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A THIRD RECONSTRUCTION

REBECCA ZIETLOW*

“The Reconstruction we are engaged in aims for nothing less than liberty and justice for all.” – The Reverend Dr. William J. Barber II, Leader of the Poor People’s Campaign¹

“Black communities deserve what all communities deserve – to be powerful in every aspect of their lives.” – Alicia Garza, Co-founder of the Black Lives Matter Movement²

INTRODUCTION

Last year, our country witnessed an outpouring of protest against police violence and in favor of racial equality in response to the tragic death of George Floyd. Thousands of protestors thronged the streets in our nation’s cities, suburbs, and even small towns in all fifty states.³ Polls taken during the peak of the protests showed that seventy-four percent of Americans supported the protestors, and support for the Black Lives Matter (“BLM”) movement remains high.⁴ Supporters of BLM cross both racial and partisan

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1. See THE REVEREND DR. WILLIAM J. BARBER II WITH JONATHAN WILSON-HARTGROVE, *THE THIRD RECONSTRUCTION: HOW A MORAL MOVEMENT IS OVERCOMING THE POLITICS OF DIVISION AND FEAR* xvi (2016).

2. ALICIA GARZA, <https://aliciagarza.com/> (last visited June 30, 2021).

3. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1782–83 (2020).

4. Scott Clement & Dan Balz, *Big Majorities Support Protests Over Floyd Killing and Say Police Need to Change, Poll Finds*, WASH. POST (June 9, 2020, 6:30 AM), https://www.washingtonpost.com/politics/big-majorities-support-protests-over-floyd-killing-and-say-police-need-to-change-poll-finds/2020/06/08/6742d52c-a9b9-11ea-9063-e69bd6520940_story.html; June 2-7, 2020, *Washington Post-Schar Poll*, WASH. POST (June 9, 2020, 6:31 AM), https://www.washingtonpost.com/context/june-2-7-2020-washington-post-schar-poll/6b811cdf-8f99-4e28-b8f1-c76df335c16a/?itid=lk_inline_manual_9. According to a March 2021 poll, sixty-five percent of Americans support the BLM movement, and BLM signs are visible in neighborhoods throughout the country. See Clyde McGrady, *The Phrase ‘Black Lives Matter’ Is Now a Common Sight in America. Is It a Sign?*, WASH. POST (June 14, 2021, 6:00 AM),

lines, a rare moment of consensus in this polarized and divided nation.⁵ Along with a movement of prison abolitionists, BLM leaders are challenging the very structure of policing in our country.⁶ Activists demand a reckoning with the truth of racial discrimination and subordination in our nation's history and its manifestations today, marked by a renewed interest in reparations for descendants of victims of slavery and racial violence.⁷ The BLM movement is the most visible manifestation of what some activists are calling the Third Reconstruction, a transformative period in our history demanding structural change to advance racial equality.⁸ Along with police reform, improving the lives of low-wage workers is central to the Third Reconstruction.

Founded in 2013 by three young Black women,⁹ the BLM movement gained national prominence a year later when a police officer killed Michael Brown, a young Black man, in Ferguson, Missouri.¹⁰ Many BLM protestors are part of a new wave of abolitionists, calling for the abolition of prisons and police departments.¹¹ These new abolitionists trace key aspects of today's carceral state "back to slavery and the white supremacist regime that replaced slavery after white terror nullified Reconstruction."¹² Prison abolitionists recognize the link between the prison industrial complex and the subordination of low-wage workers, particularly workers of color.¹³ As

https://www.washingtonpost.com/lifestyle/blm-signs-black-lives-matter/2021/06/13/e0aed736-bcdb-11eb-9bae-5a86187646fe_story.html.

5. Clement & Balz, *supra* note 4.

6. See Dorothy E. Roberts, *The Supreme Court 2018 Term Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7 (2019); see Akbar, *supra* note 3, at 1788.

7. For example, the author of this Essay is a member of the Reparations Commission for the city of Burlington, Vermont.

8. See, e.g., BARBER & WILSON-HARTGROVE, *supra* note 1, at xii–xiii; Isiah Holmes, *Poor People's Campaign Calls for 'Third Reconstruction' in America*, COLO. NEWSLINE (May 21, 2021, 1:43 PM), <https://coloradonewsline.com/2021/05/21/poor-peoples-campaign-calls-for-third-reconstruction-in-america/>.

9. *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> (last visited June 30, 2021). The co-founders, Alicia Garza, Patrisse Cullors, and Opal Tometi responded to the acquittal of George Zimmerman, who was charged with murdering Trayvon Martin. *Id.*

10. Akbar, *supra* note 3, at 1782.

11. See, e.g., Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES: OPINION (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/E3BW-LRR3>]; see also Akbar, *supra* note 3; V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453 (2019); Roberts, *supra* note 6, at 4–5; PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 229–43 (2017).

