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Carceral Intent

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CARCERAL INTENT

Danielle C. Jefferis[*]

ABSTRACT

For decades, scholars across disciplines have examined the stark injustice of American carceralism. Among that body of work are analyses of the various intent requirements embedded in the constitutional doctrine that governs the state's power to incarcerate. These intent requirements include the "deliberate indifference" standard of the Eighth Amendment, which regulates prison conditions, and the "punitive intent" standard of due process jurisprudence, which regulates the scope of confinement. This Article coins the term "carceral intent" to refer collectively to those legal intent requirements and examines critically the role of carceral intent in shaping and maintaining the deep-rooted structural racism and sweeping harms of America's system of confinement.

This Article begins by tracing the origins of American carceralism, focusing on the modern prison's relationship to white supremacy and the post-Emancipation period in U.S. history. The Article then turns to the constitutional doctrine of incarceration, synthesizing and categorizing the law of carceral intent. Then, drawing upon critical race scholarship that examines anti-discrimination doctrine and the concept of "white innocence," the Article compares the law's reliance on carceral intent with the law's reliance on discriminatory intent in equal protection jurisprudence. Critical race theorists have long critiqued the intent-focused anti-discrimination doctrine as incapable of remedying structural racism and inequities. The same can be said of the doctrine of incarceration. The law's preoccupation with an alleged wrongdoer's "bad intent" in challenges to the scope and conditions

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of incarceration makes it ill-suited to remedying the U.S. prison system's profoundly unjust and harmful features. A curative approach, this Article asserts, is one in which the law focuses on carceral effect rather than carceral intent, as others have argued in the context of equal protection. While such an approach will not remedy the full scope of harms of U.S. incarceration, it would be a start.

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I. INTRODUCTION

American carceralism is exceptional in scale, scope, and disparate impact on communities of color.[1] Approximately 700 people out of every 100,000 in the United States is confined in a federal or state prison, lo-

1. *See, e.g.*, Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 358 (2018) ("On any given day, about 2.2 million people are confined in U.S. jails and prisons—nearly 0.9% of American men are in prison, and another 0.4% are in jail. This year, 9 or 10 million people will spend time in our prisons and jails; 5,000 of them will die there."); *see also id.* ("Our incarceration rate is 57% higher than Russia's (our closest major country rival in imprisonment), nearly four times the rate in England, and over ten times the rate in Nordic and Scandinavian countries. And while American jails and prisons are less brutal and unhealthy now than they were in the 1970s, (when the total incarcerated population was under half a million people), current conditions behind bars are sometimes horrendous."); Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), https://www.prisonpolicy.org/reports/rates.html (reporting Black people are incarcerated in the United States at a rate five times greater than white people, and Hispanic people are nearly twice as likely to be incarcerated than white people).

cal jail, or immigration detention facility every day.[2] The United States confines people who have been convicted of crimes,[3] who have been accused of crimes,[4] who have sought economic opportunities and safety from conflict abroad,[5] who suffer from mental illness and addiction,[6] and who have completed sentences for crimes but are nonetheless deemed a continuing public safety risk.[7] The United States targets and incarcerates Black people in all forms of confinement at disproportionately higher rates than white people.[8] Latinx and Indigenous people are similarly disproportionately targeted.[9]

The sheer scale of American punishment is a modern phenomenon.[10] Confinement in the United States, however, is linked inextricably to the nation's founding form of racial subordination—chattel slavery. Following the issuance of the Emancipation Proclamation and the Civil War, states began devising methods to socially control and exploit newly freed Black people. As described in Part I, "slave codes"—laws restricting

2. Peter Wagner & Wanda Bertram, *'What Percent of the U.S. is Incarcerated?' (And Other Ways to Measure Mass Incarceration)*, PRISON POL'Y INITIATIVE (Jan. 16, 2020), https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/); *Immigration Detention Quick Facts*, TRAC IMMIGRATION, https://trac.syr.edu/immigration/quickfacts/ (noting as of Dec. 5, 2021, immigration detention population was 21,952).

3. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html (depicting population figures for state and federal prisons).

4. *Id.* (depicting population figures for federal and local jails).

5. *Id.* (depicting population figures for immigration detention facilities).

6. *Id.* (depicting population figures for involuntary commitment facilities); *see also* Donald Stone, *There are Cracks in the Civil Commitment Process: A Practitioner's Recommendations to Patch the System*, 43 FORDHAM URB. L. J. 789 (2016).

7. *See generally* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators*," 93 MINN. L. REV. 670 (2008).

8. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT (Oct. 13, 2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/; Spencer Woodman, *U.S. Isolates Detained Immigrants from Majority-Black Countries at High Rate, Study Finds*," INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 21, 2020), https://www.icij.org/investigations/solitary-voices/u-s-isolates-detained-immigrants-from-majority-black-countries-at-high-rate-study-finds/; Peter Wagner & Daniel Kopf, *The Racial Geography of Mass Incarceration*, PRISON POL'Y INITIATIVE (July 2015), https://www.prisonpolicy.org/racialgeography/report.html; Sakala, *supra* note 1.

9. Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration,* PRISON POL'Y INITIATIVE (July 27, 2020), https://www.prisonpolicy.org/blog/2020/07/27/disparities/?gclid=Cj0KCQiAxc6PBhCEARIsAH8Hff2tYnfbPTX_H9vjJUzvRgHHeyBNe9pVujRg3EXIeUcBDT_8Q_BFvk4aAsAVEALw_wcB.

10. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

the conduct of enslaved people[11]—became "Black codes," criminalizing the most mundane and innocuous conduct of Black Americans. Those arrested for violating the Black codes were often conscripted to convict leasing sites, the predecessors of the modern American prisons.[12] Under convict leasing regimes, state authorities "leased" people convicted of crimes to private entities; in return, those private, profit-generating entities paid the state a fee per prisoner. Leased prisoners were conscripted to labor-intensive endeavors on behalf of the private entities, including many unrestricting-building projects.[13]

When the practice of convict leasing ended in the early twentieth century, carceral punishment continued. And as the U.S. confinement apparatus grew, the doctrine of incarceration began to take shape. After decades of judicial "hands off" around state-administered punishment,[14] incarcerated people and their lawyers turned to the courts, seeking judicial intervention for harsh conditions and harmful treatment in prisons and jails. And over several decades of the twentieth century the constitutional law of incarceration developed around a primary focal point: the intent of the person or entity responsible for the confinement.[15]

This Article coins the term "carceral intent" to refer collectively to the myriad intent requirements present in the constitutional law of incarceration.[16]An actor's state of mind—their intent—is a key element of many fields of American law. From criminal law to contract law to tort law to constitutional law, intent or the absence thereof can be the difference between legality and illegality.[17] When it comes to the law of incarceration, the difference between a constitutional and an unconstitutional function or condition of confinement turns, in part, on the states of mind (*i.e.*, the motivations) of the state actors responsible for incarceration policies, laws, and practices.

The law's preoccupation with carceral intent results in a disregard for the effect of government policies and actions concerning incarceration, and the reliance on intent decontextualizes the direct links between racial subordination and imprisonment in the United States.[18] In these ways, the

11. *Id.*

12. *Id.*

13. *Id.*

14. *See, e.g.*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 962 n.306 (2009).

15. *See* discussion *infra* Part II.

16. *See* discussion *infra* Part II.

17. *Id.*; *see also* Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1359 (2008).

18. *See generally* Doron Samuel-Siegel, Kenneth S. Anderson, & Emily Lopynski, *Reckoning with Structural Racism: A Restorative Jurisprudence of Equal Protection*, 23 RICH. PUB. INT. L. REV. 137 (2019) (describing similar effects in equal protection doctrine).

carceral intent doctrine functions similarly to the discriminatory intent requirement in equal protection jurisprudence, both of which are doctrinal developments of the same era.[19] Many scholars have long criticized the discriminatory intent requirement the Court read into the Fourteenth Amendment's Equal Protection Clause as a source of the Amendment's failure to realize its purpose of dismantling Jim Crow-era segregation.[20]

This Article highlights a similar consequence from the law's reliance on carceral intent: Despite the many constitutional protections in place to regulate the state's extraordinary power to confine, hundreds of thousands of people are incarcerated in the United States without the benefit of those protections. The reason for their lack of legal protections rests on the requisite level of intent to mount a constitutional challenge to a form or condition of confinement. Hinging the constitutionality of a type or feature of incarceration on the intent the responsible state actor undermines the Constitution's protective potential concerning confinement in the United States and further entrenches the harms of a system rooted in racial subordination.

This Article has four parts. Part I discusses the U.S. incarceration system's origins in racial subordination and chattel slavery. Part II examines the doctrinal evolution of the carceral-intent requirement in the law of incarceration, focusing both on intent's role in shaping carceral conditions (how does the state treat the people in its custody?) and carceral purpose (why does the state incarcerate?). Part III analyzes the way the carceral-intent requirement entrenches the injustice at the roots of American punishment, drawing upon scholarship examining the discriminatory intent requirement in equal protection doctrine. Part IV of this Article calls for a focal shift in incarceration law from carceral intent to carceral effect, a remedial turn that is necessary to begin to reckon with and dismantle the deeply unjust and racist system of American punishment.

II. AMERICAN INCARCERATION'S RACIST ORIGINS.

The American punishment system's roots are in white supremacy,[21] its lineage one of chattel slavery and the exploitation of labor. Many

19. *See* discussion *infra* Part III.

20. *See, e.g.*, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); *see also* Doron Samuel-Siegel, Kenneth S. Anderson, & Emily Lopynski, *supra* note 18 (collecting works critiquing the intent requirement of the equal protection clause).

21. Like others before me, I adopt Frances Lee Ansley's definition of white supremacy in this piece:

scholars across disciplines have explored this topic.[22] Formerly incarcerated people have filled in the modern contours in striking detail.[23] While a full recitation of this research and these narratives would take this piece beyond its necessary scope, an abbreviated version is warranted to provide the context necessary to connect the modern doctrine of incarceration to the system's roots in racial subordination. Accordingly, this Part explores the historical background for the doctrinal developments dis-

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> By "white supremacy" I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and settings.
>
> A few years ago I probably would have called this system "institutionalized racism." Today, however, in an era of so-called "color-blindness," when "racism" can mean the disfavoring of a white person for the most transitory and isolated purpose, I believe white supremacy to be the more helpful and accurate term.

Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989); *see also* David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635 (2019); Vann R. Newkirk II, *The Language of White Supremacy,* ATLANTIC (Oct. 6, 2017), https://www.theatlantic.com/politics/archive/2017/10/the-language-of-white-supremacy/542148/.

22. *See, e.g.*, ALEXANDER, *supra* note 10; KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996); MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465 (2019); A.E. Raza, *Legacies of the Racialization of Incarceration: From Convict-Lease to the Prison Industrial Complex*, 2011 J. INST. JUST. INT'L STUD. 159 (2011).

23. *See, e.g.*, Ravi Shankar, *Nothing Has Made Me Feel More American Than Going to Jail*, MARSHALL PROJECT (Apr. 29, 2021, 10:00 PM), https://www.themarshallproject.org/2021/04/29/nothing-has-made-me-feel-more-american-than-going-to-jail; Felix Sithivong, *Coronavirus Has Sparked Another Epidemic in My Prison: Anti-Asian Racism*, MARSHALL PROJECT (Dec. 3, 2020, 10:00 PM), https://www.themarshallproject.org/2020/12/03/coronavirus-has-sparked-another-epidemic-in-my-prison-anti-asian-racism; Derrick Hardaway, *I Wasn't a Superpredator. I Was a Kid Who Made a Terrible Decision*, MARSHALL PROJECT (Nov. 20, 2020, 6:00 AM), https://www.themarshallproject.org/2020/11/20/i-wasn-t-a-superpredator-i-was-a-kid-who-made-a-terrible-decision; Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650 (2019); Albert Woodfox, SOLITARY: A BIOGRAPHY (2019).

cussed in Part II and Part III, beginning with the Civil War and Reconstruction years.

The Civil War and the 1863 issuance of the Emancipation Proclamation may have brought about the death of chattel slavery, but did not end race and racial difference.[24] The notion of white supremacy was at that point so deeply entrenched in American society that it was a religion of sorts, as Professor Michelle Alexander has explained: "Faith in the idea that people of the African race were bestial, that whites were inherently superior, and that slavery was, in fact, for blacks' own good, served to alleviate the white conscience and reconcile the tension between slavery and the democratic ideals espoused by whites in the so-called New World."[25]

This faith in racial superiority enabled southern landowners' pursuit of a solution to a perceived economic and societal crisis in the post-emancipation period. "Without the labor of former slaves, the region's economy would surely collapse, and without the institution of slavery, there was no longer a formal mechanism for maintaining racial hierarchy and preventing 'amalgamation' with a group of people considered intrinsically inferior and vile."[26] The white landowners' solution was to adapt the "slave codes"[27] of the previous era—laws designed to criminalize the conduct of enslaved people—to govern newly freed Black Americans' conduct and re-cast the white majority's social control over the Black minority.

The so-called "Black codes" criminalized even the most innocuous conduct of Black Americans, a foreshadowing of the institutionalized segregation and Jim Crow laws that would follow.[28] The Black codes regu-

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24. ALEXANDER, *supra* note 10, at 32–33.

25. *Id.* at 33.

26. *Id.*; *see also* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 6 (2007) ("For many southern whites, the abolition of slavery following the Civil War had spawned two related problems: a race problem and a labor problem. How, they asked themselves, would they prevent the newly freed African Americans from contaminating the white race and debasing white politics? And how would they find a replacement for the cheap labor black slaves had previously provided on which the southern economy was largely based?").

