NOTE

When Bonds Turn to Badges

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INTRODUCTION

The year is 1866. One year has elapsed since the ratification of the Thirteenth Amendment abolishing slavery. Jacob Burgest, a Black Union Army veteran, has found himself in a position quite familiar to other Black people living in the Reconstruction South: in jail.[1] He had been arrested after leaving his plantation job in protest over not getting paid.[2] For invoking his newly granted rights, Burgest was now in a cell under the condition of a $150 bail.[3] When a friend subsequently came to post his bail in the form of a bond, the friend was denied as a personal surety and the bail amount was tripled and contingent upon upfront payment.[4] Consequently, Burgest was incarcerated for "many weeks," during which he was "covered with vermin, robbed of [his] clothes."[5] He was left "lamenting the way the law was being 'administered wholly in the interest of the white man [while] the colored people have no justice whatsoever.'"[6]

Flash forward 153 years to 2019. Dennis Edwards, a Black man, was in a position familiar to many Black men in modern America: still in jail.[7] He was incarcerated on the condition that he pay $4,500 in bail or $520 to a private bail bonds service.[8] Edwards was never convicted of any crime, and yet, he would take his

1. *See Persecution of Colored Men*., NEW ORLEANS TRIB., Sept. 23, 1866, at 3.

2. Jacob Alan Grover, One Dead Freedman: Everyday Racial Violence, Black Freedom, and American Citizenship, 1863-1871, at 91–92 (May 17, 2017) (Ph.D. dissertation, University of Kentucky) (citing *Persecution of Colored Men*., *supra* note 1), https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1057&context=history_etds [https://perma.cc/2EM3-D57F].

3. FLOZELL DANIELS, JR., BENJAMIN D. WEBER & JON WOOL, FROM BONDAGE TO BAIL BONDS: PUTTING A PRICE ON FREEDOM IN NEW ORLEANS 3 (2018) (citing *Persecution of Colored Men*., *supra* note 1), https://s3.amazonaws.com/gnocdc/reports/Daniels_bondage_to_bail_bonds.pdf [https://perma.cc/EBF9-MTJ3].

4. *Id*.

5. Grover, *supra* note 2, at 92 (quoting *Persecution of Colored Men*., *supra* note 1).

6. DANIELS, JR. ET AL., *supra* note 3 (quoting *Persecution of Colored Men*., *supra* note 1).

7. Jarvis DeBerry, Opinion, *Don't Just Ask Why Inmate Died; Ask Why He Was an Inmate*, NOLA.COM (July 12, 2019, 1:55 PM), https://www.nola.com/opinions/article_7b085807-495c-523f-8efe-6e6004390808.html [https://perma.cc/23ZE-GHAT].

8. *Id*.

last breaths from behind bars.[9] He was left to die from medical distress because he was unable to purchase his freedom; he was unable to post bail. Time has progressed since 1866, but the criminal justice system's use of bail as a barrier to justice for Black individuals has not. Today, as during antebellum times, the Black community still lacks meaningful access to bail and thus freedom.

Bail is the "temporary release of a person awaiting trial for a crime."[10] Typically, a defendant posts bail by pledging a personal assurance or a property guarantee "to a court to persuade it to release the accused on the understanding that [the defendant] will return for trial or forfeit the money."[11]

At common law, bail amounts were set as to not "render the privilege useless to the poor"[12] and the money was paid only if the defendant failed to appear.[13] This system was grounded in the principles of due process and the presumption of innocence, which "guarantee[d] that a person will not be punished or lose their liberty before they face a trial."[14] Only the most dangerous defendants were forced to remain incarcerated.[15] Under this design, poor white people were frequently released without any condition of money bail.[16]

The modern for-profit bail system differs from the common law antecedent. In postbellum America, bail evolved into a racialized, wealth-based, for-profit system.[17] In a for-profit bail system, bail must be paid *upfront*.[18] This forces defendants who cannot afford the court-appointed bail amount to choose between two evils—utilizing a commercial bondsman[19] or remaining in jail until their trial commences.[20] Both options cripple the defendant's ability to navigate the

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9. *See id.*

10. SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 1 (2018).

11. *Id.* at 2.

12. EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA 510 (Philadelphia, James Kay, Jun. & Brother 1833) ("When bail is given, the prisoner must be discharged without extracting from him the payment of any fees.").

13. *See* LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 1 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf [https://perma.cc/2GT8-LVEZ].

14. BAUGHMAN, *supra* note 10, at 3.

15. *See id.* Originally, the First Congress provided bail to all defendants besides those accused of capital offenses. *Id.*

16. *See* DANIELS, JR. ET AL., *supra* note 3, at 2.

17. *See, e.g.*, Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1119 (2019); DIGARD & SWAVOLA, *supra* note 13. This transition has been ever quicker in recent years. *See* PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, THE HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 5 (2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf [https://perma.cc/3UUY-44UX].

18. *See, e.g.*, DIGARD & SWAVOLA, *supra* note 13.

19. This Note frequently uses the term "bondsman" (and "bondsmen") as a term of art to reference an individual who engages in commercial bond services. It is not a gendered term as both men and women can be a bondsman.

20. *See, e.g.*, DIGARD & SWAVOLA, *supra* note 13; Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM), https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice- inequality [https://perma.cc/NMJ2-4HUL]. If a defendant fails to show up for trial, they forfeit the bond; but it will be returned to

criminal justice system and subsequently diminish the protections afforded to them by the presumption of innocence.

Black individuals disproportionately bear the burden of these consequences, thus creating a two-tier system of justice.[21] Black defendants are at least 10%–25% more likely to be required to pay money bail than their white counterparts.[22] Those Black defendants who are assigned money bail are then usually given double the bail amounts that a white defendant is ordered.[23] This results in Black defendants paying on average $10,000 more in bail than white defendants.[24] These disparities are not incidental effects of systemic inequalities. The bail system is, in fact, working as intended.[25]

For-profit bail practices did not suddenly materialize in recent times. Rather, for-profit bail grew out of the stain of slavery to create an analogous system that conditions one's freedom on their ability to purchase their right to mobility and autonomy. "Freedom. A concept so fundamental to the American psyche that it is enshrined in our Constitution. And yet, America is addicted to imprisonment. From slavery through mass incarceration . . . ."[26] For-profit bail is the latest imprisonment tactic aimed to keep Black bodies enslaved.

This Note argues that the for-profit bail system is "a badge and incident of slavery"[27] in violation of the Thirteen Amendment,[28] and, as such, Congress should legislate against it. The Note adds to the burgeoning literature on bail policy by emphasizing the racially discriminatory component of for-profit bail and its disparate impact on the Black community. It thus analyzes bail solely through a racial lens. By comparing the practice to its antebellum predecessor, the Note

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them if they do appear in court. *See* DIGARD & SWAVOLA, *supra* note 13, at 1, 3. This system applies to the states. The federal government has outlawed the practice. 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

21. *See, e.g.*, Robin Steinberg, *What if We Ended the Injustice of Bail?*, TED (Apr. 2018), https://www.ted.com/talks/robin_steinberg_what_if_we_ended_the_injustice_of_bail?language=en (discussing how bail—the price of freedom—has created a two-tier system of justice between the rich and poor, particularly for Black men in New York City); Wykstra, *supra* note 20.

22. Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ [https://perma.cc/7C2R-9KU8].

23. *Id.*

24. *See id.*

25. *See, e.g.*, Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, ATLANTIC (Apr. 12, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/; Micaela A Watts, *Inmate Found Dead at Shelby County Criminal Justice Center Was Being Held on a $100 Bond*, COM. APPEAL (Feb. 20, 2020, 8:40 AM), https://www.commercialappeal.com/story/news/breaking/2020/02/18/inmate-found-dead-shelby-county-criminal-justice-center-201-poplar/4794842002/.

26. Steinberg, *supra* note 21.

27. *See, e.g.*, Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 570 (2012) ("As a phrase, the 'badges and incidents of slavery' is unique to the Thirteenth Amendment context, used as a term of art for the first time in the *Civil Rights Cases* in 1883.").

28. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, §§ 1–2.

aims to expose a deeper insidiousness: the connection between for-profit bail and slavery.

Part I of the Note discusses the development of the Court's Thirteenth Amendment jurisprudence and defines "badges and incidents of slavery" as historically rooted actions that limit one's physical mobility and inflict legal coercion. Part II illustrates how antebellum slavery and the Black Codes of Reconstruction infringed upon Black individuals' physical mobility and legal standing to maintain slavery during and after abolition. Part II further outlines the for-profit bail system and details its analogous strategies for limiting defendants' physical mobility and inflicting legal coercion.

Finally, Part III argues for a novel application of the Thirteenth Amendment and finds that for-profit bail is a badge and incident of slavery. For-profit bail is based on the same historical presumption as slavery: that freedom can be bought. It also borrows the institutional design of slavery to operate through the same methods of subjugation—by limiting defendants' physical mobility and employing legal coercion to disenfranchise their standing in the criminal justice system and extract economic exploitation. This Part also provides three practical reasons that demonstrate why it is important to conceptualize for-profit bail as a badge and incident of slavery.

I. THIRTEENTH AMENDMENT JURISPRUDENCE AND THE MEANING OF "BADGES AND INCIDENTS"

The Thirteenth Amendment is an absolute prohibition on slavery and indentured servitude of the presumed innocent.[29] Section 2 of the Amendment has been interpreted by the Court to give Congress the power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[30] However, this seemingly clear directive and grant of power has not amounted to a robust class of jurisprudence. Rather, lower courts have typically construed this Section of the Amendment as a dead letter by pronouncing a string of ad hoc determinations that have devoid it of any meaningful civil rights protections.[31] This Part rejects that premise and instead (1) reviews the Founders' intent in passing the Amendment, (2) summarizes how the Supreme Court and its subordinate tribunals have interpreted it, and (3) argues for the adoption of a more expansive application in future cases. In so doing, this Part seeks to outline how the Thirteenth Amendment was originally interpreted, how it is currently interpreted,

29. The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("[The Thirteenth Amendment] is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.").

30. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (emphasis omitted) (citation omitted). Congress has exercised that power by codifying the Amendment in the criminal code; outlawing kidnapping or carrying "away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave," 18 U.S.C. § 1583(a)(1); and knowingly holding someone in involuntary servitude, § 1584(a).

31. *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1311–12 (2007).

and how it should be interpreted in the future. Reviewing the history and progression of the jurisprudence clarifies why a broad definition of badges and incidents is appropriate in the context of for-profit bail.

A. THIRTEENTH AMENDMENT AS INTERPRETED AT ADOPTION

The Thirteenth Amendment is a post-Civil War Reconstruction Amendment that was passed because Congress feared that "the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before [emancipation]."[32] The Amendment was intended to have bite.[33] It was envisioned as a way to make "slavery impossible."[34]

The men who drafted and ratified the Amendment based it upon abolitionist ideals of natural rights.[35] Natural rights are the "basic rights, privileges, and protections characteristic of membership in a civilized society."[36] Representatives' statements confirm this broad reading of the Amendment's scope. Senator Trumbull, who proposed the Amendment and the Civil Rights Act of 1866 (the first piece of legislation passed under the Amendment), argued that "[w]ith the destruction of slavery necessarily follows the destruction of the *incidents* to slavery. . . . [And] [w]ith the abolition of slavery should go all the *badges* of servitude which have been enacted for its maintenance and support."[37] He conceptualized the Civil Rights Act as outlawing the incidents of slavery, such as the Black Codes, and protecting African-Americans' "privilege to go and come when they please, to buy and sell when they please, [and] to make contracts and enforce contracts."[38]

Senator James Harlan likewise interpreted the Amendment broadly as abolishing all of the "necessary *incident[s]*" in addition to slavery itself.[39] Representative Wilson echoed these sentiments, advocating that the amendment "will obliterate the last lingering vestiges of the slave system; . . . all it was and is,

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32. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873). Senator Trumbull warned that "the only effectual way of ridding the Country of Slavery, so that it cannot be resuscitated, is by an Amendment of the Constitution forever prohibiting it within the jurisdiction of the United States." JOHN A. LOGAN, THE GREAT CONSPIRACY: ITS ORIGIN AND HISTORY. 529 (New York, A. R. Hart & Co. 1886).

33. In the words of Representative Thayer of Pennsylvania: "[W]hen I voted for the amendment to abolish slavery[,] . . . . I did not suppose that I was offering them a mere paper guarantee." CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer).

34. CONG. GLOBE, 38th Cong., 1st Sess. 1369 (1864) (statement of Sen. Clark).

35. *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 101 (2004) ("Radical Republicans established the Thirteenth Amendment on the natural rights principles that had guided the abolitionist movement from its founding in 1833.").

36. Carter, Jr., *supra* note 31, at 1333 (quoting Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 494 (2003)). Senator Lyman Trumbull of Illinois stated that the Thirteenth Amendment enforces "natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public." CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull).

37. CONG. GLOBE, 39th Cong., 1st Sess. 322–23 (1866) (statement of Sen. Trumbull) (emphasis added).

38. *Id.* at 43.

39. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. Harlan) (emphasis added).

everything connected with it or pertaining to it."[40] But, what are the "badges and incidents" of slavery and why has the Court departed from these forefathers' wishes and interpreted the Amendment narrowly?

B. JUDICIAL INTERPRETATION AS DEFINED AND APPLIED TODAY

The Thirteenth Amendment is interpreted by the Court to outlaw slavery, involuntary servitude, and the badges and incidents of slavery. Each form of subjugation is analyzed distinctly. For-profit bail is best conceptualized as a badge and incident of slavery.

Section 1 of the Thirteen Amendment outlaws slavery and involuntary servitude.[41] The Court narrowly interprets slavery to mean chattel slavery, which is defined by compelled labor under the threat of physical coercion.[42] "Slavery implies . . . a state of bondage; the ownership of mankind as a chattel, or, at least the control of the labor and services of one man for the benefit of another."[43]

Courts are typically hesitant to hold that modern examples constitute slavery in violation of the Thirteenth Amendment.[44] Pretrial detention is not considered slavery. In *Ford v. Nassau County Executive*, a pretrial detainee alleged that his Thirteenth Amendment rights were violated because he was required to serve as a food cart worker under the threat of solitary confinement.[45] The court rejected the detainee's contention that his treatment was tantamount to slavery.[46] Because his work was not alleged to be "burdensome" and he did receive some consideration

40. *Id.* at 1324 (statement of Rep. Wilson).

41. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

42. *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 948 (1988) (finding the scope of the Thirteenth Amendment was "limited to cases involving the compulsion of services by the use or threatened use of physical or legal coercion"); The Civil Rights Cases, 109 U.S. 3, 20–22 (1883) (limiting the scope of the Thirteenth Amendment to outlawing "servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's consent").

43. Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

44. *See, e.g.*, *Kozminski*, 487 U.S. at 951 ("Although we can be sure that Congress intended to prohibit '"slavelike" conditions of servitude,' we have no indication that Congress thought that conditions maintained by means other than by the use or threatened use of physical or legal coercion were 'slavelike.'"); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873). This does not mean courts are completely unwilling to find novel violations of the Thirteenth Amendment. *See, e.g.*, Pollock v. Williams, 322 U.S. 4, 18 (1944) (nullifying the peonage law of Florida under the Thirteenth Amendment because "no indebtedness warrants a suspension of the right to be free from compulsory service"); Bailey v. Alabama, 219 U.S. 219, 244–45 (1911) (voiding statute requiring compulsory labor for debts owed). In *United States v. Booker*, two individuals forced against their will to work in a migrant labor camp were deemed slaves. 655 F.2d 562, 567 (4th Cir. 1981). The court interpreted the Thirteenth Amendment to protect persons "[w]ith little education, little money and little hope, [who] easily fell prey to the tempting offers of 'powerful and unscrupulous' individuals, who would soon assert complete control over their lives." *Id.* at 566. (citation omitted). There, even though the availability of escape remained plausible, "[t]he threat of violence or confinement, backed sufficiently by deeds as in this case, suffices to subjugate human beings to the will of another in violation of the thirteenth amendment." *Id.* at 567.

45. *See* 41 F. Supp. 2d 392, 394 (E.D.N.Y. 1999).

46. *Id.* at 401.

in exchange, the circumstances of his labor were not compelled and "d[id] not rise to the level of indignity and degradation that accompanied slavery."[47] "To hold otherwise," the court reasoned, "would trivialize the pain and anguish that the Thirteenth Amendment sought to remedy."[48]

The court's approach to the issue, not their ultimate holding, is what is trifling. Defining slavery as compelled labor under threat of coercion ignores the non-physical attributes of antebellum subjugation, such as a lack of equal rights. As the for-profit bail system—in both its pre-trial detention and bail bondsmen iterations—creates non-labor injuries, the Court's slavery jurisprudence is not the proper framework under which to address the issue.

Involuntary servitude "is of larger meaning than slavery."[49] It "necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."[50] Involuntary servitude "was intended to cover those forms of compulsory labor akin to African slavery which[,] in practical operation[,] would tend to produce like undesirable results."[51]

Courts are more willing to use involuntary servitude jurisprudence to shield against modern infringements.[52] In *McGarry v. Pallito*, the Second Circuit held that a pretrial detainee forced to work in the jail's laundry room doing other inmates' wash had plausibly stated a claim that he was subjected to involuntary servitude under the Thirteenth Amendment.[53] The complaint alleged that his refusal to work was met with physical threats to be sent to solitary confinement and legal threats to be sanctioned with an Inmate Disciplinary Report, which would impact his release date.[54] The court reasoned that such "work obtained or

47. *Id.* at 399, 401.

48. *Id.* at 401.

49. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 69.

50. United States v. Kozminski, 487 U.S. 931, 952 (1988) ("In addition, a trial court could properly find that evidence of other means of coercion or of extremely poor working conditions is relevant to corroborate disputed evidence regarding the use or threatened use of physical or legal coercion, the defendant's intention in using such means, or the causal effect of such conduct.").

51. Butler v. Perry, 240 U.S. 328, 332 (1916).

52. *See, e.g.*, United States v. Alzanki, 54 F.3d 994, 999–1000, 1009 (1st Cir. 1995) (affirming that domestic worker was held in involuntary servitude); United States v. King, 840 F.2d 1276, 1277–78 (6th Cir. 1988) (holding that a religious cult held children in involuntary servitude); United States v. Warren, 772 F.2d 827, 829 (11th Cir. 1985) (affirming migrants were held in involuntary servitude); Pierce v. United States, 146 F.2d 84, 84–86 (5th Cir. 1944) (holding that defendant forced women into involuntary servitude by forcing them into prostitution in exchange for purchasing them clothes).

53. 687 F.3d 505, 508–09, 511–12 (2d Cir. 2012).

54. *See id.* at 511–12. However, courts have consistently held that requiring pre-trial detainees to perform more basic housekeeping tasks does not violate Thirteenth Amendment. *See, e.g.*, Mendez v. Haugen, No. Civil 14–4792 ADM/BRT, 2015 WL 5718967, at *1 (D. Minn. Sept. 29, 2015) (requiring pretrial detainee to work as a restroom cleaner was not involuntary servitude); Muhmmaud v. Murphy, 632 F. Supp. 2d 171, 175–76 (D. Conn. 2009) (holding that "forced participation in programs in the Chronic Discipline Program" does not constitute involuntary servitude in violation of the Thirteenth Amendment because participation in those programs is not work).

maintained by the use or threatened use of physical or legal coercion is 'akin to African slavery, although without some of the latter's incidents.'"[55]

Although *McGarry* makes up for some of the ground ceded by *Ford* by focusing solely on pre-trial detainment, both cases are only looking at a symptom of the issue while ignoring the actual disease: the larger for-profit bail system. By exclusively connecting the constitutional violation to compelled labor and coercion, the Court is "neglect[ing] an argument more closely tied to the history and meaning of the Thirteenth Amendment."[56] For the same reasons as in *Ford*, involuntary servitude also provides an inadequate framework through which to analyze for-profit bail.

Section 2 of the Thirteenth Amendment provides broader protections, allowing Congress to directly regulate against slavery.[57] Congress has the power to nullify any legislation that "impose[s] upon the colored race onerous disabilities and burdens; [and] curtail[s] their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value."[58] In short, Section 2 outlaws the badges and incidents of slavery.

Badges and incidents of slavery are "those fundamental rights which appertain to the essence of citizenship, . . . the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."[59] Although Congress retains the power to define the term,[60] the badges and incidents of slavery are the mechanisms through which slavery was enforced.[61] The incidents of

55. *McGarry*, 687 F.3d at 511 (quoting United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964)).

56. Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 808 (1993); *cf. id.* (applying the same argument in the context of forced prostitution constituting slavery).

57. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *see* The Civil Rights Cases, 109 U.S. 3, 20–21 (1883) ("Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents . . . ?").

58. *The Civil Rights Cases*, 109 U.S. at 36–37 (Harlan, J., dissenting) (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873)).

59. *Id.* at 22 (majority opinion).

60. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."). For example, in explaining its reasoning for passing the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Congress described the badges and incidents as follows:

> Slavery and involuntary servitude were enforced, both prior to and after the adoption of the [Thirteenth] [A]mendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

Pub. L. No. 111-84, § 4702, 123 Stat. 2190, 2835–36 (2009) (codified as amended at 18 U.S.C. § 249).

61. *See, e.g.*, McAward, *supra* note 27 at 576.

slavery are the "legal constraints and conditions placed on slaves themselves"[62] and the property rights of their owners.[63]

Any modern construction of a badge or incident of slavery must have a historical connection to the purpose of the Thirteenth Amendment. The Amendment's objective was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[64] However, although passed in response to antebellum slavery, the Amendment's shield is not restricted to protecting only one race.[65]

Due to a lack of historical correlation, mere discrimination is not considered a badge and incident.[66] However, other modern examples of badges and incidents have been found,[67] which provides a framework for determining what future acts may fit the classification. In *Jones v. Alfred H. Mayer Co.*, the Court analyzed whether the private refusal to sell property to African-Americans on account of race was a badge and incident of slavery.[68] The Court emphatically answered yes.[69] The Court supported its holding with three arguments. First, the practice had a historical connection: racial discrimination in property sales was a

62. *Id.* at 571; *see* Neal v. Farmer, 9 Ga. 555, 567 (1851) ("The condition of a villein, had many of the incidents of slavery.").

63. McAward, *supra* note 27, at 571; *see* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 613 (1842) (reasoning that because the Constitution's Fugitive Slave Clause "contains a positive and unqualified recognition of the right of the owner in the slave . . . . [T]hen all the incidents to that right attach also").

64. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873).

65. *See* Bailey v. Alabama, 219 U.S. 219, 240–41 (1911) ("While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag."); Hodges v. United States, 203 U.S. 1, 17 (1906) ("Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within [the Thirteenth Amendment's] compass as slavery or involuntary servitude of the African."); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72 ("[W]hile negro slavery alone was in the mind of the Congress which proposed the thirteenth article . . . . [I]f other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.").

66. *See* The Civil Rights Cases, 109 U.S. 3, 25–26 (1883) (holding that denying a person public accommodations on account of race was not a badge and incident of slavery); *see also* Palmer v. Thompson, 403 U.S. 217, 226–27 (1971) (denying that closing the city swimming pool to prevent the races from swimming together was a badge and incident of slavery).

67. *See, e.g.*, United States v. Beebe, 807 F. Supp. 2d 1045, 1053 (D.N.M. 2011) (holding that racially motivated violence is a badge and incident because the Thirteenth Amendment does more than ensure the economic rights of slaves). *But see Palmer*, 403 U.S. at 226–27 ("Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors."); Channer v. Hall, 112 F.3d 214, 218–19 (5th Cir. 1997) (holding that requiring an immigration detainee to either work eight hours a day in food services or be segregated does not violate the Thirteenth Amendment); Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 457 (2d Cir. 1996) (holding that requiring high school students to participate in community service to graduate does not violate the Thirteenth Amendment).

68. 392 U.S. 409, 412–13 (1968) (holding under the Thirteenth Amendment, Congress had power to pass § 1982, which prohibits racial discrimination in the sale of property, but leaving open the question of whether the Amendment itself, without additional congressional action, prohibits the act).

69. *See id.* at 443 ("[T]he freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a

substitute for "Black Codes, enacted after the Civil War to restrict the free exercise of those rights, [which] were substitutes for the slave system."[70] Second, the Court reasoned that the discriminatory practice infringed upon African-Americans' physical mobility to "go and come at pleasure" because it "herd[ed] men into ghettos."[71] Finally, the practice violated Black people's legal right to "buy and sell when they please" by making "their ability to buy property turn on the color of their skin."[72]

A badge and incident of slavery therefore exists when, as alluded to in *Jones*, the act: (1) is historically rooted in slavery and the Black Codes; (2) imposes restrictions on the physical movement and free will of the subordinated party; and (3) threatens legal coercion in the form of economic pressure or the denial of equal standing in the criminal justice system. By conceptualizing for-profit bail as a badge and incident of slavery, the shortcomings of *McGarry* and *Ford* are remedied. As the next Section explores, postulating this broad definition to badges and incidents of slavery in future cases is beneficial because it exposes the fundamental injustice of owning another individual, no matter how humane of a version of slavery it amounts to.

C. APPLYING A BROAD INTERPRETATION OF BADGES AND INCIDENTS IN FUTURE CASES

To define the badges and incidents of slavery is, in effect, to define freedom. To ensure that the highest level of freedom is available, the broadest definition of badges and incidents should apply.[73] This will guarantee that no individual or government actor is ever able to seize the autonomy of another human being.[74] It "is a means to the end of preventing the de facto reestablishment of slavery."[75]

A broad definition of badges and incidents, which retains a connection to its historical pedagogy, does not demean the experience of antebellum African-Americans toiling in the fields under the whip of malicious masters. Terrible atrocities were committed during antebellum slavery and America should continue to pay penance for its crimes against humanity. However, failing to recognize badges and incidents outside of physical coercion does not honor the pain

white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.").

70. *Id.* at 441–42.

71. *Id.* at 442–43.

72. *Id.* at 443.

73. *See, e.g.*, Carter, Jr., *supra* note 31, at 1318, 1330–35 (arguing that badges and incidents should be broadly "construed in terms of race, power, and group status"). *See generally* TSESIS, *supra* note 35 (arguing that the Thirteenth Amendment has important implications for civil liberties beyond chattel slavery).

74. *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 918–19 (2019) ("If the definition of American slavery is primarily or exclusively based on the spectacle of those terms and contours—unpaid labor of Blacks toiling in pastoral fields—it is possible, even likely, to overlook or misidentify its other iterations and broader social contexts then and now. . . . The problem with the fixed benchmark on slavery is the suggestion that the enterprise can only be (or is primarily) about southern, plantation fieldwork.").

75. McAward, *supra* note 27, at 568.

suffered by African-Americans.[76] Rather, a broad definition is an affirmation that America recognizes the sins of its past and is committed to ensuring that no others have to similarly suffer to even the slightest degree.[77] It signals that even if the extreme torture, terrible conditions, and appalling assaults were not features of antebellum slavery, America still committed a grievous injustice by using humans as property and stripping them of their independent free will.

A more expansive reading of the phrase is confirmed by the original intent of the drafters and Representatives, who through ratification of the Amendment, were aiming to discard the practices that were "enacted for [slavery's] maintenance and support."[78] These forefathers "intended the Thirteenth Amendment to have an evolving and dynamic interpretation"[79] that would "act so as to obliterate the last vestiges of slavery in America."[80]

If the Thirteenth Amendment is "enforced according to [its] true intent and meaning, [it] will protect all the civil rights that pertain to freedom and citizenship."[81] The Amendment "conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for [a] crime) the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom."[82] As a result, the badges and incidents must be interpreted broadly to include anything that limits one's "right to pursue the ordinary avocations of life without other restraint than such as affects all others."[83] Therefore, Congress should define the term broadly and utilize the Amendment to enact prophylactic legislation that tears down any systems, such as for-profit bail, that interfere with the establishment of "universal civil and political freedom."[84]

The idea that for-profit bail is a badge and incident of slavery may be far-fetched, but the legal system takes for granted how the procedures used by the for-profit bail system were previously employed. Historical context matters. A system previously used in a discriminatory manner against Black individuals, which continues to have a disparate impact on the Black community today, must be labeled for what it is: a badge and incident of slavery. The next Part sets up

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76. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("[R]epeated condemnation of slavery . . . . [M]ay instead function to exonerate practices contested in the present, none of which looks so unremittingly 'evil' by contrast.").