12. Roberts, *supra* note 6, at 4; see also Akbar, *supra* note 3, at 1799.

13. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS 4 (2010) (providing the definitive account of this relationship). Many prison abolitionists are skeptical of the Thirteenth Amendment due to its "punishment for crime" exception. See U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except

Dorothy Roberts has noted, “the expanding criminal justice punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime.”¹⁴

The new abolitionists are particularly concerned about the use of unpaid labor by corporations linked to privately owned for-profit prisons,¹⁵ but the link between the carceral state and the oppression of low-wage workers goes well beyond the use of labor in prisons. From the convict leasing system of the Jim Crow South to the reliance on undocumented workers who have virtually no enforceable rights, employers have often used the criminal justice system as a means to exploit the labor of workers of color and have relied on racism to prevent class solidarity between low-wage workers.¹⁶ To combat this racial capitalist regime, activists in the Third Reconstruction are also calling for structural economic change.

At the same time as the rise of BLM, the coronavirus (“COVID-19”) crisis laid bare the link between racial and economic inequality. People of color were disproportionately likely to be infected by COVID-19 and to die from the disease because they are more likely to be poor, with less access to quality health care, and working in underpaid “essential” jobs.¹⁷ Heightened awareness of the economic dimension of racial subordination has spurred advocates for workers’ rights to focus on organizing and aiding low-wage

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.”). Some have called on lawmakers to “amend the 13th Amendment” to remove the exceptions clause. See *Short Mission Statement, AMEND THE 13TH*, <https://amendthe13th.org/>, (last visited June 13, 2021); *A ‘Black August’ Roundtable on the 13th Amendment and Prison Slavery*, COLUM. UNIV., <https://neighbors.columbia.edu/events/black-august-roundtable-13th-amendment-and-prison-slavery> (last visited June 30, 2021). Some scholars have disputed the conventional account of the exceptions clause, arguing that it never was intended to allow the enslavement of those convicted of a crime. See, e.g., ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 46–51 (2019); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1469 (2019) [hereinafter Pope, *Mass Incarceration*].

14. Roberts, *supra* note 6, at 7.

15. *What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/> (last visited June 30, 2021).

16. See James Gray Pope, *Why Is There No Socialism in the United States? Law and the Racial Divide in the American Working Class, 1676–1964*, 94 TEX. L. REV. 1555, 1557 (2016).

17. See *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fracial-ethnic-minorities.html (Apr. 19, 2021); Deepa Das Acevedo, *Essentializing Labor Before, During, and After the Coronavirus Pandemic*, 52 ARIZ. ST. L.J. 1091, 1100–02 (2020).

workers of color.¹⁸ According to the Reverend Dr. William J. Barber II, leader of the Poor People's Campaign, "[n]othing less than a Third Reconstruction holds the promise of healing our nation's wounds and birthing a better future for all."¹⁹ The economic subordination of people of color inflicts its own violence on Black, Indigenous, and People of Color ("BIPOC") communities. In fact, the systemic racism reflected in police violence is inextricably linked to the history of racial and economic subordination of low-wage workers in our country.²⁰

Today we are seeing a reprise of civil rights unionism in the Poor People's Campaign, The Fight for \$15, and the effort to organize low-wage workers into unions.²¹ Civil Rights unionists' advocacy for a living minimum wage dates back to the demand made by the organizers of the March on Washington for Jobs and Freedom in the summer of 1963.²² The Poor People's Campaign, which advocates for racial and economic justice, dates back to the mid-1960s when Dr. Martin Luther King, Jr. worked with the organization to advocate for workers' rights and the expansion of the welfare state.²³ According to Reverend Dr. William J. Barber II, "[s]omething inside the human spirit cries out against the injustice of inequality when you know people who have to choose between food and medicine in a country where CEOs make more in an hour than their lowest-paid employees make in a month."²⁴

18. See generally JANE MCALEVEY, RAISING EXPECTATIONS (AND RAISING HELL): MY DECADE FIGHTING FOR THE LABOR MOVEMENT (2014); JANE MCALEVEY, A COLLECTIVE BARGAIN (2020). On the Culinary Workers Union, see JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT (2010) and RUBEN J. GARCIA, *Politically Engaged Unionism: The Culinary Workers Union in Las Vegas*, in THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 373 (Richard Bales & Charlotte Garden eds., 2020). On the Fight for \$15 from a Seattle perspective, see DAVID ROLF, THE FIGHT FOR FIFTEEN: THE RIGHT WAGE FOR A WORKING AMERICA (2016).

19. BARBER & WILSON-HARTGROVE, *supra* note 1, at xiii.

20. Roberts, *supra* note 6, at 47; ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 131 (2020).

21. See Dave Jamieson, *Amazon Workers' Fight to Unionize Draws Help From Around the World*, HUFFPOST (Feb. 24, 2021), https://www.huffpost.com/entry/amazon-workers-fight-to-unionize-draws-help-from-around-the-world_n_6036898cc5b69253191a9d02. Service Employees International Union (SEIU), Unite Here, and the Culinary Workers Union are also actively engaged in organizing workers of color.