27. *See, e.g.*, Khaled A. Beydoun, *Antebellum Islam*, 58 HOW. L. J. 141, 145–46 n.19 (2014) ("'Slave codes' are the state statutes that proscribed the legal rights of slaves, and reaffirmed the ownership rights whites had over them. These slave codes supplemented federal law regulating slavery, and oftentimes, enhanced them by enshrining specific rights to slave owners. The states in the South looked upon Virginia's Slave Codes as a model body of law, which they used as a template for constructing their own slave codes.").

28. Roberts, *supra* note 22, at 27; *see also* Raza, *supra* note 22, at 162 ("After the radical Republicans took control over Southern state governments beginning in 1867, Black codes were usurped and became a primary form to implement control over African Americans."); Oshinsky, *supra* note 22, at 20 ("In the following days, the [Mississippi] legislature passed a

lated labor contracts, employment laws, Black freedom of movement, interracial seating on railroad cars, the segregation of schools, so-called vagrancy, Black people's cohabitation with white people, "insulting gestures," "mischief," and other aspects of daily life across the post-emancipation south.[29] By the end of 1865, every southern state except Arkansas and Tennessee had outlawed vagrancy, "so vaguely defining [the offense] that virtually any freed slave not under the protection of a white man could be arrested for the crime."[30] A Mississippi statute required Black Americans to enter labor contracts with white plantation owners by January 1 every year or risk arrest.[31] Those found with no employment were convicted of vagrancy.[32] Four other states enacted laws prohibiting Black Americans from securing legal employment without presenting discharge papers from a previous employer, effectively precluding them from leaving the plantations of the white men for whom they worked.[33] Alabama, North Carolina, and Florida enacted codes that criminalized changing employers without permission.[34]

The penalty for violating these so-called Black codes was typically forced labor.[35] Before the Civil War, with most Black people forced into slavery, southern prisons and jails had confined predominately white people and in small numbers.[36] After the War, many of those prisons and jails were destroyed or crumbling from neglect.[37] With economic collapse on

series of acts known collectively as the Black Codes. Their aim was to control the labor supply, to protect the freedman from their own 'vices,' and to ensure the superior position of whites in southern life."); Oshinsky, *supra* note 22, at 21.

29. Raza, *supra* note 22, at 162.

30. Blackmon, *supra* note 22, at 53.

31. *Id.*

32. Oshinsky, *supra* note 22, at 21; *see also* ALEXANDER, *supra* note 10, at 28 ("Nine Southern states adopted vagrancy laws—which essentially made it a criminal offense not to work and were applied selectively to blacks—and either of those states enacted convict laws allowing for the hiring-out of people in county prisons to plantation owners and private companies. [People trapped in this system] were forced to work for little or no pay. . . . Clearly, the purpose of the black codes in general and the vagrancy laws in particular was to establish another system of forced labor. In W.E.B. DuBois's words: 'The Codes spoke for themselves. . . . No open-minded student can read them without being convinced they meant nothing more nor less than slavery in daily toil.'").

33. Blackmon, *supra* note 22, at 53–54.

34. *Id.* at 54.

35. *Id.*; Oshinsky, *supra* note 22, at 21.

36. *See, e.g.*, SHANE BAUER, AMERICAN PRISON: A REPORTER'S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT 76-77 (2019) (explaining southern whites' discomfort with the penitentiary model, which associated the prison with slavery).

37. Oshinsky, *supra* note 22, at 34-35; Pope, *supra* note 22, at 1501.

the horizon, southern states did not have the funds to rebuild the prisons and jails.[38]

Rather than invest in rebuilding prisons and jails, many states began the practice of "convict leasing."[39] State authorities "leased" people convicted of crimes to private entities. In return, those private, profit-generating entities paid the state a fee per prisoner.[40] This practice saved the state the cost of rebuilding its prisons and jails and feeding and housing prisoners, and generated a modest profit.[41] The private companies—railroads, plantations, mines, mills—benefited from the effectively free labor.[42] The newly freed Black men and women, many convicted of offenses they did not commit or of offenses for which white people would not be prosecuted, suffered.

Although the experience of conscription into the convict leasing system was hardly distinguishable from chattel slavery,[43] the practice was constitutionalized with the ratification of the Thirteenth Amendment. Ratified in 1865, the Thirteenth Amendment preserved the legality of slavery and involuntary servitude if in furtherance of punishment for a crime—no matter how innocuous the criminalized conduct was.[44]

Southern states' passage and enforcement of Black codes spurred the federal government's passage of the Reconstruction Amendments, the Civil Rights Act of 1866, the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), and the Enforcement Acts of 1870 and 1871.[45] But convict leasing persisted. By 1877, every formerly Confederate state except Virginia had adopted the practice of convict-leasing:

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38. Oshinsky, *supra* note 22, at 34-35.

39. *See* ALEXANDER, *supra* note 10, at 31.

40. Ellen Terrell, *The Convict Leasing System: Slavery in its Worst Aspects*, LIB. OF CONG. (June 17, 2021), https://blogs.loc.gov/inside_adams/2021/06/convict-leasing-system/.

41. BLACKMON, *supra* note 22, at 54-55.

42. *Id.* at 55.

43. Oshinsky, *supra* note 22, at 35-36 ("Before convict leasing officially ended, a generation of black prisoners would suffer and die under conditions far worse than anything they had ever experienced as slaves. Few of them would spend much time inside a state prison or county jail. They would serve their sentences in the coal mines, sawmills, railroad camps, and cotton fields of the emerging New South.").

44. U.S. CONST. amend. XIII; *see also* Pope, *supra* note 22, at 1504 ("So far as one can tell from the official case reporters, no lawyer Filed a Thirteenth Amendment challenge to convict leasing. Nor did political opponents invoke the Amendment in support of their cause. Even as he proposed abolishing all forms of prison servitude, for example, the prominent prison expert E. Stagg Within cited the Amendment for the proposition that the 'State has a property right in the labor of the prisoner' that it 'may lease or retain for its own use.'").

45. *See* ALEXANDER, *supra* note 10, at 29.

> There were variations among the states, but all shared the same basic formula. Nearly all the penal functions of government were turned over to the companies purchasing convicts. In return for what they paid each state, the companies received absolute control of the prisoners. They were ostensibly required to provide their own prisons, clothing, and food, and bore responsibility for keeping the convicted incarcerated. Company guards were empowered to chain prisoners, shoot those attempting to flee, torture any who wouldn't submit, and whip the disobedient—naked or clothed—almost without limit. Over eight decades, almost never were there penalties to any acquirer of these slaves for their mistreatment or deaths.[46]

If there was any doubt about the motivations for the system in its first years of practice, the entrenchment of the system solidified its purpose. The majority of people sold into the convict-leasing system over five decades were Black, and the toll the system took on them was horrific: "In the first two years that Alabama leased its prisoners, nearly 20 percent of them died. In the following year, mortality rose to 35 percent. In the fourth, nearly 45 percent were killed."[47] In Louisiana, a person convicted of a crime was more likely to die than they would have been if they lived in enslavement.[48] In 1870, more than 40% of prisoners in Alabama died in the lease mining camps; a doctor warned officials that the state's entire incarcerated population could be "wiped out within three years."[49]

The legacy of chattel slavery in this convict-leasing era of American punishment is apparent among the judiciary as well, as courts perceived incarcerated people as state property with no rights other than those given to them by the mercy of the state. In *Ruffin v. Commonwealth*, for example, the Virginia Supreme Court refused to consider the merits of Woody Ruffin's constitutional challenge solely because he was incarcerated. Mr. Ruffin was serving a sentence for a previous conviction when

46. Blackmon, *supra* note 22, at 56.

47. *Id.* at 57.

48. Bauer, *supra* note 36, at 129-30 ("In 1884 the editor of the *Daily Picayune* wrote that it would be 'more humane to punish with death all prisoners sentences to a longer period than six years,' because the average convict lived no longer than that. At the time, the death rate of six prisons in the Midwest, where convict leasing was nonexistent, was around 1 percent. By contracts, in the deadliest year of Louisiana's lease, nearly 20 percent of convicts perished. Between 1870 and 1901, some three thousand Louisiana convicts, most of whom were black, died . . . The pattern was consistent throughout the South, where annual convict death rates ranged from about 16 percent to 25 percent, a mortality rate that would rival the Soviet gulags to come.").

49. *Id.* at 130.

he was accused of committing another crime in a Virginia prison. After he was convicted and sentenced to death by hanging, Mr. Ruffin sought review of his case in the Virginia Supreme Court. He asserted the state of Virginia had violated his constitutional right to a jury of his peers by holding his second criminal trial in the distant Richmond County, far from Bath County where Mr. Ruffin was confined when the alleged crime occurred.[50] The Virginia Supreme Court declined to assess the merits of his claim, concluding he was a "slave of the State" and had "not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him" by virtue of his incarceration.[51]

In the final decades of the nineteenth century, the population of people conscripted to the convict leasing system grew ten times faster than the general population.[52] Prisoners became younger and were more frequently Black, and the length of their sentences soared.[53] In a manner similar to chattel slavery, the practice of convict leasing ushered in and institutionalized white supremacy.[54] "Much like slavery[,] the convict-lease system allowed for labor exploitation, mistreatment, and violence against blacks, with the similar sexual abuse of women. Moreover, the convict-lease system set up the foundation for government and private companies to extract labor and profits from inmates."[55] By 1890, 27,000 people across the south were leased into some type of labor agreement.[56] The labor of convict lessees is the foundation for a substantial portion of U.S. infrastructure, including railroads, bridges, tunnels, and roads constructed in the region during this period.[57]

Convict leasing was not unique to southern states. Decades before federally forced emancipation, northern states were constructing prisons and confining a disproportionate number of freed Black Americans in them.[58] For example, New York freed its enslaved population in 1817; fifteen years later, one in five New York prisoners was Black, a representation nearly ten times greater than that of the state's general population.[59]

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50. 62 Va. 790, 799 (1871).

51. *Id.* at 796.

52. ALEXANDER, *supra* note 10, at 32.

53. *Id.*; Bauer, *supra* note 36, at 120 ("Slavery may have been gone, but something like it was already beginning to come back in other states. While antebellum convicts were mostly white, seven out of ten prisoners were now black.").

54. Raza, *supra* note 22, at 166.

55. *Id.*

56. Bauer, *supra* note 36, at 123.

57. *Id.* at 124 ("In North Carolina most of the thirty-five hundred miles of railroad tracks built between 1876 and 1894 were laid by convicts.").

58. *Id.* at 58-59.

59. *Id.* at 59.

Like southern state governments, northern states struggled to fund the operation of their prisons.[60] And like southern states, northern states turned to convict leasing. Private manufacturing companies set up factories inside northern prisons, forcing incarcerated people to produce rifles, tools, shoes, clothing, and other goods.[61] The state and private industry benefited: "For a day's labor, contractors paid the state about half of what they would pay a free worker. By 1831, Auburn [Penitentiary in New York] was making a profit."[62] At least fourteen other northern states followed New York's model over the next two decades.[63]

Nightmarish conditions, prisoner deaths, and self-mutilations, combined with increased competition and high-profile corruption scandals involving state governments and private industry officials, brought an end nationwide to the formal convict leasing system around the turn of the twentieth century.[64] Convict-leasing abolitionists persuaded state officials that state-run plantations and other manufacturing enterprises were a more humane alternative to the convict-leasing system, which had become less and less profitable.[65] Before 1910, leasing was abolished in several states when the government contracts with the private entities expired.[66]

The final blow to convict leasing, in journalist Shane Bauer's account, was the torture and death of a twenty-two-year-old white man in Florida.[67] Martin Tabert was from North Dakota.[68] In 1921, he set off on a trip across the country, jumping trains and working odd jobs to fund his travels.[69] When he arrived in Florida, he was arrested when he disembarked a train for not having a valid ticket.[70] The sheriff fined Mr. Tabert twenty dollars, but because Mr. Tabert had no money, the state leased him for three months' to a lumber company.[71]

The lumber company forced Mr. Tabert to work all day in swamp water with nothing to protect his feet from the conditions other than tattered boots.[72] His feet and legs swelled up, and he asked the man in charge—the "whipping boss"—for a larger pair of boots. The whipping

60. *Id.*
61. *Id.* at 60.
62. *Id.*
63. *Id.*
64. *Id.* at 168-70.
65. *Id.* at 170-71.
66. *Id.* at 171.
67. *Id.* at 173.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 174.

boss ignored him.[73] Later, when Mr. Tabert complained of an aching groin, a doctor gave him medication but the company still required Mr. Tabert to work.[74] When his work stalled due to his poor health, the whipping boss accused Mr. Tabert of shirking work and subjected him to thirty lashes with a seven-and-a-half-pound leather strap.[75] Mr. Tabert begged for the whipping to stop, which resulted in more beating.[76] Mr. Tabert passed away the following day.[77]

The lumber company claimed Mr. Tabert's death was due to a fever.[78] Upon the family's urging, however, the North Dakota state attorney investigated and ultimately substantiated the details of Mr. Tabert's death.[79] The state attorney reportedly called the Florida sheriff who took Mr. Tabert into custody for not having a valid train ticket "little better than a slave-catcher." The state attorney's investigation revealed the sheriff had an arrangement with the company to receive $20 for every person conscripted to its camp for at least ninety days—the "sentence" Mr. Tabert received.[80]

Condemnation of the convict-leasing system was widespread after Mr. Tabert's killing.[81] News outlets and prominent organizations began calling the practice slavery, and the public boycotted goods and services originating in states that still engaged in the practice.[82] States began to phase out the use of the system, with most states formally ending the practice in the early twentieth century. By that point, the system had been in operation by some measure in many states for decades, discriminately targeting people based on race. That it took the brutal torture and killing of a white man to bring about widespread denunciation and the end of the convict leasing system simply compounds the evidence of the U.S. punishment system's racist roots and character.[83]

