Abstract: A burgeoning social scientific literature on the place-based legacy of slavery has until now mostly overlooked the relationship between slavery and incarceration, despite the fact that the intensity and racial disparity of US incarceration is often attributed to its history of slavery. Gathering new data on total incarceration, Black incarceration, and racial disparity in incarceration at the county level from 1860 till today, I show that the share of slaves in a county’s 1860 population is negatively associated with subsequent Black incarceration rates, as well as the racial disparity in incarceration, with this negative effect being greatest from 1880 to 1930. Drawing on Muller (2018), I argue that this may be partly explained by the practice of large landowners in plantation counties paying the fines of convicted laborers, who would then have to work off the fine or suffer imprisonment. Data on individual convicts from several Southern states is consistent with the interpretation that such judicial peonage lowered Black incarceration rates in areas of the rural South that had been most dependent on slavery. I conclude that the existing literature is right to assume that Southern incarceration was shaped by slavery. But it shaped it in surprising ways that previous work has often failed to identify.
1 Introduction

A notable puzzle of American carceral history is that while exceptionally high rates of incarceration for African Americans (both absolutely and relative to whites) are often attributed to the legacy of slavery,\textsuperscript{1} the South, where we can assume that legacy is most strongly felt, has tended to have lower rates of Black incarceration (and less racial disparity in incarceration) compared to the rest of the country (see figure 1).

There are a number of ways we might make sense of this discrepancy between expectations and reality. We could conclude that arguments about a causal link between slavery and American incarceration are simply wrong. We could argue that incarceration rates (or their spatial variation) are an inadequate measure of slavery’s carceral legacy. Or we could ask whether such regional comparisons mask the actual influence of slavery because it may be confounded by other variables, such as Southern ruralness, poverty, or state capacity. If we take the latter approach, as I initially do in this paper, an appropriate response would be to look to see whether the predicted association between antebellum slavery and postbellum Black incarceration holds within the South.

To pose the question in this way is to link the above-mentioned puzzle of American incarceration to a growing social scientific literature on the place-based legacy of slavery in the United States. Recent studies have found that Southern counties that had more slaves in 1860 tend to have lower (Nunn, 2008) and more unequal incomes (O’Connell, 2012) today, as well as higher levels of white racism (Acharya et al., 2018) and violent crime (Gouda and Rigterink, 2017). All these things might lead us to expect that such counties also have (or had) higher levels (or racial disparity) of incarceration. But the two prior studies that have explored the effect of slavery on subsequent rates of incarceration have generated contradictory results. Christopher Muller (2018) finds that Georgia counties that had been more reliant on slavery tended to have lower rates of Black incarceration in 1880, whereas Melissa Rubio (2019) finds that for the South as whole there is a positive association.

In this paper I address this gap in the literature by collecting a large amount of county-level data on incarceration over the last 150 years. I digitized manuscript sources that reported prisoners by county of conviction and matched individual prisoners to their pre-arrest county of residence. From

\textsuperscript{1}This generally either because mass incarceration is viewed as a racialized system of social control with roots in the slave plantation (Alexander, 2012; Wacquant, 2002) or because the Southern convict lease system than ensnared former slaves from 1870 to 1920 is viewed as a continuation of slavery by another name (Adamson, 1983; Childs, 2015).
these data I assembled my key dependent variables: Black and White county-level incarceration rates (as well as their ratio) for most census years from 1870 to 2010. I then ran a number of regression models to explore the overtime relationship between the 1860 slave population share and later patterns of incarceration in the American South, employing a variety of controls and robustness checks.\(^2\)

My first finding is that the historical prevalence of slavery has no positive association with later levels of either incarceration or the racial disparity in incarceration.\(^3\) In recent years the effect of slavery is sometimes positive for total and white incarceration, and persistently negative for Black incarceration and racial disparity in incarceration. However these correlations are generally not significant when controlling for basic geographic features of a county.

If this were my only finding one might simply conclude that the expected legacy of slavery for American incarceration is either absent or incapable of being captured by the model of spatial variation that has become standard in the quantitative literature on slavery’s legacy. However, for the years 1870 to 1940 I also find not only that rates of Black incarceration and racial disparity are not higher in former slave areas of the South, but that they are in fact significantly lower (both in the substantive and statistical sense). This suggests that the legacy of slavery did matter for American incarceration, just not in a way that our existing theories are particularly equipped to explain.