22. See *Life Below \$15 An Hour: Workers on the Potential Federal Minimum Wage Hike*, NPR (Feb. 3, 2021, 4:30 PM), <https://www.npr.org/2021/02/03/963730356/life-below-15-an-hour-workers-on-the-potential-federal-minimum-wage-hike>; WILLIAM P. JONES, THE MARCH ON WASHINGTON: JOBS, FREEDOM, AND THE FORGOTTEN HISTORY OF CIVIL RIGHTS x (2013).

23. See Rebecca E. Zietlow, "Where Do We Go From Here?" *Dr. Martin Luther King, Jr. and Workers' Rights*, 14 HARV. L. & POL'Y REV. 47, 51 (2019).

24. BARBER & WILSON-HARTGROVE, *supra* note 1, at xiii.

This Essay reaches back to the First Reconstruction to consider an underutilized constitutional tool for liberty and empowerment—the Thirteenth Amendment. The Thirteenth Amendment prohibits slavery and involuntary servitude and empowers lawmakers to address the badges and incidents of slavery.²⁵ Abusive policing and the subordination of low-wage workers of color are both manifestations of the involuntary servitude that continues to plague our nation almost two centuries after the abolition of slavery. Activists today are demanding the “practical freedom” embodied in that Amendment.²⁶

I. POLICING AND LOW-WAGE WORKERS IN THE FIRST AND SECOND RECONSTRUCTION

Advances in racial equality and economic rights only come about in response to the type of mass political action that we have seen in the past year. This is particularly true for the advances that occurred during our first Reconstruction at the end of the Civil War and those that occurred during the 1960s civil rights movement, which historians refer to as the Second Reconstruction.²⁷ Both the First and Second Reconstructions were supported by workers’ rights activists and achieved advances for low-wage workers, and both countered the abusive policing practices that enforced racial and economic subordination.²⁸ During the First Reconstruction, activists and lawmakers created legal tools to dismantle the institution of slavery and its manifestations in our laws and society.²⁹ Activists and lawmakers in the Second Reconstruction used those tools to dismantle racial segregation and establish voting rights.³⁰ However, the policing of communities of color and the subordination of low-wage workers are perhaps the most intractable manifestations of systemic racism in our country because they are so central to the functioning of our economic and legal systems.

25. U.S. CONST. amend. XIII.

26. See James Gray Pope, *Black Lives Matter and the Dangerous Thirteenth Amendment* 1 (Feb. 18, 2021) (unpublished manuscript) (on file with author) [hereinafter Pope, *Black Lives Matter*].

27. See generally RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS* (2004).

28. See REBECCA E. ZIETLOW, *Free Labor and Wage Slavery: The Labor and Antislavery Movements*, in *THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION* 44–67 (2017) (detailing the ties between the anti-slavery and nascent labor movements in the antebellum and Reconstruction Eras); Zietlow, *supra* note 23, at 51–54 (detailing the ties between the labor and civil rights movements in the 1930s through the 1960s); Xi Wang, *The Making of Federal Enforcement Laws, 1870–1872*, 70 Chi.-Kent L. Rev. 1013, 1022–24 (1995) (detailing the state and private violence that motivated Congress to enact enforcement measures to protect the rights of people recently freed from slavery).

29. See FONER, *supra* note 13, at xx.

30. See VALELLY, *supra* note 27, at 173.

Throughout our nation's history, police have disciplined and controlled low-wage workers and people of color, and rights advocates have resisted policing. Professional police forces were first established in the United States in northeastern cities to regulate immigrants who came to this country as early industrial workers.³¹ Southern states established slave patrols, which constantly monitored enslaved people to prevent them from escaping and forming bonds with each other that might lead to plots to escape.³² The 1850 Fugitive Slave Act ("1850 Act") federalized those slave patrols, appointing federal magistrates in free states who assisted slave catchers to hunt down and capture people accused of being fugitives from slavery.³³ Resistance to the first federal police force by fugitives from slavery and their allies proved a catalyst that brought about the Civil War and the First Reconstruction.³⁴ During the Second Reconstruction, activists strategically resisted policing with acts of civil disobedience, effectively generating support for their cause.³⁵

Resistance to the policing of slavery was a central component of the anti-slavery movement. Northern resistance to the 1850 Act prompted federal officials to step up and militarize enforcement.³⁶ Free northern Black people and their white allies rallied to the cause of their enslaved brethren and engaged in civil disobedience to disrupt federal officials enforcing the 1850 Act.³⁷ Their resistance was effective. "By the end of the first year of the [1850 Act's] operation it was clear to all dispassionate observers that, rather than quieting agitation over slavery as so many of its proponents had hoped, it had stirred passionate opposition and defiance."³⁸ Those who were accused of being fugitives had few rights to protect themselves against false accusations and lacked any right to due process of law.³⁹ Conflict over the

31. See ALEX S. VITALE, *THE END OF POLICING* 36–37 (2017).

32. *Id.* at 47.

