NOTE

Slavery, Jim Crow, and Mass Incarceration: Could the Thirteenth Amendment Hold the Key to Racial Equity in Criminal Justice?

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ABSTRACT

The United States incarcerates people at a higher rate than any other country on Earth. Within the U.S., Black people—particularly at the state level—are incarcerated at disproportionately high rates relative to the total population, the rate at which white people are incarcerated, and crime rates overall. Consequently, Black Americans also disproportionately suffer the disadvantages of collateral penalties accruing to conviction, such as felon disenfranchisement and housing ineligibility. This Note asserts that these inequities are incidental to slavery and its racist wake—from Black Codes to Jim Crow laws and the War on Drugs—and that Congress can therefore combat them in two steps.

First, Congress should invoke the Thirteenth Amendment by identifying the mass incarceration of Black Americans as a "badge or incident of slavery." Doing so enables Congress to legislate on topics otherwise traditionally deep within state autonomy, such as the validity of criminal laws and policies. The history and interconnectedness of race, politics, and criminality in the U.S.—particularly at the state level—makes this identification reasonable. Congress should then use this power to enact a statute providing a way to challenge state criminal laws that result in grossly disproportionate rates of incarceration by race and lack compelling justification for their maintenance. This Note suggests one framework, the "Civil Justice Act," which would allow the Department of Justice to bring disparate impact claims against states to invalidate discriminatory criminal practices and require "preclearance" before replacement by the state. Similar statutes exist to

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enforce civil rights in other contexts—housing, employment, and particularly, voting. The solution offered by this Note would bring criminal justice to par.

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INTRODUCTION

The United States—the "land of the free"—incarcerates people at the highest rate of any country on Earth.[1] In fact, the U.S. is home to only about 5% of the world's total population but accounts for about 24% of the world's

[1] *See Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [https://perma.cc/W4W5-EURS]; ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST: TENTH EDITION 2 (2013), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf [https://perma.cc/7SUG-HGRS].

incarcerated population,[2] roughly 2.3 million people.[3] And whereas only about 13.4% of the U.S. population is Black,[4] 37.6% of the Federal prison population is Black.[5] At the state level, where about 83% of U.S. prisoners are incarcerated, Black people are incarcerated at more than five times the rate of white people.[6] Indeed, the United States now imprisons a larger percentage of its Black population than South Africa did during apartheid.[7] In Washington, D.C., an estimated three out of four young Black men will serve prison time during their lives.[8] In Oklahoma, the state with the highest overall Black incarceration rate, one in fifteen Black males ages eighteen or older is in prison.[9] In her book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Professor Michelle Alexander explains that:

> [o]ne in three young African American men will serve time in prison if current trends continue, and in some cities more than half of all young adult black men are currently under correctional control—in prison or jail, on probation or parole. Yet mass

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2 The U.S. population is roughly 331 million out of about 7.8 billion globally. *See* Nathaniel Whelan, *Countries by Percentage of World Population*, WORLDATLAS (Sept. 26, 2020), https://www.worldatlas.com/articles/countries-by-percentage-of-world-population.html [https://perma.cc/5E8W-7SE3]. The U.S. prison population is over 2.2 million out of 10.35 million estimated globally. ROY WALMSLEY, WORLD PRISON BRIEF, WORLD PRISON POPULATION LIST: ELEVENTH EDITION 2 (2015), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf [https://perma.cc/3ENT-YUB5].

3 This number includes people in local jails, juvenile detention centers, territorial prisons, immigration detention centers, involuntary confinement, Indian Country jails, and military guardhouse and brigs. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/8U47-893L]. Accounting for only state and federal facilities, the incarcerated population was about 1.43 million in 2019. E. ANN CARSON, U.S. DEP'T OF JUSTICE, NCJ 255115, PRISONERS IN 2019 1 (2020), https://www.bjs.gov/content/pub/pdf/p19.pdf [https://perma.cc/YUM2-SX29].

4 *QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219#PST045219 [https://perma.cc/FE2L-7TYG].

5 *BOP Statistics: Inmate Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/T8C4-H4M4].

6 ASHLEY NELLIS, SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 14 (2016). There are about 2.3 million people incarcerated in the U.S., of which about 1.92 million are in state prisons and local jails; therefore, about 83% of prisoners are under state or local control (excluding juveniles, territorial prisons, immigration detention, and involuntary confinement). Sawyer & Wagner, *supra* note 3.

7 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8 (10th anniversary ed., 2020).

8 *See id.*

9 NELLIS, *supra* note 6, at 3.

> incarceration tends to be categorized as a criminal justice issue as opposed to a racial justice or civil rights issue (or crisis).[10]

But mass incarceration *is* a civil rights issue, and, in much of the U.S., *it is a crisis*. Racial disparities are pervasive in the U.S. criminal justice system, even more so at the state level than federal. Louisiana offers a compelling example. In 2018, while only 33% of people living in Louisiana were Black, 91% of prisoners serving life without parole there for nonviolent offenses were Black.[11] In Louisiana, "life means life," which means that a life sentence will not be shortened.[12] More than half of those serving life without parole in Louisiana were under twenty-five years old when they were convicted, and about 75% are Black.[13] None of them will see freedom again. Most of them will spend the rest of their days at Angola State Penitentiary—the largest prison in the U.S.—which sits on a former slave plantation and was named Angola after the country from which its slaves were stolen.[14] On its face, Louisiana's life without parole scheme does not discriminate based on race, but these effects are a glaring relic of slavery.

Not every state criminal justice system has such an obvious odor of slavery, but in states across the country, facially race-neutral laws have the effect of criminalizing Black people at considerably unequal rates, just like Louisiana's life without parole scheme. For example, Iowa, Minnesota, New Jersey, Vermont, and Wisconsin incarcerate Black people at least ten times more frequently than White people.[15] Twelve states' prison populations are more than half Black: Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South

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10 ALEXANDER, *supra* note 7, at 11.

11 Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/ [https://perma.cc/ZLM9-LH6Z].

12 Lea Skene, *Louisiana's Life Without Parole Sentencing the Nation's Highest—and Some Say that Should Change*, ADVOC. (Dec. 7, 2019, 4:59 PM), https://www.theadvocate.com/baton_rouge/news/article_f6309822-17ac-11ea-8750-f7d212aa28f8.html (last visited Sept. 21, 2020).

13 *Louisiana Leads Nation in Life Without Parole Terms*, CRIME REP., (Dec. 12, 2019), https://thecrimereport.org/2019/12/12/louisiana-leads-nation-in-life-without-parole-terms/ [https://perma.cc/3BXL-T9LU].

14 For a history of the Angola Prison, see *History of Angola*, ANGOLA MUSEUM, https://www.angolamuseum.org/history-of-angola [https://perma.cc/TB2L-XMNC]; *see also Angola State Prison: A Short History*, VOICES BEHIND BARS: NAT'L PUB. RADIO & ANGOLA ST. PRISON, https://ccnmtl.columbia.edu/projects/caseconsortium/casestudies/54/casestudy/www/layout/case_id_54_id_547.html [https://perma.cc/LGD4-EU24].

15 *See* NELLIS, *supra* note 6, at 3.

Carolina, and Virginia.[16] Maryland's prison population is 72% Black.[17] Moreover, the consequences of incarceration do not end at the prison gates—hundreds of collateral consequences may attach as a lasting badge of incarceration.[18] The result is that Black people disproportionately suffer multi-layered consequences of harsh and discriminatory state criminal sentencing practices, including disenfranchisement and ineligibility for occupational licenses, adoptions, property rights, welfare, public housing, and more.[19] This Note does not assert that prison populations must exactly mirror the demographics of society, but most would agree that these statistics are shocking on their face. Such an imbalance in the prison population is very likely a symptom of the larger national struggle with race, policing, criminality, and incarceration.

As Part I explains, the Thirteenth Amendment gives Congress power to combat this systemic racial discrimination in state criminal justice systems. The power would be exercised in two steps: First, Congress should recognize and declare that mass incarceration is a "badge or incident of slavery" within the meaning of the Thirteenth Amendment.[20] The historical interconnectedness of race, politics, and criminality in the U.S. support this conclusion because the present state of mass incarceration traces its roots to the demise of Jim Crow. Once this determination is made, Congress can harness the power of Section 2 of the Thirteenth Amendment to pass powerful prophylactic legislation allowing the Department of Justice to challenge state criminal laws with racially disparate impacts.[21] In particular, Part II suggests using this power to eliminate the "intent requirement," which requires evidence that a law was enacted purposely to discriminate based on

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16 *Id.*

17 *Id.*

18 *See* ALEXANDER, *supra* note 7, at 118–20.

19 AM. BAR ASS'N, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 4 (2018), https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf [https://perma.cc/95FN-GRJJ]. For example, in *Jackson v. Tyron Park Apartments, Inc.*, No. 6:18-CV-06238 EAW 2019 WL 331635 (W.D.N.Y. Jan. 25, 2019), the plaintiff alleged that the exclusion of convicted felons from eligibility for rental housing was a violation of the FHA's disparate impact standard. *See id.* at *1. The court dismissed plaintiff's complaint, however. *See id.*

20 *See generally* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561 (2012).