77. A broader definition of slavery recognizes that "while [slavery's] antebellum defining characteristics may no longer be in existence, it transformed or evolved—not just once, but perhaps several times." Goodwin, *supra* note 74, at 911.

78. CONG. GLOBE, 39th Cong., 1st Sess. 322–23 (1866) (statement of Sen. Trumbull).

79. Carter, Jr., *supra* note 31, at 1331–32 ("[T]ruly examining the Amendment's drafters' original intent supports a robust interpretation of its intended scope.").

80. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Wilson).

81. Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

82. Hodges v. United States, 203 U.S. 1, 27 (1906) (Harlan, J., dissenting), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

83. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 90 (1873) (Field, J., dissenting).

84. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

this discussion by providing an overview of how restraints on mobility and imposition of legal coercion on Black bodies began in antebellum and postbellum America and were carried through into the modern, for-profit bail system.

II. THE MODERN FOR-PROFIT BAIL SYSTEM AND ITS ANTEBELLUM HERITAGE

"If law is a matter of social practice," understanding one requires the understanding of the other.[85] In the pursuit of understanding, it is necessary to trace the intertwined evolution of law and its contemporaneous social practices from the beginning. Our interpretative barometer should not be limited to analyzing only what has changed. Rather, much can be gleaned from what has stayed the same. This Part first reviews antebellum and Reconstruction practices in America. By grounding the discussion on for-profit bail within the historical narrative of slavery, this Part next uses a racial focus point to set up the discussion for why for-profit bail is a badge and incident.

A. ANTEBELLUM AND POSTBELLUM PRACTICES

Chattel slavery abused and dehumanized African-Americans in an attempt to justify stripping them of the fruits of their labor. *How* this happened, though, is essential to understanding slavery. In other words, the processes that ensured the subjugation of African-Americans are as important as the effects they manifested. The system of chattel slavery was successful because it operated on many levels to strip slaves of their mobility and free will. In addition to tortuous physical punishments like those doled out by the master's whip, two key tools contributed to slaves' subjugation: (1) limits on their physical mobility and ability to travel freely; and (2) legal coercion which denied them a place in the criminal justice system and condemned them to debt and economic exploitation. This Section explores these limitations during and immediately following the era of antebellum slavery.

1. Physical Coercion and Limitations on Mobility

It would be disingenuous to not acknowledge that a large factor limiting slaves' mobility was physical coercion—pain and fear imposed by the masters through brutal physical punishments. Former slaves recounted seeing their equals "tor[n] up by dogs, and whipped unmercifully."[86] Others let the scars on their bodies speak of their lived experiences and "expressed that the horrors of slavery go beyond anything that words can convey."[87] In addition to the masters' physical abuse, local ordinances permitted masters to send slaves to the town prisons to

85. Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2255 (2014).

86. Interview by Ila B. Prine with Charity Anderson, in Mobile, Ala. (Apr. 16, 1937), http://xroads.virginia.edu/~hyper/wpa/anderso1.html [https://perma.cc/BF3W-MW2P].

87. Goodwin, *supra* note 74, at 918.

receive lashings.[88] Although the horrors of these atrocities were intended to paralyze them in fear, horror alone was insufficient to keep African-Americans enchained. To succeed, the system needed to further limit the physical mobility of slaves. It did so through slave patrols and fugitive slave laws.

Under the law, if a slave left their master's property, they were required to carry a pass that detailed their reasons for being off the property.[89] Masters believed that such an "energetic and scrutinizing system [was] absolutely *necessary*" to keep "[a] closer and more careful circumspection" on the travels of their slaves.[90] In practice, states took various approaches to their slave patrol laws but the patrollers, private citizens, were commonly empowered to "inflict corporal punishment," "seize any negro slave who behaves insolently to a patroller," and "hold such slave in custody."[91]Austin Steward, a former slave, described how "[s]laves are never allowed to leave the plantation to which they belong, without a written pass. Should any one venture to disobey this law, he will most likely be caught by the patrol and given thirty-nine lashes."[92]

Additionally, police collaborated with the masters in a public–private effort to patrol Black bodies. For example, a slave owner could bring an allegedly suspect or dangerous slave to the police and pay for their temporary detainment or "safe keeping."[93] The police would then transfer the slave to the custody of jailors, who would later collect "discharge fees" from the master upon the slave's release; the fee was then deposited with the city Treasurer.[94]

The patrolling of Black bodies did not cease upon emancipation. Rather, it intensified. Many states passed Black Codes designed to control Black people's movement and association. For example, Black people had curfews imposed upon them and could be arrested for gathering in public spaces.[95]

The patrolling of slaves was not confined to the plantation or local town. Federal law, likewise, restricted freedom of movement. Fugitive slave laws policed the physical mobility of slaves across state lines.[96] The laws allowed private citizens—bounty hunters—to receive a reward for "capturing, accusing, and eventually returning enslaved people to slaveholders."[97] "[B]ounty hunters were

88. *See* RICHARD C. WADE, SLAVERY IN THE CITIES: THE SOUTH 1820-1860, at 94 (1970) (describing a system where the master "simply made out a slip for the number of lashes, gave it to the slave to be whipped, and sent him off to jail for punishment").

89. *See* Goodwin, *supra* note 74, at 916.

90. WADE, *supra* note 88, at 80.

91. PATROL REGULATIONS FOR THE COUNTY OF ROWAN; PRINTED BY ORDER OF THE COUNTY COURT, AT AUGUST TERM, ANNO DOMINI 1825, at 3 (Salisbury, Pilo White 1825).

92. AUSTIN STEWARD, TWENTY-TWO YEARS A SLAVE, AND FORTY YEARS A FREEMAN; EMBRACING A CORRESPONDENCE OF SEVERAL YEARS, WHILE PRESIDENT OF WILBEFORCE COLONY, LONDON, CANADA WEST 27 (Rochester, William Alling 1857) (emphasis omitted).

93. DANIELS, JR. ET AL., *supra* note 3, at 2.

94. *Id.*

95. *See The Black Codes of Bail*, NAT'L BAIL OUT, https://www.nationalbailout.org/blackcodes [https://perma.cc/QJZ9-TQE8] (last visited Oct. 31, 2021).

96. *See, e.g.*, Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, 462–65 (repealed 1864); Northwest Ordinance of 1787, art. 6.

97. DANIELS, JR. ET AL., *supra* note 3, at 2.

deputized to perform police functions, such as stopping, searching, seizing, and detaining anyone they suspected might be a fugitive or runaway slave."[98] These laws were the most effective tools for policing Black bodies because they did not discriminate between enslaved and free Black people or between Black people who lived in a free or slave state, thereby imposing the cost of slavery on all Black persons.[99] Bounty hunters could capture and kidnap any Black soul, whether enslaved, indentured, or free. Moreover, the bounty hunters could also harass, whip, and even lynch anyone aiding a Black person.[100]

Harriet Jacobs, a fugitive slave living in New York, pronounced the passing of the fugitive slave laws as the "beginning of a reign of terror to the colored population."[101] She described how the law tore families from their homes and drove them north to Canada to seek safety.[102] She "seldom ventured into the streets" and "lived in a state of anxiety" that culminated in her having to flee New York to hide in New England for over a month to evade the bounty hunters on her tail.[103] Ms. Jacobs best summarized life under the fugitive slave laws in saying: "What a disgrace to a city calling itself free, that inhabitants, guiltless of offence, and seeking to perform their duties conscientiously, should be condemned to live in such incessant fear, and have nowhere to turn for protection!"[104]

Bounty hunters were not the only ones profiting off the fugitive slave laws. Police and federal marshals—both representatives of the criminal justice system—would also work with private parties and on their own to reap financial rewards.[105] Police would frequently arrest Black people "on suspicion of being a 'runway'" or "for appearing not to belong in a place."[106] Fugitive slave and slave patrol laws meant that Black people could not safely navigate through society independently. However, this was not the only peril on the horizon. Black people also had to be wary of legal coercion.

2. Legal Coercion and Economic Depletion

Property rights formed the legal foundation of slavery. Slavery legitimatized the idea that freedom could be bought and sold. While slave markets ran rampant *selling* freedom, African-Americans had to claw back the right to *purchase* their freedom. Cash was all that stood between freedom and a life in chains. Some slaves were able to purchase their freedom by working for wages when not

98. *Id.*

99. *See* Goodwin, *supra* note 74, at 929.

100. *See* WADE, *supra* note 88, at 218, 227.

101. HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL.: WRITTEN BY HERSELF. 286 (L. Maria Child ed., Boston, Published for the Author 1861).

102. *See id.*

103. *Id.* at 287–92.

104. *Id.* at 287.

105. *See* DANIELS, JR. ET AL., *supra* note 3, at 2.

106. Goodwin, *supra* note 74, at 930. For example, during fifteen months spanning 1858–1859, police in New Orleans arrested 913 "runaway slaves," which, because there were "no special crackdown[s]," was understood to be a "routine" number of arrests. WADE, *supra* note 88, at 219.

needed by their masters.[107] But, more commonly, African-Americans had to "crowdsource" and rely on mutual aid from their communities. This usually happened when a former slave, either escaped or bequeathed their liberty from a sensible master, "traveled abolitionist lecture circuits, published narratives, and networked with movement activists to raise funds" to purchase their or a family member's freedom.[108] Regardless of the source, the money was used to pay the arbitrary price of freedom, an ideal that never should have been commercialized.

Even beyond the price of freedom, existing as someone else's property resulted in the "social death" of the slaves.[109] This meant that the slave "had no socially recognized existence outside of his master."[110] Because a slave only belongs to and exists through the master, a slave, in the eyes of a non-slave, was a "social nonperson,"[111] who did not "belong to the community."[112] This created a culture of slavery that ostracized slaves, prohibiting their integration into white society. Even after emancipation, this culture persisted and continued to deny honor, belonging, and the rewards of citizenship to Black people.[113]

Moreover, this system that turned humans into property was operating within the context of a larger economic machine. Slavery *was* the American economy. "Slavery was so profitable to the growth of American capital that economists and sociologists have yet to thoroughly unpack 'the capital stored in slaves.'"[114] Nonetheless, the value of slaves' bodies was estimated as being worth more than "the combined value of all the nation's railroads and factories" and slaves' export, cotton, "was the most valuable export made in America."[115] All of that value matriculated to state and powerful institutional actors; slaves reaped none of the rewards.

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107. *See* PHILIP GOULD, BARBARIC TRAFFIC: COMMERCE AND ANTISLAVERY IN THE EIGHTEENTH-CENTURY ATLANTIC WORLD 144–50 (2003) (explaining the story of Venture Smith, a slave who purchased his freedom by working for wages when not needed by his master).

108. Julia W. Bernier, *Bail Funds, Buying Freedom, and a History of Abolition*, AFR. AM. INTELL. HIST. SOC'Y: BLACK PERSPS. (Aug. 13, 2020), https://www.aaihs.org/bail-funds-buying-freedom-and-a-history-of-abolition/ [https://perma.cc/VKM4-SFW4]. Carolina Jones was one such African-American who traveled to raise money from abolitionist to free his wife and sons. *Id.* Even Fredrick Douglas, who reclaimed his freedom from escaping slavery, had his rights solidified when abolitionist purchased his freedom. *Id.*

109. *See generally* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982) (coining the term "social death" to define the ostracization of Black Americans from white antebellum society and casting it as a distinctive feature of American slavery).

110. *Id.* at 5.

111. *Id.*

112. Craig Lambert, *The Caribbean Zola: Orlando Patterson May Be the Last of Harvard Sociology's Big Thinkers.*, HARV. MAG., Nov.–Dec. 2014, at 43, 45 (quoting Orlando Patterson).

113. *See id.* at 45–46.

114. Goodwin, *supra* note 74, at 920 (quoting Sven Beckert & Seth Rockman, *Introduction* to SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 1, 1 (Sven Beckert & Seth Rockman eds., 2016)).

115. Sven Beckert & Seth Rockman, *Introduction* to SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 1, 1 (Sven Beckert & Seth Rockman eds., 2016).

Thus, while the upper echelons profited, antebellum slaves "had no [legal or property] rights which the white man was bound to respect"[116]: slaves had no right to bail;[117] no right to wages; no ability to or protection from the right to contract. Following emancipation, abolitionists fought to change this.

First, "[B]lack politicians pushed for racial equity in defining the right to bail."[118] And the right was bequeathed to Black people.[119] But, even so, "it was soon applied according to a racial double standard as white supremacists fought to control how justice would be administered in parish courts."[120] This meant that bail was used to ensure the continued detention of Black people while, simultaneously, guaranteeing the quick release of white men. A Reconstruction-era court required a freedman to pay $500 bail for a "trifling offense" and when he could not procure the sum, kept him detained.[121] In comparison, the same court mandated a $250 bail for a white man who brutally murdered a freedman; when he could not pay the sum, it was reduced to $200, and, not being able to pay even that, he was eventually released "without bail."[122] Discrepancies of this nature were not limited to local anomalies but were instead pervasive, catching the attention of federal authorities, such as the Freedman's Bureau.[123] Black-owned newspapers also became "attuned" to the discriminatory bail practices and would run daily columns listing the bail amounts to provide a measure of public notice and accountability.[124]

Bail was also discriminatorily applied toward Black people as "a shrewd device of the ex-slaveholders to get compensation for the loss of their slaves."[125] In states such as Texas, a Black person who could not afford bail would be detained pretrial and put to work in an inmate leasing program.[126] The law was "clearly intended to operate against [B]lacks" because they were the ones predominately incarcerated pretrial.[127] The right to bail was never used to protect Black individuals from the perils of the criminal justice system; it was used to keep them trapped instead.

Second, Black people were given the ability to contract following emancipation—a right that the criminal justice system immediately weaponized. Freedmen

116. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857).

117. *See* DANIELS, JR. ET AL., *supra* note 3, at 2.

118. *Id.* at 3.

119. *See* U.S. CONST. amend. XIV, § 1; Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982) (extending the right to bail by declaring African-Americans as citizens).