33. See CHRISTOPHER JAMES BONNER, *REMAKING THE REPUBLIC: BLACK POLITICS AND THE CREATION OF AMERICAN CITIZENSHIP* 116 (2020) (noting that the 1850 Act "created a massive slavecatching infrastructure for all of the United States").

34. See ERIC FONER, *GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD* 26 (2015).

35. See CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST & LEGAL CHANGE IN THE CIVIL RIGHTS ERA* 5–6 (2018).

36. R.J.M. BLACKETT, *THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY* 68 (2018).

37. *Id.* at 143.

38. *Id.* at 86.

39. Paul Finkelman, *A Political Show Trial in the Northern District: The Oberlin-Wellington Fugitive Slave Rescue Case*, in *JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE* 37, 39–40 (Paul Finkelman & Roberta Sue Alexander eds., 2012).

plight of those accused of being fugitive slaves was one of the major catalysts of the Civil War.⁴⁰

During the Reconstruction Era after the Civil War, Congress enacted measures to protect individuals against abuse of police power. Most notably, the Due Process Clause of the Fourteenth Amendment prohibits state actors from depriving “any person of life, liberty, or property, without due process of law.”⁴¹ The Due Process Clause also incorporated most of the Bill of Rights, including protections for criminal defendants, against state officials.⁴² In 1871, Congress responded to reports of Ku Klux Klan violence, facilitated by state officials, by enacting a law that authorizes private suits against state officials and private conspiracies that violate constitutional rights.⁴³ That statute, now codified at 42 U.S.C. § 1983, provides a cause of action for all civil rights litigation and is the principal measure to protect individuals against police violence.⁴⁴

However, the Reconstruction Era’s promise of justice in law enforcement systems remains unfulfilled to this day. After Reconstruction, the federal government largely backed away from enforcing the rights of newly freed slaves, and by the end of the nineteenth century, state officials ignored federal protections with impunity. Racialized violence raged throughout the country, from individual lynchings to mass violence in cities such as Tulsa, Chicago, and Detroit.⁴⁵ Law enforcement officials turned a blind eye to this violence and often joined as active participants.⁴⁶

In the decades after Reconstruction, law enforcement officials again played a central role in the oppression of former slaves and their descendants, enforcing a system of convict leasing and sharecropping that was reminiscent of slavery, if not outright enslavement.⁴⁷ Convict leasing and sharecropping

40. See PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 19 (1981).

41. U.S. CONST. amend. XIV § 1.

42. See *Duncan v. Louisiana*, 391 U.S. 145, 147–62 (1968) (detailing the Court’s incorporation jurisprudence).

43. See Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 280 (1965–1966).

44. See *id.* But see Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. Rev. 889, 910–16 (2010) (summarizing the ways in which the United States Supreme Court has reduced the availability of damages in § 1983 suits, including, most notably, the doctrine of official immunity).

45. See Eugene Robinson, *Opinion: It Was Much More Than Tulsa*, WASH. POST (May 31, 2021, 3:43 PM), <https://www.washingtonpost.com/opinions/2021/05/31/it-was-much-more-than-tulsa/>.

46. See DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 271 (2008); ALEXANDER, *supra* note 13, at 37.

47. See BLACKMON, *supra* note 46, at 7–8.

were both systems of peonage, or “slavery by another name” in the Jim Crow South, which lasted until at least the Second World War in the early 1940s.⁴⁸ According to Douglas Blackmon, “[w]here mob violence or the Ku Klux Klan terrorized black citizens periodically, the return of forced labor as a fixture of black life ground pervasively into the daily lives of far more African Americans” who worked in mines, quarries, lumber camps, farms, and factories.⁴⁹ Northern industrial workers, mostly white, also confronted police violence when they engaged in protests and strikes to establish workers’ rights.⁵⁰ Thus, in the post-Reconstruction Era, policing continued to be central to the subordination of low-wage workers.

The Second Reconstruction was born during the New Deal Era, as labor activists joined with civil rights unionists, what historian Martha Biondi calls the “Black Popular Front.”⁵¹ The New Deal expansion of the welfare state embedded systemic racism in the foundation of the modern state. To gain the votes of segregationist Dixiecrats, New Deal protections for workers—including unemployment insurance and the National Labor Relations Act—excluded domestic and agricultural workers.⁵² Those workers, who were largely workers of color, remained vulnerable to exploitation by their employers and dependent on the welfare state when they lost their jobs.⁵³ People of color were thus largely excluded from the post-World War II economic boom.⁵⁴ Instead of a robust welfare safety net, those workers encountered punitive measures and an expanded carceral state.⁵⁵

Responding to pressure from labor and civil rights activist A. Phillip Randolph, President Franklin D. Roosevelt created a Civil Rights Section of the Department of Justice (“CRS”), which launched a campaign to revitalize Reconstruction Era protections.⁵⁶ The CRS developed a three-pronged

48. *Id.* at 8–9.

49. *Id.* at 7.