In the remainder of the paper I attempt to explain, using the limited data at my disposal, this second puzzling result. I find little evidence that lower rates of Black incarceration in former slave counties are explained by low rural crime rates, weak local state capacity, a reliance on extra-judicial punishment (such as lynching), or a paternalist tendency for landlord-controlled judiciaries to give lower sentences to African American defendants. I do, however, find evidence consistent with the explanation that wealthy landowners would typically pay the bail, fines or court costs of accused rural laborers, thereby establishing a relation of debt and dependency that I call “judicial

\(^2\) I included both geographic controls and social and economic controls measured in 1860, and in alternative specifications controlled for urban population and crime rates in the outcome year. I weighted by county population in the outcome year, ran regressions on the natural log and inverse hyperbolic sine of each outcome, and on various binary definitions of a high slave county.

\(^3\) Note, however, there does appear to be a positive association of slavery with the severity of punishment, as measured by the number of capital sentences per prisoner and the rate of mortality in prisons. See the conclusion below.
peonage” (but also reducing the number of jail and prison inmates from their counties). While this phenomenon has received less attention than, e.g., convict leasing in the historiography, I show that it was highlighted by many African American critics of Southern justice at the time.

If judicial peonage is the explanation for low Black incarceration rates in former plantation areas of the Jim Crow South (and I accept that more evidence will be needed to establish this) then it supports our intuition that the Southern judicial system was indeed fundamentally shaped by the legacy of slavery. Not because the prison replaced the plantation, either as a space of confinement or as a primary source of labor, but because for many former slaves and their descendants who were accused of crimes (often on trumped up charges) the plantation itself became a kind of prison. And while the direct economic impact of the convict lease system may have been limited to a handful of industrialists who profited from the lease, an under-appreciated economic impact of brutal Southern prisons and jails may have been the power they gave landlords who held Black tenants in judicial peonage to threaten them with the penitentiary or the chain gang if they failed to repay their “debts.”

2 Literature Review

The historical literature on slavery and incarceration suggests a number of predictions about their relationship. Many scholars have drawn analogies between slave plantations and prisons, based on the physical confinement and brutalization of the institutionalized population, the forced labor they are required to perform, and (in the Americas) their racial composition.\(^4\) In this context some have gone further, arguing not only that American plantations and prisons may be seen as in some sense descriptively alike, but that the latter acted as a functional substitute for the former (after it was abolished).\(^5\) Within this literature we thus find both broad claims of a functional or institutional evolution from the slave plantation to the supermax prison,\(^6\) as well as more specific arguments that, for example, the

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\(^4\) Also the use of racism to justify their confinement. For a recent overview of uses of the analogy see Fludernik (2019, ch. 6). Prisoners themselves have often drawn the analogy, especially African American prisoners, see James (2005).

\(^5\) E.g. Davis (1998); Gilmore (2000); Graff (2015).

\(^6\) E.g. Wacquant (2002) claims that “slavery and mass imprisonment are genealogically linked [by a] relationship of structural symbiosis and functional surrogacy.” See also Alexander (2012); Goodwin (2018). In addition to these claims about the geneology of prisons in America it has also been more generally argued that modern penal systems,
convict lease system which ensnared freedpeople across Southern states in the aftermath of the Civil War acted as “a functional replacement for slavery.”\(^7\)

While the legacy of slavery may be measured in different ways (see the conclusion below), what I will call “the replacement thesis” (understood very broadly as a claim of functional or institutional succession) should lead us to expect that a country, region or locality that was more historically reliant on slavery would, all else being equal, rely more on prison as a means of social control after chattel slavery was outlawed, specifically with regard to the incarceration of former slaves and their descendants.\(^8\) While this prediction often remains implicit among proponents of the replacement thesis, it has been made explicit, and some (as we shall shortly see) have claimed to find evidence in support of it. Yet before discussing their findings it should be clarified that the replacement thesis is by no means a consensus view among scholars of post-emancipation incarceration.

