain the groundbreaking work of this commission.<sup>133</sup> The Commission explained:

[This] high-level, extra governmental council on human rights, patterned somewhat after the President's Council of Economic Advisers . . . would:

(1) Study trends in the field of human rights and call them to the attention of both government and the public.

(2) Meet the need for extensive research on human rights.

(3) Advise on U.S. policy involving human rights matters in such important areas as the Development Decade (1970), food, population, and technical assistance.

(4) Publicize and promote international standards of human rights through the mass media and through continuation of the Commission's publication annotating the Universal Declaration of Human Rights in terms of U.S. practice.<sup>134</sup>

The Commission also suggested research and "instruction in the concepts of human rights at all levels in the educational system" since "democracy . . . and progress and peace in the world . . . depend . . . on the attitudes of generations yet to be educated."<sup>135</sup> The Commission's report also contains a recommendation to coordinate national and local human rights efforts. The Commission observed: "To date, efforts to enlist the cooperation of State and local agencies as well as national organizations representing those agencies have been

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<sup>133</sup> TO CONTINUE ACTION FOR HUMAN RIGHTS, *supra* note 78, at 45.

<sup>134</sup> *Id.* at 46.

<sup>135</sup> *Id.* at 47.

haphazard and uncoordinated.”<sup>136</sup> The Commission envisioned a central agency as the means of coordinating and sustaining that effort.

They even suggested the appointment of an executive-level Special Assistant for Human Rights who could advise the President on all matters pertaining to human rights, both domestic and international, and serve as the focal point for the correlation of a public information and education program by acting as a liaison with Congress, state and local governments, and nongovernmental organizations. It is clear their intent was to normalize a culture of human rights having legitimacy and not only the appearance thereof. To ensure this, the Commission even suggested a permanent “commission or an advisory board on which leading private citizens from the fields of education, business, and other areas could serve . . . .”<sup>137</sup> Moreover, the Commission recommended that departments and agencies with significant impact on the protection or realization of human rights designate a high-level officer to have policymaking and coordinating responsibilities for human rights.

Instead of acting on these wise insights, by 1977, a new Presidential administration asked various executive-level officials to undertake a review of actions that the U.S. could take to improve human rights conditions, as the carceral state continued to grow.<sup>138</sup> By 1998, President Bill Clinton formed an Interagency Working Group on Human Rights Treaties to provide “guidance, oversight, and coordination with respect to questions concerning adherence to and the implementation of human rights obligations and related matters.”<sup>139</sup> It was chaired by the Assistant to the President for National Security Affairs. The carceral state grew.

Each subsequent presidential administration has exercised minimal efforts when it comes to meaningful integration of human

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<sup>136</sup> TO CONTINUE ACTION FOR HUMAN RIGHTS, *supra* note 78, at 45.

<sup>137</sup> *Id.* at 47.

<sup>138</sup> See *Presidential Review Memorandum/NJC-28*, OFF. OF THE HISTORIAN (May 20, 1977), [https://history.state.gov/historicaldocuments/frus1977-80v02/pg\\_139](https://history.state.gov/historicaldocuments/frus1977-80v02/pg_139).

<sup>139</sup> Implementation of Human Rights Treaties, Exec. Order No. 13107, 63 Fed. Reg. 68,991, 68,991 (Dec. 10, 1998).

rights tenants. The Johnson-era vision of a White House formally committed to promoting domestic *and* international human rights as legally enforceable obligations of government remains an anomaly and that is a tragedy. Had these recommendations been followed, the carceral state would likely have never claimed its first breath.

An additional reform involves enforcement in U.S. courts. Currently, human rights standards are not enforceable in the U.S. unless and until they are implemented through local, state, or federal law. International treaties define rights very generally, and international courts and monitoring bodies typically lack the ability to directly enforce their decisions in the U.S. The U.S. must give attention to the weight assigned to international and human rights law under its legal system. That weight must increase or, alternatively, the U.S. must commit to infusing human rights tenets into state and federal laws. An example is found in the DC Human Rights Act, enforced by the DC Office of Human Rights. The Act prohibits discrimination in its various forms—discrimination in housing, employment, and educational institutions—based on twenty-one protected traits.<sup>140</sup>

## VIII. CONCLUSION

On the twentieth anniversary of the UDHR in 1968, the U.S. did one of its most comprehensive studies of human rights. The report that followed urged the country to understand that human rights are “not just a matter of the enunciation or standards and the approval of

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<sup>140</sup> These protected traits are:

[R]ace, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, sealed eviction record status as a victim of an intrafamily offense, place of residence or business, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, and homeless status.

D.C. Code Ann. § 2-1401.01 (2023).

pious documents”; they “must be practiced.”<sup>141</sup> The report’s authors explained this to mean the “application of human rights standards to specific and actual problems of population, refugees, education, labor, health, immigration, economic assistance, the treatment of prisoners, protection of lives and property, and support for democratic government.”<sup>142</sup> President Lyndon Johnson’s grand human rights ambitions were placed in the hands of his successor President Nixon, who received the Commission’s final report and undertook no actions toward fulfillment of its aims.

The record of most presidential administrations to follow are dire when it comes to manifesting a genuine commitment to human rights being a lived experience of everyone in the U.S., even the justice-impacted. This has contributed to the longevity of the carceral state, which has grown into a Herculean structure that won’t easily be extirpated. The legislative excision of words from laws, in general or the Thirteenth Amendment in particular, will not cause the carceral state to crumble or become unsteady nor will it extract the systemic racism that infects it, or end the country’s impulse reaction of responding punitively to poverty or transgressions. That is why I take exception to criminal justice reforms that fail to transform. TJ, a globally dominant method of ending legacies of systemic abuses, is a slow moving, multilayered, complicated process. But, on the other side of it, awaits the hope of a reimagined model of justice that liberates the human rights that the carceral state has held in custody beyond its release date.

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<sup>141</sup> TO CONTINUE ACTION FOR HUMAN RIGHTS, *supra* note 78, at 49.

<sup>142</sup> *Id.*