21 For an analysis of Congress's prophylactic antidiscrimination powers in light of more recent Supreme Court limitations under Section 5 of the Fourteenth Amendment, see Kimberly E. Dean, *In Light of the Evil Presented: What Kind of Prophylactic Legislation Can Congress Enact After* Garret, 43 B.C. L. REV. 697 (2002); Ronson P. Honeychurch, *Exclusive Democracy: Contemporary Voter Discrimination and the Constitutionality of Prophylactic Congressional Legislation*, 37 U. HAW. L. REV. 535 (2015).

race before it may be struck down by a court.[22] As Section II.A explains, currently this requirement can only be satisfied by direct evidence of the legislature's intent, not by statistical evidence about the effects of a state criminal law or sentencing practice. The intent requirement therefore represents a difficult and—in light of modern understandings of inherent biases and anti-Black racism—unnecessary barrier to reform. However, Section II.B points to jury selection as an example of the Supreme Court's receptiveness to statistical evidence in other contexts of racial discrimination, which suggests the Court may be receptive to analyzing statistical evidence as a proxy for discriminatory intent in sentencing and criminal law regimes as well. Next, Section II.C shows that Congress can abrogate the intent requirement altogether, as it has done in employment, voting, and housing discrimination with "disparate impact analysis." Finally, Part III proposes that Congress bring disparate impact analysis to state criminal justice reform via the proposed "Civil Justice Act."

I. THE THIRTEENTH AMENDMENT: RACIAL DISPARITIES IN MASS INCARCERATION AS A BADGE AND INCIDENT OF SLAVERY

As a result of the Union's victory in the Civil War and the consequent abolition of slavery, the Thirteenth, Fourteenth, and Fifteenth Amendments[23] were added to the Constitution to enumerate a "revolution in federalism," giving the Federal government power to protect individuals' civil rights against intrusion by the states.[24] The Thirteenth Amendment is the theoretical bedrock upon which the Fourteenth and Fifteenth Amendments were built, declaring that:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly

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22 *See infra* Section II.A.

23 Because these amendments and laws were drafted by many of the same congressmen and ratified within a total of five years, the Civil War Amendments are often analyzed *pari material*, and this Note will therefore treat them as such. The Thirteenth Amendment was passed by Congress on Jan. 31, 1865 and ratified December 6, 1865. The Fourteenth Amendment was passed on June 13, 1866 and ratified on July 9, 1868. The Fifteenth Amendment was passed Feb. 26, 1869 and ratified Feb. 3, 1870. *Landmark Legislation: Thirteenth, Fourteenth, and Fifteenth Amendments*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm [https://perma.cc/XAR4-CNXK]; *The Reconstruction Amendments*, NAT'L CONST. CTR., https://constitutioncenter.org/learn/educational-resources/historical-documents/the-reconstruction-amendments [https://perma.cc/A23E-P5NH].

24 Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 174 (1951); *see* WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 10–14 (1898).

> convicted, shall exist within the United States, or any place subject to their jurisdiction.
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> Section 2. Congress shall have power to enforce this article by appropriate legislation.[25]

The first section clearly abolishes chattel slavery,[26] but was this all that the amendment was meant to accomplish? Strict textualists would answer affirmatively, holding that the Thirteenth Amendment makes illegal only the ownership of humans as property.[27] But most others, including the Supreme Court, understand that Section 2 empowers Congress to go much further.[28] Exactly how far, however, remains unclear. "Thirteenth Amendment optimists" interpret it to invalidate anti-abortion laws and any other infringements of one's right to make choices.[29] Case law defining the maximum of Congress's Thirteenth Amendment powers is scant. But there is a clearly delineated minimum, which recognizes that Section 2 gives Congress a broad power to identify the "badges and incidents of slavery"[30] and to "pass all laws necessary and proper" to eradicate them, including through prophylactic legislation.[31]

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25 U.S. CONST. amend. XIII.

26 Chattel slavery is the condition where one human is legally the property of another person. *What is Slavery?*, ABOLITION PROJECT, http://abolition.e2bn.org/slavery_40.html [https://perma.cc/83N3-LW43].

27 *See infra* notes 41–43 and accompanying text; *see also* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power after* City of Boerne v. Flores, 88 WASH. U. L. REV. 77, 79 (2010) (noting laws passed under Section 2 banning involuntary servitude to enforce the literal terms of Section 1).

28 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 402, 440–44 (1968) (holding that racial discrimination by private actors in the sale of real estate is within the purview of the Thirteenth Amendment); *see generally* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1 (1995); McAward, *supra* note 27. *But see* Mark A. Graber, *Subtraction by Addition: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501, 1516 (2012) (arguing that the Fourteenth and Fifteenth Amendments may have limited the Thirteenth Amendment's scope simply by being enacted later in time).

29 *See* Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1735–38 (2012).

30 In *Jones*, 392 U.S. at 440, it was this determination made by Congress that allowed it to regulate wholly private conduct.

31 *See* The Civil Rights Cases, 109 U.S. 3, 20–21 (1883) (denying application to private conduct but describing the reflexive, expansive reach of the badge and incidents by embracing the approach of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)) ("Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to proscribe proper modes of redress for [the Thirteenth Amendment's] violation in letter or spirit."); *see also* McAward, *supra* note 27, at 80, 95; *cf.* Bailey v. Alabama, 219 U.S. 219, 242, 244 (1911) (invalidating a peonage law under the Thirteenth Amendment "[w]ithout imputing any actual motive to oppress" and considering only "the natural operation of the statute," which was to bring about slavery as "a condition, however named and wherever it might be established, maintained, or enforced").

As the next Section spells out in more detail, this term of art, *badges and incidents of slavery*, was coined by the Supreme Court to describe the types of problems the Thirteenth Amendment is meant to address. If Congress reasonably determines that a form of racial discrimination is linked historically to systemic anti-Black racism and the Court agrees that form of discrimination is a badge of slavery, then the means Congress chooses to eradicate it are entitled to considerable deference. As the following sections explain, historical evidence, Supreme Court precedent, and the legislative history of the Thirteenth Amendment and Civil Rights Act of 1866 support this interpretation and the constitutionality of this Note's proposed Civil Justice Act.

A. What Is a Badge and Incident of Slavery?

The threshold question to be answered is whether the Thirteenth Amendment may be applied to racial disparities in state criminal justice systems at all. As this Section details, the answer depends on a term of art derived from history and precedent. Classification as a badge or incident of slavery taps into the unique power of the Thirteenth Amendment to invalidate discriminatory practices. Thus, this Note must first determine: What is a badge and incident of slavery?

The terms "badge" and "incident" of slavery both predate the Thirteenth Amendment, which was ratified in 1865. Historically, courts mostly used "incident of slavery" as a legal term. For example, in *Prigg v. Pennsylvania*,[32] the Supreme Court held that the Fugitive Slave Clause of the Constitution contains a "recognition of the right of the owner in the slave," and therefore "all the incidents to that right attach[ed]," including the right to "seize and recapture his slave."[33] In various judicial decisions predating the Civil War, the "incidents of slavery" are spelled out in some detail, including the inability to give testimony in court or serve on a jury, lack of a right to vote, illegality of conducting religious or educational efforts, and other laws effectuating the degradation of Black Americans.[34] In sum, the "incidents of slavery" were all the legal rights that were directly tied to the ownership of slaves and the slave's subjugation.[35]

Whereas the definition of "incident" of slavery is fairly established, the term "badge of slavery" has had a broad, kinetic definition that has evolved

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32 41 U.S. 539 (1842).

33 *Id.* at 613; *see also* McAward, *supra* note 20, at 571.

34 *See* McAward, *supra* note 20, at 570–73, 595 n. 170.

35 *See id.* at 575.

over time.[36] By the time of the American Civil War, "badge of slavery" in the U.S. "in both legal and political discourse referred to the skin color of African Americans."[37] Because of this, many of the legal restrictions on slaves also applied to free Blacks because "they also wore the badge of slavery."[38] Around the time of emancipation and early Reconstruction, however, the meaning of "badge of slavery" shifted to refer to efforts to restrict Black Americans' rights so as to perpetuate white supremacy, including by discriminatory laws and official actions.[39]

For its part, the Supreme Court has melded the terms "badge" and "incident" into a single phrase over the years whose meaning has evolved over time.[40] The singularized term of art "badges and incidents of slavery" was first forged in 1883 in the *Civil Rights Cases*,[41] which held that "[m]ere discriminations on account of race or color were not regarded as badges of slavery," but were "an ordinary civil injury . . . subject to redress by [state] laws."[42] Thus, the prevailing interpretation of the Thirteenth Amendment for 85 years was narrow, reaching only involuntary servitude or slavery.[43] In 1968, however, this interpretation was overruled in the seminal case of *Jones v. Alfred H. Mayer Co.*,[44] where the Supreme Court affirmed Congress's determination that racial discrimination by private actors in the rental or sale of housing is a badge and incident of slavery.[45] In *Jones*, the Court explained the evolving nature of the badges of slavery and their relation to the Thirteenth Amendment:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a

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36 For example, the term "badge of slavery" at the time of the Roman Empire meant "evidence of political subjugation," and Adam Smith used the phrase in *The Wealth of Nations* to reference colonial manufacturing restrictions by the British. *Id.* at 575–76.