While the end of the convict leasing system meant private industry no longer dominated the prison system, the abolition of convict leasing did not meaningfully change the character of American punishment.[84] States took over the labor element of incarceration, instituting chain gangs and

73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 175.
82. *Id.*
83. *See, e.g.*, *id.* at 176 ("Under the convict leasing system, private companies had been torturing and slaughtering black men for decades. It took the murder of a white man for the country to pay attention.").
84. *Id.* at 196.

other public road projects and infrastructure-building projects.[85] This move was deemed by many as redemptive of the prior era of inhumane and torturous punishment conditions. Indeed, progressives of the era dubbed the roads projects as reformatory.[86] A U.S. Department of Agriculture study described carceral labor as a boon to the "physical health of the convict" and "their general character and prepared[ness] . . . for better citizenship."[87]

Yet, conditions in the new public prisons and labor camps remained dire: "One North Carolina judge found men at road camps being 'chained with iron neck collars, poorly fed, and severely whipped by drunkard guards.' One county official in North Carolina told a journalist that 'the mules at the camp were better housed and better treated in every way than the convicts.'"[88] Incarcerated men on the chain gang lived in "rolling cages that resembled those used for animals in a circus, except that convicts were crowded into them in much greater numbers. Often a wheeled cage that was only nine feet wide by twenty feet long contained eighteen bunks with thin, dirt-encrusted mattresses."[89]

Food on the chain gangs was meager, rotten, and bug-ridden.[90] Men—most of whom were Black—were whipped, hung by cuffs, put in sweatboxes, beaten with rifles, and hung from stocks or bars for not working fast enough.[91] In 1932, Arthur Maillefert, a teenage boy from New Jersey, was stripped naked and forced into a barrel with only his head and feet protruding after he complained of illness while forced to work at a road camp in Florida.[92] He was forced to remain like this for forty-eight hours, receiving only bread to eat and water to drink.[93] His legs were bitten and stung by insects.[94] After he tried to escape, the camp's "whipping boss" beat him with a rubber hose and forced him into a sweatbox with a heavy chain around his neck and stocks around his ankles. The boy died

85. *Id.* at 196-97.

86. Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South*, 59 J. S. HIST. 85, 86 (1993).

87. *Id.* at 197.

88. *Id.* at 198.

89. Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1017 (2009).

90. *Id.* at 1017; BAUER, *supra* note 36, at 199.

91. BAUER, *supra* note 36, at 199.

92. *Id.*

93. *Id.*

94. *Id.*

the following morning.[95] Nonetheless, chain gangs and work camps persisted through the 1930s.[96]

Plantation prison farms grew during this era across the south as well, as states purchased private farms and conscripted the people in their custody to work them,[97] including at Parchman Prison Farm in Mississippi, Angola Prison Farm in Louisiana, Cummins Prison Farm in Arkansas, and Ramsey Prison Farm in Texas. Photos from the middle of the twentieth century on these prison farms are indistinguishable from the images that depict the work of enslaved people in the preceding century on the same sites.[98] White sergeants kept watch over the men at Parchman—approximately 90% of whom were Black[99]—while forcing the prisoners to pick cotton and harvest other crops. Whippings and shootings were commonplace.[100]

The brutalities of American punishment persisted through the latter half of the twentieth century as the number of people in custody skyrocketed.[101] Existing prisons did not have the capacity to confine the increasing numbers of people in state custody, so states continued to build.[102] Along with prison populations (*i.e.*, the numbers of people incarcerated after a criminal conviction), the populations of people awaiting trial in local jails grew.[103] Since the 1970s, the national jail population has more than tripled.[104] Civil confinement structures also emerged as the federal government began confining people accused of violating civil immigration laws in the middle of the twentieth century[105] and, by the

95. *Id.*

96. *Id.* at 200.

97. *See, e.g.*, Maurice Chammah, *Prison Plantations*, MARSHALL PROJECT, (May 1, 2015), https://www.themarshallproject.org/2015/05/01/prison-plantations; HOWE, *supra* note 89, at 1014-15.

98. Chammah, *supra* note 97.

99. Howe, *supra* note 89, at 1015.

100. *Id.* at 1016.

101. *See generally* PATRICK A. LANGAN, JOHN. V. FUNDIS, LAWRENCE A. GREENFELD, & VICTORIA W. SCHNEIDER, U.S. DEP'T. JUST., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS YEAREND 1925-1986 (1988), https://bjs.ojp.gov/content/pub/pdf/hspsfiy25-86.pdf.

102. *Id.*

103. *See, e.g.*, Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 871-73 (2021).

104. *Id.* at 871.

105. *See, e.g.*, Danielle C. Jefferis, *Yearning to Breathe Free: Migration-Related Confinement in America*, 106 CORNELL L. REV. ONLINE 27, 32-37 (2020) (book review); *see also* Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145, 150-56 (2020).

latter half of the century, states instituted civil commitment regimes for people convicted of certain sex offenses.[106]

By 2022, a sprawling system of confinement has emerged, one in which millions of people are ensnared each year. And though the purposes and sources of authority for contemporary confinement in the United States vary, the roots of American punishment can be traced directly to the nation's response to the end of chattel slavery—a reaction to the forced end to human enslavement. Indeed, the demographics of people whom the system impacts the most still reflect the people whom the convict leasing system targeted the most, as this Part has shown.

As the nature of U.S. incarceration practices evolved, the law of incarceration did as well. This Part discussed the judiciary's early regard for incarcerated people in the discussion of *Ruffin v. Commonwealth*, in which the post-Emancipation Virginia Supreme Court deemed the incarcerated party "a slave of the State." Part II shifts from history to doctrine, to examine more fully the body of constitutional law governing incarceration in two categories— the law governing the conditions of incarceration and the law governing the purpose of incarceration—which developed in response to the various modes and perceptions of incarceration discussed above. The history recounted in this Part is critical to contextualizing the legal developments discussed below and understanding the role of legal intent in the evolution of the constitutional regulation of American confinement.

III. INTENT AND THE LAW OF INCARCERATION.

Legal intent is a central force in American law.[107] Across fields and disciplines, the law relies on an analysis of an alleged wrongdoer's state of mind when engaging in certain conduct.[108] Was the conduct purposeful?

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106. TREVOR HOPPE, ILAN H. MEYER, SCOTT DE ORIO, STEFAN VOLGER, & MEGAN ARMSTRONG, U.C.L.A. SCHOOL OF LAW, WILLIAMS INSTITUTE, CIVIL COMMITMENT OF PEOPLE CONVICTED OF SEX OFFENSES IN THE UNITED STATES 1 (Oct. 2020) [hereinafter WILLIAMS INSTITUTE REPORT].

107. I use the terms "intent" and "legal intent" to refer broadly to the various state of mind requirements that trigger civil liability, as the Supreme Court has done with respect to Eighth Amendment doctrine, for example. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 839 (1994) (referring to "intent" as a synonym of "state of mind" and "an ambiguous term that can encompass objectively defined levels of blameworthiness"). I contrast that broad use of the term with perhaps a more typical—and narrower—use of "intent" in criminal law, which refers to a purposeful or intentional *mens rea*. *See generally* Jay Sterling Silver, *Intent Reconceived*, 101 IOWA L. REV. 371, 374 (2015) (discussing the evolution of intent in criminal and civil law).

108. *See generally* Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895 (2016); Dana Kay Nelkin & Samuel C. Rickless, *The Relevance of Intention to Criminal Wrongdoing*, 10 CRIM. L. & PHIL. 745 (2016); Pamela S. Karlan, *Discriminatory Purpose and*

Did the alleged wrongdoer commit a mistake? Did they ignore an obvious risk?

Such broad intent inquiries serve to evaluate and classify an action within a legal framework.[109] In criminal law, for example, the legal intent inquiry "can turn reckless homicide into first degree murder, reckless endangerment into attempted murder, violation of a security clearance into treason, and inadvertent mistake of fact into perjury."[110] In civil law, a legal intent inquiry can turn negligence into fraud.[111] The same inquiry can shift liability for compensatory damages alone into liability for compensatory damages *and* punitive damages.[112] Legal intent can differentiate conduct that is actionable and conduct that is not actionable, and actions for which a party is legally responsible and actions for which a party is not.[113]

Carceral intent, as this Article defines it, is a label for the various legal intent standards built into the constitutional doctrine governing the state's power to incarcerate. When a party—typically an incarcerated person—challenges the fact of their incarceration or a condition of their incarceration, they must prove not only that the fact of their incarceration or the challenged condition violates the constitution, they must also prove the state actor or actors allegedly responsible for their incarceration acted with a particular state of mind. That state-of-mind element, which varies

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Mens Rea: The Tortured Argument of Invidious Intent, 93 YALE L.J. 111 (1983); Ferdinand F. Stone, *Touchstones of Tort Liability*, 2 STAN. L. REV. 263-64 (1950); Ristroph, *supra* note 17, at 1359 ("Intent standards are everywhere in the law: in criminal mens rea categories; in civil tort claims; in antidiscrimination statutes; in the tax code and many administrative regulations; in the canons of interpretation applied to statutes, contracts, and other legal texts; and, of course, in several areas of constitutional doctrine.").

109. Ristroph, *supra* note 17, at 1359.

110. Nelkin & Rickless, *supra* note 108, at 746.

111. *Compare* RESTATEMENT (SECOND) OF TORTS § 282 (AM. L. INST. 1979) ("[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."), with RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1979) ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance on it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.").

112. *See, e.g.*, JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW & PRACTICE § 5:2 (2d ed. 2021) (describing punitive damages awards in cases in which a defendant "desires to cause the harm sustained by the plaintiff").

113. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct in discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals and groups. But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." (emphasis added)). *But see infra*, Part IV.

according to the type of challenge, is the carceral-intent requirement. Just as the law classifies the killing of a person according to the killer's state of mind or the liability of a party to a tort lawsuit on the basis of the party's intent, the law classifies the constitutionality of modes and features of incarceration according to the incarcerator's intent.

This Part briefly describes the constitutional law of incarceration. It then categorizes and describes the role of intent within the constitutional doctrine of the state's power to incarcerate in two respects: carceral conditions (the *ways* the state treats those whom it incarcerates) and carceral purpose (*why* the state incarcerates).

A. *The Law of Incarceration, Generally.*

The power to incarcerate—to deprive a person of her physical liberty—is among the most extreme forms of government power. "No right is held more sacred, or is more carefully guarded, by the common law," Chief Justice Warren wrote, "than the right of every individual to the possession and control of his own person, free from restraint or interference by others, unless by clear and unquestionable authority of law."[114] Consequently, many fundamental constitutional rights govern when and under what conditions the state has the "clear and unquestionable authority of law"[115] to exercise the power to deprive a person of their liberty.

Among those fundamental constitutional rights, for example, are those protected by the Fourth Amendment, which requires a reasonable basis to "seize" a person or to restrict her freedom of movement, even for a moment.[116] The Fifth Amendment requires the federal government to make a threshold showing of evidence to justify certain criminal charges to a grand jury,[117] prohibits the government from charging people for the same crime on the same allegations twice,[118] prohibits the government from compelling a person to answer questions that might lead to self-incrimination in criminal proceedings,[119] and requires the government to provide a person adequate notice and the opportunity to be heard before depriving that per-

114. *See* Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

115. *Id.*

116. *See id.*; *see also* U.S. CONST. amend. IV.

117. *See* U.S. CONST. amend. V; *see also* Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 227-34 (1997).

118. U.S. CONST. amend. V; *see* Garcia, *supra* note 117, at 234-38.

119. U.S. CONST. amend. V; *see* Garcia, *supra* note 117, at 218-27, for an in-depth analysis of the historical development of the various privileges enshrined in the Fifth Amendment; *see also* Tracey Maclin, *The Prophylactic Fifth Amendment*, 97 B.U. L. REV. 1047, 1049 (2017).

son of her liberty[120]—all stages in the criminal legal process that may result in incarceration. The Sixth Amendment mandates that the government present a "speedy and public" case,[121] requires the government to permit an impartial jury to consider the evidence and render a verdict,[122] and requires the government to provide the accused with the assistance of counsel[123] and the opportunity to confront witnesses against her[124]—all protections in place before a person may be incarcerated. And *after* the government deprives a person of her physical liberty, the Eighth Amendment imposes an ongoing duty on the state to ensure the conditions in which the person is confined do not amount to "cruel and unusual punishment."[125]

Indeed, the constitutional law of incarceration is robust and, at least in theory, one of the most constitutionally regulated areas of government power. But enforcing those limits on the government power to incarcerate often implicates carceral-intent requirements. To bring an actionable challenge to a practice or condition of incarceration will likely require the challenging party to plausibly plead, and ultimately prove, the requisite state of mind of the government actor alleged to be responsible for the challenged practice or condition. This Article places those intent requirements into two broad categories—intent in challenges to carceral conditions and intent in challenges to carceral purpose, as explained in the next two sections.

B. *Carceral Conditions—How Does the State Treat the Incarcerated?*

The U.S. Constitution regulates carceral conditions, placing restrictions on how the state treats those whom it incarcerates. Specifically, the Eighth Amendment prohibits the government from inflicting punishment that is "cruel and unusual.[126] Judicial interpretation of this "cruel

120. *See* U.S. CONST. amend. V.

121. U.S. CONST. amend. VI.

122. *Id.*

123. *See id.*; *see also Gideon v. Wainwright*, 372 U.S. 335 (1963).

124. U.S. CONST. amend. VI.

125. U.S. CONST. amend. VIII; *see also* Whitley v. Albers, 475 U.S. 312, 318 (1986) ("The language of the Eighth Amendment, 'excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,' manifests 'an intention to limit the power of those entrusted with the criminal-law function of government'" (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)).