50. See AHMED WHITE, *THE LAST GREAT STRIKE: LITTLE STEEL, THE CIO, AND THE STRUGGLE FOR LABOR RIGHTS IN NEW DEAL AMERICA* 129–31 (2016); LOUIS HYMAN, *TEMP: HOW AMERICAN WORK, AMERICAN BUSINESS, AND THE AMERICAN DREAM BECAME TEMPORARY* 35 (2018) (“Bethlehem Steel had directly paid the policemen’s salaries.”).

51. MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* 6 (2006).

52. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 100 (2011).

53. See Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1240–41 (2005).

54. *Id.* at 1241.

55. See Roberts, *supra* note 6, at 34–35.

56. See ROBERT K. CARR, *FEDERAL PROTECTIONS OF CIVIL RIGHTS: QUEST FOR A SWORD* 24–25 (1947).

approach: (1) enforcing anti-peonage laws;⁵⁷ (2) enforcing voting rights;⁵⁸ and (3) prosecuting police for violating federal civil rights.⁵⁹ On the ground, civil rights unionists sought to combat racial segregation and extend New Deal programs to African Americans.⁶⁰ Labor leaders such as A. Philip Randolph, the president of the Pullman Porters' Union in the 1930s who later served as vice president of the AFL-CIO, and Walter Reuther, president of the United Automobile Workers ("UAW"), provided crucial early support for the southern civil rights movement.⁶¹ Randolph and Reuther helped to plan the 1963 March on Washington for Jobs and Freedom in Washington, D.C., where Dr. King gained a national profile with his "I Have A Dream" speech.⁶² Activists at that march called not only for protections against race discrimination, but also for an increase in the minimum wage.⁶³ Toward the end of his life, Dr. King formed a coalition with the Poor People's Campaign to advocate for a stronger safety net, and he died in Memphis supporting striking sanitation workers.⁶⁴

Activists during the Second Reconstruction also resisted abusive policing, engaging in civil disobedience and risking arrest and imprisonment.⁶⁵ The brutality of southern police officials, such as Birmingham's Bull Connor, against young civil rights activists galvanized support for the activists among northern moderates.⁶⁶ Under Chief Justice Earl Warren, the United States Supreme Court issued a series of decisions that activated Reconstruction Era civil rights statutes⁶⁷ and incorporated protections for criminal defendants in the Bill of Rights against state governments.⁶⁸ In the mid-1960s, police violence against Black men sparked multiple riots in northern cities, which drew attention to the lack of economic opportunities in inner-city neighborhoods occupied largely by people of

57. *Id.* at 116; *see also* *United States v. Gaskin*, 320 U.S. 527, 528 (1944).

58. *See* CARR, *supra* note 56, at 85; *United States v. Classic*, 313 U.S. 299, 303 (1941).

59. *See* CARR, *supra* note 56, at 85; *Screws v. United States*, 325 U.S. 91, 93 (1945).

60. JONES, *supra* note 22, at 18; BIONDI, *supra* note 51, at 13.

61. *See* Zietlow, *supra* note 23, at 49 n.5.

62. *See id.*; JONES, *supra* note 22, at 168.

63. JONES, *supra* note 22, at 174.

64. Zietlow, *supra* note 23, at 49.

65. *See* SCHMIDT, *supra* note 35, at 14.

66. *See* MARTIN LUTHER KING, JR., LETTER FROM A BIRMINGHAM JAIL (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

67. *See, e.g.,* *Monroe v. Pape*, 365 U.S. 167, 168–69 (1961).

68. *See, e.g.,* *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Though those cases were not expressly about race, many of them involved defendants who were people of color and the rulings were part of the Warren Court's activist agenda in enforcing race equality norms.

color.⁶⁹ The Black Panthers formed in response to police brutality, and to promote economic development in those inner-city neighborhoods.⁷⁰ The Johnson administration responded by expanding the safety net with its Great Society programs.⁷¹

Unfortunately, however, efforts at police reform in the 1960s faltered, as did the campaign for economic justice. Both efforts were met by debilitating violence, including the assassination of Dr. King and Black Panther leader Fred Hampton.⁷² The war on drugs and other aggressive criminal measures in the 1980s and 1990s accelerated the mass incarceration of young men of color in what Michelle Alexander refers to as the “New Jim Crow.”⁷³

At the same time, conservative attacks on unions succeeded in reducing workers’ rights, and part-time gig work increasingly supplanted well paying full-time jobs with benefits.⁷⁴ Just as after the First Reconstruction, the workers who have fared the worst in the post-civil rights era are workers of color. From undocumented workers to Uber drivers, low-wage workers in this country are now experiencing what I have elsewhere described as the “new peonage.”⁷⁵ Despite the advances in racial equality achieved during the first two Reconstructions, low-wage workers continue to suffer from exploitation that is enabled and magnified by racial subordination.⁷⁶ Along with remedying racial inequality in our law enforcement systems, establishing rights for low-wage workers is thus part of the unfinished business of the Second Reconstruction.