37 *See id.* at 576.

38 *See id*.

39 *See id.* at 582–93.

40 *See* McAward, *supra* note 20 at 578–82.

41 109 U.S. 3 (1883).

42 *Id.* at 24–25.

43 *See, e.g.*, Hodges v. United States, 203 U.S. 1, 16 (1906) ("The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation.").

44 392 U.S. 409 (1968).

45 *Id.* at 412, 440–44 (upholding the constitutionality of 42 U.S.C. § 1982, which provides that: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

> substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[46]

"Relic" in the Court's language above is used as a synonym for "badge,"[47] and was earlier used to assert that "[s]egregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship."[48] Similarly, the Fifth Circuit recognized school segregation as a relic or badge of slavery in 1966 and declared that the Thirteenth, Fourteenth, and Fifteenth Amendments "created an affirmative duty that the States eradicate all relics, 'badges and indicia of slavery' lest Negroes as a race sink back into 'second-class' citizenship."[49] Later, in 1984, the Fifth Circuit recognized that the underrepresentation of Black people on the New Orleans police force was "a badge of slavery" because "it [was] a sign, readily visible in the community, that attaches a stigma upon the black race."[50] Each of these conceptions of "badges and incidents" is consistent with the Thirteenth Amendment's philosophical and historical underpinnings.[51]

However many badges and incidents the courts have identified over the years, there remains no clear test to determine what is or is not included in the term. Academics, for their part, have offered various iterations.[52] Ultimately, this Note relies on the *Jones* articulation of the standard, asking

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46 *Id.* at 441–43. In his concurrence, Justice Douglas laid out more specific examples of "badges and incidents," including voter suppression, exclusion from juries, and wrongful or malicious criminal convictions. *See id*. at 445–48 (Douglas, J., concurring).

47 *See* McAward, *supra* note 20, at 592.

48 Bell v. Maryland, 378 U.S. 226, 260 (1964) (Douglas, J. concurring).

49 United States v. Jefferson Cty. Bd. of Educ., 372 F.2d 836, 873 (5th Cir. 1966) (quoting The Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J. dissenting)).

50 Williams v. City of New Orleans, 729 F.2d 1554, 1580 (5th Cir. 1984).

51 Notably, the principle drafter of the Thirteenth Amendment, Senator Lyman Trumbull, explained that it was meant to "not only abolish slavery in name, but in fact." Cong. Globe, 39th Cong. 1st Sess. 42–43 (1865); *see also* tenBroek, *supra* note 24, at 172–79, 190–91.

52 For example, Professor Carter suggests that "as the group's link to slavery grows more attenuated, the nature of the injury must be more strongly connected to the system of slavery to be rationally considered a badge or incident thereof." William M. Carter, Jr., *Rights, Race, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1318 (2007). Professor McAward offers that a "badge and incident . . . is public or widespread private action, based on race or previous condition of servitude, that mimics the law of slavery and has significant potential to lead to the de facto re-enslavement or legal subjugation of the targeted group." McAward, *supra* note 20, at 630. Professor Colbert suggests that the "continued disproportionate imposition of the death sentence on [Black people] for their crimes against whites is closely linked to the former system of slavery" and therefore should be covered by the Thirteenth Amendment. *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 49 (1995).

whether the policy at issue—in this case, mass incarceration—evolved from a recognizable system of racial oppression such as Jim Crow, which replaced the Black Codes, which replaced slavery.[53] This kinetic but historically rooted interpretation is consistent with the goals of the framers of the Thirteenth Amendment and their concept of Congress's power.[54] Applying this standard, Section B concludes that the racially disparate effects of mass incarceration are a badge of slavery within the meaning of the Thirteenth Amendment.

B. Mass Incarceration Is a Badge and Incident of Slavery

If Congress determines that the racial disparities existing today within America's system of mass incarceration are a badge or incident of slavery within the meaning of the Thirteenth Amendment, then Congress will be imbued with particularly strong prophylactic power to eradicate these disparities. This Section applies the interpretive guideposts established above to some of the history precipitating the present state of mass incarceration and concludes that such a determination would be reasonable.

The racial disparities reflected in the present state of mass incarceration in the U.S. are—much like former segregation at lunch counters and schools or overt discrimination in voting, housing, and employment—a substitution of Jim Crow for more subversive forms of discrimination. As the Supreme Court recognized in *Jones*, the Thirteenth Amendment applies to ever-evolving forms of racial oppression, so long as a historical connection may be drawn between slavery, historic racism, and the challenged policy.[55]

The history of state criminal laws as vehicles for discrimination is well documented and, frankly, depressing. State criminal laws passed after emancipation, known as Black Codes and Pig Laws, purposely targeted Black Americans for coerced labor and disenfranchisement.[56] Until 1901, Louisiana, like many southern states even sold that labor for profit.[57] Vagrancy laws made it a crime to be unemployed, and "[m]any

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53 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441–42 (1968); McAward, *supra* note 20, at 598.

54 tenBroek, *supra* note 24, at 172–79, 190–91.

55 *See Jones*, 392 U.S. at 440–44.

56 *See Black Codes*, HIST. (Oct. 10, 2019), https://www.history.com/topics/black-history/black-codes [https://perma.cc/F26G-QCX5]; *see also Black Codes and Pig Laws*, PBS, https://www.pbs.org/tpt/slavery-by-another-name/themes/black-codes/ [https://perma.cc/86ES-YBUU].

57 *See* Nathan Cardon, "*Less Than Mayhem": Louisiana's Convict Lease, 1865–1901*, 58 LA. HIST. 417 (2017) (discussing the history of forced labor in Louisiana prisons); *see also* Matthew J. Mancini, *Convict Leasing*, 64 PARISHES, https://64parishes.org/entry/convict-leasing [https://perma.cc/W5PV-756R].

misdemeanors or trivial offenses were treated as felonies, with harsh sentences and fines."[58] The rise of Jim Crow laws in many states legalized second-class citizenship for Black Americans for nearly 100 years, and the criminal justice system was an integral tool of oppression.[59]

In the 1960s, the Civil Rights Movement brought hope for real change away from Jim Crow, but was met with the now-common "get tough on crime" and "law and order" appeals to white voters by Southern governors and Richard Nixon's presidential campaign.[60] Indeed, "[a]fter the passage of the Civil Rights Act [in 1964], the public debate shifted focus from segregation to crime."[61] The civil disobedience doctrine of Dr. Martin Luther King, Jr. was linked by then Vice President Richard Nixon to increasing crime rates.[62] Conservative politicians and media associated social unrest with the Civil Rights movement, reporting frantically about large public demonstrations that preceded each landmark piece of Civil Rights legislation passed in the 1960s.[63] In the words of one Nixon strategist, President Nixon "emphasized that you have to face the fact that the whole problem is really the blacks" and explained that "[t]he key is to devise a system that recognizes this while not appearing to."[64] As of 1970, the total prison population in the U.S. was about 300,000.[65]

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58 *Black Codes and Pig Laws*, *supra* note 56.

59 *See* Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM L. & CRIMINOLOGY 1043, 1055–56 (2010) (describing examples of "selective enforcement by police departments, selective prosecution, and selective sentencing by judges" that led to racial discrimination in the Jim Crow era); *see also* Hunter v. Underwood, 471 U.S. 222, 229, 232–33 (1985) (invalidating provision of the Alabama Constitution—adopted in 1901 at a convention where "zeal for white supremacy ran rampant"—which disenfranchised people convicted of "moral turpitude" crimes because the qualifying acts such as vagrancy, adultery, and wife-beating "were thought [at the time] to be more commonly committed by blacks").

60 *See* ALEXANDER, *supra* note 7, at 50–51, 68–71.

61 *Id.* at 54.

62 *See id.* at 51.

63 *See Id.* at 51–54. For instance, The Civil Rights Act of 1964 was precipitated by the March on Washington, the Voting Rights Act by the March to Montgomery and Bloody Sunday on the Selma Bridge, and Title VII and the Fair Housing Act of 1968 by nationwide riots following the assassination of Dr. Martin Luther King, Jr. *See Civil Rights Movement Timeline*, HIST. (Jan. 16, 2020), https://www.history.com/topics/civil-rights-movement/civil-rights-movement-timeline [https://perma.cc/7CK5-8S3V].

64 ALEXANDER, *supra* note 7, at 51; *see also* Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (March 26, 2012), https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/ [https://perma.cc/R4SF-FWMY].

65 *See* JUSTICE POL'Y INST., THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENIUM 1 (May 2000), http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf [https://perma.cc/GG5H-S73T] [hereinafter THE PUNISHING DECADE].