Few historians of the 19th century South would deny something survived of the slave plantation in postbellum convict camps, penitentiary farms and chain gangs, where conditions for the majority Black prisoners were notoriously brutal (Oshinsky, 1996; Blackmon, 2009). Yet many have called into question claims of functional succession, concerned that they elide important differences and discontinuities (Ayers, 1986; Lichtenstein, 1996). For instance, economic historians have pointed out that at its height (in the 1890s) convict leasing incorporated less than one percent of the Southern Black population, whereas over 90% had been enslaved in 1860 (Wright, 1997; Poyker, 2019b).\(^9\) Social and political historians have stressed that convicts typically worked in new Southern industries, like railroads and min-

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\(^8\)Note this prediction does not require the denial that institutions replicate themselves across space, both with and without the geographic mobility of those who control (or are controlled) by them. It simply implies that whatever mechanisms (cultural, economic or demographic) might lead one institution to be replaced by another, they should be felt more intensely where the former institution existed, and less where it didn’t. Thus if any prison system is held to replace Brazilian slavery we would expect it to be the Brazilian prison system, and not, for instance, the Swedish one. By the same token, one would expect the carceral replacement of Brazilian slavery to be more observable in regions of Brazil where slavery had been historically concentrated. The absence of such a spatial correlation would not necessarily invalidate the theory, but it would represent an anomaly that would have to explained.

\(^9\)Poyker (2019a) estimates that its peak in 1886 the convict lease system affected at most 9,104 inmates of all races. By 1914 only 1,431 inmates were still caught up in the system. By contrast 4 million people were enslaved in the American South in 1860.
ing, whereas slaves had been concentrated in agriculture (Lichtenstein, 1996), and that unlike slavery convict leasing rarely had the enthusiastic backing of Southern elites (Mancini, 1996). Historians of gender and the family have pointed to the scarcity of women and children in Southern prisons (by comparison with slave plantations) despite the fact that African American women were incarcerated at much higher rates than white women (Haley, 2016; LeFlouria, 2016). Some legal historians have also questioned popular readings of the 13th amendment as a “loophole” intended to allow slavery to persist in prison (Armstrong, 2011; Pope, 2019). Yet while there are important lessons in this literature about the dangers of conflating analogy with (functional) homology—as well as homology with (institutional) continuity—it does not provide an alternative prediction about the spatial relationship between slavery and incarceration (other than perhaps that we should expect no consistent pattern in this regard).

To my knowledge only two prior studies have attempted to empirically test the replacement thesis with spatial data, and they come to opposite conclusions. Christopher Muller (2018) collected data on the county of conviction of convict laborers from the Georgia state penitentiary in 1880, at the height of convict leasing. Muller theorizes, in line with the above-mentioned prediction, that “[i]f convict labor replaced slave labor, we would expect African-Americans to have faced the greatest risk of imprisonment in Georgia’s cotton belt, where slavery predominated” (Muller, 2018, pp. 368-369). But he finds that, in fact, such counties typically had the lowest rates of Black incarceration. He concludes that “[i]n postbellum Georgia, the relationship between slavery and imprisonment was characterized by contention more than by functional succession” (Muller, 2018, p. 371).

In a recent working paper Melissa Rubio (2019) subjects the replacement thesis to a broader test, comparing incarceration in all Southern counties from 1870–1940. To test the hypothesis that labor scarcity in plantation areas following emancipation meant that “convict labor was used to replace slave labor” Rubio regressed the race-specific incarceration rates on the 1860 county-level slave share, which she instruments with suitability the soil to cotton. She found a significant positive effect of slavery on subsequent Black incarceration rates in all models, an effect that increased in size over time, whereas white incarceration was uncorrelated with slavery. These results appear to support the replacement thesis, as do the (unreported) results of Acharya et al. (2018), who found a positive relationship between historical slavery and contemporary levels of Black incarceration.\(^\text{10}\)

\(^{10}\)In their influential book *Deep Roots* Acharya et al. (2018, pp. 44-43) write “the share
However, Rubio’s method of estimating incarceration rates allows her to observe only where a state prisoner was *held*, not where they were *convicted*.\(^{11}\) For state prisoners in most times and places that would be the county in which a state prison happens to be located, but in the South during the period Rubio is examining that would often be the county in which a state or county prisoner was leased out to a private employer. Both could often be located far from the county of conviction, which is typically the geographic unit we are interested in when we are comparing incarceration rates as a measure of crime or criminal justice policy.\(^{12}\) This difference of measurement may help to explain why Rubio’s results differ from those reported by Muller (2018).

### 2.1 Quantitative studies of slavery’s legacy

Given the recent upsurge of quantitative studies of slavery’s legacy, as well as the popularity of the replacement thesis, it is surprising that Rubio’s paper appears to have been the first to apply the long-run slavery regression to the question of incarceration.\(^{13}\) Yet this burgeoning literature has already found results that are either consistent with the replacement thesis (if the mechanism is economic inequality, white racism or continuity of slaveowner power) or would independently predict a positive association between slavery and incarceration (e.g. through its effect on crime and violence).