69. See NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 117 (1992).

70. See Roberts, *supra* note 6, at 44; Hall, *supra* note 53, at 1258.

71. See Hall, *supra* note 53, at 1258.

72. Dr. Martin Luther King, Jr. was assassinated in Memphis, where he was supporting the unionization effort of city sanitation workers. Black Panther leader Fred Hampton was ambushed and killed by the police.

73. See ALEXANDER, *supra* note 13, at 14; see also Roberts, *supra* note 6, at 12.

74. See LOUIS HYMAN, *TEMP: HOW AMERICAN WORK, AMERICAN BUSINESS, AND THE AMERICAN DREAM BECAME TEMPORARY* 198 (2018); see also KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL* xi-xii (2009).

75. See Rebecca E. Zietlow, *The New Peonage: Liberty and Precarity for Workers in the Gig Economy*, 55 WAKE FOREST L. REV. 1087, 1091 (2020) [hereinafter Zietlow, *The New Peonage*]; see also Acevedo, *supra* note 17, at 1137.

76. Joseph Zebalows-Roig, *The Economic Prospects of Black Americans Have Stayed Largely Unchanged for Decades. Here Are 12 Charts Demonstrating Alarming Rates of Inequality.*, BUS. INSIDER (June 10, 2020, 10:16 AM), <https://www.businessinsider.com/charts-black-americans-gaping-economic-inequality-white-unemployment-earnings-financial-2020-6>.

II. THE THIRD RECONSTRUCTION AND THE THIRTEENTH AMENDMENT

The Thirteenth Amendment contains the positive promise of freedom that is animating the Third Reconstruction and provides a paradigm for thinking about the systemic change that activists seek in the Third Reconstruction.⁷⁷ Legal scholars Dorothy Roberts and James Gray Pope have suggested that abolitionists today draw on the Thirteenth Amendment as a model for the transformation of law enforcement systems.⁷⁸ Ensuring freedom from involuntary servitude requires dismantling the prison industrial complex that profits from the mass incarceration of people of color.⁷⁹ Others have argued that the Thirteenth Amendment is a potent source for workers' rights today.⁸⁰ Activists in the Third Reconstruction have raised awareness of the lingering effects of slavery and involuntary servitude on our law and society, creating the groundwork to breathe life into this underenforced constitutional provision.

Until now, BLM activists have not only ignored the Thirteenth Amendment, but condemned it, because of its exception "as a punishment for crime whereof the party shall have been duly convicted."⁸¹ However, it is far from clear whether the conventional view of the exceptions clause is correct.⁸² At least one federal appeals court has held that the Thirteenth Amendment applies to mandatory work programs in detention centers.⁸³ Most importantly, this negative focus on one aspect of the Thirteenth Amendment has caused too many activists to disregard the amendment's liberatory potential for victims of racial injustice and economic

77. See Pope, *Black Lives Matter*, *supra* note 26, at 27–28.

78. See Roberts, *supra* note 6, at 122; Pope, *Black Lives Matter*, *supra* note 26, at 5.

79. See Roberts, *supra* note 6, at 122.

80. See, e.g., Symposium, *The Thirteenth Amendment and Economic Justice*, 19 NEV. L.J. 365 (2018); 39 SEATTLE U. L. REV. 659 (2016).

81. U.S. CONST. amend. XIII § 1. Some have called for amending the Thirteenth Amendment to remove the exceptions clause. See, e.g., Flores A. Forbes, *How a 13th Amendment Loophole Created America's Carceral State*, PRISON LEGAL NEWS (Jan. 8, 2020), <https://www.prisonlegalnews.org/news/2020/jan/8/how-13th-amendment-loophole-created-americas-carceral-state/>; Mika'il DeVeaux, *A Project to End Neo-Slavery and Hyperincarceration in the United States*, CITIZENS AGAINST RECIDIVISM INC., <https://www.citizensinc.org/amend-the-13th-amendment> (last visited July 5, 2021).

82. For example, James Gray Pope has argued persuasively that this interpretation of the exceptions clause is incorrect and contrary to the original meaning of the Amendment. Pope, *Mass Incarceration*, *supra* note 13, at 1478–80.

83. McGarry v. Pallito, 687 F.3d 505, 508–09 (2d Cir. 2012). The appellate court noted that "[c]ontrary to the district court's conclusion, it is well-settled that the term 'involuntary servitude' is not limited to chattel slavery-like conditions. The Amendment was intended to prohibit all forms of involuntary labor." *Id.* at 510.

subordination.⁸⁴ Moreover, advocates need not be constrained by judicial interpretations of this underenforced amendment. The Thirteenth Amendment has always been enforced primarily through political activism and legislative means.⁸⁵ Just as guns rights activists reframed the Second Amendment as a source of individual rights, activists today have an opportunity to shape the meaning of the Thirteenth Amendment and breathe life into its liberatory promise.⁸⁶

The Thirteenth Amendment “clearly condemns not racial classifications in the abstract, but those that result in subjugation and exploitation—the hallmarks of slavery and involuntary servitude.”⁸⁷ Thus, the Thirteenth Amendment arguably outlaws many aspects of the carceral state, including any abusive practices that are not “punishment,”⁸⁸ the use of compulsory labor in prisons,⁸⁹ and collateral consequences of criminal convictions such as felony disenfranchisement and employment discrimination.⁹⁰ Requiring individuals to work to pay off debt also arguably violates the Thirteenth Amendment.⁹¹ The Supreme Court recently acknowledged that criminal fines are a legacy of Jim Crow Era servitudes.⁹² A Department of Justice investigation into the death of Michael Brown in Ferguson, Missouri, revealed that the City of Ferguson police department treated Black residents as an important source of revenue, targeting them for fines and fees and

84. See Roberts, *supra* note 6, at 109–10 (arguing that activists could break from precedent and use the constitution “instrumentally” to achieve their goals).