120. DANIELS, JR. ET AL., *supra* note 3.

121. *Records of the Assistant Commissioner for the State of Louisiana: "Miscellaneous Reports and Lists Relating to Murders and Outrages" Mar. 1867 - Nov. 1868*, FREEDMEN'S BUREAU ONLINE, http://freedmensbureau.com/louisiana/outrages/outrages4.htm [https://perma.cc/4J3Z-3YNT] (last visited Nov. 2, 2021).

122. *Id.*

123. *See* DANIELS, JR. ET AL., *supra* note 3.

124. *Id.*

125. *Attempt to Revive Slavery in Texas*, WEEKLY LOUISIANAN, Nov. 28, 1874.

126. *See* DANIELS, JR. ET AL., *supra* note 3.

127. *Id.*

were, understandably, extremely poor upon emancipation and the criminal justice system preyed on that poverty. Exploiting these weakened economic positions and the new, but corrupt, right to contract, the state paid bail for the freedmen who could not to return them to their originally enslaved positions. Black individuals were then charged for allegedly violating a Black Code and subjected to a fine great enough to "have seemed insurmountable for an impoverished African [-]American farm worker in the Black Belt."[128] Often without the consent of the debtor, the state would transfer that debt to a paying private party, who in return, would receive a labor contract from the Black man.[129] There were no limitations on what the purchaser could do with this contract—they could sell it to a third party or even refuse to accept that the Black man repaid the debt as obligated.[130] Other states adopted similar, legally coercive schemes. Alabama would "accuse the negro of some petty offense, and then require him, in order to escape conviction, to enter into an agreement to pay his accuser so much money, and sign a contract, under the terms of which his bondsmen can hire him out until he pays a certain sum."[131] The scheme was so ingrained in the postbellum South that it provoked a federal judge in Alabama in the early 1900s to request that the U.S. Attorney General launch an investigation.[132] Under each policy, Black people were subject to economically coercive contracts because they had been arrested and could not afford to get out of jail on other terms.

Without the ability to travel freely or protections against the coercive criminal justice system, Black people were still enslaved by society even after their lawful emancipation. As the next Sections explain, the for-profit bail system ensures that such treatment continues today.

B. FOR-PROFIT BAIL TODAY

Under the modern for-profit system, a defendant must pay *upfront* a surety typically beyond their means to ensure their release from jail.[133] This key difference means that to afford the upfront payment more individuals are having to employ

128. La Toya Tanisha Francis & Patrick Rael, *Mentha Morrison: A Story of Debt Peonage in Jim Crow Georgia*, AFR. AM. INTELL. HIST. SOC'Y: BLACK PERSPS. (Oct. 4, 2018), https://www.aaihs.org/mentha-morrison-a-story-of-debt-peonage-in-jim-crow-georgia/ [https://perma.cc/GA6L-CLUS].

129. *See id.*

130. *See id.*

131. Goodwin, *supra* note 74, at 946 (quoting DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 171 (2008)).

132. *See id.*

133. For-profit bail is distinct from "modern debtors' prisons," which hold guilty people in jail for being unable to pay fines and fees, like a fine for driving without a license. *See* Sarah Morgan, Note, *Civil Rights/Constitutional Law – Indebted to the State: How the Thirteenth Amendment's Promise of Abolition Holds Protections Against the Modern Debtors' Prisons*, 39 W. NEW ENG. L. REV. 327, 328–29 (2017). Many defendants operating in the for-profit bail system have not been convicted of any crime and are still innocent. *See, e.g.*, John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, ABA (Nov. 30, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/ (citing problems with wealth-based incarceration).

commercial bondsmen.[134] Judges, in response, are setting "higher and higher bail amounts"[135] for more defendants to counteract the increased ease of pretrial escape offered by bondsmen.[136] This created a self-perpetuating cycle. Because the bail amount is often set beyond indigent defendants' means, they are typically forced to choose between two evils: remaining incarcerated until their trial date or retaining a commercial bondsman.[137] The modern for-profit bail system is thus operating in two distinct but connected ways to enslave impoverished, primarily Black defendants.[138]

For-profit bail subjugates defendants by turning them into pretrial detainees. Pretrial detainees are individuals stuck behind bars awaiting their trial, who have never been convicted and "are legally presumed innocent."[139] Of the approximately 750,000 people currently detained in jail,[140] about 70% are being held pretrial.[141] And yet, the rate of pretrial incarceration is only rising: Between 2000

134. *See* BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR 1 & 13 n.6 (2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf [https://perma.cc/EFA6-DKS9].

135. Ashley Mullen, Note, *Incarceration or E-Carceration: California's SB 10 Bail Reform and the Potential Pitfalls for Pretrial Detainees*, 104 CORNELL L. REV. 1867, 1869–70 (2019). In 2017, New York state judges set over $1.1 billion in total bail bonds amounts. TAMMY GAMERMAN & ZACHARY SCHECHTER-STEINBERG, OFF. OF THE N.Y.C. COMPTROLLER, THE PUBLIC COST OF PRIVATE BAIL: A PROPOSAL TO BAN BAIL BONDS IN NYC 22 (2018), https://comptroller.nyc.gov/wp-content/uploads/documents/The_Public_Cost_of_Private_Bail.pdf [https://perma.cc/4WU2-YYRJ].

136. *See* LIU ET AL., *supra* note 17 ("The overall share of defendants who needed to meet financial conditions (e.g., were required to post bail) to avoid pretrial detention increased from 53[%] in 1990 to 72[%] in 2009, while the share of defendants released without bail dropped by 15[%] . . . ."); MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 5 (2017), https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf [https://perma.cc/9ZMH-S8GE] (finding that in New Orleans, 87% of federal detainees were required to pay bonds).

137. *See, e.g.*, RABUY & KOPF, *supra* note 134, at 1; Mullen, *supra* note 135, at 1870. If a defendant is able to personally afford their bail bond, they will be released pretrial and will recover the majority of the security after attending their court date. RABUY & KOPF, *supra* note 134, at 13 n.4.

138. The for-profit bond system is happening at the state and municipal level. Federal law says a "judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2).

139. RABUY & KOPF, *supra* note 134, at 1.

140. *See* ZHEN ZENG, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., JAIL INMATES IN 2016, at 1 (2018), https://bjs.ojp.gov/content/pub/pdf/ji16.pdf [https://perma.cc/8QBN-ZS53].

141. RABUY & KOPF, *supra* note 134, at 1; *see* THE BAIL PROJECT, AFTER CASH BAIL: A FRAMEWORK FOR REIMAGINING PRETRIAL JUSTICE 3 (2020), https://bailproject.org/wp-content/uploads/2020/02/the_bail_project_policy_framework_2020.pdf [https://perma.cc/P2BJ-UDDJ] (calculating that pretrial detainees constitute over 2/3 of America's jail population). Some estimate the number to be closer to 60%. *See, e.g.*, *Why We Need Pretrial Reform*, PRETRIAL JUST. INST., https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform/ [https://perma.cc/NQG9-THW6] (last visited Nov. 2, 2021). However, some cities have an even larger population of pretrial detainees. San Francisco's local jail population, for example, is composed of 85% pretrial detainees. Tamara Aparton, *Op-Ed: The Waste, Inequality of Filling Jails with Those Who Can't Make Bail*, S.F. PUB. DEF. (Oct. 3, 2014), https://sfpublicdefender.org/news/2014/10/op-ed-the-waste-inequity-of-filling-jails-with-those-who-cant-make-bail/ [https://perma.cc/QA99-RAKG].

and 2014, 95% of the growth in the jail population was due to an increase in the number of pretrial detainees.[142]

Pretrial detainees are often incarcerated because of socioeconomic status: they cannot afford to make bail.[143] To be more exact, almost nine out of ten pretrial detainees cannot make bail.[144] While the typical felony bail amount is set at $10,000,[145] "even if the bail is set as 'low' as $100" can be a barrier to exit for many pretrial detainees.[146]

In practice, however, pretrial incarceration has a disparate impact on minorities. Black defendants compose 35% of the pretrial population even though they constitute only 13% of the U.S. population.[147] Being Black will alone "increase[] a defendant's odds of being held in jail pretrial by 25%."[148] This is in part because of the discretion afforded to judges in pretrial bail hearings, which allows a

142. *Why We Need Pretrial Reform*, *supra* note 141.

143. *See* LIU ET AL., *supra* note 17, at 8 ("Bail can be prohibitively expensive for many people."); Tana Ganeva, *The Fight to End Cash Bail*, STAN. SOC. INNOVATION REV., Spring 2019, at 18, 24.

144. *See* Burdeen, *supra* note 25. In New York City, 88% of defendants remain incarcerated because they are unable to make bail. *See* BAUGHMAN, *supra* note 10, at 2. In other words, in New York City jails, 16,000 such souls are detained every day because they are poor. *See BDS Testifies Before the NYC Council on the Harm of the Commercial Bail Bond Industry*, BROOKLYN DEF. SERVS. (May 2, 2018), https://bds.org/bds-testifies-before-the-nyc-council-on-the-harm-of-the-commercial-bail-bond-industry/#_ftnref2 [https://perma.cc/4L7V-3GLT] (statement of Catherine Gonzalez, Staff Attorney, Brooklyn Defender Services).

145. *E.g.*, LAISNE ET AL., *supra* note 136, at 6; RABUY & KOPF, *supra* note 134, at 1. In some jurisdictions, such as Maryland, the typical felony bail is higher, averaging around $90,000, but other jurisdictions, such as New York, had lower bail, at around $5,000. CHRISTINE BLUMAUER, ALESSANDRA BROWN, MARIELLA CASTALDI, SELEEKE FLINGAI, PHILLIP HERNANDEZ, STEFANIE MAVRONIS, KALIE PIERCE, TOM STANLEY-BECKER & JORDAN STOCKDALE, ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES 4 (2018), https://spia.princeton.edu/sites/default/files/content/Advancing_Bail_Reform_In_Maryland_2018-Feb27_Digital.pdf [https://perma.cc/SGZ8-NYSC]. California's average bail amount is $50,000. Kyle Harrison, Note, *SB 10: Punishment Before Conviction? Alleviating Economic Injustice in California with Bail Reform*, 49 U. PAC. L. REV. 533, 535 (2018).

146. *BDS Testifies Before the NYC Council on the Harm of the Commercial Bail Bond Industry*, *supra* note 144. This is partially so because 47% of Americans do not have even $400 saved for emergency expenses. Harrison, *supra* note 145, at 537–38; *see* LIU ET AL., *supra* note 17, at 8 (discussing a 2017 survey suggesting that "four in ten households . . . would be unable to pay . . . a $400 emergency expense" (citation omitted)). As such, pretrial incarceration does not evenly impact socioeconomic classes. *See* Loren Miller, *Race, Poverty, and the Law*, 54 CALIF. L. REV. 386, 403 (1966) ("[T]here has to be a facing up to the fact that the one hundred dollar bail and the one hundred dollar fine of the uniform bail and fine schedules do not fall with equal impact on the ten thousand dollar a year junior executive and the four hundred dollar a month father of a family of five, even if both have violated the same statute in exactly the same manner."). One New York attorney summarized the issue: "It's not just race, it's socio-economic . . . poor people are viewed differently." CATHERINE HEARD & HELEN FAIR, INST. FOR CRIME & JUST. POL'Y RSCH., PRE-TRIAL DETENTION AND ITS OVER-USE: EVIDENCE FROM TEN COUNTRIES 18 (2019) (alteration in original), https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf [https://perma.cc/2BVE-VRYR].

147. Megan Stevenson & Sandra Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESS 21, 29 (Erik Luna ed., 2017).

148. *Why We Need Pretrial Reform*, *supra* note 141; *see* THE BAIL PROJECT, *supra* note 141, at 3 & n.4.

potential for racial bias in the process.[149] Compared to a white man charged with the same crime, a Black man will receive a bail amount 35% higher.[150] Quite simply, higher bail amounts translate into a higher likelihood of pretrial incarceration.[151] Pretrial detainment usually lasts between fifty and two hundred days,[152] but its consequences can span a lifetime.

Even those defendants who are not incarcerated pretrial can remain victims of the for-profit bail system through commercial bail. Although they have more freedom than their counterparts behind bars, individuals who are able to purchase their physical freedom are still frequently forced to relinquish it immediately to their private master, the commercial bail bondsmen. Commercial bail works as follows: an arrested individual who is unable to afford bail pays a bondsman a fee—usually 10% of the bond amount—and signs over collateral, at the bondsmen's discretion, to cover the full bail amount.[153] The fee is nonrefundable even if the defendant attends every court appearance, is acquitted, or has the charges against them dropped.[154] In exchange, the bond agent "agrees to pay the court the full bail bond amount if the defendant does not appear for [their] court date."[155] If the individual does not show up, the bondsman is authorized to aggressively pursue and arrest them.[156] Defendants who can afford bail are typically only able to do so with the assistance of a commercial bondsman.[157] In New Orleans, for example, 97% of felony defendants and 69% of misdemeanor defendants paid bail through the use of a bondsman.[158]

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149. *See* LIU ET AL., *supra* note 17, at 9; Sawyer, *supra* note 22. Examples of this have existed throughout the country—"[s]outhern courts often hold Negro misdemeanants to high bail in civil rights disturbances and release white offenders on very low bail." Miller, *supra* note 146.

150. *See* Zoe Guttman, Yuki Hebner, Kanon Mori & Jonathan Balk, *Beyond Cash Bail: Public Health, Risk Assessment, and California Senate Bill 10*, 17 J. SCI. POL'Y & GOVERNANCE, Sept. 2020. Other studies have estimated "[B]lack and brown defendants receive bail amounts that are twice as high as bail set for white defendants." Sawyer, *supra* note 22.

151. Minority demographics are more than twice as likely to be incarcerated pretrial because they cannot afford bail. *See* Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 897 (2003).

152. *See* LIU ET AL., *supra* note 17.

153. *E.g.*, Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES (Mar. 31, 2018), https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html; Wykstra, *supra* note 20. Often the defendant cannot even afford the lump-sum payment of the premium fee and instead are assigned a payment plan. Silver-Greenberg & Dewan, *supra*.

154. *See* Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), https://www.nytimes.com/2008/01/29/us/29bail.html.

155. *E.g.*, RABUY & KOPF, *supra* note 134, at 13 n.6.