126. U.S. CONST. amend. VIII; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (recognizing the Eighth Amendment's prohibition on cruel and unusual punishment is incorporated within the Due Process protections of the Fourteenth Amendment and, therefore, applicable to the states).

and unusual punishment" clause has led to a complex and, in many ways, opaque doctrine that is relatively young by American law standards.[127]

Early applications of the clause focused on the *mode* of punishment rather than the conditions in which punishment was inflicted.[128] Was a sentence of hard labor, for example, appropriate for the convicted offense or, rather, was that mode of punishment cruel and unusual?[129] This focus on mode of punishment in lieu of the conditions in which the punishment was carried out was not because the application of the cruel and unusual punishment clause to carceral conditions was in doubt, but rather because of several barriers to challenging carceral conditions in the first place.[130] It was not until the U.S. Supreme Court began to topple those barriers in the mid-twentieth century that the conditions doctrine began to develop.[131]

The first U.S. Supreme Court opinion to articulate a liability standard in cruel-and-unusual punishment challenges to prison conditions was the 1976 decision in *Estelle v. Gamble*.[132] In the case, J.W. Gamble injured his back while incarcerated in a Texas state prison.[133] He sought medical attention for the injury from the prison clinic, where he was

127. Schlanger, *supra* note 1, at 365; Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 157-60 (2020).

128. *See, e.g.*, Schlanger, *supra* note 1, at 365 ("The delay was not because the Supreme Court struggled to conclude that the Eighth Amendment covered prison conditions; the few relevant cases made clear the Court's understanding that the Constitution forbids inhumane penal conditions. In fact, this was the taken-for-granted part of Eighth Amendment jurisprudence, as other more contested issues were litigated.").

129. *See Weems v. United States*, 217 U.S. 349, 377 (1910).

130. Schlanger, *supra* note 1, at 368-69.

131. Estelle v. Gamble, 429 U.S. 97 (1976); *see also* Schlanger, *supra* note 1, at 370 ("The first case in which the Court articulated a liability standard was *Estelle v. Gamble*, a prisoner's lawsuit seeking damages for allegedly poor medical care in a Texas prison."); *id.* at 368 ("If the Eighth Amendment encompasses prison conditions, why were prisoners' conditions-of-confinement lawsuits so scarce? Numerous barriers existed until toppled, one by one, by the Supreme Court. First, in 1941, the Court barred official censorship practices that prevented prisoners' petitions from even arriving at the federal courthouses. Then the Supreme Court in 1961 revived 42 U.S.C. § 1983 and thereby gave prisoner plaintiffs a jurisdictional path into federal court. In 1962, the Court deemed the Cruel and Unusual Punishments Clause applicable against states and localities. And in 1964, it held that there was no categorical bar to prisoner constitutional lawsuits. The federal disinclination to meddle in prison operations—labeled, after the fact, the 'hands-off doctrine'—was dead."). *But see* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (analyzing whether the Eighth Amendment prohibits a second electrocution after a failed attempt by reason of malfunction and holding the Eighth Amendment prohibits only "the wanton infliction of pain").

132. 429 U.S. 97 (1976); *see also* Schlanger, *supra* note 1, at 369.

133. Estelle, 429 U.S. at 98.

evaluated for a hernia and sent back to his cell.[134] His pain intensified over the weeks that followed, and eventually, Mr. Gamble suffered what was likely a heart attack.[135]

In a civil complaint, Mr. Gamble alleged the prison staff failed to provide adequate medical care for his back injury, and that failure in care led to his heart attack.[136] The prison staff's failure to provide appropriate care, he asserted, constituted cruel and unusual conditions of confinement in violation of the Eighth Amendment.[137]

The Court agreed with Mr. Gamble.[138] Justice Marshall writing for the majority explained, "[T]he [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,' against which we must evaluate penal measures."[139] The Court offered two broad standards by which such prison conditions were to be evaluated: "[W]e have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' or which 'involve the unnecessary and wanton infliction of pain.'"[140] Accordingly, to succeed on his Eighth Amendment claim for cruel and unusual carceral conditions, Mr. Gamble had to prove either that the conditions in which he was confined were inconsistent with "evolving standards of decency" *or* the conditions involved the "unnecessary and wanton infliction of pain."

Extrapolating from those principles, then, the Court held the government's failure to provide medical care for the people whom it incarcerates risks "produc[ing] 'torture or a lingering death,'" carceral conditions that amount to "the evils of most immediate concern to the drafters of the [Eighth] Amendment."[141] Where torture or lingering death does not result, "[i]n less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency . . .", thus violating the Eighth Amendment's first broad standard (leaving untouched second broad standard, the "wanton and unnecessary infliction of pain").[142] With this discussion, the Court seemed

134. *Id.* at 99.

135. *Id.* at 99-101.

136. *Id.*

137. *Id.* at 101-02.

138. *Id.* at 103.

139. *Id.* at 102-03 (citations omitted, alterations and quotations in original).

140. *Id.* at 104.

141. *Id.* at 103.

142. *Id.* at 103 (internal citation omitted). There is, however, ambiguity in the Court's decision later in the opinion concerning under which broad standard a denial of adequate medical care falls. On the one hand, the Court defines a denial of adequate medical care as practice "inconsistent with contemporary standards of decency," and on the other hand, the

to be orienting the analysis to the challenged condition, from the perspective of the incarcerated person.[143] If an incarcerated person could prove that they required certain medical care that they did not receive from the prison officials, and that lack of care resulted in torture, lingering death, or pain and suffering with no penological purpose, it appeared those conditions would amount to a violation of the Eighth Amendment.

But the Court concluded that discussion by pivoting to a standard focused on the state of mind of the individual or entity responsible for the challenged condition: "We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by *prison doctors* in their response to the prisoner's needs or by *prison guards* in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed."[144] The Court goes on to explain "an inadvertent failure to provide adequate medical care" does not violate the Eighth Amendment.[145]

The phrase "deliberate indifference" had found its way into the Eighth Amendment lexicon just six years earlier in *Martinez v. Mancusi*, a Second Circuit case in which the panel found that prison authorities' removal of a man from the hospital before he was ready to be moved and in contradiction to a surgeon's orders "was more than mere negligence," and, if proven, "would constitute a deliberate indifference to, and defiance of, the express instructions of the operating surgeons and hospital attendants."[146]

Neither the *Estelle* Court nor the *Martinez* panel defined the "deliberate indifference" standard, though the notion of a requisite intent—a state-of-mind requirement—on the part of the prison official or institution responsible for a challenged condition was suggested in the Second Circuit's characterization of the prison surgeon's orders as "more than

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Court explains that not every claim of inadequate medical care will violate the Eighth Amendment: "An accident, although it may produce anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain." *Id*. at 105 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

143. *Cf.* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV 1049 (1978) (contrasting the "victim" or "condition" conception of racial discrimination with the "perpetrator" perspective).

144. *Id*. at 104 (emphasis added).

145. *Id*. at 105-06 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").

146. Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 2010).

mere negligence"[147] and the *Estelle* Court's emphasis that "an inadvertent failure" to provide adequate medical care does not amount to a constitutional violation.[148] But going forward, what sort of medical care denial would be deemed the product of deliberate indifference rather than mere negligence? More generally, what sort of intent must a prison official allegedly responsible for a challenged condition demonstrate to be found liable for an Eighth Amendment violation?

The Court began answering such question—and developing a carceral-intent standard—in a series of cases beginning a decade later with *Whitley v. Albers* in 1986.[149] Between the *Estelle* and *Albers* decisions, Professor Margo Schlanger has observed, the Court's ideological make-up had shifted to the right with the resignations of Justice Stewart and Chief Justice Burger and the appointments of Justices O'Connor and Scalia.[150] The *Albers* plaintiff, Gerald Albers, was confined at the Oregon State Penitentiary in 1980 when an altercation broke out between prisoners and prison staff.[151] Many of the onlookers to the altercation, including Mr. Albers, believed several staff were using excessive force against the prisoners.[152] Two officers ordered the onlookers to return to their cells.[153] A few men ignored the officers' order, and a fight broke out between the prisoners and the officers, resulting in several prisoners taking one of the officers hostage.[154]

After some negotiating, several officers charged the hostage-takers and began shooting at the prisoners.[155] Mr. Albers, an onlooker who was not involved in the hostage-taking, sustained a gunshot to his left leg, which caused severe damage to his leg and mental and emotional distress.[156] He sued the officer who ordered the shots, Harol Whitley, for (among other claims) a violation of his Eighth Amendment right to be free from cruel and unusual punishment.[157]

In a 5-4 opinion written by Justice O'Connor, the Court recalled the language from *Estelle* that an Eighth-Amendment claimant must, under one of the broad standards, "allege and prove the unnecessary and wanton

147. *Id.* at 924; Schlanger, *supra* note 1, at 371 ("Justice Marshall did not elaborate further on the meaning of 'deliberate indifference,' a phrase that had entered Eighth Amendment jurisprudence only a few years earlier, in [*Martinez*].").

148. *Estelle*, 429 U.S. at 105-06.

149. Whitley v. Albers, 475 U.S. 312, 319-20 (1986).

150. Schlanger, *supra* note 1, at 377-78.

151. *Whitley*, 475 U.S. at 314-15.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 315-16.

156. *Id.* at 316-17.

157. *Id.* at 317.

infliction of pain."[158] That standard takes varying forms depending on the "kind of conduct against which an Eighth Amendment objection is lodged."[159] For an objection to a use-of-force like Mr. Albers's, the Court held that "whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether the force *was applied* in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"[160] Focusing, again, on the alleged bad actor's motivations rather than the nature of the challenged force from the alleged victim's perspective, the good-faith intent requirement turns on a subjective analysis of the officer's "need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted."[161] Accordingly, a prisoner-plaintiff "complaining of excessive force in a riot situation [must] demonstrate official-defendants' *intent to harm* in order to make out a constitutional case."[162]

The Court's next opportunity to refine the carceral-intent standard with respect to prison conditions came with *Wilson v. Seiter*.[163] Mr. Wilson challenged his conditions of confinement in an Ohio prison, alleging they constituted cruel and unusual punishment in violation of the Eighth Amendment.[164] The question presented to the Court was "whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials, and, if so, what state of mind is required."[165] In another 5-4 decision, Justice Scalia writing for the majority asserted each of the Court's previous cruel-and-unusual-punishment cases had required a measure of carceral intent—a culpable state of mind on the part of the prison official defendants.[166] The Court explained, "The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment*.[167]

158. *Id*. at 320.

159. *Id*.

160. *Id*. at 320-21 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (emphasis added)).

161. *Id*. at 321.

162. Schlanger, *supra* note 1, at 378 (emphasis added).

163. Wilson v. Seiter, 501 U.S. 294 (1991).

164. *Id*. at 296.

165. *Id*.

166. *Id*. at 298-99 ("These cases *mandate* inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." (emphasis added)).

167. *Id*. at 300 (emphasis in original).

Relying on an opinion authored by Judge Posner of the U.S. Court of Appeals for the Seventh Circuit, the Court then observed "[t]he infliction of punishment is a *deliberate act* intended to chastise or deter."[168] Accordingly, consistent with prior cases and the perceived original meaning of the Eighth Amendment, the Court made express the carceral-intent requirement at which the *Estelle* majority had hinted: All Eighth Amendment challenges to prison conditions require *some* showing of carceral intent—some evidence the alleged wrongdoer acted with a particular state of mind—and that intent standard is, at minimum, *Estelle*'s deliberate indifference standard.[169] But what, precisely, is deliberate indifference?

At last, the Court answered the question with its decision in *Farmer v. Brennan*.[170] The Federal Bureau of Prisons (BOP) transferred Ms. Farmer, a transgender woman, to the United States Penitentiary (USP) in Terre Haute, Indiana, a high-security men's prison.[171] At USP-Terre Haute, the BOP assigned Ms. Farmer to the prison's general population.[172] Within two weeks of her placement in general population, Ms. Farmer was beaten and raped by another prisoner.[173] She sued the prison's warden, the director of the BOP, and several other high-level officials alleging the carceral conditions in which the defendants incarcerated her constituted violations of her Eighth Amendment right to be free from cruel and unusual punishment.[174] Ms. Farmer asserted, specifically, the defendants placed her in the general population at USP-Terre Haute "despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that petitioner . . . would be particularly vulnerable to sexual attack" by other prisoners.[175]

Justice Souter, writing for the majority, framed the Court's analysis with an overview of the Eighth Amendment's protection, focusing on carceral conditions: "The Constitution does not mandate comfortable prisons, but neither does it permit inhuman ones."[176] But, the Court then again pivoted away from a focus on conditions to a focus on the individual or entity allegedly responsible for challenged conditions, identifying an affirmative duty on the part of prison officials to ensure people who are incarcer-

168. *Id.* (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (emphasis added)).

169. *Id.* at 303-04.

170. Farmer v. Brennan, 511 U.S. 825, 835, 837 (1994) (recognizing the Court had "never paused to explain the meaning of the term 'deliberate indifference'").

171. *Id.* at 830.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 830-31 (internal quotations omitted).

176. *Id.* at 832 (internal quotations and citations omitted).

ated are reasonably safe and receive "adequate food, clothing, shelter, and medical care."[177]

What, then, is the link between a challenged condition and the extent to which a prison official executed the requisite duty? Carceral intent. "To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.'"[178] In challenges to carceral conditions, "that state of mind is one of 'deliberate indifference'" to a prisoner's health or safety."[179] Relying on *Estelle* and *Whitley*, the Court explained deliberate indifference requires "'more than ordinary lack of due care for the prisoner's interests or safety'"[180] but is something less than purposeful or knowing conduct.[181] Deliberate indifference equates to "recklessness."[182]

Although Eighth Amendment challenges to carceral conditions almost always arise in civil cases, the Court borrowed scienter requirements from criminal law to define "recklessness":

> The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.[183]

The Court justified this turn to criminal law in the civil law context by reasoning that the Eighth Amendment "does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"[184] Thus, a prison official is liable for violating the Eighth Amendment only where the person knows of the harmful conditions and knowingly ignores them—a test that rises and falls on carceral intent.