85. See James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 993–94 (1997); Rebecca E. Zietlow, *Conclusion: The Political Thirteenth Amendment*, 71 MD. L. REV. 283, 286 (2011).

86. See REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 5–6 (2006).

87. Pope, *Black Lives Matter*, *supra* note 26, at 15; see William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1342–46 (2007).

88. See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 978 (2019); Pope, *Mass Incarceration*, *supra* note 13, at 1467–68; Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 398 (2009).

89. Pope, *Black Lives Matter*, *supra* note 26, at 19; William M. Carter, Jr., *Class as Caste: The Thirteenth Amendment’s Applicability to Class-Based Subordination*, 39 SEATTLE U. L. REV. 813, 815, 825 (2016); Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1150–51 (2013).

90. Goodwin, *supra* note 88; Pope, *Mass Incarceration*, *supra* note 13; Raghunath, *supra* note 88.

91. See Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 931–33 (2016).

92. See *Timbs v. Indiana*, 139 S. Ct. 682, 688–89 (2019) (incorporating the “excessive fines” provision of the Eighth Amendment against states via the Fourteenth Amendment); see also Goodwin, *supra* note 88, at 933–52.

imprisoning them when they could not pay. Towns throughout the country have similar systems.⁹³ Reminiscent of the Jim Crow convict leasing system, this debt imprisonment arguably imposes involuntary servitudes that violate the Thirteenth Amendment.⁹⁴

Along with outlawing involuntary servitude, the Thirteenth Amendment also prohibits practices that create the badges and incidents of slavery.⁹⁵ This theory extends the scope of the amendment beyond involuntary servitude itself, and provides a tool to remedy the impact of slavery and involuntary servitude on enslaved people, their descendants, and their communities.⁹⁶ Scholars debate the meaning of badges and incidents of slavery⁹⁷ but the history of racially discriminatory policing in this country is so integrally tied to the history of slavery and involuntary servitude that racially discriminatory policing imposes a badge or incident of slavery under even the most narrow definition of the term.⁹⁸ BLM activists and abolitionists today are doing important work showing the connection between policing and slavery, which strengthens the argument that abusive police practices are badges and incidents of slavery, and thus remediable under the Thirteenth Amendment.

The Thirteenth Amendment also provides a paradigm for advocates for workers' rights in the Third Reconstruction because it prohibits race discrimination and economic subordination. From undocumented workers to Uber drivers and temp workers, the situation of low-wage workers in our society is increasingly precarious.⁹⁹ Workers are forced to endure practices

93. See Akbar, *supra* note 3, at 1792.

94. See Zatz, *supra* note 91, at 947–48.

95. See Carter, *supra* note 87, at 1365–66; James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 440–45 (2018).

96. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (upholding a provision of the 1866 Civil Rights Act which barred race discrimination in real estate transactions on the grounds that Congress could have rationally held that such discrimination imposed a badge or incident of slavery).

97. See, e.g., Carter, *supra* note 87, at 1366 (arguing that the badges and incidents of slavery should be defined with reference to “(1) the connection between the class to which the plaintiff belongs and the institution of chattel slavery, and (2) the connection the complained-of injury has to that institution”); Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 848–49 (2016) (defining a “badge” as a “relic” of slavery); Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 561 (2012) (defining badges or incidents as “public or widespread private action, aimed at any racial group or population that has previously been held in slavery or servitude, that mimics the law of slavery and has significant potential to lead to the de facto reenslavement or legal subjugation of the targeted group”).

98. For example, William Carter, Jr. has persuasively argued that racial profiling imposes a badge or incident of slavery. See Carter, *supra* note 87, at 1371.