In his 1980 presidential campaign, Ronald Reagan built on the success of Nixon's "tough on crime" appeal and added welfare reform as a central issue to his platform.[66] According to Professor Alexander, these "highly racialized appeals, targeted at poor and working-class whites, were nearly always accompanied by vehement promises to be tougher on crime."[67] The strategy worked again, as Reagan (a Republican) pulled 22% of all Democrat voters to his side, and 34% of Democrats who thought "civil rights leaders were pushing 'too fast.'"[68] Following through on his appeals, Reagan announced the now-infamous War on Drugs and ramped up federal funding for local law enforcement, which Alexander argues was targeted specifically at Black and minority communities.[69] George H.W. Bush repeated this refrain in his 1988 presidential campaign.[70] These racially charged politics contributed to the rise of mandatory minimums and three-strike laws at the Federal and state levels throughout the 1980s.[71] By the end of the decade, the U.S. prison population had more than tripled since Nixon took office, up to 1.15 million.[72]

By 1994, the prison population had stabilized at roughly 1.05 million,[73] but the Democrat-sponsored Violent Crime Control and Law Enforcement Act (the "1994 Crime Bill") led a resurgence of "tough on crime" policy and rhetoric at both the state and federal levels.[74] Democrats, weary after years

66 *See* ALEXANDER, *supra* note 7, at 60–62; Christopher Borelli, *Reagan Used Her, the Country Hated Her. Decades Later, the Welfare Queen of Chicago Refuses to Go Away*, CHI. TRIB. (June 10, 2019), https://www.chicagotribune.com/entertainment/ct-ent-welfare-queen-josh-levin-0610-story.html (last visited Sept. 29, 2020).

67 ALEXANDER, *supra* note 7, at 62.

68 *Id.*

69 *See id.* at 62–63.

70 Bush infamously used the image of Willie Horton to evoke racial fears against Black men. *See generally* Doug Criss, *This Is the 30-Year-Old Willie Horton Ad Everybody Is Talking About Today*, CNN (Nov. 1, 2018, 6:17 PM), https://www.cnn.com/2018/11/01/politics/willie-horton-ad-1988-explainer-trnd/index.html [https://perma.cc/B9H2-W373].

71 *See* Arit John, *A Timeline of the Rise and Fall of "Tough on Crime" Drug Sentencing*, ATLANTIC (Apr. 22, 2014), https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/ [https://perma.cc/AL8U-ULCM].

72 *See* THE PUNISHING DECADE, *supra* note 65, at 1; *see also* SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1 (2020) https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf [https://perma.cc/8AWU-722B] (showing growing rates of incarceration over the 1970s and 80s).

73 ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEP'T OF JUSTICE, NCJ 151654, PRISONERS IN 1994 1 (1995), https://www.bjs.gov/content/pub/pdf/Pi94.pdf [https://perma.cc/6TS9-QRPW].

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

of being berated as weak on crime, joined in the harsh refrain of the Republicans, and both sides spent much of the next two decades bragging about who was tougher on crime.[75] Thus was the state of criminal justice until 2008—the year U.S. imprisonment rates peaked—when the Democrats, under the leadership of newly-elected President Obama, finally began shifting the tone and substance of the crime debate.[76] Some aspects of the War on Drugs have since been rolled back, even as recently as the Trump administration, but its effects remain a stark reminder of the roots of today's incarceration crisis.[77]

Concededly, these racial appeals by presidential candidates, the harshening of criminal policies at the state level, and the concurrent rise in incarceration rates do not necessarily mean that the laws were passed with the intent of discriminating against Black Americans. But that is beside the point. Whatever the reason for these harsher criminal sentencing laws, by 2000, the number of prisoners in the U.S. had eclipsed two million, and racial disparities within that population continued or worsened.[78]

This brief history suggests the interconnectedness of race, politics, and criminality in the U.S. and brings us back to the standard outlined in *Jones*. The pattern of racially charged politics, hyper-criminalization, and mass incarceration shows a connection between the demise of Jim Crow and its replacement with a more subtle form of discrimination in mass incarceration.

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75 *See* Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019, 2:30 PM), https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis [https://perma.cc/7J8R-NLWF].

76 *See id.*; John Gramlich, *America's Incarceration Rate Is at a Two-Decade Low*, PEW RES. CTR. (May 2, 2018), https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/ [https://perma.cc/2UNM-CT9Y]; President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference [https://perma.cc/8RDM-CRSJ] ("Since my first campaign, I've talked about how, in too many cases, our criminal justice system ends up being a pipeline from underfunded, inadequate schools to overcrowded jails.").

77 *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (shortening sentences—especially for pre-2010 crack cocaine convictions—and expanding a "safety valve" for sentencing judges to go below statutory mandatory minimums); *see also* Ames Grawert, *What Is the First Step Act—And What's Happening With It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it [https://perma.cc/GGL3-JS4P] (explaining the First Step Act of 2018); Betsy Pearl & Maritza Perez, *Ending the War on Drugs*, CTR. FOR AM. PROGRESS (June 27, 2018, 9:00 AM), https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452786/ending-war-drugs/ [https://perma.cc/FM8J-2TFC] (giving examples of reforms at the state and local levels).

78 ALEXANDER, *supra* note 7, at 77; COMMITTEE ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 57–59, 68–69 (Jeremy Travis et. al eds. 2014).

Mass incarceration's disparate effects are a systemic barrier to racial equity in the U.S., a promise long awaited by its Black and minority citizens. Therefore, a determination that the present state of racial disparities in mass incarceration is a badge or incident of slavery would be at least reasonable.

C. The Importance of Defining Mass Incarceration as a Badge or Incident of Slavery

If Congress determines that racial disparities in state criminal justice systems are a badge and incident of slavery, it will be tapping into the unique power of the Thirteenth Amendment. First, because Section 2 empowers Congress to define the limits of the protected right—to be free from slavery and its badges and incidents—Congress may receive greater deference from courts in evaluating the constitutionality of the means chosen to enforce the right. The Thirteenth Amendment empowers Congress to adopt creative means of addressing racial discrimination, for example by addressing purely private action, as analyzed in *Jones*, or establishing robust remedial programs such as the Freedmen's Bureau.[79]

Second, because discrimination in state criminal sentencing practices has been litigated and interpreted narrowly under the Fourteenth Amendment, anchoring this Note's proposed Civil Justice Act in the Thirteenth Amendment will provide a blank slate for courts to interpret the legislation's constitutionality. As Part II explains, under current law the Supreme Court will not consider statistical evidence of racial disparity in a Fourteenth Amendment challenge to state criminal sentencing practices. Thus, the "intent requirement" presents an unrealistic and unnecessary hurdle for litigants to overcome. However, in other contexts of racial discrimination such as employment, voting, and housing, Congress has statutorily required the Court to look only to the effects of a policy instead of its intent—namely, via disparate impact analysis. As Part III details, the Civil Justice Act overrides the "intent requirement" for discrimination claims against state criminal justice laws via disparate impact analysis and provides a strong enforcement mechanism based on the Voting Rights Act of 1965.[80] These measures would serve as a strong check against the states' traditional autonomy over matters of criminal justice.

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79 *See generally African American Records: Freedmen's Bureau*, NAT'L ARCHIVES, https://www.archives.gov/research/african-americans/freedmens-bureau [https://perma.cc/C459-SZE5].

80 52 U.S.C. §§ 10301–10310, 10503, 10508 (2018).

II. THE INTENT REQUIREMENT AND DISPARATE IMPACT ANALYSIS

Today, a claim of racial discrimination against a state's criminal justice system would likely be made under the Equal Protection Clause of the Fourteenth Amendment, which provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[81] The Fourteenth Amendment is the first textual commitment in our Constitution to the concept of equal protection, which also underpins the Thirteenth and Fifteenth Amendments.[82] Section II.A explains that the Fourteenth Amendment requires a showing of intentional discrimination, which cannot be satisfied by indirect statistical evidence as was provided above and the case of *McCleskey v. Kemp*.[83] This "intent requirement" is a nearly impossible hurdle for litigants to overcome, and given modern understandings of implicit biases and anti-Black racism, the requirement seems increasingly outdated.[84] However, Section B of this Part suggests that the Supreme Court is not as averse to statistical evidence as Section A might suggest. Section II.C then demonstrates that Congress can abrogate the intent requirement altogether, as it has done in the past to combat racial discrimination in employment, voting, and housing. Finally, Part III takes these principles and applies them to the proposed remedy—the Civil Justice Act—which abrogates the intent requirement and finds inspiration for its enforcement mechanism from employment, housing, and especially voting rights legislation.

A. The Intent Requirement: McCleskey v. Kemp

An example of what a claim against a state's discriminatory criminal law might look like today is *McCleskey v. Kemp*, in which the Supreme Court considered a Fourteenth Amendment challenge to Georgia's death sentencing process.[85] In *McCleskey*, the Court held that statistical evidence of racially disparate application of a state's capital punishment laws could not prove an equal protection claim.[86] Overall, the Court rejected McCleskey's claim because it would have required the Court to declare that Georgia's legislature selected or reaffirmed its capital sentencing practice "because of," not merely "in spite of," its disproportionately adverse effects

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81 U.S. CONST. amend. XIV, § 1.

82 *See* GUTHRIE, *supra* note 24, at 3–5.

83 481 U.S. 279 (1987); *see infra* note 90 and accompanying text.

84 *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 135–36 (1990).

85 *See* 481 U.S. at 286.

86 *See id.* at 291–92.

upon Black citizens.[87] The Court explained that "legislatures necessarily have wide discretion in the choice of criminal laws and penalties, and as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, we will not infer a discriminatory purpose on the part of the State of Georgia."[88] Inferring such a purpose would have been to call the entire legislature racist. Of course, even if this were true, as a matter of institutional respect, the Court would not do that.