Eighth Amendment liability for carceral conditions now turns, in significant part, on the intent of the alleged wrongdoer, whether that party be an individual prison official or the prison or governmental entity itself.[185] Scholars have levied myriad critiques against the deliberate-indifference

177. *Id.*

178. *Id.* at 834 (quoting Wilson v. Seiter, 501 U.S. 294, 297 (1991)).

179. *Id.* (citations omitted).

180. *Id.* at 835 (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).

181. *Id.* at 836.

182. *Id.*

183. *Id.* at 836-37.

184. *Id.* at 837.

185. *See, e.g.*, *Thorpe v. Clarke*, 37 F.4th 926, 932 (4th Cir. 2022); *Porter v. Pa. Dep't of Corrs.*, 974 F.3d 431, 441 (3d Cir. 2020).

standard[186] but it remains a core component of the constitutional doctrine of incarceration.[187]

C. *Carceral Purpose—Why Does the State Incarcerate?*

The preceding discussion focused on the constitutional regulation of carceral conditions—how the state treats those whom it incarcerates. But it assumes the state is doing so in response to a valid conviction for criminal conduct. While such a responsive purpose is the leading reason for incarceration in the United States, governmental entities incarcerate people for an array of other purposes as well. Many thousands of people are incarcerated for other putatively non-punitive purposes, including for so-called administrative purposes, like ensuring people do not abscond from a particular jurisdiction during the pendency of proceedings and like pre-trial detention, immigration confinement, and confinement for public safety reasons.[188]

The doctrinal distinction between incarceration the state intends to serve as punishment and incarceration the state intends to serve some non-punitive carceral purpose arose in *Bell v. Wolfish*, a class action involving a challenge to the conditions of confinement in a federal facility in New York City known as the Metropolitan Correctional Center (MCC).[189] While the MCC predominately confined people awaiting trial, the facility also incarcerated people who had already been convicted. Both groups of MCC prisoners generally lived in and experienced the same conditions of confinement. Accordingly, in their constitutional challenge to the conditions of confinement at the MCC, the *Bell* class purported to represent "all persons confined at the MCC, pre-trial detainees and sentenced prisoners alike."[190]

The district court enjoined several practices and conditions at the MCC as violations of the Fifth Amendment's guarantee of due process, one of the many procedural protections in place to regulate the state's power to incarcerate.[191] Drawing a distinction between prisoners who had not been convicted of a crime (pre-trial detainees) and prisoners who had been convicted of a crime, the district court imposed a heightened standard on the jail officials, in contrast to the deliberate-indifference

186. *See, e.g.*, Godfrey, *supra* note 127; Schlanger, *supra* note 1; Dolovich, *supra* note 14; Ristroph, *supra* note 17.

187. *See, e.g.*, *supra* note 185.

188. *Id.*

189. *See* Bell v. Wolfish, 441 U.S. 520, 535-40 (1979).

190. *Id.* at 526.

191. *See generally* United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114 (S.D.N.Y. 1977).

standard, to justify a particular prison practice with respect to pre-trial detainees who are "not subject to the substantial powers of prison officials that attend their function of administering punishment."[192] Because pre-trial detainees were not subject to such extraordinary state power (*i.e.*, punishment), any deprivation or restriction on their rights while in a carceral setting, according to the district court, "must be justified by a compelling necessity."[193] The Second Circuit largely agreed.[194]

The Supreme Court squarely rejected the view that the government must make a higher showing to justify carceral conditions imposed on people who had not been convicted of a crime. While the Court recognized that people who are incarcerated pre-trial retain the same rights as people who have not been charged with a crime, Justice Rehnquist for the majority nonetheless departed from the lower courts' compelling-interest standard.[195] The Court wrote it could identify no constitutional source for the heightened standard the lower courts endorsed.[196] Despite acknowledging the myriad constitutional protections intended to protect the liberty of those who had only been charged with a crime, not convicted of one, the Court accepted without analysis[197] that the initial decision to detain a person accused of a crime is an appropriate exercise of government power to ensure the person's presence at trial.[198] But conditions of such pre-trial confinement are unlawful *only* where those conditions amount to punishment, "[f]or under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[199]

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192. *Id.* at 124.

193. *Id.* (quoting Detainees of Brooklyn House of Det. v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975); Rhem v. Malcolm, 507 F.2d 333, 336-37 (2d Cir. 1974).

194. Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978) ("Fundamental to the Anglo-American jurisprudence of criminal law is the premise that an individual is to be treated as innocent until proven guilty by a jury of his or her peers. . . . Accordingly, it is not enough that the conditions of incarceration for individuals awaiting trial merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause of the eighth amendment. Time and again, we have stated without equivocation the indisputable rudiments of due process: pretrial detainees may be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'" (quoting Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974); Rhem v. Malcolm, 527 F.2d 1041 (2d Cir. 1975); Detainees of Brooklyn House of Det. for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975)).

195. Bell v. Wolfish, 441 U.S. 520, 531-32 (1979).

196. *Id.* at 531-535.

197. Critically, the class members did not challenge the state's threshold authority to detain a person charged with a crime for the purpose of ensuring their presence at trial, leaving the Court to accept that foundational premise as true. *Id.* at 533-34.

198. *Id.* at 533-34.

199. *Id.* at 535.

What sorts of carceral conditions amount to "punishment" for pre-trial detainees? To start, none of the conditions inherent to incarceration itself constitute punishment, according to the Court:

> Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial.[200]

Looking to the carceral conditions themselves, from the perspective of the incarcerated person, the loss of freedom of choice and privacy inherent to confinement did not trouble the Court with respect to pre-trial detainees. Nor did interferences "with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement."[201]

The Court then turned to carceral intent. Beyond those acceptable conditions inherent to incarceration, a restriction or condition of confinement for pre-trial detainees amounts to constitutionally impermissible "punishment"[202] only where one of two standards is met: one, where there is no legitimate government purpose for the restriction or condition or the restriction or condition is excessive to some legitimate government purpose, or, two, where there is "an *expressed intent to punish* on the part of detention facility officials."[203] As to the first standard, the government's justification for a particular feature of incarceration does not need to be tied to the underlying justification of ensuring the accused's presence at

200. *Id.* at 537; *see also id.* at 540 ("'If the government could confine or otherwise infringe the liberty of detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention.'" (quoting Campbell v. McGruder, 580 F.2d 521, 529 (D.C. Cir. 1978)).

201. *Id.* at 537.

202. *Id.* at 536-37 ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law . . . Under such circumstances, the Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." (citations omitted)).

203. *Id.* at 538 (emphasis added), 561-62.

trial.[204] Indeed, "[t]he Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained," which may provide a rational basis for restrictions or conditions of confinement that are divorced entirely from the underlying interest in presence at trial.[205]

Given the historical and growing deference the judiciary affords to prison and jail administrators,[206] this legitimate-purpose test all but collapses into the punitive-intent standard.[207] A court will rarely conclude that a restriction or condition of incarceration is *not* tied to a legitimate state interest, given the breadth of state interests the Court identified. Instead, a court will inquire into the intent of the legislature and/or the prison or jail administrators: Did the officials expressly *intend* for this condition or restriction to be punitive? Justice Marshall, in dissent, wrote, "The Court holds that the Government may burden pre-trial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are 'arbitrary or purposeless.'"[208] This low, legitimate-interest threshold for justifying a particular restriction or condition of confinement leaves the second standard—the punitive-intent standard—as the operative constitutional regulation in the pre-trial detention space.[209]

The role of carceral intent in regulating carceral function is significant. *Bell* examined the function of pre-trial detention but its holding and the role of intent in carceral function has extended well beyond pre-trial confinement.[210] As stated above, the majority of people incarcerated in the United States are confined for obviously punitive reasons.[211] Each of those people has been convicted of a crime and sentenced to a period of time in a custodial setting as a consequence of the adjudication of the criminal law charges against them. Their convictions fall squarely within the criminal law paradigm, and there is little dispute that the state's carceral intent for these people is to punish.

But the United States also confines many tens of thousands for purportedly non-punitive "administrative" or "regulatory" reasons.[212] Admin-

204. *Id*. at 539-40.

205. *Id*. at 540.

206. *See* Danielle C. Jefferis, *Carceral Deference* (draft manuscript on file with author).

207. *See generally infra* Part III.

208. *Bell*, 441 U.S. at 564.

209. *But see infra*, Part IV (discussing Kingsley v. Hendrickson, 576 U.S. 389 (2015), and the possible extension of an objective standard into the law governing non-punitive carceral conditions).

210. *See supra* note 197 and accompanying text.

211. Sawyer & Wagner, *supra* note 3.

212. This Article focuses on administrative detention regimes that confine people in carceral spaces. There are many other forms of state coercion and control that fall under the

istrative detention regimes confine people who have been charged with a crime and are awaiting their trial, people awaiting the adjudication or enforcement (*i.e.*, deportation) of their immigration cases, and people who have been convicted of certain sex offenses beyond the term of their sentence of punitive incarceration.[213] In each of these categories, the people subject to administrative carceralism are likely confined in carceral spaces.[214] The purpose of their incarceration, however, is distinctly non-punitive. And because the carceral intent is not to punish, those robust constitutional protections that accompany punitive confinement do not attach.

Most people in non-punitive detention are held in pre-trial confinement, as some of the *Bell* class members were. In 2018, jail population nationwide was approximately 738,400.[215] In 2020, the number of people in jails awaiting trial was roughly 470,000.[216] Conditions in American jails are decidedly harsh and impact communities of color in profoundly unjust ways, as explained further below.[217] However, those conditions of incarceration are constitutionally actionable only where challengers can show an express carceral intent to punish.

The federal government also confines many tens of thousands of people in so-called "civil" immigration detention, the operation of which is a sweeping, multi-agency affair.[218] As I wrote in another Article, multiple components of executive-branch agencies are responsible for executing federal civil immigration laws and are statutorily authorized—and in some cases required—to confine people whose lives in some way touch those laws.[219] Of those components, the Department of Homeland Security's U.S. Immigration and Customs Enforcement (ICE) is the one responsible for the largest number of people in immigration confinement.[220]

A precise immigration-detention population is difficult to obtain, as the number fluctuates dramatically. In 2017, estimates of the average dai-

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administrative enforcement category but are, nonetheless, experienced as punitive, including sex offender registry statutes and electronic monitoring. By excluding those systems here, this Article does not intend to communicate that those systems are not also punitive. *See, e.g.*, *Id.*

213. *Id.*

214. *Id.*

215. BUREAU OF JUST. STAT., NCJ 253044, JAIL INMATES IN 2018 (March 2020), https://www.bjs.gov/content/pub/pdf/ji18_sum.pdf. Reliable jail population data does not distinguish between people confined pre-conviction and people serving misdemeanor jail sentences.

216. Sawyer & Wagner, *supra* note 3.

217. *See generally infra* Part IV.

218. Jefferis, *Constitutionally Unaccountable*, *supra* note 105, at 157.

219. *Id.*

220. *Id.* at 157-58.

ly population of people confined for civil, immigration-related reasons ranged from 38,000 to 40,500.[221] By the end of 2018, the daily detention population exceeded 48,000.[222] In early 2019, ICE alone confined an average of nearly 50,000 every day, and by the middle of 2019, the figure exceeded 52,000—an apparent all-time high.[223] By 2021, the average daily population has dropped significantly, likely due to both the change in presidential administrations and efforts to mitigate the proliferation of COVID-19 infections in immigration detention facilities.[224] In February 2021, ICE reported 13,529 in detention.[225]

As with local jails, the federal government confines many immigration detainees in distinctly punitive settings.[226] And while people in immigration detention are accused of violating civil, not criminal, laws, the role of carceral intent in regulating this carceral function remains the same. Courts have extended *Bell*'s holding to immigration detention, holding that conditions and restrictions in putatively civil immigration detention are constitutionally actionable only where they are animated by an express intent of the legislature or the incarcerators to punish or the condition or restriction is arbitrary or purposeless (lacking a legitimate government interest) or excessive to achieving a stated purpose.[227] Similar to pre-trial detention, the Supreme Court has recognized an array of governmental interests in confining people pursuant to civil immigration law authority,[228] meaning the legitimate-interest test, again, collapses into the carceral-intent standard.

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221. *Id.* at 149.

222. *Id.*

223. *Id.*

224. *See, e.g.*, *Immigration Detention Numbers Fall Under Biden, But Border Book-Ins Rise*, TRAC IMMIGRATION, https://trac.syr.edu/immigration/reports/640/ (Mar. 15, 2021).

225. *Id.*

226. *See generally* Danielle C. Jefferis & René Lima-Marín, *It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955 (2019).

227. *See, e.g.,* Jones v. Wolf, 467 F. Supp. 3d 74, 82-83 (W.D.N.Y. 2020) ("To evaluate the merits of either a conditions-of-confinement or denial-of-medical care claim [arising in immigration detention], courts consider whether the complained-of conditions or deprivations 'amount to punishment.' . . . A complained-of condition or deprivation amounts to punishment if: (a) 'the disability is imposed for the purpose of punishment'—that is, there is 'an expressed intent to punish on the part of the detention facility officials'; (b) no 'alternative purpose to which the condition or deprivation may rationally be connected is assignable for it; or (c) the condition or deprivation is 'excessive in relation to the alternative purpose assigned to it.'" (quoting Bell v. Wolfish, 441 U.S. 520, 538 (1979)).