99. See Zietlow, *The New Peonage*, *supra* note 75, at 1091; Kathleen Thelen, *The American Precariat: U.S. Capitalism in Comparative Perspective*, 17 PERSP. POL. 5, 6 (2019); LOUIS HYMAN,

that arguably impose involuntary servitude, from schedule uncertainty to covenants not to compete, and from management by algorithms to work requirements for public benefits.¹⁰⁰ Over ten million undocumented workers, primarily workers of color, have virtually no enforceable rights and are regularly subjected to unsafe conditions at rock bottom wages.¹⁰¹

The Thirteenth Amendment is an important source of rights for low-wage workers to address “the gordian knot that ties race to class and civil rights to workers’ rights.”¹⁰² Enforcing the prohibition on involuntary servitude provides a rationale for raising the minimum wage, classification and employee protections for gig workers, and strengthening the safety net to foster worker autonomy, among other measures.¹⁰³ Finally, to protect these workers against involuntary servitude and provide services for the formerly incarcerated, the State must create a meaningful safety net.¹⁰⁴ Measures such as health insurance, retirement benefits, and unemployment benefits for gig workers are necessary to empower all workers to demand better wages and conditions in their low-wage jobs.¹⁰⁵

III. A NOTE ON BACKLASH AND VOTING RIGHTS

The Third Reconstruction can only be achieved by effective political activism. Thus, protecting and expanding voting rights is crucial to its success. The changes that activists are advocating will not come about as the result of litigation, especially given the new number of conservative judges on the federal bench appointed by Donald Trump. As in the other Reconstructions, activism has generated backlash and anxiety in those who believe that race is a zero-sum game.¹⁰⁶ Many politicians have seized on this anxiety and fanned the flames for their own cynical purposes. They have fomented not only political opposition, but also violent mobs, including the

TEMP: HOW AMERICAN WORK, AMERICAN BUSINESS, AND THE AMERICAN DREAM BECAME TEMPORARY 10 (2018).

100. See *supra* note 99.

101. See Maria L. Ontiveros, *Immigrant Workers’ Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 658 (2005). According to the Pew Research Center, the number of undocumented workers in the United States rose to 10.5 million in 2017. Mark Hugo Lopez, Jeffrey S. Passel & D’Vera Cohn, *Key Facts About the Changing U.S. Unauthorized Immigrant Population* (Apr. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/>.

102. Hall, *supra* note 53, at 1239.

103. See Zietlow, *The New Peonage*, *supra* note 75, at 1140.

104. For a more detailed argument on how laws can address the involuntary servitude of workers in the gig economy, see Zietlow, *The New Peonage*, *supra* note 75, at 1134–41.

105. See *id.*

106. See HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* 4 (2021).

insurrection on January 6, 2021—the first time the Confederate flag was ever carried through the halls of Congress.¹⁰⁷ The campaign to stop the teaching of “critical race theory,” the “Blue Lives Matter” movement, and state legislators enacting laws to restrict access to the ballot are all manifestations of resistance to systemic change. This is an ongoing battle over our nation’s soul and very identity as a democracy.

Fortunately, voting rights activists form a crucial part of the Third Reconstruction and their efforts have been highly successful. In the fall of 2020, the NAACP, Fair Fight 2020, Voto Latino, and other organizations mobilized voters of color to turn out in historically high numbers.¹⁰⁸ In January 2020, the same high voter turnout elected the first Black Senator ever elected from the state of Georgia, Raphael Warnock, the current pastor of Dr. Martin Luther King, Jr.’s Ebenezer Baptist Church.¹⁰⁹ Protecting and strengthening voting rights is an essential aspect of the Third Reconstruction. Continuing to maximize participation and access to the ballot is an essential pre-condition to achieving the Third Reconstruction.

CONCLUSION

George Floyd’s death at the hands of a Minneapolis police officer was a national tragedy that triggered a movement. However, George Floyd suffered from systemic racism throughout his life.¹¹⁰ Floyd’s story is in many ways the quintessential story of African Americans. Floyd was the descendant of enslaved people and sharecroppers, raised by a single mother in a public housing development in a predominantly black neighborhood.¹¹¹ Floyd attended underfunded public school and got caught up in the criminal justice system due to minor drug offenses.¹¹² Floyd’s criminal record made it hard for him to find a job in his native city of Houston, so he moved to Minneapolis to start a new life working part-time at a local nightclub and training to become a commercial truck driver.¹¹³ In the weeks leading up to

107. Maria Cramer, *Confederate Flag an Unnerving Sight in Capitol*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html>.

108. Jenese Harris, *Historic Black Voter Turnout in 2020 Presidential Election*, NEWS4JAX (Nov. 10, 2020 6:16 PM), <https://www.news4jax.com/vote-2020/2020/11/10/historic-black-voter-turnout-in-2020-presidential-election/>.

109. Bill Barrow, *Georgia Takeaways: Black Turnout Fuels Warnock Victory*, A.P. NEWS (Jan. 6, 2021), <https://apnews.com/article/associated-press-georgia-election-result-a0be02280fcaef22fa0e65b3a5fdb056>.

110. See Manny Fernandez & Audra D.S. Burch, *George Floyd, from ‘I Want to Touch the World’ to ‘I Can’t Breathe,’* N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/article/george-floyd-who-is.html>.

111. *Id.*

112. *Id.*

113. *Id.*

his murder, Floyd contracted COVID-19 and lost his job when the nightclub closed down.¹¹⁴ The Third Reconstruction must address racialized violence such as the death of George Floyd. It also must address the precarity of George Floyd's existence as a low-wage worker of color before he died. The Thirteenth Amendment provides a tool for achieving this goal.

114. *Id.*