McCleskey offered as proof a detailed empirical study of over 2,000 murder cases in Georgia during the 1970s (the "Baldus Study"), which showed, among other shocking racial disparities,[89] that defendants charged with murder of white victims were "more than four times as likely to receive the death sentence as [were] defendants with black victims."[90] The Court of Appeals rejected the Baldus Study as proof of unconstitutional discrimination, even accepting its validity arguendo.[91] Even though the Eleventh Circuit had acknowledged that the study "showed that systematic and substantial disparities existed in the penalties imposed . . . based on [the] race of the homicide victim . . . [and the] race of defendants,"[92] the Supreme Court agreed with the circuit court that "the Baldus study [was] clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose."[93]

The Supreme Court affirmed, rejecting McCleskey's claim because the tendencies shown by the study could not justify attributing a racially discriminatory motive to the people driving the Georgia sentencing system, such as the prosecutor and jury at trial, or legislators in enacting and keeping

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87 *Id.* at 298 (quoting Personnel Adm'r of Massachusetts v. Feeny, 442 U.S. 256, 279 (1979)).

88 *Id.* at 298–99.

89 One such finding was that "prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; 19% of the cases involving white defendants and black victims." *Id.* at 287. Additionally, "the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.* at 286. A final disparity was that "*defendants charged with killing white persons received the death penalty in 11% of the cases*, but defendants charged with killing blacks received the death penalty in only 1% of the cases." *Id.* (emphasis added).

90 *Id.* at 320 (Brennan, J., dissenting).

91 *See id.* at 291 n.7, 295 n.15.

92 *Id*. at 289 (quoting McCleskey v. Kemp, 753 F.2d 877, 891, 895 (11th Cir. 1985)).

93 *Id*. at 297.

it in place.[94] Furthermore, the *McCleskey* Court highlighted that the state had no opportunity to rebut the Baldus Study because prosecutors and jurors should not be called to testify about their decisions to seek the death penalty as a matter of policy.[95] The Court went on to explain that because McCleskey challenged central aspects of the state's criminal justice system, it would require "exceptionally clear proof" before finding a Fourteenth Amendment violation in this context.[96]

After *McCleskey*, a challenge to state criminal sentencing practices under the Equal Protection Clause requires direct evidence of discriminatory intent. As a result, someone wishing to challenge a conviction, say, under Louisiana's life-without-parole system for racial discrimination would have to show not only that 91% of those serving life without parole for nonviolent offenses under the statute are Black,[97] but that the legislature, judge, prosecutor, or jury in the case specifically intended to discriminate on the basis of race.

The *McCleskey* intent requirement should be abrogated for at least two reasons. First, the intent requirement misunderstands the nature of discrimination itself, which can occur either intentionally or unintentionally. Implicit bias is now well documented and better understood than it was when *McCleskey* was decided.[98] Although the framers of the Civil War Amendments may not have discussed implicit bias, their intent was to address all of the direct *and indirect* effects of slavery, of which implicit bias and racism may be counted.[99] Congress has reached this result in other contexts of discrimination. For example, in the employment, voting, and housing contexts, Congress has enacted legislation that abrogates the intent requirement. The Supreme Court has subsequently upheld each of those statutory schemes, which underscores the limited constitutional relevance of the intent requirement.

Second, practically speaking, the intent requirement presents a nearly impossible obstacle for litigants to overcome.[100] As applied to state

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94 *See id.* at 292 ("Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967))).

95 *See id*. at 296.

96 *Id.* at 297.

97 *See* Balko, *supra* note 11.

98 *See, e.g.*, Jerry Kang et. al, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012).

99 *Cf.* tenBroek, *supra* note 24, at 186.

100 *See* COLE, *supra* note 84, at 135–36.

sentencing practices, the intent requirement obligates defendants to come forward with evidence that is simply not available to them. Even if racist motives were abundant, there is generally no discovery available to criminal defendants and they are unable to question a prosecutor, juror, or legislator about their intent in performing their roles.[101] And even if there were discovery, it is very difficult to show the intent of an entire legislature, which is made up of many individual legislators who may hide their true intents or never enter them on the record. To its credit, the Supreme Court has implicitly recognized the limited utility and relevance of requiring direct evidence of discriminatory intent in jury selection, another aspect of law deeply within state autonomy.

B. Statistical Evidence of Discriminatory Intent: Batson v. Kentucky

While the Supreme Court's treatment of statistical evidence in *McCleskey* paints a bleak picture of defendants' chances for challenging the discriminatory state criminal sentencing practices, *Batson v. Kentucky*[102] suggests that the Constitution does not necessarily require *direct* evidence of intent to discriminate for a violation of the Equal Protection Clause. Instead, statistical evidence is sufficient in some circumstances, even in challenges to certain aspects of state criminal justice systems. Much like capital sentencing practices, the jury system is among the most deeply embedded aspects of state criminal justice systems.[103] And similar to Georgia's death penalty as examined in *McCleskey*, laws governing jury selection today are facially race-neutral but all too often have resulted in discrimination.[104]

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101 *See id.*

102 476 U.S. 79 (1986).

103 *See* Swain v. Alabama, 380 U.S. 202, 210–26 (1965) (extolling the virtues of the peremptory strike and explaining its history, then upholding its use in a county with an approximately 26% Black population of males over 21 but not one Black juror seated in 15 years); C.J. Williams, *On the Origins of Numbers: Where Did the Number of Peremptory Strikes Come from and Why Is Origin Important?*, 39 AM. J. TRIAL ADVOC. 481, 490, 494 (2016). The jury is born of the desire to have impartial citizens decide defendants' fates and traces its roots back to Greco-Roman times. *See* Williams, *supra*, at 486–87. The jury—and with it the peremptory strike—first arrived in England around 1066 AD, from where it was passed on to the English colonies in North America and, finally, incorporated into the criminal laws of the newly sovereign states after the Revolutionary War. *See id.*; Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 814 (1997).

104 Two prominent aspects of jury selection, peremptory strikes and the "key man" system, are of particular concern. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019) (reversing the conviction of a defendant tried for the sixth time for the same murder by the same prosecutor after the first five trials resulted in mistrials or overturned convictions due to prosecutorial misconduct or racially motivated peremptory strikes); ALA. CODE § 12-16-60(a) (2020) (specifying qualified jurors as those who are "generally reputed to be honest and intelligent and [who are] esteemed in the community for integrity, good character and

However, unlike in *McCleskey*, the Court does accept statistical evidence of a pattern across cases to prove discrimination in jury selection.[105]

The Court in *Batson* created a specific Equal Protection test for alleged discrimination in jury selection, now known as the *Batson* challenge. This framework provides a model for the Civil Justice Act and is an indication of the Court's potential receptiveness thereto. First, the defendant must show a prima facie case of discrimination by giving evidence of one or more exclusions that are difficult to explain on grounds other than for a racial motive.[106] Second, if the trial judge believes a prima facie case has been made, then the prosecutor must come forward with race-neutral reasoning to justify the challenged strike or strikes.[107] Finally, the defendant has the burden of proving intentional discrimination by refuting the explanations produced by the prosecutor.[108] *Batson* suggests that although the Court is still looking for specific intent to discriminate, it is not as averse to statistical evidence as *McCleskey* suggests.[109] *McCleskey* distinguished discrimination challenges in capital sentencing from jury selection challenges because "in [jury selection] cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions."[110] However, as the next Section explains, Congress can and has abrogated the intent requirement altogether by enacting disparate impact legislation. In those circumstances, the Court has applied and upheld the use of statistical evidence of discrimination.

C. Abrogating the Intent Requirement: Disparate Impact Legislation

Congress can override the intent requirement, as enunciated in *McCleskey* and *Batson*, by enacting disparate impact legislation. It has done so under the Fourteenth Amendment for employment discrimination and

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sound judgment"); Hoffman, *supra* note 103, at 829 (discussing the use of peremptory challenges in jury selection to remove Black jurors for racially discriminatory purposes); Charles DiSalvo, *The Key-Man System for Composing Jury Lists in West Virginia—the Story of Abuse, The Case for Reform*, 87 W. VA. L. REV. 219, 230–31, 251–55 (1985).

105 *See Batson*, 476 U.S. at 96–100.

106 *See id.* at 96.

107 *See id.* at 97–98.

108 *See id.* at 100. For an easy, unofficial outline of the *Batson* challenge, see Brian W. Stull & Sonya Allen, *Batson Cheat Sheet*, PUB. DEFENDER SEMINAR (2008), http://www.ncids.org/Defender%20Training/2008%20Fall%20Conference/BatsonCheatSheet.pdf [https://perma.cc/SE6P-BU7C].

109 *See Batson*, 476 U.S. at 96–100 ("In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination").

110 McCleskey v. Kemp, 481 U.S. 279, 294–95 (1987).

under the Fifteenth Amendment for voter discrimination. Congress tried to bring disparate impact analysis to death penalty reform with the Racial Justice Act,[111] but like several previous attempts at a similar reform, the bill was never passed into law.[112] The Racial Justice Act suffered from two main objections: first, criticism of the use of statistical evidence; second, criticism of the proposed remedy, which was to commute individual death sentences.[113] However, the use of statistical evidence under Title VII of the Civil Rights Act of 1964[114] and the Voting Rights Act counsel against such skepticism, and for purposes of this Note, the proposed Civil Justice Act's state-centric remedy would not raise the same concerns as the Racial Justice Act's commutation approach. Furthermore, locating the effort for state criminal justice reform in the Thirteenth Amendment may circumvent some constitutional hurdles posed by *McCleskey* and other cases discussed below.