228. *See, e.g.*, Nielsen v. Preap, 139 S. Ct. 333 (2019); Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Zadvydas v. Davis, 533 U.S. 678 (2001) (recognizing governmental interest in detaining non-citizens to ensure their presence at immigration proceeding and to protect public safety).

Finally, across the United States, states confine many thousands more people in carceral settings who have completed criminal-law sentences imposed for convictions of certain sex offenses but whom the state nonetheless deems to be an ongoing threat to public safety. Recent estimates put the total population of people incarcerated pursuant to putatively civil "Sexually Violent Predator" or "Sexually Violent Person" laws at more than 6,300.[229] Most of those thousands of people are confined in facilities closely resembling the prisons or jails in which they were confined while awaiting the completion of their criminal sentence, now on an indefinite clock of confinement with no punishment to complete or sentence to serve.[230] Nonetheless, the Court has similarly extended *Bell*'s carceral-intent requirement to the civil commitment of people convicted of certain sex offenses.[231] In *Kansas v. Hendricks*, the Court considered the constitutionality of Kansas's Sexually Violent Predator Act (SVPA).[232] The SVPA provided for "the civil commitment of persons who, due to 'mental abnormality' or a 'personality disorder,' are likely to engage in 'predatory acts of sexual violence.'"[233] Kansas invoked the statute to keep Leroy Hendricks in prison after the completion of his judicially imposed sentence.[234] Justice Thomas, writing for the majority, upheld the SVPA, concluding in part that the carceral intent underlying the SVPA was not to punish but to "protect the public from harm."[235] Incidentally, the Court hinged its carceral-intent analysis on the *absence* of an intent requirement of the person being committed: "The absence of such [a scienter] requirement here is evidence that confinement under the statute is *not intended to be retributive*."[236]

As the preceding section has shown, despite the many constitutional protections in place to regulate the state's extraordinary power to confine, hundreds of thousands of people are incarcerated in the United States without the benefit of those protections. The reason for their lack of legal protections rests on carceral intent concerning the purpose of their incarceration: If the state does not intend to punish a person through their confinement, the Supreme Court has held, then the protections attendant to the law of punishment and the law of incarceration

229. Trevor Hoppe, Ilan H. Meyer, Scott De Orio, Stefan Volger, & Megan Armstrong, *Civil Commitment of People Convicted of Sex Offenses in the United States*, U.C.L.A. SCHOOL OF LAW, WILLIAMS INSTITUTE (Oct. 2020).

230. *Cf.* WILLIAMS INSTITUTE REPORT, *supra* note 106, at 4.

231. Kansas v. Hendricks, 521 U.S. 346 (1997).

232. *Id.* at 350.

233. *Id.* (quoting Kan. Stat. Ann. § 59-29a01 (1994)).

234. *Id.*

235. *Id.* at 361-62.

236. *Id.* at 362.

do not attach.[237] The robust procedural protections of the Fourth, Fifth, and Sixth Amendments are absent, for example, as is the ongoing duty to ensure carceral conditions do not run afoul of the Eighth Amendment's constitutional floor.[238] Coupled with the deliberate-indifference requirement of the carceral-conditions doctrine, many characteristics and happenings of American carceralism remain unreachable and unregulated by the constitutional protections purportedly in place to do just that.

IV. THE ROLE OF INTENT IN ENTRENCHING INJUSTICE.

The law's fixation on carceral intent legitimizes and entrenches the profoundly unjust and racist legacies of the U.S. incarceration system. Establishing punitive intent as a requisite to challenging putatively non-punitive forms of confinement, as the Court did with *Bell v. Wolfish*,[239] exempts many forms of incarceration from the constitutional regulation of punishment. And "[t]he Court's interpretation of the Eighth Amendment's ban on cruel and unusual punishment, in particular, has radically undermined prison official's responsibility for tragedies behind bars—allowing, even encouraging, them to avoid constitutional accountability."[240]

Accounts of the troubling conditions inside America's prisons and the government's inhumane, at times cruel, treatment of people who are incarcerated, often never escape institutions' walls.[241] Prisons are largely opaque and have few incentives for transparency.[242] Much of what the public knows of the conditions inside America's carceral spaces comes from the first-hand accounts of people seeking relief from harmful, at times nightmarish, conditions through the judicial system.[243] Seminal lawsuits like

237. Ristroph, *supra* note 17, at 1370 ("The Eighth Amendment prohibition of cruel and unusual punishments is the most visible constitutional regulation of punishment, but it is not the only one. Various procedural protections, including the prohibitions on ex post facto laws and bills of attainder in Article I, as well as the Double Jeopardy Clause of the Fifth Amendment, effectively restrict the manner in which the state exercises its power to punish. For these constitutional restrictions to apply, the state action in question must be properly characterized as 'punishment,' or in some cases, even more narrowly as 'criminal punishment.'").

238. *Id.* ("Whether the state action constitutes criminal punishment [such that the constitutional regulation of incarceration attaches] is an inquiry that begins with the state's intentions: when the state imposed the burden or liability at issue, did it intend to punish?").

239. *See supra*, Section II.A.

240. Schlanger, *supra* note 1, at 360.

241. Danielle C. Jefferis, *Delegating Care, Evading Review: The Federal Tort Claims Act and Access to Medical Care in Federal Private Prisons*, 80 LA. L. REV. 37, 38 (2019).

242. *Id.* at 38-39.

243. *Id.*

Farmer v. Brennan,[244] *Brown v. Plata*,[245] *Estelle v. Gamble*,[246] and others have helped record the history of America's treatment of incarcerated people and have shaped, in varying degrees, the way incarcerated and formerly incarcerated people, prisoners' rights advocates, and prison systems view and approach confinement.[247]

Yet, for every even marginally successful case challenging some feature of U.S. confinement, there are thousands more that are unsuccessful.[248] And the system's profound injustice persists. Black men in the United States are incarcerated at disproportionate rates compared to their white male counterparts, as are Indigenous and Latinx men.[249] Incarcerated people face persistent and deadly violence and often debilitatingly dangerous conditions, the oversight and regulation of which is often left exclusively to the prison staff, those responsible for the conditions themselves.

This Part first situates the development of the above-described carceral-intent doctrine in its political and social context to show that the doctrine was borne of an era in which predominately white society expected—and demanded—harsh punishment of communities of color, an extension of the punishment system's origins in chattel slavery. This Part then analyzes the principle of "white innocence" and the parallel evolution of the role of intent in anti-discrimination doctrine to illuminate the ways in which the carceral-intent standard entrenches injustice and the subordinating historical legacies on which it was built.

A. *Carceral Intent in Context*

The 1976 decision in *Estelle v. Gamble*[250] and the 1979 decision in *Bell v. Wolfish*,[251] the two cases that laid the foundation for the carceral-intent requirement as described in Part II, came after two decades of increased judicial involvement in punishment oversight and regulation.[252] For most of the history of the United States, the judiciary stayed out of

244. 511 U.S. 825 (1994).

245. 563 U.S. 493 (2011).

246. 429 U.S. 97 (1976).

247. Jefferis, *supra* note 241, at 39.

248. *See, e.g.*, U.S. District Courts, *Civil Federal Judicial Caseload Statistics* (Mar. 31, 2020), U.S. CTS., https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2020/03/31.

249. Sawyer & Wagner, *supra* note 3.

250. 429 U.S. 97 (1976).

251. 411 U.S. 520 (1979).

252. *See, e.g.*, Schlanger, *supra* note 1, at 365-69. *But see* Jefferis, *Carceral Deference*, supra note 206.

prisons and prison oversight, taking a "hands-off" approach to the constitutional regulation of punishment and incarceration, a view that "'courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations.'"[253] Courts espoused various justifications for the hands-off approach, despite being presented with chilling and torturous accounts of conditions inside prisons and jails.[254]

Beginning in the late 1950s and continuing into the 1960s, the federal judiciary could no longer resist taking notice of the nature of American punishment. This period saw the rise of the Civil Rights Movement, as well as several well-publicized prison riots and increased public concerns for prisoner welfare.[255] Courts began first to draw boundaries around permissible *means* of punishment[256] and then around conditions of

253. Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506 (1963) (quoting *Banning v. Looney*, 213 F.2d 771 (10th Cir. 1954)).

254. *See, e.g.*, Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955) ("The control of federal penitentiaries is entrusted to the Attorney General of the United States and the Bureau of Prisons who, no doubt, exercise a wise and humane discretion in safeguarding the rights and privileges of prisoners so far as consistent with effective prison discipline. Unless perhaps in extreme cases, the courts should not interfere with the conduct of a prison or its discipline."); *Banning*, 213 F.2d at 771; United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105, 107 (7th Cir. 1953) ("Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory discretion of federal courts."); Cullum v. Cal. Dep't of Corrections, 267 F. Supp. 524, 525 (N.D. Cal. 1967) ("[I]nternal matters in state penitentiaries are the sole concern of the state except under exceptional circumstances . . . [I]f every time a guard w[as] called upon to main order he had to consider his possible tort liabilities it might unduly limit his actions. Such limitation may jeopardize his safety as well as the safety of other prisoners."); Stroud v. Swope, 187 F.2d 850, 852 (9th Cir. 1951) ("Aside from the purely legal aspects of this case very practical considerations militate against granting to appellant the relief for which he prays for to do so would open the door to a flood of applications from federal prisoners which would seriously hamper the administration of our prison system."); *see generally* Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 32-33 (2009) ("Until the civil rights era of the 1960s and 1970s, prisoners had no articulable rights to humane conditions of confinement or access to formal justice. Initially the courts viewed prisoners as 'slaves of the state' and so refused to hear their complaints. Later under the 'hands off doctrine' (which persisted well into the latter half of the twentieth century) courts deemed themselves powerless to enforce prisoners' claims because of concerns over separation of powers, federalism, prison security, and judicial competence.").

255. *See, e.g.*, Mushlin & Galtz, *supra* note 254, at 32-33.

256. *See, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958); *see also* Weems v. United States, 217 U.S. 349 (1910) (considering the constitutionality of the punishment of "cadena temporal"—a form of colonial punishment involving imprisonment for at least twelve years and one day, in chains, at hard and painful labor—for the offense of falsifying a public document); *see generally* Schlanger, *supra* note 1, at 364-68.

confinement.[257] All levels of the federal judiciary stepped in to regulate the administration of U.S. prisons and jails.[258] Supreme Court decisions in this era included *Hutto v. Finney*,[259] *Jones v. North Caroline Prisoners' Labor Union*,[260] *Bounds v. Smith*,[261] *Maechum v. Fano*,[262] *Wolff v. McDonnell*,[263] *Pell v. Procunier*,[264] and *Procunier v. Martinez*,[265] as well as *Estelle v. Gamble*[266] and *Trop v. Dulles*.[267] As described above, until *Estelle*, few of these decisions so much hinted at a carceral-intent requirement. Rather, the Court focused generally on the challenged conditions and their effect, relying on the principle that the Eighth Amendment prohibits penalties "that

257. Bell v. Wolfish, 441 U.S. 520, 523 (1979) ("Over the past five Terms, this Court has in several decisions considered constitutional challenges to prison conditions or practices by convicted prisoners.").

258. Schlanger, *supra* note 1, at 368-69 ("So it was not until the 1960s, with the path thus cleared, that lower courts began to frequently scrutinize conditions of confinement in state prison and local jails, and occasionally find them unconstitutional under the Cruel and Unusual Punishment Clause . . . [T]he first such cases involved prison discipline—corporal punishment and conditions in disciplinary isolation—perhaps because these were the easiest to conceptualize as 'punishment' additional to the sentence of incarceration. But further evolution was very speedy: by 1970, plaintiffs had won the first federal case to order the wholesale reform of a prison, in Arkansas. With few other effective avenues for complaint, prisoners started to bring federal cases in large numbers, alleging various types of inhumane treatment—brutal disciplinary sanctions for prison misconduct, excessive force, failures to provide adequate medical care, failures to protect from violence and extortion by other prisoners, and the like" (citations omitted)).

259. 437 U.S. 678 (1978) (analyzing the constitutionality of Alabama's prison conditions, in which prison officials subjected incarcerated people to punitive isolation for indeterminate periods of time and which the district court characterize as constituting a "dark and evil world completely alien to the free world").

260. 433 U.S. 119 (1977) (analyzing constitutionality of prison regulation restricting labor union practices among incarcerated people).

261. 430 U.S. 817 (1977) (analyzing whether states must provide incarcerated people law libraries or alternative sources of legal knowledge).

262. 427 U.S. 215 (1976) (analyzing due process requirements when a state transfers a prisoner to a prison with "substantially less favorable" conditions).

263. 418 U.S. 539 (1974) (analyzing constitutionality of various prison conditions, including the due process requirements of a disciplinary proceeding and an incarcerated person's right to send and receive confidential correspondence to and from attorneys).

264. 417 U.S. 817 (1974) (analyzing constitutionality of prison restriction on right of media access to incarcerated people).

265. 416 U.S. 396 (1974) (analyzing the constitutionality of prison censorship of incarcerated people's mail and restrictions on use of law students and legal paraprofessionals in conducting attorney-client interviews with incarcerated people).

266. 429 U.S. 97 (1976) (discussing the scope of the Eighth Amendment right to be free from cruel and unusual punishment and articulating for the first time that the Eighth Amendment's proscription of "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" establish "the government's obligation to provide medical care for those whom it is punishing by incarceration").