Economists first employed the long-run slavery regression to test long-standing claims about slavery’s negative impact on economic development, but the methods soon spread to other disciplines. Some of the earliest work explored cross-national comparisons, but most of studies focus on the US, analyzing the effect of variation in historical reliance on slavery across states.

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\(^{11}\) Rubio extracts county-level prisoners counts from complete count census data available from the Integrated Public Use Microdata Series (IPUMS) for the years 1860, 1870, 1880, 1900, 1910, 1930 and 1940. The original census schedules recorded prisoners as they presented themselves to census takers in their place of incarceration or work, and census takers did not generally record their previous residence or the county of jurisdiction in which they were conviceted.

\(^{12}\) Criminologists and statisticians typically refer to incarceration rates based on conviction counts as “jurisdiction” rates, which for purposes of policy analysis are typically preferred to the “custody” rates analyzed by Rubio. Proxies for a jurisdiction rate could include the place in which the crime was committed, or the place in which a prisoner lived prior to being committed to prison.

\(^{13}\) One explanation may be the relative difficulty, until quite recently, of obtaining county-level data on incarceration — see data section below.
commuting zones, and (most commonly) counties. While the focus on the county as the unit of analysis is not always substantively justified in the literature, the large number of counties in the US (3,142 today) provides researchers with opportunities to check the robustness of their findings, e.g. by comparing otherwise similar or adjacent counties that appear to differ primarily in the prevalence of slavery, or by instrumenting for slavery using features of a county that are presumed to have been endogenous to slavery but otherwise exogenous to the outcome of interest.

This research has generally found a negative impact of slavery on contemporary levels of income, whether we compare nations (Nunn, 2008; Bruhn and Gallego, 2012), states (Mitchener and McLean, 2003; Nunn, 2008) or counties (Lagerlöf, 2005; Nunn, 2008; Radpou, 2015) in the US.14 Similar studies find consistently positive effects on contemporary and historical levels of income inequality (either overall or by race) when comparing across nations (Easterly, 2007; Soares et al., 2012), US counties (Sundstrom, 2007; O’Connell, 2012; Bertocchi and Dimico, 2014), or municipalities in Colombia (Acemoglu et al., 2012) and Brazil (Fujiwara and Laudares, 2019).15 Last but not least, Acharya et al. (2016, 2018) find that the 1860 slave population share of US counties drives later racist attitudes among whites, as reflected in public opinion surveys and historical voting preferences.16

Exploring the mechanisms linking slavery to (among other things) lower incomes and higher inequality, researchers have variously pointed to persistent effects of discrimination in labor markets (Jung, 2018), under-investment in education (Bertocchi and Dimico, 2012, 2014; Reece and O’Connell, 2015), and weak state capacity (Suryanarayan and White, 2019), all of which has been attributed, at a deeper level, to elite capture of local institutions (Acemoglu et al., 2012). Acharya et al. (2018) explain their findings with respect to racist views to a critical juncture during Reconstruction, in which an

14 However, Summerhill (2010) finds that when comparing municipalities in São Paulo the percentage of slaves in 1872 has a positive effect on contemporary income. He finds the same relationship across Brazilian states, but it becomes negative when the slave percentage is measured in 1819 rather than 1872.

15 For a comparable literature on the contemporary legacy of latin American land inequality see Acemoglu et al. (2008) and Dell (2010).

16 Other studies find that county-level slave percentages in the US are associated with higher rates of single-headed households (Bertocchi and Dimico, 2019), higher rates of female labor force participation (Baiardi, 2019) and slower declines in heart disease mortality (Kramer et al., 2017) for African Americans today. O’Connell (2020) also finds a positive effect on confederate monuments, and Reece (2020) finds a positive effect on contemporary income and homeownership for whites (but also white unemployment). In one of the earliest articles in this genre, Zajonc (2002) finds that for a sample of counties slavery is negatively associated with contemporary rates of Black-owned businesses.
atypically intense form of elite-driven white supremacist ideology arose in the Black Belt. They attribute the persistence of that ideological differential across subsequent generations of whites to the influence of schools, churches and families over the formation of racial attitudes in childhood and early adulthood.\(^17\)

Closer to the topic of this paper, Buonanno and Vargas (2019) identified a link between the historical prevalence of slavery and contemporary patterns of violent and property crime in Colombian municipalities, while Gouda and Rigterink (2017) find a positive effect of slavery on violent crime in US counties.\(^18\) A separate literature often suggests there is a positive effect of slavery on lynching in the US,\(^19\) and some studies have found a positive impact on hate crime.\(^20\) State-level analyses have found evidence of more punitive laws and sentences in former slave states.\(^21\) In addition to the above-mentioned