156. *See* Taylor v. Taintor, 83 U.S. 366, 371 (1873) ("[Bondsmen] may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose."); Silver-Greenberg & Dewan, *supra* note 153 (citing the bondsmen's discretion "to check in regularly, keep a curfew, allow searches of their car or home at any time, and open their medical, Social Security and phone records").

157. *See* RABUY & KOPF, *supra* note 134, at 13 n.4. ("[A]lmost all defendants nationwide use commercial bail bondsmen to meet money bail."). Over half of the defendants in the New York state system posted bail using a bail bondsman. GAMERMAN & SCHECHTER-STEINBERG, *supra* note 135.

158. LAISNE ET AL., *supra* note 136, at 6.

America is one of only two countries in the world that allows for-profit private actors to post bail for others in exchange for a fee.[159] In doing so, the system cedes the decision of who deserves pretrial freedom to quasi-private actors who have complete discretion over whether to accept or reject a potential client.[160] To ensure they have clientele, bondsmen have been found to collude with judges and sheriffs to keep bail high.[161]

Commercial bonds, also known as surety bonds, operate to benefit one person only: the bondsman. Fueled by increasing usage, commercial bail has grown into a $2 billion industry.[162] Bail bond firms, underwritten by private equity investors and insurance companies,[163] grow their coffers by siphoning resources out of the pockets of vulnerable defendants.[164] Consider, for example, how "corporate bonds [are] extract[ing] 'tens of millions of dollars from Maryland's poorest zip codes, contributing to the perpetuation of poverty."[165] In Maryland alone, over a five-year period, defendants, the majority of whom are Black, paid over $256 million in nonrefundable fees to bondsmen.[166] Under either pretrial incarceration or release on commercial bail, defendants—presumed innocent—experience severe infringement of both (1) physical mobility and (2) legal and economic autonomy in violation of the Thirteenth Amendment.

1. Physical Coercion and Limitations on Mobility

While the masters reap the riches, defendants not only pay the price but are also subject to limits on their physical mobility. Neither (a) pretrial detainees nor (b) defendants released on commercial bail are immune to such restraints.

a. Pretrial Incarceration

At the most extreme, pretrial detention can inflict the fatal blow—death—forever robbing one of their physical mobility. Jeffrey Pendleton, a Black man, was booked for possession of marijuana and, unable to post a $100 bail, was found

159. *E.g.*, Liptak, *supra* note 154. The other country is the Philippines. *Id.*

160. *E.g.*, *id.* ("It's really the only place in the criminal justice system where a liberty decision is governed by a profit-making businessman who will or will not take your business.").

161. *See id.* ("Since bond companies do not compete on price, they have every incentive to collude with lawyers, the police, jail officials and even judges to make sure that bail is high and that attractive clients are funneled to them."). In Louisiana, two judges and a bondsman went to jail because the bondsman was offering vodka, cash, and lap dancers as bribes. Shane Bauer, *Lobbyists, Guns, and Money: Inside the Shadowy—and Very Well-Connected–Bail Bonds Industry*, MOTHER JONES, May–June 2014, at 42, 47.

162. *See* Silver-Greenberg & Dewan, *supra* note 153; Wykstra, *supra* note 20.

163. Silver-Greenberg & Dewan, *supra* note 153. Insurance companies guarantee the full amount of the bond in exchange for a portion of the premiums. *Id.* In 2016, AIA Bail Bond Insurance Company underwrote $800 million in bonds and suffered zero losses. *Id.*

164. In states such as Maryland which have instituted bail reform, some bail bondsmen have reported a 70% decline in profits. BLUMAUER ET AL., *supra* note 145.

165. *Id.* at 9. In 2017, New York City bail bondsmen extracted between $16 and $27 million in nonrefundable fees "from already low-income communities to the pockets of opportunistic bail bond agents." GAMERMAN & SCHECHTER-STEINBERG, *supra* note 135, at 6.

166. BLUMAUER ET AL., *supra* note 145, at 8, 31.

dead in his cell less than a week later.[167] A Black woman, Sandra Bland, was trapped in jail by an unaffordable $5,000 bond where she was found dead.[168] Layleen Polanco, a transgender Dominican-born woman, died in solitary confinement at the notorious Rikers Island while awaiting trial because she was unable to pay a $500 bail.[169] Likewise, Tommy Young's inability to pay a $100 bail also cost him his life.[170] These names represent the beginning of the list, not the end. Pretrial incarceration—and its physical and mental burdens—dragged each of these defendants closer towards death and, in doing so, ultimately foreclosed any possibility of them reclaiming their physical autonomy.

Pretrial incarceration imposes dire limitations on physical mobility well before death. Those incarcerated are required to follow the jail's rules and are given the minutest freedom of mobility. When they can shower, eat, go outside, and communicate with the outside world are all forced into a schedule beyond their control.[171] Even so, these are the *privileged* defendants. Others are subjected to solitary confinement. Kalief Browder, a tragic but not an unheard-of example of a pretrial detainee, spent almost two years in solitary confinement where he was confined alone for twenty-three hours a day; "whenever he [did] leave, he [would be] handcuffed and strip-searched."[172] The threat of solitary confinement is also used to compel detainees to provide physical labor, like working in the laundry rooms.[173]

In addition to restraints on physical mobility, detainees are also living under the constant threat of physical and sexual abuse from the guards and other inmates.[174] In New York's Rikers Island, attacks by guards and other inmates have been so grave that detainees have suffered "broken jaws, broken orbital bones, broken noses, long bone fractures, and lacerations requiring sutures."[175] The guards at Rikers would further threaten detainees to prevent them from

167. Burdeen, *supra* note 25.

168. *See* Ray Sanchez, *Who Was Sandra Bland?*, CNN (July 23, 2015, 9:17 PM), https://www.cnn.com/2015/07/22/us/sandra-bland/ [https://perma.cc/R32R-4SPF].

169. *See* Rosa Goldensohn & Savannah Jacobson, *Woman Who Died at Rikers Island Was in Solitary*, CITY (June 10, 2019, 6:43 PM), https://www.thecity.nyc/2019/6/10/21211014/woman-who-died-at-rikers-island-was-in-solitary [https://perma.cc/6244-P5U4].

170. *See* Watts, *supra* note 25.

171. *See* Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life.*, NEW YORKER (Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law (detailing the inability of inmates to leave their cell but for a few exceptions).

172. *Id.* Browder was arrested for alleging stealing a backpack and had a bail amount set at $3,000, which he was unable to pay. *Id.* At his arraignment, over two months later, he was denied bail. *Id.*

173. *See generally* McGarry v. Pallito, 687 F.3d 505 (2d Cir. 2012) (describing how a pretrial defendant was forced to work in the jail's laundry room doing all the inmates' wash).

174. *See, e.g.*, Gonnerman, *supra* note 171 ("[T]he officer came to escort him to the shower, but before they even got there, [Browder] said, the officer knocked him down: 'He put his forearm on my face, and my face was on the floor, and he just started punching me in the leg.'"); Ganeva, *supra* note 143, at 24 (describing one St. Louis jail as "'hellish': guards allowing sexual assault, providing poor medical care, and even having inmates compete in gladiator-style fights").

175. Letter from Preet Bharara, U.S. Att'y for the S. Dist. of New York, to Bill de Blasio, Mayor, New York City, Joseph Ponte, Comm'r, New York City Dep't of Corr. & Zachary Carter, Corp.

reporting any of this violence or seeking medical aid for their injuries.[176] Through impaired physical mobility and the constant threat of violence, pretrial detainees—who are still legally innocent—are dehumanized and stripped of personal autonomy. Their brothers and sisters released on commercial bail suffer a similar fate, as explained in the next Section.

b. Commercial Bond

The relationship between a defendant and a bondsman is contractual. Even so, under certain situations, states have given bondsmen the power to infringe upon defendants' mobility in excess of what private parties or even the police are permitted to do. The criminal justice system has deputized bondsmen to be "lightly regulated law enforcement agent[s]."[177] At the height of their authority, a bondsman can restrict a defendant's physical freedom by arresting them.[178] Bondsmen have the discretion to, *for any reason at all*, return defendants to jail without a court order.[179] In some states, bondsmen can break into a defendant's home without a warrant or move a defendant across state lines without following the extradition process.[180]

Bondsmen often operate in the grey area to carry out arrests or to ensure that the defendant is complying with the terms of their bail contract.[181] In the words of Judge Jules Edwards III, bondsmen "intimidate[e] and coerc[e] and l[ie]" to limit defendants' physical mobility.[182] When Ronald Egana fell behind paying his bondsman, two men with guns and in bulletproof vests came to his place of work and "forced him into a car."[183] Even worse, Jason Turner was shot by his bondsman who was attempting to track him down after he missed a meeting with his parole officer.[184] Judge Edwards highlighted the absurdity of bondsmen's powers by noting the uniqueness of the arrangement: "If [the defendant is] not in compliance with the contract, sue him. How do you get to snatch his body and hold him hostage?"[185] In other words, if the defendant fails to comply with bail, by, for

Counsel, New York City (Aug. 4, 2014), https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf [https://perma.cc/H582-5JCA].

176. *See id.*; Gonnerman, *supra* note 171.

177. Liptak, *supra* note 154.

178. *See* Silver-Greenberg & Dewan, *supra* note 153.

179. *See id.* In California, one bond agreement said a defendant could be returned to jail if they did "anything to suggest that they might forfeit the bond." *Id.* "Under a Beaumont, Tex., contract, one late payment could mean jail." *Id.* Juan Contreras of San Francisco was "retuned to custody when he did not answer the bond agent's calls." *Id.* If the bondsman returns the defendant to jail, they usually still get to keep the defendant's premium. *See id.*

180. Liptak, *supra* note 154.

181. Some bondsmen even sexually coerce defendants into having sex with them in exchange for not being sent back to jail. Bauer, *supra* note 161, at 45.

182. Silver-Greenberg & Dewan, *supra* note 153.

183. *Id.*

184. Bauer, *supra* note 161, at 44.

185. Silver-Greenberg & Dewan, *supra* note 153.

example, not appearing in court, bondsmen should only be able to sue—which is the remedy for all other contract violations.

In addition to their authority, including their questionable means to arrest, bondsmen regularly use coercive contracting to further restrict defendants' mobility beyond what the court requires. Bondsmen have the unchecked discretion to independently impose monitoring systems ranging from curfews to regular check-ins and ankle monitors.[186] On top of monitoring requirements, bondsmen can also infringe on a defendant's autonomy by mandating "searches of their car or home" and insisting upon inspection of "their medical, phone, and Social Security records."[187] In response to these infringements on personal mobility and autonomy, more defendants are submitting complaints to state regulators charging bondsmen of "kidnapping and false imprisonment for purposes of extortion."[188]

By failing to provide bondsmen adequate oversight and instead granting them almost unfettered discretion, the state is imbuing quasi-private actors with the ability to subjugate individuals according to their unregulated wishes. But the coercive tactics endured by commercial bailees and pretrial detainees do not stop here. Rather, the physical coercion only increases susceptibility to legal coercion—as will be discussed in the next Section.

2. Legal Coercion and Economic Pressure

For-profit bail uses pretrial incarceration and commercial bondsmen to subjugate presumed innocent individuals by denying them mobility. It also works to deny (a) pretrial detainees and (b) commercial bailees of fair standing in the criminal justice system by subjecting them to increased legal and economic coercive pressures.

a. Pretrial Incarceration

Detained individuals are sucked deeper into the criminal justice system through legal coercion that is intensified by their state of incarceration. Pretrial detention, or the threat thereof, is used to pressure defendants into pleading guilty, which will define the rest of the defendant's trial process and their life outside of the criminal justice system.[189] The extraordinarily strong incentive to reclaim their autonomy by shortening or ending their jail time deprives incarcerated defendants of their bargaining power and pressures them to strike a plea agreement, often on less favorable terms,[190] sometimes regardless of

186. *See id.*

187. *Id.*

188. *Id.*

189. *See* HEARD & FAIR, *supra* note 146, at 25; DIGARD & SWAVOLA, *supra* note 13, at 4 ("[A]t least part of the effect of pretrial detention on conviction is due to a greater likelihood that those who are detained will plead guilty—regardless of the strength of their defense, or even if they did not commit the alleged offense."). For a discussion on the effects of a guilty plea, see, for example, Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.

190. Not only are incarcerated defendants more likely to take a plea deal, but they also often plea to more severe charges that would have been reduced had they been released on bail. *See* DIGARD &

their culpability.[191]

Moreover, incarcerated pretrial defendants may also face internal pressure to return to work and care for their families, as well as external pressure from an overworked court-appointed attorney potentially motivated to quickly resolve the case.[192] Unlike a released defendant, a pretrial detainee can become ostracized from their community. Those locked up for even short times, as short as three days,[193] can lose their jobs, housing, or custody of their kids.[194] They can fall behind in school or lose access to medications.[195] All of these factors sever community bonds and socially stratify the defendants. Defendants who have made it to the outside face fewer of these anxieties.

Accepting a guilty plea has the benefit of getting a defendant out of jail sooner but does not cure the ills of pretrial detention. Pretrial detention has lasting consequences: it makes the detained defendant more likely to be convicted, more likely to be sentenced to prison, and more likely to commit crimes in the future than released defendants.[196]

First, pretrial detention increases the likelihood of conviction.[197] One study found that pretrial detainees are 25% more likely to be convicted.[198] This is, in part, because pretrial-detention-induced plea agreements "ultimately result[] in the defendants being denied a real determination of guilt."[199] It is also partly the

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SWAVOLA, *supra* note 13, at 4 ("For felony cases . . . spending more time in pretrial detention lessened the chance that the charge would be reduced to a misdemeanor."); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 530 (2017) (discussing how detainees plea deals are less favorable because they are less likely to receive a reduction in charges).

191. *See, e.g.*, LIU ET AL., *supra* note 17, at 11–12 (establishing that pretrial detention leads to a higher likelihood of conviction "almost exclusively" because the uncertainty faced in jail strongly incentivizes defendants to plead guilty); John H. Blume & Rebecca K. Helm, Essay, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 174 (2014) ("[D]efendants[,] . . . especially if they are incarcerated pretrial, will plead guilty just to get out of jail.").