Although the Supreme Court has twice left open the question of whether the Thirteenth Amendment on its own provides for disparate impact analysis,[115] support for the idea is found in the congressional debates over the Thirteenth Amendment and its statutory counterpart, the Civil Rights Act of 1866.[116] The debates reveal that each was imbued with the same theory of equal protection textualized in the Equal Protection Clause of the Fourteenth Amendment.[117] Whereas the Fourteenth Amendment embodies negative equal protection in that states shall not "deny to any person . . . the equal protection of the laws,"[118] legislation passed under the Thirteenth and Fifteenth Amendments reflect the positive obverse of the Equal Protection Clause.[119] The negative side of equal protection is embodied by the

111 H.R. 4017, 103rd Cong. (2d Sess. 1994).

112 Upon a showing of significant racial discrimination, the prosecutor would have been required to put forth a non-race-based explanation for the decision to seek that particular death sentence. *See* H.R. 4017, § 2921(e); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 520 (1995). For a discussion of previous failed attempts at reform beginning in 1988, see Paul Schoeman, *Easing the Fear of Too Much Justice: A Compromise Proposal to Revise the Racial Justice Act*, 30 HARV. C.R.-C.L. L. REV. 543, 551–52 (1995).

113 *See* Schoeman, *supra* note 112, at 555.

114 42 U.S.C. § 2000e-2(a) (2012).

115 *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 n.17 (1982); City of Memphis v. Greene, 451 U.S. 100, 129 (1981) (White, J., concurring).

116 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–83 (2018)).

117 *See generally* tenBroek, *supra* note 24.

118 U.S. CONST. amend. XIV, § 1.

119 One example of positive equal protection under the Fourteenth Amendment is the existence of "affirmative action" programs, by which minority students are given preferential treatment in admission to schools in light of past discrimination. *See* CHRISTINE J. BACK & JD S. HSIN, CONG. RES. SERV., R45481, "AFFIRMATIVE ACTION" AND EQUAL PROTECTION IN HIGHER EDUCATION (2019).

Fourteenth Amendment, that no state shall deny equal protection of the laws; the positive aspect refers to the government's duty to actually give equal protection, including by taking special measures to advance Black people's interests as reparation for our awful beginnings with slavery, as reflected by the Thirteenth and Fifteenth Amendments. Indeed, this belief was textualized first in the Civil Rights Act of 1866, which—in the words of their common drafter—was "intended to give effect" to the Thirteenth Amendment[120] and provided that "all persons born in the United States . . . shall have the same right, in every State . . . to [the] full and equal benefit of all laws."[121] The Act also specifically referenced criminal laws by including the right to "like punishment, pains, and penalties" as others similarly situated,[122] which the proposed Civil Justice Act merely attempts to echo and amplify.

This background, coupled with the Thirteenth Amendment analysis in Part I, implies broad Congressional powers that may include authorization of disparate impact analysis as a tool for enforcement. The following two subsections will explore two contexts in which Congress has enacted disparate impact analysis: employment and voting discrimination. Then, the third subsection explores the limits of Congress's enforcement powers under the Civil War Amendments, particularly as they may be applied to the statute proposed in Part III, the Civil Justice Act.

1. Title VII of the Civil Rights Act of 1964

One example of a successful disparate impact law that has been upheld under the Fourteenth Amendment is Title VII of the Civil Rights Act of 1964, which makes it unlawful "to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of . . . race, color, religion, sex, or national origin."[123] The Civil Rights Act of 1964 was the result of valiant civil rights demonstrations that culminated in the March on Washington in 1963.[124]

In *Griggs v. Duke Power Co.*,[125] the Supreme Court upheld the constitutionality of Title VII and for the first time applied the concept of

120 tenBroek, *supra* note 24, at 190.

121 14 Stat. 27, at 27.

122 *Id.* The term "like" in this context means "similar" or "proportionate."

123 42 U.S.C. § 2000e-2(a)(2) (2012).

124 *See generally* Megan Turchi, *Events that Lead to the Civil Rights Act of 1964*, BOSTON.COM (July 2, 2014), https://www.boston.com/news/untagged/2014/07/02/events-that-led-to-the-civil-rights-act-of-1964 [https://perma.cc/7735-W9VU].

125 401 U.S. 424 (1971).

disparate impact under the statute.[126] The unanimous *Griggs* Court treated the case as one strictly about interpretation of Title VII and did not question the constitutionality of the disparate impact claim.[127] According to the Court, Congress intended to address "the *consequences* of employment practices, not simply the motivation," and to "remove barriers that have operated in the past" to result in preferential treatment for white people over Black people.[128] The Court explained that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[129]

Griggs shows that Congress can enact a disparate impact scheme to combat invidious—unintentional, even—racial discrimination pursuant to its Fourteenth Amendment powers. Although *McCleskey* presents something of a roadblock to this type of claim in the criminal justice reform context, the relative success of Title VII in fighting discrimination is a hopeful example to draw from when applying the Thirteenth Amendment's protections to the discriminatory effects of mass incarceration. More than 50 years after *Griggs*, Title VII remains a bulwark of antidiscrimination, and courts have managed to keep the disparate impact standard under control, assuaging concerns about a potential flood of complicated litigation.[130] Title VII's success, in addition to the following analysis of the Voting Rights Act, supports the conclusion that Congress can and should abrogate the intent requirement altogether when analyzing the disparate impacts of mass incarceration where it has before it a record of systemic racial discrimination.

2. The Voting Rights Act of 1965

Another example of successful disparate impact legislation, this time under the Fifteenth Amendment, is found in the Voting Rights Act of 1965. The Voting Rights Act is a sterling example of Congress's prophylactic power to protect civil rights from intrusion by state governments and reflects both the positive and negative equal protection principles discussed above.[131] At the time the Voting Rights Act was passed, the news footage of Bloody Sunday in Selma, Alabama had finally riled enough popular support for

126 *See id.* at 436.

127 *See id.*

128 *Id.* at 429–30, 432 (emphasis in original).

129 *Id.* at 431.

130 *See* Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. POL'Y ANALYSIS & MGMT. 424 (2015). *But see* Richard A. Epstein & Erwin Chemerinsky, *Should Title VII of the Civil Rights Act of 1964 Be Repealed?*, 2 S. CAL. INTERDISC. L. J. 349 (1993).

131 *See supra* text accompanying notes 116–122; Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960–1990*, 5 U. PA. J. CONST. L. 665, 685, 699 (2003).

Congress to take action.[132] After decades of frustrating case-by-case litigation, the Civil Rights Division of the Department of Justice ("DOJ") drafted this powerful legislation to address problems encountered in prior cases.[133] The Voting Rights Act embodies the "revolution in federalism"[134] carried out by the Civil War Amendments and provides the central model upon which the Civil Justice Act builds. Importantly, the Voting Rights Act provides both a private right of action and authorization for the DOJ to bring suits against the states. Although voting regulation, like criminal sentencing and jury selection, is usually within state autonomy, the Voting Rights Act imposes federal control to fight discrimination. For example, it forces certain jurisdictions to submit proposed changes to voting practices to the DOJ or U.S. District Court for the District of Columbia for "preclearance" and allows for the imposition of federal observers to local election operations.[135]

Second, the Voting Rights Act directly abrogates the intent requirement.[136] Although the Supreme Court in 1980 declared that the Fifteenth Amendment has the same intent requirement as the Fourteenth Amendment, in 1982 Congress amended the Voting Rights Act to ensure the availability of disparate impact litigation thereunder.[137] The Voting Rights Act also outlaws the use of literacy tests, which the Supreme Court had previously held were not per se unconstitutional.[138] Therefore, the statute

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132 *See Selma to Montgomery March*, MARTIN LUTHER KING, JR. RES. & EDUC. CTR., https://kinginstitute.stanford.edu/encyclopedia/selma-montgomery-march [https://perma.cc/NK2G-MVNG].

133 *See* McCrary, *supra* note 131, at 685.

134 tenBroek, *supra* note 24, at 174–75.

135 McCrary, *supra* note 131, at 685–87; *see* 52 U.S.C. §§ 10304–05 (2018).

136 Section 2 of the Voting Rights Act reads:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group as] set forth in section 10303(f)(2) of this title . . . .

52 U.S.C. § 10301(a).

137 *See* City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) ("[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose"). This ruling was superseded in 1982 by Congress when it amended the Voting Rights Act to explicitly allow for the "effects test" when evaluating whether a law was discriminatory. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; *see generally* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983) (explaining the criticism following *Mobile* and resulting congressional debates leading to amendment of the Voting Rights Act); *see also* U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

138 *See* 52 U.S.C. § 10303(e); Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 53–54 (1959).

goes beyond the minimum protection given by the Court, preventing not only actual constitutional violations (which must be intentional) but addressing also potential violations, as shown by statistical evidence of laws' discriminatory effects. This suggests that Congress can invalidate state laws that are not per se unconstitutional, but which Congress reasonably identifies as being likely to bring about or facilitate constitutional violations.