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\(^17\)Note that some scholars who analyze the effect of slavery on racial disparities control for the contemporary Black population share (O’Connell, 2012; Reece and O’Connell, 2015; Acharya et al., 2018), while others do not. This is due to a discipline-specific engagement with theories of “racial threat”. Such theories suggest that whites living in areas with larger Black populations will be more fearful of African Americans, and thus more likely to exert pressure on police and courts to disproportionately arrest, convict, and sentence African Americans to prison (Blalock, 1967; Jacobs and Kleban, 2003). Since historical slave percentages tend to be highly correlated with contemporary Black population shares, some of the measured effect of the former on Black incarceration, according to this literature, may be considered an effect of contemporary demography rather than an institutional or cultural legacy. Acharya et al. (2018) go to some lengths to show that this isn’t what is driving their results. See section 6 below for a discussion of racial threat dynamics as potential mediators of slavery’s effect on incarceration.

\(^18\)Note, however, that Gouda and Rigterink (2017) report that this effect disappears when controlling for contemporary Black population share, which suggest it may be driven by racial threat (see note 17 above). Gouda and Rigterink (2017) do not separately analyze crime rates by race, but in a recent unpublished working paper Gabriel Lenz finds that slavery is negatively correlated with county-level Black homicide rates in 1939.

\(^19\)The quantitative literature on lynching has explored a variety of geographic measures of slavery, many of which are found to be positive associated with county-level rates of lynching. See, e.g., Ager (2013); Christian (2017); Cook et al. (2018). See section 6 below for my own findings in this respect. Price et al. (2008) find that former slaves were less likely to be lynched than free-born Blacks.

\(^20\)Gunadi (2019) finds a positive effect of county-level slave percentage on contemporary hate crime against African Americans. Acharya et al. (2016) report the effect of slavery on this outcome was significant only at the 90th percentile. Gouda and Rigterink (2017) find no effect of slavery on “white on black” hate crime, but a positive effect of slavery on “black on white” hate crime.

\(^21\)Vandiver et al. (2007) show that former slave states account for 90% of all US executions from 1976 (when federal restrictions were lifted). Cohen (1996) finds that the laws of former slave states were more accepting of violence used for coercion and punishment with respect to spousal abuse and corporal punishment. See section 6 for the new county-level
mechanisms, these authors sometimes point to a distinct culture of violence, rooted in slavery’s endemic violence or in Southern “codes of honor.”

Both Bertocchi and Dimico (2019) and Mazumder (2019) explore the relationship between county-level slavery and incarceration, but only in interaction with their primary variables of interest. To my knowledge within this literature only Acharya et al. (2018) and Rubio (2019) have explicitly examined the effect of slavery on later county-level incarceration rates (current Black incarceration rates in the former, 1870–1940 rates in the latter). As we have seen, both studies find evidence in support of the replacement thesis, but the former do not report their results, while the latter appears to rely on custody counts of prisoners to estimate incarceration rates. There is thus room for improvement by collecting more and better data.

3 Data

Part of the reason that prior quantitative studies of slavery’s legacy have often overlooked incarceration may be that until very recently the only available data on prison populations took the form of national, regional or at best state-level counts of prisoners (typically excluding local jails). A cursory look at these data outside the United States do not reveal patterns that are particularly consistent with the replacement thesis. As can be seen in figure 2, contemporary national-level incarceration rates in the Western hemisphere are uncorrelated with the historical prevalence of slavery in 1750.22 Figure 3 shows that for the British Caribbean colonies there is a consistently negative association between the 1834 slave share of population share and national-level rates of incarceration over the following century. Finally, figures 4 and 5 indicate that there is no consistent association between patterns of state-level incarceration in Brazil and the share of each state’s population that was enslaved in 1870.

Data from other countries with a legacy of slavery provide a weak test of the replacement thesis in so far as they do not disaggregate prison populations by race. Yet in the United States, where racial breakdowns of state prisoners have been published from 1870, these data provide even less support for the replacement thesis. As we already noted, since 1870 the South has consistently had lower rates of incarceration for African Americans, as well as lower rates of racial disparity in incarceration (figure 1). Even when we compare within the South, state-level rates of Black incarceration and

evidence I have collected on punitiveness of judges we well as state-level prison conditions.
22This result is unchanged if we measure slavery in 1830.
prison admissions (and racial disparity in both) from 1870 to 2018 tend to be negatively associated with a state’s historical reliance on slavery (figure 6).