192. *See* HEARD & FAIR, *supra* note 146, at 7 ("People in custody are at greater risk of pressure from police or prosecutors to confess or accept plea deals in exchange for release . . . ."); Blume & Helm, *supra* note 191 ("[C]ourt appointed lawyers will be overworked and underpaid and thus motivated to resolve the case through a quick guilty plea."); Leslie & Pope, *supra* note 190 (discussing the detainee's risk of forgoing income or failing to take care of family responsibilities).

193. *See* Thea L. Sebastian & Alec Karakatsanis, *Challenging Money Bail in the Courts*, JUDGES' J., Summer 2018, at 23, 24.

194. *See, e.g.*, LIU ET AL., *supra* note 17, at 12, 14; *Why We Need Pretrial Reform*, *supra* note 141.

195. *Why We Need Pretrial Reform*, *supra* note 141.

196. *See, e.g.*, DIGARD & SWAVOLA, *supra* note 13, at 4–6.

197. *See, e.g.*, Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 203 (2018) (finding pretrial detainees 24% more likely to be found guilty); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L., ECON. & ORG. 511, 512 (2018) (finding that in Philadelphia pretrial detention increased the likelihood of conviction by 13%).

198. Sebastian & Karakatsanis, *supra* note 193.

199. BAUGHMAN, *supra* note 10, at 3–4.

result of a lower dismissal rate for cases against pretrial detainees.[200] Other factors that drive higher conviction rates of pretrial detainees include their limited access to the following: time to meet with the defense counsel to prepare their case; financial resources from the inability to attend their pre-arrest job; and opportunities to engage in "'prophylactic measures' that increase the likelihood of acquittal, dismissal, or diversion, such as paying restitution, seeking treatment or other services, and pursuing education and employment opportunities."[201]

Second, once convicted, a pretrial detainee is more likely to receive a harsher sentence. They are over four times more likely to be sentenced to jail and about three times as likely to be sentenced to prison than those released before trial.[202] Further, their sentences are likely to be for a longer duration—usually over twice as long.[203]

Third, pretrial defendants are more likely to be charged for committing a future crime.[204] According to one study, pretrial detention can cause a 32.2% increase in the likelihood of a future felony charge.[205]

These increased recidivism rates are a response to the negative economic consequences of pretrial detention. Pretrial detention can directly and indirectly force defendants into debt. Many jurisdictions directly charge pretrial detainees a daily "pay to stay" fee, sometimes as much as $50 a day, which can spiral into hundreds or thousands of dollars of debt for a defendant who could not even afford bail.[206] More indirectly, because of the time lost in the workforce and the stigma associated with incarceration, pretrial detainees suffer lower future earnings and reduced employment opportunities.[207] Additionally, a conviction—which is more likely to happen to a pretrial detainee—decreases annual earnings by 40% and

200. A study of cases in New York City found that "[w]hile 34 percent of cases in which the person was released were dismissed, the dismissal rate was just 19 percent for people who were detained." DIGARD & SWAVOLA, *supra* note 13, at 4.

201. *Id.* at 5.

202. *See* CHRISTOPHER T. LOWENKAMP, MARIE VANOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 10 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf [https://perma.cc/39JL-CHN9].

203. *Id.* ("The jail sentence is 2.78 times longer for defendants who are detained for the entire pretrial period, and the prison sentence is 2.36 times longer."); *see* DIGARD & SWAVOLA, *supra* note 13, at 5.

204. *See, e.g.*, LIU ET AL., *supra* note 17, at 12 ("Pretrial detainees are also more likely to be charged with a new offense in subsequent years.").

205. *Id.* at 13 (citing Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 767 (2017)).

206. Steven Hale, *Pretrial Detainees Are Being Billed for Their Stay in Jail*, APPEAL (July 20, 2018), https://theappeal.org/pretrial-detainees-are-being-billed-for-their-stay-in-jail/ [https://perma.cc/E7CA-JK3R]. The amount of the pay to stay fee varies by jurisdiction. In Virginia and North Carolina, it can be as low as $3 or $10 a day, respectively, but in Tennessee and Kentucky, it can be as high as $38 and $50 a day, respectively. *Id.*

207. "[R]eleased defendants are 11.3[%] more likely to have any income two years after their bail hearing and 9.4[%] more likely to be formally employed 3 to 4 years after conviction" compared to their counterparts who remained incarcerated. LIU ET AL., *supra* note 17, at 12 (citing Dobbie et al., *supra* note 197, at 227).

reduces annual employment by nine weeks.[208] Overall, pretrial detainment and its corresponding coercion to accept plea bargains have cascading effects that trap pretrial defendants in both the criminal justice system and debt. The next Section explores the harms suffered by defendants who are not incarcerated pretrial but who remain subjugated through commercial bail.

b. Commercial Bond

The for-profit bail system drags defendants deeper into the criminal justice system by penalizing them for contracting with bondsmen. A defendant can lose access to a public defender if bail is posted on their behalf. "In Harris County[, Texas,] some judges automatically assume that those accused of crimes can afford an attorney if bail is posted, even if the person can prove that bail was posted by a third party or that they are unable to afford an attorney in addition to paying bail."[209] In Oklahoma, judges operate under the same presumption, which can only be overcome if the defendant takes the additional step of demonstrating financial need.[210] A defendant must therefore choose between 1) sitting in a cage in exchange for an attorney and 2) contracting for their temporary freedom but possibly losing representation in court.

A defendant who withstands the legal coercion and posts commercial bail risks further entrapment in the criminal justice system and the possibility of economic exploitation by the bondsman. First, as discussed above, a bondsman has the discretion to arrest any of their bailees, which could create additional charges, fines, and sentences for the defendant.[211] Second, desperate defendants, out on commercial bail and edging towards debt, are *pushed* into debt by the coercive bail contracts.[212] As Judge Lee V. Coffee described: "[Pretrial defendants are] living under a constant daily threat that 'if [they] don't bring more money, [the bondsman is] going to put [them] in jail.'"[213] By threatening defendants with arrest and incarceration, bondsmen can coerce defendants into paying more than the legally allowable premiums by including steep, extra fees and high interest rates in the bail contract.[214] For example, a California resident thought he was agreeing to

208. PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf. [https://perma.cc/SUZ2-WF9N].

209. *The Black Codes of Bail*, *supra* note 95.

210. *See FAQ*, LEGALAIDOK.ORG, https://oklaw.org/resource/getting-a-public-defender-in-criminal-or-cert [https://perma.cc/NJ9E-VS8F] (last visited Nov. 2, 2021).

211. *See supra* notes 178–80 and accompanying text.

212. *See, e.g.*, Silver-Greenberg & Dewan, *supra* note 153 (for example, even though state law regulates what a bail agent can charge, bail contracts are deceptively filled with additional costs like late fees, interest costs, and renewal premiums).

213. *Id.*

214. *See, e.g.*, UCLA SCH. OF L. CRIM. JUST. REFORM CLINIC, THE DEVIL IN THE DETAILS: BAIL BOND CONTRACTS IN CALIFORNIA 1 (2017), https://static.prisonpolicy.org/scans/UCLA_Devil%20_in_the_Details.pdf [https://perma.cc/Y7TL-YLT8]. Silver-Greenberg and Dewan go on to note:

> In New Orleans, the Southern Poverty Law Center has complained to state regulators that bondsmen routinely charge more than is allowed by law. In phone calls placed by The New

pay the $5,000 premium on his daughter's bond, but he ended up owing over $117,000 for "late fees, interest on delinquent balances and 'renewal premiums' that required the defendant to pay again to stay out of jail if the case was not resolved within a year."[215] On a smaller but still problematic scale, Ronald Egana had to pay an additional $10 a day to wear an ankle monitoring bracelet, even though the court never ordered one.[216] If a defendant has outstanding payments, the bondman can repossess the agreed-upon collateral without notice, unlike in other lending agreements.[217] Even if the bond agency repossesses the collateral, nothing stops the agency from also returning, or threatening to return, the defendant to jail.

These coercive tactics, used both during pretrial detention and by bondsmen, are not original to the for-profit bail system. Rather, as the next Part explores, the practice of limiting free will through restraints on physical mobility and imposition of legal coercion began during slavery.

The next Part analyzes how for-profit bail is a badge and incident of slavery. It explores the tight historical similarities between the institutional practices that kept African-Americans in bondage and the contemporary practices of for-profit bail. Both antebellum slaves and legally innocent pretrial defendants have had their movements restricted and have been coerced economically and through the judicature. These similarities raise the practice of the for-profit bail industry to the level of a badge and incident of slavery, the implication of which will be illustrated in the following Part. Both groups deserve Thirteenth Amendment protections.

III. FOR-PROFIT BAIL AS A BADGE AND INCIDENT OF SLAVERY AND THE IMPORTANCE OF SUCH CLASSIFICATION

The Thirteenth Amendment offers a way to liberate the mobility and autonomy of legally innocent, indigent defendants from the grasp of the for-profit bail industry. However, the Amendment "stands in the shadows," unseen as a source for civil rights by modern scholars.[218] This Part adds to a budding body of scholarship that seeks to reinvigorate the applicability of the Amendment by concluding that for-profit bail is a badge and incident of slavery in violation of the Thirteenth Amendment. At a time when "[r]ace is virtually impossible to remove" from discussions on mass incarceration, it is important to understand the racial implications of for-profit bail and the Thirteenth Amendment provides a

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> York Times, several bail bond companies quoted prices that exceeded what is allowable under state law by a few hundred dollars. When asked, they said the extra money was a "lock-up fee" paid to the jail. But there is no such fee.

Silver-Greenberg & Dewan, *supra* note 153.

215. *Id.*

216. *Id.*

217. *See id.* This practice differs from a standardized loan, which would have provided notice of potential repossession and a certain amount of time to repay.

218. Goodwin, *supra* note 74, at 975.

useful mechanism through which to do so.[219] Accordingly, this Part will analyze (1) why the for-profit bail industry deserves this distinction and (2) why it is important to conceptualize it as such.

A. FOR-PROFIT BAIL IS A BADGE AND INCIDENT OF SLAVERY

American slavery has "endur[ed] and evolve[ed] as those in power substituted one group of vulnerable people for another."[220] After emancipation, transformation of slavery was encouraged by postbellum white farmers' desire to "recapture their former slaves through new civil laws."[221] Slavery has undergone another round of evolution as the criminal justice system's discriminatory enforcement of laws has led to a new version of slavery. Slavery was thus not abolished but was rather moved "from the plantation to the prison."[222] In other words, slaves were cast free from their plantation shackles only to be recaptured with prison chains.

For-profit bail has developed in this tradition by sprouting from the remnants of the processes that originated in slavery. When the for-profit bail industry is understood as a sum of both of its parts—pre-trial incarceration and bail contracts—it is a badge and incident of slavery as outlined in *Jones v. Alfred H. Mayer Co.*[223] because it (a) imposes limits on physical mobility and (b) applies legal coercion in ways similar to those used during slavery.[224] Individuals who have observed the for-profit bail system have likewise drawn the connection to slavery. A witness who attended bail hearings in St. Louis, where most of the defendants were people of color, remarked that they "could not help but draw a correlation to slave auctions."[225] Similarly, the Vernon C. Bain Center, a barge in the East River outside of the Bronx that doubles as the jail that houses many of New York City's pretrial detainees, has been deemed "a modern-day slave ship."[226]

Critics may challenge the idea that the for-profit bail industry is a badge and incident of slavery on three grounds, none of which are persuasive. First, they may argue that because the Supreme Court has not recognized an absolute right to bail,[227] the for-profit bail system does not infringe upon a fundamental right connected to citizenship. However, such arguments fail to properly capture the rights on which for-profit bail is infringing: the right to the presumption of

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219. *Id.* at 979.

220. *Id.* at 910.

221. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53 (2008).

222. Angela F. Chan, *America Never Abolished Slavery*, HUFFPOST (May 2, 2015), https://www.huffingtonpost.com/angela-f-chan/america-never-abolished-slaveryb_6777420.html [https://perma.cc/2HP7-QQWZ].

223. *See* 392 U.S. 409, 444–45 (1968) (Douglas, J., concurring).

224. *See* DANIELS, JR. ET AL., *supra* note 3, at 1 ("What was originally designed as a right to pretrial freedom has become a means of control and extracting money from people who are arrested, and jailing those who cannot pay.").

225. Ganeva, *supra* note 143, at 24.

226. *Id.* at 18.

227. *See* ALISON M. SMITH, CONG. RSCH. SERV., R45533, U.S. CONSTITUTIONAL LIMITS ON STATE MONEY-BAIL PRACTICES FOR CRIMINAL DEFENDANTS 5 (2019) (citing Carlson v. Landon, 342 U.S. 524, 545–46 (1952)).

innocence and the right to an attorney. Both of these rights are at the core of our justice system, which is an essential part of citizenship. For-profit bail infringes upon the former right, ideologically, by locking up legally innocent people and, practically, by coercing pretrial defendants to accept plea deals. It violates the latter by restricting the ability of a defendant out on a commercial bond to have a public defender.[228]

Second, critics may claim that the upfront cash payment required in the for-profit system is necessary to incentivize a defendant's reappearance. However, bail was not originally conceptualized in this way. At common law, bail was not an incentive for return; rather, it was an insurance system. A defendant's bail was set at the amount that would be owed if they were found guilty of the crime and it was paid in the form of a third-party's promise to cover the amount if the defendant fled.[229] Thus, the system was designed to ensure that the victim received compensation regardless of whether the defendant appeared in court.[230]

Early American courts embraced this system and were not worried about the defendant reappearing, as illustrated by the general practice of releasing white defendants without bail.[231] Bail as upfront payments was seldom used because doing so would likely keep the still-innocent defendant incarcerated, infringing upon their presumption of innocence.[232] The idea that bail needed to be paid upfront to incentivize return did not take hold until post-emancipation, when Black individuals were first granted the right to bail.[233] There was no fear of infringing upon a Black person's innocence—slavery had already normalized that decimation.[234] Thus, because Black people already had to pay for their freedom in slavery, it became acceptable for courts to use criminal laws and bail to charge them for their liberty; only this time under the guise of needing to incentivize their return.