267. 356 U.S. 86 (1958).

transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'"[268] By most accounts, incarcerated people made significant headway during this era in obtaining judicial oversight—and, consequently, improvement—of the harsh and dangerous prison conditions that dominated the era.[269]

But in the late 1970s and into the 1980s, the federal judiciary's view of prisoners' rights and the scope of constitutional regulation of punishment changed. Justice Stewart and Chief Justice Burger resigned; Justices O'Connor and Scalia took the bench, "shift[ing] the Court considerably to the right."[270] This ideological shift on the Court coincided with what many call the rise of mass incarceration,[271] the birth of the carceral state,[272] or the beginning of the New Jim Crow[273]—a period marked by predominately white backlash to the gains of the Civil Rights Era and a reimagining of the preferred form of social control of communities of color.[274] The incarceration rates of Black and Latinx men grew exponentially. Political conservatism, criminality rhetoric, and public hostility to the perceived "comforts" and privileges courts afforded to incarcerated people, as well as societal hostility to the civil litigation system, resulted in a sharp decline of the rights of incarcerated people.[275]

Within this political and social context, carceral intent took shape and assumed its place as a formative doctrinal element of American incarceration. The Court decided *Estelle* in 1976 and *Bell* in 1979, and then spent the next two decades defining and refining the carceral-intent standards within the carceral-function and carceral-conditions frameworks.

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268. *Hutto*, 437 U.S. at 685 (citing *Estelle*, 429 U.S. at 102; Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

269. *See, e.g.*, Mushlin & Galtz, *Getting Real About Race and Prisoner Rights*, *supra* note 254, at 28-30.

270. Schlanger, *supra* note 1, at 378.

271. *See id.* at 359-60, 369-77; 1 Crim. Proc. § 1.6(i) (4th ed.).

272. Mushlin & Galtz, *supra* note 254, at 28-29.

273. ALEXANDER, *supra* note 10.

274. *See, e.g.*, ALEXANDER, *supra* note 10, at 50-51 ("The rhetoric of 'law and order' was first mobilized in the late 1950s as Southern governors and law enforcement officials attempted to generate and mobilize white opposition to the Civil Rights Movement. In the years following *Brown v. Board of Education*, civil rights activists used direct-action tactics in an effort to force reluctant Southern states to desegregate public facilities. Southern governors and law enforcement officials often characterized these tactics as criminal and argued that the rise of the Civil Rights Movement was indicative of a breakdown of law and order."); *see* Jason Reed, *Dual Failures: The Role of Race in Eighth Amendment Violations in Prisons*, 31 L. & INEQ. 233 (2012); Lawrence Glickman, *How White Backlash Controls American Progress*, ATLANTIC (May 21, 2020), https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/.

275. *See, e.g.*, Mushlin & Galtz, *supra* note 254, at 33-35.

B. *American Prisons and "White Innocence"*

As Professor Osamudia James has explained, "[s]ocial narratives play a significant role in public life, allowing groups of people to unify around a set of shared experiences and beliefs."[276] The social narrative of the 1970s and 1980s was a story of rising crime and proliferating threats to suburban communities that built upon the long-standing narrative of Black criminality and the need for dominant group control over communities of color to reign in the advances achieved during the Civil Rights Movement. This was in many ways another iteration of American society's post-Civil Rights Era narrative of "white innocence."[277] Critical race theorists have examined the phenomenon of white innocence from many perspectives, including through the lens of the purported colorblindness/post-racial era of the latter half of the twentieth century, as most clearly illustrated in constitutional anti-discrimination doctrine.[278] This section builds on those critiques to posit that analyzing incarceration law's fixation on carceral intent through the framework of white innocence and anti-discrimination doctrine is a constructive and preliminary step to dismantling and reimagining the law and system of American incarceration.

The United States was founded, and existed for much of its first century, as an expressly racist nation.[279] "Nineteenth-century Americans lived in a truly racist society. Racist talk and racial epithets were accepted forms of public discourse. Black persons were first enslaved, and later segregated and subjugated, by law. And their Supreme Court sanctioned all of this in the name of the Constitution."[280] Beyond the origins of U.S. incarceration described in Part I, much of American society was constructed and existed around formal race-based distinctions.

Then came the twentieth century and the Civil Rights Movement or the Second Reconstruction. Legal advances achieved during the middle third of the century included a rejection of most formal classifications based on race.[281] Jim Crow laws and *de jure* segregation were struck down

276. Osamudia James, *The "Innocence" of Bias*, 119 MICH. L. REV. 1345, 1350 (2021); *see also* Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009).

277. James, *supra* note 276, at 1345-46, 1350.

278. *See, e.g.*, Simson, *supra* note 21; Hutchinson, *supra* note 276; Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) [hereinafter *Innocence and Affirmative Action*]; Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 1 (1990) [hereinafter *The Rhetorical Tapestry of Race*]; and others.

279. *See, e.g.*, Ross, *The Rhetorical Tapestry of Race*, *supra* note 278, at 1.

280. *Id*.

281. *Id*. at 12.

in furtherance of formal equality.[282] A society built on explicit race-based subjugation suddenly transformed—at least superficially—into a society that rejected any classification based on race.[283] The era of colorblindness had arrived.[284]

By most measures, the Court's decision in *Washington v. Davis*[285] marks the legalization of the law's so-called formal colorblindness. In *Washington*, Black police officers sued the Commissioner of the District of Columbia, the Chief of the District of Columbia's Metropolitan Police Department (MPD), and the Commissioners of the U.S. Civil Service Commission for the allegedly discriminatory recruitment and promotion polices of the MPD.[286] The plaintiffs challenged, specifically, the MPD's use of a written personnel test which excluded a disproportionately high number of Black applicants.[287] The MPD's reliance on this test in recruitment and promotion decisions, the plaintiffs alleged, violated their Fifth Amendment Due Process right to equal protection of the law.[288] The plaintiffs did not alleged the MPD's use of the written test in its recruitment and promotion decisions was intentionally discriminatory.[289] Rather, the written test had a discriminatory impact: fewer Black police officers served on the MPD than was representative of the Black population of D.C., a higher percentage of Black applicants failed the written test than white applicants. [290] Further, the test had not been validated to establish its reliability for measuring subsequent job performance.[291]

The issue before the U.S. Supreme Court was the constitutional viability of the discriminatory *effect* theory of discrimination. Does the Constitution's guarantee of equal protection prohibit a law's disparate impact absent a showing that the state *intended* for the law to disparately impact a person or group on the basis of race?[292] Writing for the Court's majority, Justice White said no:

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282. *Id.* at 19 ("We have our own cracked surface of tragic reality. Prior to *Brown v. Board of Education*, our tragedy was the continuing presence of de jure segregation and all that it entailed. Post-*Brown*, the tragedy is different but nonetheless powerful.").

283. *Id.*

284. *See, e.g.*, john a. powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U. S.F. L. REV. 419, 423, 435 (2000).

285. 426 U.S. 229 (1976); *see also* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

286. 426 U.S. at 232.

287. *Id.* at 232-33.

288. *Id.* at 233. The plaintiffs also asserted claims under 42 U.S.C. § 1981 and D.C. CODE § 1-320 (1973).

289. *Id.* at 235.

290. *Id.*

291. *Id.*

292. *Id.*

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.[293]

In much the same way the Court read a carceral-intent requirement into the Eighth Amendment and the law of punishment, the Court in *Washington* read an intent requirement into the Constitution's prohibition of race-based discrimination, reasoning that it is a "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[294] The Court announced its decision in *Estelle* just six months later.[295]

Many critical race theorists have condemned *Washington* and the principle underlying the Court's holding, arguing that purported colorblindness in the law is neither a realistic endeavor nor an appropriate remedy following the many decades of *de jure* segregation and racial subordination on which American society and American law was constructed.[296] Requiring a showing of intent for state discrimination to be actionable undermines the remedial goal of the equal protection principle embodied in the Reconstruction-Era Fourteenth Amendment.[297]

The theory of white innocence derives from these arguments concerning the futility (or counterproductiveness) of a colorblind constitution. "White innocence is the insistence on the innocence or absence of responsibility of the contemporary white person."[298] In Professor David Simson's articulation of the principle, the white innocence theory:

> combines two extremely powerful concepts in both law and public imagination: equality and innocence. It fuses them into a legal thought system that predictably prioritizes the interests

293. *Id.* at 239.

294. *Id.* at 240.

295. *Washington* was announced on June 7, 1976; *Estelle* was announced on November 30, 1976.

296. *See, e.g.*, Neil Gotanda, *Reflections on* Korematsu, Brown *and White Innocence*, 13 TEMP. POL. & CIV. RTS. L. REV. 663 (2004); Lawrence, *supra* note 20.

297. Simson, *supra* note 21, at 638 ("[W]ith respect to ideas about racial equality and their treatment by the law, the current moment is also in important ways a continuation of patterns that trace back a very long time. These continuities relate to the ways in which a country and legal system officially dedicated to equality, including racial equality, and the rule of law have managed to justify the reality of a persistent racial hierarchy that favors those who count as 'white' over all others.").

298. Ross, *The Rhetorical Tapestry of Race*, *supra* note 278, at 3.

> of whites, yet masquerades as racially egalitarian and impartial. In this way, Whiteness as Innocence ideology has continuously legitimized the dominant status of whites in the racial hierarchy of the United States by making it seem consistent with American social and legal commitments."[299]

The theory undermines the presumption that structural racial subordination cannot exist without purposeful, invidious race-based animus.[300]

This white innocence theory is at work in the Court's decision in *Washington*. In the Court's view, holding government actors accountable for the disparate, though unintentional, impacts of laws may result in predominately white—and "innocent" (*i.e.*, not blameworthy[301])—individuals in power being held accountable for their unintended consequences.[302] The white innocence frame creates what some have identified as plausible deniability, "the ability to practice discrimination, while at the same time denying that any discrimination is actually taking place."[303]

But discrimination and its attendant injuries and harms persist, even in the absence of proof of discriminatory intent.[304] That is, "the injury of racial inequality exists irrespective of the decisionmakers' motives."[305]

> Does the black child in a segregated school experience less stigma and humiliation because the local school board did not consciously set out to harm her? Are blacks less prisoners of the ghetto because the decision that excludes them from an all-white neighborhood was made with property values and not race in mind? Those who make this . . . objection [to *Washington*] reason that the facts of racial inequality are the real problem. They urge that racially disproportionate harm should trigger heightened judicial scrutiny without consideration of motive.[306]

Nonetheless, the white innocence frame permeates post-Civil Rights Era constitutional doctrine, including with respect to the law of incarceration.

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299. Simson, *supra* note 21, at 638-39.

300. *See, e.g.*, powell, *supra* note 284.

301. Simson, *supra* note 21, at 643.

302. Similar critiques have been levied toward the Court's affirmative-action jurisprudence. *See, e.g.*, Ross, *Innocence and Affirmative Action*, *supra* note 278.

303. Simson, *supra* note 21, at 639 (quoting JIM SIDANIUS & FEICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 43 (1999)).

304. Lawrence, *supra* note 20 at 319.

305. *Id.*

306. *Id.* at 319-20.

The Court's injection of carceral intent into the law of incarceration coincides with the Court's injection of the intent requirement in constitutional anti-discrimination doctrine. The decisions in *Washington* and *Estelle* were announced just months apart; *Bell v. Wolfish* came three years later. The doctrinal development can be viewed as yet another iteration of the white innocence phenomenon and, by many accounts, an ideological project the Court is engaged actively in defending and maintaining.[307]

Considering the carceral-intent doctrine's political and social context, viewing incarceration law through the lens of critical race scholarship's white innocence frame casts American carceralism as an appropriate response to a phenomenon—crime—that is happening *to* white Americans. The prison is the place to assign or relegate society's dangerous criminal element. Whiteness is forced to respond to violence and crime through confinement but remains blameless and moral, innocent of the harms and injustice inherent to the prison system. The carceral-intent requirement adds a layer of analysis to the structure of U.S. incarceration that says, in effect, it is not the white majority's fault that the punishment system is so harsh, *unless* the white majority has intended for it to be punitive or is reckless with respect to its harms. The disproportionate rates of Black and brown Americans in U.S. prisons and jails are not the consequence of intentional or purposeful decisions but instead a natural consequence of the choice the individual criminal makes. Just desserts, if you will.[308]

In reality, American punishment is an extension and reformation of past iterations of social control of people of color.[309] The harms of incarceration persist, regardless of whether the harms are the product of a prison official's or an institution's intent to punish. The detrimental and disproportionately widespread impact of incarceration on communities of color remains, entrenched by the law's reliance on state-of-mind requirements that fail take account the historical legacies on which the U.S. system of incarceration was built.[310]

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307. *See, e.g.*, Gotanda, *supra* note 296, at 669.

308. *See, e.g.*, Lawrence, *supra* note 20 at 325-26 ("If there can be no discrimination without an identifiable criminal, then 'innocent' individuals will resent the burden of remedying an injury for which the law says they are not responsible. Understanding the cultural source of our racism obviates the need for fault, as traditionally conceived, without denying our collective responsibility for racism's eradication. We cannot be individually blamed for unconsciously harboring attitudes that are inescapable in a culture permeated with racism. And without the necessity for blame, our resistance to accepting the need and responsibility for remedy will be lessened.").

309. *See supra*, Section I.