It is difficult, however, to draw any inferences from such patterns in existing data on incarceration rates. Nations, regions, and states may be seen as too large geographic units to identify the local legacies of slavery. For instance the so-called “Black Belt,” which had some of the highest concentrations of slaves in the US prior to 1865 (and which remained majority African-American thereafter) is coextensive with no state, yet makes up less than a quarter of the region where slavery was legal in 1860 (hereafter “the South”). Moreover, other features of regions and states (such as poverty, rurality, culture, law and state capacity) may confound slavery’s legacy for incarceration. In any case one would want to observe the effect of slavery on incarceration at the jurisdictional level at which incarceration and sentencing decisions are made. In the US that is exclusively the county or city.

To address these problems with the existing data on prisoners I have assembled, for the entire US, decennial county-level counts of state prisoners and jail inmates by race, for 1870–1880, 1910–1940, and 1990–2010. These data enable me to distinguish the carceral legacy of slavery in the Black Belt from the majority-white “up-county” and frontier regions of the South where plantation slavery had made few inroads. Because the largest Southern cities were often roughly coextensive with their counties, we can also use these data to compare Southern cities like Charleston and Mobile that had had relatively large slave populations, with newer cities like Atlanta and St. Louis.

The “Black Belt”, which in this article I loosely associate with the terms “plantation counties” and “former slave counties”, was named for its alluvial soils suitable for cotton growing rather than the racial makeup of its population. Yet the region is conventionally defined today as rural Southern counties in which more than a third or a half of the population is African American. As such its boundaries have shifted over time, but its core shape has been remarkably persistent.

Some of these confounders could even explain the South’s reliance on slavery in the first place, making it difficult to disentangle slavery from correlated carceral outcomes that are not themselves caused by it. For instance, some have argued that immigrants to the South brought with them a distinct culture of honor and violence that may have attracted them to slaveownership whilst also making them less inclined to make use of courts (and thus prisons) in settling disputes (Gouda and Rigterink, 2017). I explore some of these potential confounders in the discussion section below.

Another problem, from a causal-inference perspective, is that state-level data cannot provide the fine-grained variation that allow researchers to instrument for slavery using features of the local geography, or to employ other robustness checks, such as matching and border-analysis.
that had few enslaved residents in 1860. Importantly, with county-level data one can apply the same methods that others have employed to estimate the long run effect of slavery and see how these carceral outcomes compare to other aspects of slavery's legacy.

These data come from a variety of sources. For 1870 I transcribed prisoner counts from original or scanned schedules of that year’s Census of Social Statistics, which recorded a district-level aggregate of native-born white, foreign-born white, and Black prisoners on June 1st 1870. Where schedules were missing or not filled I used a separate estimate of jail inmates from the full population census available at IPUMS, using designations for group quarters and occupation. To remove any state prisoners (and thus avoid the aforementioned problem of a custody count) I identified all Southern state penitentiaries in 1870, collected counts of their inmates by race in that year from state-level penitentiary reports, and subtracted these numbers from any suspiciously large county-level inmate counts in the corresponding counties. As a result my estimates of the incarceration rate for 1870 are only for jails (not prisons) but I was also able to collect the number of county-level convictions (for all races) to both jails and prisons from the 1870 Census of Social Statistics to produce an additional measure of the total prison and jail admission rate.

For 1880, 1910, 1920, 1930 and 1940 I identified jail inmates and prisoners in the IPUMS full count census using the group quarters, occupation and relationship variables and matched them to each prisoner’s county of residence in the previous census year using matching algorithms developed by Abramitzky et al. (2020). The race-specific prisoner totals and match rates are displayed in table ???. My county-level incarceration rates based on this method are not jurisdictional counts, since the county in which a prisoner used to live will often be different from the county in which they

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26 I collected scans of these schedules from state archives, the National Archives and genealogical websites. Each county consists of 1 to 10 districts and I aggregated to the county level only after first establishing that no district schedules were missing.

27 Typically the Census of Social Statistics schedules distinguished jail inmates from state prisoners, so in practice this correction only applied to missing counties for which I used an estimate of prisoner population from the full count census.

28 Since penitentiaries were typically either small or nonexistent in 1870 (the ratio of jail inmates to state prisoners in the South in 1870 was X to Y) I do not believe that it would be possible to identify enough county-level variation in state prison populations in order to run a separate regression on prison incarceration rates in that year.