Third, critics may argue that the for-profit bail industry should not be a badge and incident of slavery because it does not always encompass compelled labor or physical coercion.[235] Even though a pretrial detainee may be compelled to work under threat of solitary confinement and can suffer physical abuse from guards

228. *See supra* notes 209–10 and accompanying text.

229. TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M. B. BROOKER, PRETRIAL JUST. INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 2 (2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf [https://perma.cc/2S7H-RH6N].

230. *See id.*

231. *See* DANIELS, JR. ET AL., *supra* note 3, at 2 ("Poor white people were generally required to be released on bail without paying money so long as the person acting as surety was a holder of property in an amount double the sum he was posting as security.").

232. *See id.* ("The institution of slavery shaped the concept of bail beyond its original meaning as a source of pretrial freedom for propertied white men.").

233. *Cf. id.* ("In a world that already put a price on human beings, it was a short step to normalize monetary payments as a condition of release.").

234. *See* Benjamin Weber, *Beyond Money Bail*, VERA INST. OF JUST.: THINK JUST. BLOG (June 27, 2018), https://www.vera.org/blog/beyond-money-bail [https://perma.cc/V8E3-MEGS] ("[S]lavery eroded the presumption of innocence for whole swaths of people . . . and normalized paying money in exchange for human freedom.").

235. *See* United States v. Kozminski, 487 U.S. 931, 952 (1988).

and other inmates, these findings are not necessary for Congress to use its Section 2 powers to designate for-profit bail as a badge and incident.[236] This Note does not claim that the for-profit bail industry perpetuates slavery in violation of Section 1 of the Thirteenth Amendment. Rather, it presents the argument for why for-profit bail is a badge and incident, thereby laying the foundation from which Congress can, and should, legislate.

1. Limitations on Physical Autonomy

The Thirteenth Amendment's proscription on the badges and incidents of slavery applies to for-profit bail today because pretrial detention and commercial bondsmen deprive defendants of their physical autonomy in the same way antebellum masters and Jim Crow laws constrained slaves and free Black people. For-profit bail and slavery were both successful because they each restricted the physical mobility of their presumed-innocent subjects. Would slavery have been possible if Black people were allowed to travel as they please? Why does the for-profit bail system similarly presume that limitations on mobility are necessary to corral Black people?

For-profit bail builds upon slavery's idea that freedom can be bought, rather than simply bestowed through mere existence. Slavery and for-profit bail are both "institutions that ensured freedom for some and degrees of unfreedom and bondage for others."[237] The underlying premise of slavery was that Black people's freedom could be given by a master or purchased.[238] For-profit bail is no different. A defendant could be given his freedom by a court,[239] but, most likely, they will have to pay bail upfront; proving to the court that they are worthy of retaining their freedom before the merits of the alleged offense can even be tried. In both systems of slavery and for-profit bail, the price of freedom is intentionally placed beyond the subjugated party's means, often causing them to turn to family, friends, and institutional parties, such as abolitionists and bondsmen, for financial support.[240]

Slavery and the for-profit bail system also both "trade on the fiction of [B]lack dangerousness and criminality to extract revenue and exert control."[241] The underbelly of slavery, the motivation percolating beneath each action, was fear. Indeed, slaves lived in fear, but so did masters. Masters and those who depended upon slavery were terrified of slaves, of the uprisings and rebellions they could incite. Fear drove "[s]laveholders [to] develop[] a set of ideas about [B]lack

236. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

237. DANIELS, JR. ET AL., *supra* note 3, at 2.

238. *See supra* notes 107–08 and accompanying text.

239. Instead of owing the court cash upfront, a defendant could be released (1) without bail; (2) on a non-surety bond, where a person is released and only has to pay if he fails to reappear; or (3) under the word of another that he will reappear, to name a few alternatives. *See* 18 U.S.C. § 3142(a).

240. *See supra* note 108 and accompanying text.

241. DANIELS, JR. ET AL., *supra* note 3, at 2.

people as inherently dangerous and criminal."[242] Masters codified their ideals in financial markets and methods of regulation "based in white fear."[243] Although evolving, the idea of Black criminality and dangerousness "remained disturbingly durable," lingering in the modern criminal justice system.[244] Today, the for-profit bail system is "fueled by racist myths about [B]lack people as inherently dangerous and criminal."[245] Consequently, the for-profit bail system, like slavery, is founded on the idea that physical autonomy of Black individuals must be limited to preserve its existence.

The fiction of criminality is used in both systems to justify limiting the physical autonomy of Black individuals. During the antebellum period, masters cruelly beat slaves to instill a fear of running away.[246] They also controlled mobility of slaves by confining them to the fields of the plantation, prohibiting them from entering the main house without permission or leaving the property without proper documentation.[247] If slaves were caught outside of their established bounds, slave patrols could seize them, inflict corporal punishment, and deliver them back to their masters, who would often impose additional physical retribution.[248] Even after emancipation, the Black Codes meant Black individuals could not freely roam the streets or gather in public areas.[249] Every movement could be questioned. Every turn needed a justification.

Just as the coming and goings of slaves were monitored to prevent their escape, so too are the physical whereabouts of defendants to ensure their reappearance. Pretrial detainees can only visit certain parts of the jail according to the schedule of others.[250] If they step out of line, pretrial detainees, like their antebellum ancestors, risk death or physical abuse from detainees or the guards.[251] They can, alternatively, be dragged to solitary confinement where their mobility is essentially eradicated.[252] Defendants out on commercial bail may have increased mobility over pretrial detainees—but similar to Black people living under Black Codes—they are subject to arbitrary curfews, electronic monitoring systems, and invasive searches that limit where and when they can travel.[253] Whether as a slave, an emancipated Black, or a pretrial defendant, Black individuals have been divested

242. *Id*. *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF URBAN AMERICA (2010) (documenting the emergence of the idea of Black criminality).

243. DANIELS, JR. ET AL., *supra* note 3, at 2 ("[Slavery] built a financial market based on white fear, empowered private actors to capture people alleged to be criminal, and eroded the presumption of innocence.").

244. *Id*.

245. *Id*. at 4.

246. *See supra* notes 86–88 and accompanying text.

247. *See supra* notes 89–92 and accompanying text.

248. *See supra* notes 89–92 and accompanying text.

249. *See supra* note 95 and accompanying text.

250. *See supra* note 171 and accompanying text.

251. *See supra* notes 167–70, 174–76 and accompanying text.

252. *See supra* note 172 and accompanying text.

253. *See supra* notes 186–87 and accompanying text.

of their physical mobility by systems that fear the consequences of allowing them the freedom of movement.

To solidify the physical limitations on Black people, slavery "created a market for man-hunting" that was intended to eliminate their mobility.[254] Under the fugitive slave laws, masters hired bounty hunters and local police and paid them sizeable rewards for the return and safekeeping of fugitive slaves.[255] The private industry for man-hunting "grew because there was money to be made from capturing and jailing [B]lack people who were alleged to be fugitives, called dangerous, or appeared out of place."[256] The system deputized bounty hunters and enforced little restrictions on how to capture and arrest fugitives.[257]

Today, the for-profit bail system still uses the market of man-hunting to limit the mobility of Black people. The role of masters and fugitive slave hunters is now filled by judges and bail bondsmen. Judges, similar to antebellum masters, create the conditions that necessitate utilizing bounty hunters. If a judge set a lower bail amount or required no money bail, the bondsmen would never be employed. Partially because courts receive a percentage of the premiums paid to bondsmen and partially because of collusion in the system, judges are financially motivated to use bondsmen, similar to how masters were motivated to use bounty hunters to return their expensive "property."[258]

Modern bail bondsmen operate in the same way as their slave-hunting predecessors. Both can track their subjects across state lines, arrest them on a whim, and drag them back to where their modern-day master is located.[259] Both are deputized by the system and given little oversight. Modern bondsmen even take after their fugitive-hunting forefathers by opting to employ physically coercive means at their discretion, even though such practice is within the legal grey area of modern bondsmen.[260] Additionally, bondsmen and bounty hunters both occupy the same fear-inducing position in the system. That these parties occupy these positions is a form of deterrence, just as much as a tool for actually recapturing. As such, slaves and defendants both live under the coercive fear of being rearrested and are unable to move freely through society.

Slaves and defendants in the pretrial bail system are physically restricted both by rules detailing where they can travel throughout the day, threats of physical coercion, and by a system that minimizes their safety while prioritizing their recapture by bounty hunters—who are deputized to catch them using questionable force. The limitations on their liberty do not end there, however. As the next Section details, legally coercive tactics first used during slavery are also employed by the for-profit bail system.

254. DANIELS, JR. ET AL., *supra* note 3, at 2.
255. *See supra* notes 97, 105 and accompanying text.
256. Weber, *supra* note 234.
257. *See supra* note 98 and accompanying text.
258. *See supra* note 161; *infra* note 284 and accompanying text.
259. *See supra* notes 98, 178–80 and accompanying text.
260. *See supra* notes 98, 100, 181–84 and accompanying text.

2. Legal Coercion and Economic Oppression

"The development of money bail was linked to the legal and financial instruments of slavery."[261] For-profit bail prolongs the legally coercive traditions of slavery by likewise trapping Black people in the criminal justice system and condemning them to debt.[262]

First, slavery and its reiteration in the Black Codes are alive in the lived experience of detainees navigating the criminal justice system. Neither newly emancipated slaves nor Black individuals today are given meaningful access to bail. In every era, Black people have had to pay more to access the right to be free after an arrest.[263] Bail is priced beyond their means because the system wants them incarcerated to control and financially exploit their "[B]lack dangerousness."[264] These fictitious racial misconceptions, coupled with the alarmingly high rate of arrest of Black individuals—two-and-a-half times that of white individuals—produce modern jails, some with a racial composition of 87% Black individuals.[265] With compositions this skewed, no convincing argument can be made that Black individuals today have as equal access to bail as whites.

The denial of meaningful access to bail during the Reconstruction era and today causes the same negative consequences: Black individuals are dragged deeper into the criminal justice system where they can be economically exploited. During Reconstruction, coercive contracts denied access to bail. An arrest—usually for a trivial or trumped-up violation of a Black Code—and an abhorrently high bail amount were used to coerce newly freed Black individuals into peonage contracts.[266] To avoid jail time, Black defendants would, at times nonconsensually, be entered into the debt of their accuser or a third-party and would be subject to forced labor as repayment.[267] Alternatively, the jail could directly benefit by forcing Black individuals to work in inmate leasing programs if they are unable to make bail.[268] Either way, bail was used to ensure that Black individuals were trapped in the criminal justice system and available for economic exploitation.

Today, bail continues to trap Black defendants in the justice system, but the system has found new ways to economically exploit them. The modern day cycle, similar to arrests made during Reconstruction, often start with charges being exaggerated in order to justify higher bail amounts.[269] In the short term, high bail amounts trap pretrial detainees in jail and economically exploit them by charging

261. DANIELS, JR. ET AL., *supra* note 3, at 2.

262. *See The Black Codes of Bail*, *supra* note 95 ("The Black Codes of Bail are policies and practices associated with pretrial detention that trap people in the criminal legal system, exploit them economically, condemn them to debt, attempt to control their movement and interaction with family and loved ones, or make them vulnerable to further criminalization.").

263. *See supra* notes 120–24, 150 and accompanying text.

264. DANIELS, JR. ET AL., *supra* note 3, at 2–3.

265. *See id*. at 1 (discussing jails in New Orleans).

266. *See id*. at 2; Goodwin, *supra* note 74, at 946.

267. *See supra* notes 128–32 and accompanying text.

268. *See supra* notes 126–27 and accompanying text.

269. *See* Ganeva, *supra* note 143, at 20.

them "pay to stay fees."[270] In the long term, pretrial detention triggered by inability to pay high bail amounts drives defendants to accept plea agreements, which will likely increase their chance of conviction, length of incarceration, and rate for recidivism.[271] This creates extended contact with and new opportunities for interaction with the criminal justice system, which not only economically disadvantages defendants by stifling their earning potential, but also allows the courts, jails, and private-prison systems to profit off of a cycle of imprisonment.[272]

By creating a barrier to freedom through high bail amounts, the criminal justice system also funnels defendants into another faction of the system: the quasi-private pockets of commercial bail bondsmen. This exposes defendants to coercive contracting, the exact form of economic oppression as was experienced by newly freed Black individuals. To avoid jail time, defendants contract with bondsmen and pay them nonrefundable premiums for their release. But these contracts are rife with hidden charges and restrictive clauses. Defendants are often later charged excessive fees, collateral requirements, and interest rates that, when added together, drastically exceed what they are legally permitted to be charged.[273] Defendants must pay these additional, unwarranted amounts, or the bondsmen may return them to jail with new charges.[274] In both the Reconstruction era and today, bail is used to trap defendants in the criminal justice system where legal coercion can be utilized to extract economic gains from Black people, through uncompensated labor, coercive contracts, or direct payments.

Second, for-profit bail employs the same economic incentives as slavery.[275] Both systems were designed to extract value from Black bodies and send profits into the hands of the states and powerful institutional actors.[276] And, both systems did so on a multi-billion-dollar scale.[277] During slavery, local government actors economically benefited from tolls for physically punishing slaves when their masters could not; fees for discharging temporarily detained slaves; and rewards for returning runaways.[278] Private actors similarly pursued their paydays through hunting fugitive slaves[279] or, more commonly, through reaping the benefits of uncompensated slave labor. After the Civil War was lost, the idea of profiting off of racial minorities continued "creat[ing] a bad set of financial incentives around the use of jail."[280] Former masters and local governments continued to economically gain by having the police arrest and force Black individuals to work for

270. *See supra* note 206 and accompanying text.
271. *See supra* notes 189–205 and accompanying text.
272. *See supra* notes 207–08 and accompanying text.
273. *See supra* notes 212–17 and accompanying text.
274. *See supra* note 213 and accompanying text.
275. *See* DANIELS, JR. ET AL., *supra* note 3, at 2 ("The development of money bail was linked to the legal and financial instruments of slavery.").
276. *See id.* at 3 ("[M]any aspects of the criminal legal system were being used to extract value from the formerly enslaved.").
277. *See supra* notes 114–15, 162–66 and accompanying text.
278. *See supra* notes 88, 93–94, 105–06 and accompanying text.
279. *See supra* note 97 and accompanying text.
280. Weber, *supra* note 234.

private masters under peonage contracts or as unpaid inmate laborers.[281] In all these situations, institutional actors got richer at the expense of the subjugated.