The constitutionality and relative successes of both Title VII and the Voting Rights Act speak positively to the practicability and constitutionality of a comparable measure to address criminal justice reform—namely, the proposed Civil Justice Act. However, Congress's powers in any context are not without limits, and the Civil Justice Act must clear at least two major hurdles posed by modern Supreme Court precedent.

3. Limits to Congress's Prophylactic Power: Shelby County *and* City of Boerne

The Supreme Court has invalidated civil rights legislation in two cases relevant to this Note. In 2013, *Shelby County v. Holder*[139] invalidated the Voting Rights Act's preclearance formula, used to determine which jurisdictions would be subject to the preclearance regime, because the formula was still based on conditions that had existed in 1964.[140] The preclearance mechanism itself, requiring certain jurisdictions to submit to the District Court for the District of Columbia or to the DOJ for preclearance of their voting laws, was not challenged. Thus, the preclearance regime remains constitutionally valid if given a proper preclearance formula. After *Shelby County*, Congress's prophylactic power depends largely on the record before it at the time it legislates—if the Court views that record as sufficient to justify the means chosen, then the act is constitutional.[141] Despite invalidation of the formula in *Shelby County*, the preclearance regime, the "effects test," the provision of federal observers, and the right of action for the DOJ remain constitutionally sound and in operation today.[142]

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139 570 U.S. 529 (2013).

140 *See id.* at 536–37, 554–56.

141 *See id.* at 553–55.

142 *See* Miss. Republican Exec. Comm. v. Brooks, 469 U.S. 1002 (1984) (summarily affirming ruling that upheld § 2 of the Voting Rights Act, the "effects test," against constitutional scrutiny); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding § 5 of the Voting Rights Act, the preclearance regime); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding § 4(e), the ban on literacy tests, despite their facial constitutionality under *Lassiter*); Statement of Interest of the United States with Respect to Section 3(c) of the Voting Rights Act, Perez v. Texas, No. 5:11-cv-360 (W.D. Tex. July 25, 2013) (urging the Court to uphold upholding § 3(c) of the Voting Rights Act, the "bail-in" and "bail-out" preclearance regimes). *But see* Honeychurch, *supra* note 21, 537 (arguing that *Shelby County* made preclearance a dead letter).

Relatedly, after *City of Boerne v. Flores*,[143] legislation passed under Section 5 of the Fourteenth Amendment must be a congruent and proportional response to the record before Congress.[144] In *City of Boerne*, the Court held that although Congress can enact remedial or preventative legislation to guarantee rights not perfectly matching those defined by the Court, Congress cannot define constitutional rights on its own—that job is for the Court.[145] The Supreme Court described Congress's power to enforce the Fourteenth Amendment as "remedial," as opposed to "substantive."[146] Therefore, there must be a congruent and proportional connection between the constitutional injury sought to be prevented and the means adopted to that end. Legislation interpreted as going "too far" or operating in a manner unconnected to a legitimate end may be considered a substantive change of the scope of a right itself, which Congress is not empowered to make.[147]

As uncovered in Part I, however, Section 2 of the Thirteenth Amendment gives Congress a particularly powerful role in defining the proper targets of its prophylactic powers. Even after *City of Boerne*, it is *Congress*, not the Court, who is empowered to define under the Thirteenth Amendment what are the badges and incidents of slavery. Once it does so, Congress can then legislate to eliminate those badges and incidents using its "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery"—a deferential standard.[148] Under the Civil Justice Act, the substantive right protected is the right to be free from slavery and all of its badges and incidents, which are embodied in disproportionate incarceration rates of Black Americans. The history of the Thirteenth Amendment and the interconnectedness of race, politics, and criminality in the U.S. support this conclusion, and as long as the statutory scheme is tailored to the announced purpose of eradicating badges and incidents of slavery, and does not go too far against the states' autonomy over criminal justice, then the law is constitutional. As Part III explains, the Civil Justice Act is rooted in the Thirteenth Amendment, takes on tailored and previously upheld measures from the Voting Rights Act, and is careful to limit the remedy to avoid concerns about federalism. Therefore, the Civil Justice Act

143 521 U.S. 507 (1997).

144 *See id.* at 520.

145 *See id.* at 535–36.

146 *Id.* at 527.

147 *Cf. id.* at 535–36.

148 *See* Jones v. Alfred H. Mayer Co. 392 U.S. 409, 439 (1968) (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)); *see also* McAward, *supra* note 27, at 95, 101 (suggesting the standard of review applied here is generally "rational basis," asking only whether the law is reasonably related to the end it seeks to achieve, but in light of *City of Boerne* the degree of deference afforded is somewhat uncertain).

should pass constitutional muster—a big first step toward combating the discriminatory effects of mass incarceration.

III. APPLYING THE THIRTEENTH AMENDMENT TO COMBAT RACIAL DISPARITIES IN STATE CRIMINAL SENTENCING PRACTICES: THE CIVIL JUSTICE ACT

The Thirteenth Amendment represents an underutilized reservoir of power that Congress should apply to eradicate racial disparities in criminal justice. Part I of this Note delineated the scope of the Thirteenth Amendment's applicability to the badges and incidents of slavery. The racial disparities pervading many state criminal justice systems are a badge or incident of slavery because today's mass incarceration is a product of Jim Crow's demise and replacement by more subversive forms of discrimination. Part II demonstrated that the intent requirement of the Equal Protection Clause may be abrogated in favor of objective, statistical evidence where Congress identifies systemic racial discrimination, just as it has done with jury selection, employment, and voting. Part III brings these pieces together and asserts that Congress can and should enact disparate impact legislation to combat racial discrimination in state criminal sentencing practices. This proposed legislation, entitled The Civil Justice Act, is modeled on Section 2 of the Voting Rights Act, draws on the language of "punishment, pains, and penalties" in the Civil Rights Act of 1866,[149] and marshals *Batson*'s burden-shifting framework.[150] The Civil Justice Act would read as follows:

The Civil Justice Act

(a) No criminal sentencing law or practice, nor consequence collateral to conviction, shall be applied by any State or political subdivision in a manner which results in racially disparate punishment, pains, or penalties, because such inequity is a badge or incident of slavery prohibited by the Thirteenth Amendment.

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149 14 Stat. 27, at 27. In *Jones*, the Supreme Court contemplated that the framers of the Thirteenth Amendment had "no doubt that [Section 2] contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act." 392 U.S. at 439–40. *Jones* went on to explain that Section 2 of the Thirteenth Amendment empowers Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Id.* at 439 (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)). The case further quoted *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) 316, 421 (1819).

150 *See supra* Section II.B.

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the punishment, pain, or penalty in the State or political subdivision is not equitably applied to members of a class of citizens protected by subsection (a) in that its members have disproportionately more contact than do members of other classes with the punishment, pain, or penalty; *provided that*, nothing in this Act shall entitle any group to rates of punishment or incarceration equal to their demographic proportion in the population.

(c) Upon a prima facie showing by clear and convincing evidence that a criminal sentencing law or practice, or consequence collateral to conviction, violates subsection (a), the burden shall shift to the state to justify, by a preponderance of the evidence, maintenance of the law, practice, or consequence in light of its racially disparate application.

(d) If a criminal sentencing law or practice, or consequence collateral to conviction, violates subsection (a) and is without sufficient justification, then that law, practice, or consequence is invalid. The offending jurisdiction may then offer a replacement law, practice, or consequence, but any replacement must be precleared by whichever of the U.S. Department of Justice or a three-judge panel of the U.S. District Court for the District of Columbia is chosen by the State, before such replacement may come into effect.

(e) The U.S. Department of Justice is hereby authorized to enforce the provisions of this Act and shall furnish annual reports to Congress concerning racial disparities in criminal justice and steps taken to address them. Claims shall be brought in the nearest U.S. District Court within the district in which the challenged jurisdiction sits; if the State is charged, then in the district of the State capital.

Under the Civil Justice Act, the DOJ would bring a suit against a jurisdiction in the federal court nearest that jurisdiction geographically. Subsection (a) will apply to state criminal laws that have the effect or result of discriminating against people on account of race—for example, Louisiana's life without parole scheme, Georgia's death penalty laws from *McCleskey*, or felony disenfranchisement practices in other states. Similar to a disparate impact claim in employment or voting, a claim against Louisiana's life without parole scheme could point to statistical evidence of racially discriminatory effects, such as that 91% of nonviolent offenders sentenced to life without parole in Louisiana are Black.[151] Under subsection

151 *See* Balko, *supra* note 11.

(b), such a prima facie showing of racially disparate impact must be made by "clear and convincing evidence." This heightened burden of proof will help to ensure that litigation under the Civil Justice Act does not run amok and that only the most egregious of disparities are addressed. Further, in subsection (a), the Civil Justice Act disclaims any right to proportionate incarceration, meaning incarceration rates do not need to match population demographics. This is important conceptually because proportionate representation as a benchmark is probably irrational considering its disconnect from actual crime rates or other possible measures of jailable conduct. The statistics are meant to be a starting point for the inquiry; they indicate an underlying problem, but statistics alone cannot provide the solution. Equity does not require equal proportions based on race; equity requires blatant discrepancies to be addressed.