29 Here I followed Katherine Eriksson, who developed both the means of identifying prisoners and the technique of matching them to previous counties (Eriksson, 2015, 2019). I excluded prisoners who were in jail or prison for more than 10 years prior to my observation by eliminating prisoners from the population to which I matched the prisoners.
were convicted, but figure ?? shows that in states and years for which I have an independent estimate of incarceration by county of conviction these estimates are closely correlated (whereas both are poorly correlated with custody rates). For 1940 I additionally transcribed a special census report on jail populations by race.30

Finally, for 1990-2010 I employed newly assembled county-level prison and jail counts from the Vera Institute of Justice. The annual data were assembled from the Annual Survey of Jails and the Census of Jails, with inmates from multi-county jails assigned to adjacent counties according to population. In estimating a comparable jail inmate count I excluded those held in jails as form of pre-trial detention, the use of which can vary greatly by state. Vera’s county-level prison estimates combine data collected directly from individual state corrections departments and the Bureau of Justice Statistics’ National Corrections Reporting Program (NCRP). For my 1990, 2000 and 2010 estimates I interpolated missing counties using data from the adjacent years.

For the denominator in my decennial county-level incarceration rates I followed Vera in estimating the total county population by race aged 15-64, either from census tables or the full count censuses. The justification for excluding those under 15 and over 64 is that such people are very rarely incarcerated, yet the proportion of these groups can vary greatly by county and is capable of skewing rates and making comparisons across counties difficult. To address the issue of counties with very small populations having inflated incarceration rates (especially for African Americans) I first added the prison and jail totals to the population denominator (by race), then (as a robustness check) selectively removed counties with populations of under 50, 250 and 1000 people from my regressions.

While comparative criminologists often treat the incarceration rate as an indicator of punitiveness, and the racial disparity in incarceration rates as an indicator of racial bias, neither measure is without its flaws. As I explore in the discussion section below, the number of people in prison and jail observed at a given time and place is a function of (a) the crime rate, (b) the arrest rate, (c) the conviction rate, and (d) the average sentence length, all operating over many years prior to the observed year. Of these only (d) can be treated as a measure of punitiveness, and only when we can control for variation in the severity of offenses. The problems are compounded by

30United States Bureau of the Census (1943). Note that this report only separately reported non-white jail inmates for counties with more than 25 non-white inmates. The race-specific jail incarceration rates for this year are therefore right-curtailed and should be treated with more circumspection than the other data.
estimates of racial disparity, which are a function of both behavioral differences between groups and bias at each stage of the criminal justice system. Yet in the absence of more fine-grained data for each of these variables we are forced to rely on aggregate patterns in incarceration, which prior to the Bureau of Justice Statistics are typically the only comparable data available. In what follows I retain this conventional approach but supplement it with individual data on Southern convicts from selected states (including data on crime and sentencing) as well as a county-level measure of executions per prisoner for every state, and a state-level estimate of prisoner mortality. Here the idea is to test whether a punitive legacy of slavery can be identified not just in the rate of incarceration, but also in the severity of punishment. I also separately examine the relationship between judicial and extra-judicial punishments, measured as the number of people lynched in a given county.

4 Methods

In this article I employ a variety of models of the long-run slavery regression with various transformations of my original decennial measures of county-level incarceration as dependent variables. As is typical in these models, the fraction of the county population enslaved in 1860 is my independent variable of interest, but I also run separate specifications with this variable measured in 1850. For every specification I first report the bivariate effect of historical slavery on incarceration, then report the effect after controlling for other county-level geographic and socio-economic variables observed in 1860. These controls are intended to account for the fact that counties that were more reliant on slavery may systematically differ from other counties in ways that were unrelated to their use of slavery. First, I control for many time-invariant features of a county’s geography that may be correlated with incarceration but cannot be considered effects of slavery. Here the inclusion of controls for a county’s longitude and latitude (together their squared term) also helps to address spatial autocorrelation in the data. Second, I add

31These include total and race-specific county-level incarceration rates, as well as the ratio of the Black to white incarceration rate, for the census years 1870, 1880, 1910, 1920, 1930, 1940, 1990, 2000, and 2010. All dependent variables are logged in my preferred specification, but I also ran separate regressions on raw levels, their inverse hyperbolic sine, standardized coefficients, and with just the raw prison populations as the dependent variable (with the race-specific county population on the right hand side of the regression equation).