Today, jails, through for-profit bail, are still being used to transfer wealth from Black individuals to institutional actors. Commercial bail has allowed private bondsmen, insurance companies, and equity investors to pilfer billions of dollars from pretrial defendants, the majority of whom are Black.[282] In 2017, these private actors collected profits and premiums off of $15.9 billion in bonds.[283] Bondsmen share their premiums with local governments, which would not receive a cut if the defendant was to pay independently.[284] Local governments also profit by charging pretrial detainees for their time in jail.[285] Hence, slavery, Reconstruction era jails, and the for-profit bail system are connected through their scheme to financially benefit government actors and commercial institutions at the expense of Black individuals.

Further, the extracting of value from Black bodies condemns them to debt. Both systems use legal leverage to deny economic advancement to Black people. Even after freed slaves were allowed to earn wages, "city and town officials used jail detention to drain financial resources."[286] Today, an incarcerated individual's earning potential is similarly limited by time spent in jail, even by short-term pretrial incarceration. Pretrial detainees who are coerced to accept plea agreements and, as a result, are convicted, suffer lifelong negative economic consequences.[287] The defendants who do make bail can have their savings quickly drained by bondsmen's demands. Defendants must often sell personal property or take on additional loans from friends, family, or commercial lenders to afford payments to the bondsmen.[288] Under mounting debt and economic hardship imposed by either alternative, Black individuals will remain economically subjugated by the system.

Due to the economic exploitation and legal erasure discussed above, Black bodies suffer the same social results in the for-profit bail system as they had in slavery. Slaves and freedmen suffered a "social death" because they were considered to be outside of society.[289] Like antebellum slaves and free Black people, defendants operating in the for-profit bail system are denied a sense of belonging in the mainstream community.[290] Defendants are "othered" because incarceration

281. Goodwin, *supra* note 74, at 946–48.

282. *See supra* notes 162–66 and accompanying text.

283. LIU ET AL., *supra* note 17, at 10.

284. *See* DANIELS, JR. ET AL., *supra* note 3, at 4 (discussing how in New Orleans "3[%] of the 12[%] the bail bondsman charges is passed on to the court, the sheriff, the district attorney, and the public defender.").

285. *See supra* note 206 and accompanying text.

286. Weber, *supra* note 234.

287. *See supra* notes 207–08 and accompanying text.

288. *See* Silver-Greenberg & Dewan, *supra* note 153 ("Commercial bail fees, often scraped together by multiple family members, siphon millions from the poor, predominantly African-American and Hispanic communities.").

289. *See supra* notes 109–13 and accompanying text.

290. *See supra* notes 194–95 and accompanying text.

is stigmatized, regardless of whether the defendant has been convicted or remains legally innocent. Defendants out on commercial bonds who are living under a curfew or with an electronic monitoring device also face similar stigmas.[291] Stigmatization means that those who endure time behind bars, or who are publicly marked as defendants, are stereotyped, discriminated against, and subjected to a lower status.[292] They are society's castaways. As a result, stigmatization implicates "a major barrier to successful community reintegration."[293]

Stigmatization is not the only othering factor defendants in the for-profit bail system must endure. Such defendants are also at risk of losing their jobs, housing, and children—the three anchors of community building.[294] When the for-profit bail system cuts these tethers, defendants become further dissociated from the community at large. Because the for-profit bail system disproportionately affects Black people, they are the ones being ostracized from society, just as they were during slavery.

For-profit bail is a badge and incident of slavery. It is historically and fundamentally analogous to slavery and it utilizes the same mechanisms—limitations on physical mobility and legal coercion—to subjugate Black individuals. But, why does this matter? Why is it important to denote for-profit bail as a badge and incident of slavery?

B. WHY CONCEPTUALIZE FOR-PROFIT BAIL AS A BADGE AND INCIDENT OF SLAVERY?

Conceptualizing for-profit bail as a badge and incident of slavery will provide Congress the means to legislate against it. Congress should use its Section 2 powers to outlaw money bail and eradicate this system that predominately limits the freedom of Black Americans and coerces them to live their lives as second-tier citizens. A modern society that recognizes that its citizens are being ensnared in the remnants of slavery and chooses not to act cannot retain the title of "land of the free." For-profit bail must go.

Bail reform has captured national attention. Federal, state, and judicial actors are all enthusiastically engaged in reform measures. However, the pending initiatives all suffer from varying weaknesses. None of the alternatives offer a remedy as comprehensive as the one available if Congress were to declare for-profit bail as a badge and incident of slavery. Because of the affirmative powers granted by the Thirteenth Amendment, Congress is uniquely suited to tear down the for-profit bail system and end its detrimental consequences.

Reform measures pending at the federal level are inadequate because they do not capture the scope of the injustice.[295] For example, the No Money Bail Act of

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291. *See* Stevenson & Mayson, *supra* note 147, at 46.

292. *See* Kelly Moore, Jeffrey Stuewig & June Tangney, *Jail Inmates' Perceived and Anticipated Stigma: Implications for Post-Release Functioning*, 12 SELF & IDENTITY 527, 527 (2013).

293. *Id.*

294. *See supra* note 194 and accompanying text.

295. Think tanks have also proposed federal legislation. For example, Data for Progress proposed the End Money Bail Act, which would require local governments to release most people pretrial unless the judge determines, by clear and convincing evidence, that the defendant is a danger to the community or

2019 proposes denying funds to states that "use[] payment of money as a condition of pretrial release with respect to criminal cases."[296] Although the legislation seeks the proper remedy—the release of defendants without money bail—it fails to properly conceptualize how the for-profit bail system generates its harm: by limiting defendants' physical mobility and imposing legal coercion. Any proposal to end for-profit bail must put a stop to these coercive devices. If the proposal fails to do so, these devices will reappear in new forms, much in the same way as vestiges of slavery have manifested for generations. Legislation that not only labels the for-profit bail system as a badge and incident of slavery but also outlaws its discriminatory effects will better protect against slavery's reemergence.

States are also instituting, or trying to introduce, bail reform.[297] However, their piecemeal attempts to eradicate their for-profit bail systems do not abdicate Congress of its responsibility to act. State initiatives on bail reform are more, not less, reason for Congress to conceptualize for-profit bail as a badge and incident and act to prevent states from implementing new systems that could do more harm. There are currently two main types of state reform proposals in circulation: replacing money bail with a risk-assessment system, such as the proposals in California, Colorado, and New Jersey;[298] and partially repealing money bail for misdemeanors and nonviolent felonies, while granting judges the discretion to impose monitoring systems, such as the proposal in New York.[299] Again, neither of these reform efforts offers the proper remedy to the real problem: the need to eradicate the processes of slavery. Like federal legislative proposals, state remedies should be aimed at correcting the processes originating from slavery that subjugated Black Americans. However, risk assessments and judicial discretion to impose monitoring requirements would allow racial biases to continue seeping into the bail system and permit limitations on physical mobility. In reimagining bail systems, states must remember the for-profit system's oppressive roots to

unlikely to reappear for trial regardless of the imposition of pretrial release conditions. DATA FOR PROGRESS, THE END MONEY BAIL ACT 3–4 (2019), https://www.filesforprogress.org/memos/money-bail-memo.pdf [https://perma.cc/CAB2-DDDF]. The Federal government already prohibits courts from imposing "a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2).

296. H.R. 4474, 116th Cong. § 3.

297. *See, e.g.*, S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (repealed 2020); H.B. 13-1236, 69th Gen. Assemb., 2013 Reg. Sess. (Colo. 2013) (amending COLO. REV. STAT. § 16-1-104 to create new presumptions and to revise criteria and methods for setting bail); KY. REV. STAT. ANN. § 431.510 (2021) (outlawing commercial bail bond industry); N.J. STAT. ANN. §§ 2A:162-15 to -17 (2018).

298. *See, e.g.*, Cal. S.B. 10; Colo. H.B. 13-1236; *see also* SMITH, *supra* note 227, at 2; Diana Dabruzzo, *New Jersey Set Out to Reform Its Cash Bail System. Now the Results Are In.*, ARNOLD VENTURES (Nov. 14, 2019), https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/ [https://perma.cc/D3XG-ST7S]; *New York's New Bail Reform Model*, VERA INST. OF JUST., https://www.vera.org/state-of-justice-reform/2019/bail-reform [https://perma.cc/8SKE-3KCC] (last visited Nov. 2, 2021).

299. *See* THOMAS P. DINAPOLI, OFF. OF THE N.Y. STATE COMPTROLLER, REPORT ON THE STATE FISCAL YEAR 2019-20 ENACTED BUDGET 32 (2019), https://www.osc.state.ny.us/files/reports/budget/pdf/budget-enacted-2019-20.pdf [https://perma.cc/9A4E-HHUF]; *New York's New Bail Reform Model*, *supra* note 298.

ensure that none are replanted in the new procedures. Additionally, many states have not taken reformative measures because "there is not enough political pressure to end the practice."[300] However, if for-profit bail is deemed a badge and incident, states will be constitutionally mandated to reform their systems immediately.

Finally, bail reform advocates have also brought judicial challenges under the Fourteenth Amendment.[301] Such challenges are inadequate for two reasons. First, conceptualizing for-profit bail as a Thirteenth Amendment violation, and having Congress legislate accordingly, will protect defendants better than the Fourteenth Amendment's Equal Protection and Due Process clauses. A Thirteenth Amendment violation more effectively captures who is being hurt by the system: Black people. Eradicating for-profit bail under the Thirteenth Amendment will still protect indigent defendants; however, eradicating it under the Fourteenth Amendment fails to capture the trauma the system has imposed on the Black community.

Second, a Thirteenth Amendment violation will also fill in the gaps left by Fourteenth Amendment jurisprudence. For example, the Fifth Circuit held that Harris County's money bail system violated the Equal Protection and Due Process rights of indigent misdemeanor defendants.[302] However, the court's holding has three important limitations. First, Equal Protection claims require evidence of discriminatory intent,[303] or at least an overwhelming showing of disparate impact,[304] which may not be available in every locality. In *Harris County*, the Court held that there was an Equal Protection Clause violation because a clear discriminatory purpose was evidenced "by numerous, sufficiently supported factual findings, including direct evidence from bail hearings."[305] However, other jurisdictions might have insufficient evidence of discriminatory purpose to warrant a violation. Second, assessment of Fourteenth Amendment violation is based on interpretations of state law. The Fifth Circuit held that the bail system violated due process based on the laws of Texas, rather than the Due Process Clause.[306] Third, the Fifth Circuit's holding only applies to misdemeanor and not felony defendants.[307] A Thirteenth Amendment violation would not have

300. Rachel Anspach, *The Cash Bail System Is Unconstitutional—So Why Won't the Practice End?*, REWIRE NEWS GRP. (Sept. 6, 2017, 11:02 AM), https://rewirenewsgroup.com/article/2017/09/06/cash-bail-system-unconstitutional-wont-practice-end/ [https://perma.cc/QJ9E-BKDT].

301. *See* Jones v. City of Clanton, No. 2:15cv34–MHT, 2015 WL 5387219, at *1 (M.D. Ala. Sept. 14, 2015); Walker v. City of Calhoun, No. 4:15-CV-170-HLM, 2016 WL 361580, at *2 (N.D. Ga. Jan. 28, 2016); Pierce v. City of Velda City, No. 4:15–cv–570–HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015).

302. ODonnell v. Harris Cnty., 892 F.3d 147, 157 (5th Cir. 2018).

303. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

304. Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (requiring a showing of "a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured . . . by . . . the Fourteenth Amendment").

305. 892 F.3d at 161.

306. *See id.* at 158, 161.

307. *See id.*

these same limitations. If for-profit bail is outlawed under the Thirteenth Amendment, discrepancies in state law, in the factual record, and in the crime charged will not matter.

Conceptualizing for-profit bail as a badge and incident of slavery is important for practical reasons. Not only would it empower Congress to legislate against the practice of money bail, but it will also outlaw discriminatory processes rooted in slavery; cover all defendants; and, perhaps most importantly, honor those most severely harmed by the system: Black individuals. However, even if none of these practical benefits manifest, theorizing how for-profit bail is a badge and incident of slavery is important because it infuses race into bail reform discussions. The Black community is overwhelmingly affected by for-profit bail. During a time of racial justice reform when bail practices are being challenged and modified on the state and local levels, it is essential to investigate why for-profit bail has a disparate impact on Black individuals. Yes, mass incarceration policies have resulted in the arrest of a higher proportion of minorities, who, on average, are less economically advantaged due to systemic racism. But this does not fully explain why Black defendants are being denied meaningful access to bail at higher levels. Tracing for-profit bail back to its antebellum and postbellum predecessors reveals the answer: money bail is administered to keep Black people enslaved. The system's intentions during Reconstruction and today are the same. By conceptualizing for-profit bail as a badge and incident of slavery, this Note increases the innovations possible in bail reform. Ideally, it will push Black trauma to the center of the reform efforts and will lead to the elimination of for-profit bail. Even so, the Thirteenth Amendment has no racial limitations, and its invocation will ensure that no demographic—racial or socioeconomic—is ever reduced to enslavement because of bail policies.

CONCLUSION

The Thirteenth Amendment is "one of the most promising of the available 'instruments for the protection of individual rights'" and it should no longer be ignored by Congress.[308] The Amendment was enacted to give Congress the power to legislate against the processes through which slavery was enforced. For-profit bail is one example of slavery's enduring legacy. Not only is it historically rooted in slavery and the Black Codes of Reconstruction, but for-profit bail is also a badge and incident because it employs the same mechanisms of subjugation against Black individuals: infringements on physical mobility and imposition of legal coercion.

308. Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1637 (2001) (citation omitted).

This conclusion reframes the relevance of race in discussions of bail reform. For-profit bail is disproportionately devastating the Black community. Even though states and courts are taking up the banner of bail reform, such efforts must place race at the center of the analysis if they are to protect those being most severely injured. The recognition that for-profit bail is a badge and incident therefore seeks to push proposed reform measures further by highlighting the need for more progressive innovations that eradicate the physically limiting and legally coercive aspects of slavery. This relic of slavery must be stricken so that Black people can finally have equal access to the presumption of innocence.