310. Justice Stevens, dissenting in *Estelle v. Gamble*, noted the dangers of interpreting an intent standard into the Eighth Amendment: "Subjective motivation may well determine

V. FROM CARCERAL INTENT TO CARCERAL EFFECT.

Carceral intent as a formative, doctrinal mechanism of incarceration law is an impermeable barrier to meaningful change to American carceralism. If any sort of reimagining of the United States' approach to punishment and accountability is to occur, the change must include a move in the doctrine from carceral intent to carceral effect. As Professor Schlanger argued, "The Supreme Court took a wrong turn in the 1980s and 1990s, adopting an unjustified and unproductive Eighth Amendment doctrine that made jailers' hearts the touchstone for prisoners' rights litigation, rather than the objective impact of their choices."[311] Indeed, the operable lens should not be on the motivations of the prison official or the institution but on the effects of the challenged policy or condition. Is the challenged policy or condition itself cruel and unusual?[312]

For a moment during the Civil Rights Era discussed above when the federal judiciary took a more active role in the constitutional oversight and regulation of prisons and jails, the Court seemed poised to adopt such a standard. Shortly after *Estelle* and the first mention of the deliberate-indifference standard for Eighth Amendment challenges, the Court issued decisions in *Hutto v. Finney*[313] and *Rhodes v. Chapman*.[314] Neither case discussed any form of carceral intent but instead focused on the character of the challenged conditions—carceral effect. *Hutto* encapsulated decades-long litigation challenging conditions throughout the Arkansas prison system.[315] The district court characterized the conditions as "a dark and evil world completely alien to the free world."[316] The Supreme Court agreed, finding the conditions relating to punitive isolation in Arkansas prisons, which included lashings with a "wooden-handled leather strap five feet long and four inches wide" and the infliction of electrical shocks "to various sensitive parts" of a man's body, were cruel, unusual, and unpredictable.[317]

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what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it. Whether the conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and inhuman." 429 U.S. 97, 116 (1976).

311. Schlanger, *supra* note 1, at 362.

312. John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 NW. U. L. REV. 9, 11 (2020) ("[T]he most important factor in determining the line between punishments and non-punishments, at least intuitively, is penal effect.").

313. 437 U.S. 678 (1978).

314. 452 U.S. 337 (1981).

315. 437 U.S. at 680-81.

316. *Id.* at 681 (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).

317. *Id.* at 684 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

Justice Stevens for the majority drew from the decision in *Estelle*: "The Eighth Amendment's ban in inflicting cruel and unusual punishments . . . 'proscribes more than physically barbarous punishments. It prohibits penalties that are grossly disproportionate to the offense, as well as those that transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'"[318] In analyzing the issue before the Court, Justice Stevens made no mention of any sort of carceral intent or state-of-mind requirement and focused instead on the conditions and experience of the challenged conditions: "It is equally plain, however, that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. *A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months*."[319]

Similarly, in *Rhodes*, plaintiffs Kelly Chapman and Richard Jaworski, two prisoners at an Ohio maximum-security prison, challenged the prison's practice of assigning two men to a cell built for one under the Eighth Amendment.[320] Again, in analyzing the applicable doctrine, the Court focused on the challenged conditions and their effects:

> Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be disproportionate to the severity of the crime warranting imprisonment. In *Estelle v. Gamble*, we held that the denial of medical care is cruel and unusual because, in the worst case, it can *result* in physical torture, and, even in less serious cases, it can result in pain without any penological purpose.[321]

The Court pivoted back to carceral intent, however, with the cases that followed *Hutto* and *Rhodes*, *Bell* and *Wilson*, as described above, eventually solidifying the carceral-intent standard with *Farmer*.

A doctrinal shift away from carceral intent to carceral effect is justified for two primary reasons, as this Part explains. First, the carceral-intent standard is conceptually flawed. A standard that focuses instead on carceral experience avoids those flaws. Second, a shift to carceral experi-

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318. *Id.* at 685 (quoting *Estelle*, at 102).

319. *Id.* at 686-87 (emphasis added).

320. *See, e.g.*, Schlanger, *supra* note 1, at 385-86; Dolovich, *supra* note 14, at 896-97 ("There are, however, two serious conceptual problems with [the Court's reasoning in *Farmer*]: First, even assuming that the question of whether prison conditions constitute 'punishment' turns on the mental state of the inflicting officer, to establish recklessness as the threshold standard makes no sense . . . An actor who is reckless . . . is by definition not acting intentionally and thus cannot be said to be 'punishing' those harmed by her action.).

321. Schlanger, *supra* note 1, at 386.

ence would transform incarceration law into a remedial doctrine. The law would be better equipped to provide meaningful protection against the harsh and unjust character of American punishment, a necessary step to beginning to dismantle a system with direct, traceable lineage to American slavery.

A. *Carceral Intent's Conceptual Flaws*

The role of carceral intent in the law of incarceration poses conceptual problems.[322] Professor Schlanger has framed some of these problems as "the problem with punishment."[323] The Court's reliance on punishment as the touchstone of the Eighth Amendment (and, in turn, the conclusion that punishment must be intentional) both "proves too much" and is not as clearly established as the Court suggests.[324] The conclusion proves too much because *if* punishment "requires intent to chastise or deter," as Justice Scalia wrote in *Wilson*, then the deliberate indifference standard is insufficient because the intent requirement does not rise to the level of intentional or purposeful conduct.[325] Moreover, the connection between punishment and chastisement or deterrence is simply incorrect: many forms of modern punishment have goals other than chastisement or deterrence.[326]

> [M]any consequences of criminal misbehavior that are indisputably part of the punishment are not 'intended to chastise or deter.' Criminal restitution, for example, is intended to make victims whole. In the era of self-supporting or profit-making prisons, sentences of hard labor were intended to promote profitable use of prisoner labor . . . The examples could multiply, but the point is simple; an intent to chastise or deter is neither necessary not sufficient to identify punishment.[327]

Professor Sharon Dolovich has expanded on the analytical flaws of the carceral-intent requirement, reasoning that the key inquiry in the law of confinement is whether the *state* is confining people in cruel and unusual conditions, not whether an individual officer intends to inflict punishment on an individual prisoner.[328] "[O]nce the nature of state punishment is

322. *Id.* at 385-86.

323. *Id.* at 386; *see also* Dolovich, *supra* note 14, at 896-97.

324. Schlanger, *supra* note 1, at 386.

325. *Id.* at 386-87.

326. *Id.*

327. *Id.* at 386-87.

328. Dolovich, *supra* note 14, at 896-97 ("But second and more importantly for our purposes, Farmer is premised on a narrow, individualistic conception of punishment that is

properly understood, it becomes clear that what makes an experience of 'punishment' is not the mental state of the inflicting officer, but whether prisoners' suffering is traceable to state-created conditions of confinement."[329]

The conceptual flaws with respect to incarceration law's carceral-intent requirement make a reimagining of the doctrine particularly apt.

B. *A Remedial Turn*

Given the conceptual flaws in the carceral-intent doctrine, as well as the doctrine's contribution to the entrenchment of the injustice and racial subordination that defines American confinement, a reinterpretation of the doctrine is warranted. Critical race scholars and others have argued for a more remedial interpretation of constitutional anti-discrimination provisions,[330] and this Article posits that a similar turn with respect to incarceration law is necessary.

Justice Stevens, dissenting in *Estelle*, provides an anchor for this remedial turn. Fearful of the consequences of the Court's injection of a carceral-intent requirement into the Eighth Amendment, Justice Stevens offered this brief warning:

> By its reference to the accidental character of the first unsuccessful attempt to electrocute the prisoner in *Louisiana ex re. Francis v. Resweber*, and by its repeated references to "deliberate indifferent" and the "intentional" denial of adequate medical care, I believe the Court improperly attaches significance

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wholly unsuited to the Eighth Amendment context. In the private sphere, individuals qua individuals may and do inflict punishment on others. It is, however, the distinct practice of state punishment with which the Eighth Amendment is exclusively concerned . . . [O]nce the nature of state punishment is properly understood, it becomes clear that what makes an experience 'punishment' is not the mental state of the inflicting officer, but whether prisoners' suffering is traceable to state-created conditions of confinement.").

329. *Id.*

330. *See, e.g.*, Lawrence, *supra* note 20; Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of 'The Id, the Ego, and Equal Protection'*, 40 CONN. L. REV. 931 (2008); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Doron Samuel-Siegel, Kenneth S. Anderson, & Emily Lopynski, *supra* note 18, at 152 ("The first barrier [to combatting the pernicious effects of structural racism] is the intent doctrine. Existing equal protection doctrine is preoccupied with intent and does not account for the effect of government policies. It presupposes that, absent intentional discrimination by identifiable actors in a given local setting, the Fourteenth Amendment does not mandate a remedy for racial inequality. In doing so, the doctrine enables the persistence of harms created by all but individual racism, including the harms of structural racism."); Ian Haney-López, *supra* note 20.

> to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted. Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it. Whether the conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and inhuman.[331]

Justice Stevens offered a similar dissent in *Bell*, urging the Court to focus not on the intent of the state actors responsible for the incarceration but to the effects—the experience—of confinement:

> [B]y blindly deferring the administrative judgments on the rational basis for particular restrictions, the Court effectively delegates to detention officials the decision whether pre-trial detainees have been punished. This, in my view, is an abdication of an unquestionably judicial function.
>
> Even had the Court properly applied the punishment test, I could not agree to its use in this context. It simply does not advance analysis to determine whether a given deprivation imposed on detainees constitutes "punishment." For in terms of the nature of the imposition and the impact on detainees, pre-trial incarceration, although necessary to secure defendants' present at trial, is essentially indistinguishable from punishment. The detainee is involuntarily confined and deprived of the freedom "to be with his family and to form the other enduring attachments of normal life." Indeed, this Court has previously recognized that incarceration is an "infamous punishment." And if the effect of incarceration itself is inevitably punitive, so too much be the cumulative impact of those restraints incident to that restraint.[332]

Shifting the focus of incarceration from the subjective state of mind of the state actors responsible for carceral function or conditions to the objective effect of the function or conditions—the carceral experience—is just what Justice Stevens insisted decades ago.

Scholars have invited the Court to make a partial shift in this direction by adopting the objective standard announced *Kingsley v. Hendrick-*

331. Estelle v. Gamble, 429 U.S. 97, 116-17 (1976).

332. Bell v. Wolfish, 441 U.S. 520, 568-69 (1979).

son[333] into other areas of incarceration law.[334] Michael Kingsley was a pretrial detainee confined at a Wisconsin county jail on a drug charge.[335] A jail officer noticed Mr. Kingsley had affixed a piece of paper to the light fixture in his cell and ordered him to remove it; Mr. Kingsley refused.[336] Other officers ordered Mr. Kingsley to remove the piece of paper, and he continued to refuse.[337] The next morning, four officers approached Mr. Kingsley's cell and ordered him to stand, back up to the door, and keep his hands behind him.[338] Mr. Kingsley, again, refused the officers' order.[339] When he refused to comply, the officers handcuffed and forcibly removed him from his cell, carried him to a holding cell, and placed him face down on a bunk with his hands still cuffed behind his back.[340] Mr. Kingsley alleged that the officers then kneed him in the back, slammed his head into the concrete bunk, and tased him for approximately five seconds.[341]

Mr. Kingsley sued the officers in federal court for their alleged use of excessive force in violation of Mr. Kingsley's due process right.[342] The case proceeded to a jury trial, at which the district court instructed the jury that excessive force "means force applied recklessly that is unreasonable in light of the facts and circumstances of the time."[343] The jury instructions defined the requisite carceral intent—the required state-of-mind showing on the part of the defendants—as: "Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to the plaintiff."[344]

On appeal, Mr. Kingsley argued the district court erred in its jury instructions because the lower court did not hew to a standard of "objective unreasonableness."[345] The court of appeals panel held that the law requires a subjective inquiry into the defendant officer's state of mind—an inquiry into whether the officer intended to punish the plaintiff through the use of force, in line with *Bell v. Wolfish*.[346]

333. 576 U.S. 389 (2015).
334. *See, e.g.*, Schlanger, *supra* note 1, at 410-17.
335. 576 U.S. at 392.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.* at 392-93.
342. *Id.* at 393.
343. *Id.*
344. *Id.*
345. *Id.* at 394.
346. *Id.*

The U.S. Supreme Court granted review of the case to resolve a circuit split on the issue of carceral intent.[347] Justice Breyer, writing for the majority, held that when considering the permissiveness of a defendant's use of force against a person *in pretrial confinement*, courts must use an objective standard: "[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."[348] The Court relied on *Bell*, stating that punitive intent can be inferred from the objective evidence.[349] That is, a jail official's actions may be so unreasonable under a set of circumstances that the conduct fails *Bell*'s rational-basis test.[350] "[A]s *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."[351]

Adopting an objective unreasonableness standard like the one advanced in *Kingsley* would be a start toward reorienting incarceration law to a remedial perspective, but the move does not go far enough and likely would not the touch Eighth Amendment's deliberate-indifference doctrine. Rather, the Court must eliminate the carceral-intent standard altogether or adopt a "punitive-impact" or "punitive-in-effect" standard. That is, is the challenged *effect* or the *experience* of confinement cruel and unusual punishment? Carceral intent may remain relevant for purposes of determining the appropriate remedy. Indeed, a strict-liability approach to incarceration law would swing too far in the opposite direction. But carceral punishment is punishment, no matter the intent of the state actor responsible for enacting, implementing, or carrying out the punishment, and the law of incarceration should reflect as much.

VI. CONCLUSION

The American carceral system is exceptional for all the wrong reasons: in scale, scope, and disparate impact. The system evolved directly from chattel slavery and has never shed its foundation of white supremacy. The law of incarceration has not traced a similar path, however. Indeed, the Court's injection of a carceral-intent standard into the constitutional law of incarceration is yet another iteration of the myth of white innocence—the notion that in the post-Civil Rights Era, white people are blameless for the injustices and structural racism that persist.

347. *Id.* at 395.
348. *Id.* at 396-397.
349. *Id.* at 397-98.
350. *Id.*
351. *Id.* at 398.

Yet, in the wake of the Black Lives Matter-led protests of 2020 and what many deem the largest movement in U.S. history, calls for a Third Reconstruction have emerged—a collective awakening to the modern entrenchment of structural racism and a recommitment to advancing racial justice and equity. An element of this reimagining requires a reckoning with American carceralism and the ways in which the law's devotion to carceral intent ignores carceral experience.