Once a prima facie case of racially disparate impact is established, the burden would shift to the state to either refute the evidence presented or to justify maintaining the policy despite its racially disparate effects. The burden on the state here would be lower than the challenger's, requiring only a proof by preponderance of the evidence.[152] The state may well have legitimate reasons for maintaining a practice with disparate effects, such as the incapacitation, deterrence, or rehabilitation of criminals, or a similar disparity in the rate the underlying crime is committed. However, the state could not just parrot these terms without justification. The court will be charged with weighing the reasonableness of the policy in light of the racially disparate impacts and may reject the state's proffered justification if it does not hold up to reason.

If the court rejects the state's justifications for the sentencing practice, then the discriminatory statute would be invalid per subsection (d), but that does not mean that prisoners would simply walk free. Instead, a system modeled on the preclearance regime of the Voting Rights Act is activated.[153] The state may bring forth a replacement policy, but it must be submitted to a three-judge panel of the District Court for the District of Columbia or to the Department of Justice, at the state's discretion, for preapproval before the state can implement the new policy. Preclearance acts to ensure efforts for reform are genuine, but also keeps states in control of writing their own laws. The state's new, precleared policy would replace the challenged one, but convictions already secured under the old policy would remain in

152 This was also the case in the final version of the Racial Justice Act of 1994. *See* H.R. 4017, 103rd Cong. § 2921(e) (1994); Schoeman, *supra* note 112, at 553.

153 *See* Section 3 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. This section was unaffected by the Supreme Court's decision in *Shelby County v. Holder*.

place.[154] The Civil Justice Act, then, is really a method of reforming state criminal justice systems prospectively by rolling back policies that have operated in the past to discriminate and keep them from discriminating in the future. As to the fates of individual prisoners or those currently suffering other collateral consequences of imprisonment, their sentences would remain in effect because the statute would be statutorily invalidated but not unconstitutional. However, a hopeful secondary effect of the Civil Justice Act would be for those invalidated practices to be brought to the public's attention. The public then can assert pressure on legislatures to carry out further reforms as needed.

Although preclearance is associated negatively with the *Shelby County* decision, the Civil Justice Act will avoid the shortcomings of the preclearance formula of the Voting Rights Act as it was invalidated in that case.[155] Specifically, the coverage of the Civil Justice Act preclearance regime is based on current conditions and whether racial disparities exist in a covered jurisdiction when challenged, not whether a condition existed 40 years ago. Further, the preclearance will end when the particular practice is replaced, it will not remain in place for decades like the Voting Rights Act. With a dynamic and relevant coverage formula, and in light of the other limiting factors of the Civil Justice Act, preclearance in this instance likely is a congruent and proportional response to racial discrimination in some state criminal justice systems.

Further supporting the congruence and proportionality of the Civil Justice Act, the DOJ would intervene only where evidence is overwhelming of racial disparities, as with Louisiana's nonviolent life without parole sentences. A private right of action might be a more direct way of dealing with discrimination, but it could lead to a "flood of litigation" because of the extremely high number of potential applications for the language of subsection (a) of the Civil Justice Act. Therefore, the Civil Justice Act limits enforcement power to the DOJ to control the flow and direction of cases brought under the Act. This could also improve the overall effectiveness of the Act by allowing the DOJ to selectively challenge only the most egregious state laws or practices. To counteract inconsistent enforcement across presidential administrations, subsection (e) mandates consistent monitoring and annual reports to Congress about the racial impacts of state criminal sentencing practices. Ultimately, this information may be the most valuable

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154 Because the law would not have been declared unconstitutional, but only invalid under the Civil Justice Act, prisoners would not necessarily be entitled to habeas corpus relief.

155 Shelby County v. Holder, 570 U.S. 529, 537, 553–557 (2013) (explaining that the formula was based on states with a "test or device" in place as of November 1964).

result of the Civil Justice Act, bringing to light the depth and width of the problem at hand.

At bottom, the constitutionality of the Civil Justice Act will likely turn on the courts' interpretation of the record before Congress and whether the Act is a congruent and proportional response thereto. At the time this Note is written, it appears the record may be forming itself. Just like anti-Black violence precipitated the civil rights demonstrations of the 1960s, the Civil Rights Act of 1964, and the Voting Rights Act of 1965, recent killings of Black Americans caught on video have again brought the U.S. near its boiling point.[156] As a result, fighting against anti-Black racism, inherent biases, and systemic criminal injustices like police brutality and mass incarceration are at the center of political discourse.[157] Unfortunately, these issues take on a hyper-partisan tone.[158] Whether five current members of the Supreme Court would interpret the Thirteenth Amendment liberally like *Jones* and Part II of this Note, however, is another matter altogether, especially since the passing of Justice Ruth Bader Ginsburg and her replacement with a conservative Justice Barrett.[159] Moreover, it is worth

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156 *See* Eliott C. McLaughlin, *Anger Erupts in American Cities After Charging Decision in Breonna Taylor Case*, CNN (Sept. 28, 2020, 4:08 AM), https://www.cnn.com/2020/09/28/us/weekend-protests-breonna-taylor/index.html [https://perma.cc/FA8E-H8GZ]; *Jacob Blake's Shooting Shows America Has a Long Way to Go in Its Journey Toward a Racial Reckoning*, CNN (Sept. 4, 2020, 1:20 PM), https://www.cnn.com/2020/08/30/us/jacob-blake-shooting-one-week-later/index.html [https://perma.cc/N22F-TXLP]; Patricia Sullivan et al., *Thousands Gathered Across City to Protest Death of George Floyd*, WASH. POST (June 7, 2020, 12:26 AM), https://www.washingtonpost.com/dc-md-va/2020/06/06/dc-protests-saturday-george-floyd/ [https://perma.cc/Q3MR-P5ED].

157 *See The Movement to Abolish Prisons and the Police*, NPR (Aug. 18, 2020, 1:05 PM), https://www.npr.org/2020/08/18/903546893/the-movement-to-abolish-prisons-and-the-police [https://perma.cc/EVS5-PRLL]; Li Zhou & Ella Nielsen, *The House Just Passed a Sweeping Police Reform Bill*, VOX (Jun. 25, 2020, 8:50 PM), https://www.vox.com/2020/6/25/21303005/police-reform-bill-house-democrats-senate-republicans (last visited Oct. 3, 2020) (discussing the overwhelming passage of the George Floyd Justice in Policing Act, H.R. 7120, 116th Cong. (2020), in the House of Representatives); *Rand Paul Introduces Bill to End the Type of Warrant Involved in Breonna Taylor's Death*, CNN (June 11, 2020, 9:22 PM), https://www.cnn.com/2020/06/11/politics/rand-paul-bill-no-knock-warrants-breonna-taylor/index.html [https://perma.cc/8DLL-PLMX].

158 *See, e.g.*, Leila Fadel, *Critics Accuse Trump of Using Race to Divide Americans*, NPR (Oct. 9, 2020, 12:01 PM), https://www.npr.org/2020/10/09/921284261/critics-accuse-trump-of-using-race-to-divide-americans [https://perma.cc/32DE-AQNW].

159 *Amy Coney Barrett Confirmed to US Supreme Court*, BBC NEWS, (Oct. 26, 2020), https://www.bbc.com/news/election-us-2020-54700307 [https://perma.cc/ZHL2-BX28]; Mark Sherman, Lisa Mascaro, & Mary Clare Jalonick, *Barret Vows Fair Approach as Justice, Democrats Skeptical*, ASSOCIATED PRESS (Oct. 12, 2020), https://apnews.com/article/election-2020-virus-outbreak-donald-trump-religion-ruth-bader-ginsburg-6dbe137f4ae4952fc3a32bf4b140de84 (last visited Oct. 14, 2020).

noting that Chief Justice Roberts penned the *Shelby County* decision, and the Court's conservative majority can be fairly described as more sensitive to federalism concerns and generally less amenable to liberal civil rights legislation. Nevertheless, there is broad support for meaningful, racially focused criminal justice and prison reform.[160] These ties between politics, racism, and mass incarceration are real, and it is high time we start untangling them.

CONCLUSION

In sum, Congress can combat systemic racial discrimination in state criminal sentencing practices by passing the Civil Justice Act to allow disparate impact challenges, just as it has done against discrimination in employment, housing, and voting. States traditionally have great autonomy to administer their criminal justice systems, but the Thirteenth Amendment gives Congress yet-unrealized power to catalyze reform thereof. This reform may take a muscular form, as with the preclearance provision of the Civil Justice Act, but it must also be a congruent and proportional response to the record before Congress. The Civil Justice Act is tailored to limit intrusions on state sovereignty and only empowers the Department of Justice to bring claims to challenge discriminatory state sentencing practices. The burdens of proof also are adjusted to show deference to the state. Litigation under the Civil Justice Act would help build a public record of racially discriminatory effects of state criminal justice practices, which would spur further, long-overdue reform.

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160 *See* Shaila Dewan, *Here's One Issue That Could Actually Break the Partisan Gridlock*, N.Y. TIMES (Nov. 24, 2020), https://www.nytimes.com/2020/11/24/us/criminal-justice-reform-republicans-democrats.html [https://perma.cc/PG98-DGSD].