32[insert estimates of spatial auto-correlation in bivariate residuals] Spatial auto-correlation may be summarized as the tendency for nearer things to be more similar
additional controls for demographic and economic characteristics of a county in 1860 that might be related to both the prevalence of slavery and the subsequent use of incarceration in that county. These include measures of agricultural wealth, productivity, and inequality, as well as access to rail and water transit routes. Since these controls may themselves be related to prior levels of slavery they introduce the possibility of post-treatment bias which may mop up some the effect of slavery. Thus the size and significance of the reported coefficient on the historical slave share of population in the “all controls” model can be considered a lower-bound estimate of the true effect.

To prepare the data I first harmonized all variables to the X 1990 counties for which data on the total and slave population in 1860 can be estimated. However, in any given year the number of county-level observations depends on the degree of missingness in my estimates of race-specific prisoner counts, such that these numbers range from X county-level observations for African Americans in 1940 to Y county-level observations for total prisoners in 1930.

In my preferred specification I weight by the race-specific county population in the outcome year \( \text{pop}_{rcy} \). I normalize the dependent variable by taking the log of the total and race-specific incarceration rate in each county \( c \) and separately run weighted least squares (WLS) regressions for each racial group \( r \) and census year \( y \), adding controls in the following manner:

\[
\begin{align*}
\log (\text{incr}_{rcy}) &= \beta_0y + \beta_1y (\text{slavery}_{c1860}) + \epsilon_{rcy} \quad (1) \\
\log (\text{incr}_{rcy}) &= \beta_0y + \beta_1y (\text{slavery}_{c1860}) + \theta X_c + \epsilon_{rcy} \quad (2) \\
\log (\text{incr}_{rcy}) &= \beta_0y + \beta_1y (\text{slavery}_{c1860}) + \theta X_c + \eta Y_{c1860} + \epsilon_{rcy} \quad (3)
\end{align*}
\]

Where \( \text{incr}_{rcy} \) is the number of prisoners per 100,000 adults aged between 15 and 64 of race \( r \) (\( b \)=black, \( w \)=white, \( t \)=total) living in county \( c \) in census year \( y \) \((\text{prisoner}_{rcy} / \text{pop}_{rcy} \times 10^{-5})\); \( \text{slavery}_{c1860} \) is the percent of that county’s total population that was enslaved in 1860.

I employ, in my preferred specification, Richard Hornbeck’s method of aerial interpolation (Hornbeck, 2010), which divides county-level data from one year by the area of intersection with a base year and stitches it back together to estimate the same data on a base-year geography. I run all regressions on both 1860 and 1990 counties using this method, as well an alternative method of interpolating developed by Slez et al. (2015) that aggregates to the smallest common geography. Many thanks to Richard Hornbeck, Elisabeth Perlman and Adam Slez for assisting me in implementing these methods.

\[33\]
1860 population that was enslaved in 1860 \( \left( \frac{\text{slaves}_{1860}}{\text{pop}_{1860}} \times 10^{-1} \right) \); \( X_c \) is a vector of time-invariant geographic controls: county area (log), longitude and latitude, their squared term, and a measure of terrain ruggedness\(^{34}\); and \( Y_{c1860} \) is a vector of additional controls derived from the 1860 population and agricultural censuses: total population (log), proportion of small farms, inequality of farm holdings (gini), acres of improved farmland (log), farm value per improved acre (log), the proportion of the free population that was African American in 1860, and dummy variables for whether the county had access to railroads and navigable waterways. \( \epsilon_{rcy} \) is an error term. My model of racial disparity in incarceration takes the same form as equations 1–3, but with the dependent variable as \( \log \left( \frac{\text{incrt}_{bcy}}{\text{incrt}_{wcy}} \right) \), where \( \text{incrt}_{b} \) is the Black incarceration rate and \( \text{incrt}_{w} \) is the white incarceration rate. Finally I use robust state-clustered standard errors to determine the confidence intervals on my estimate of \( \beta_1 \).

This form closely replicates Acharya et al. (2018) and can thus be compared with their results. It also enables me to compare estimates of \( \beta_1 \) across years. However, I also separately ran each regression in an unweighted OLS specification; in 2SLS and 2SWLS while instrumenting for slavery using the suitability of a county’s soil to cultivating cotton (a common specification for the long-run slavery regression)\(^{35}\); in a pooled county panel framework with state and year fixed effects; and with the addition of heteroskedasticity and autocorrelation consistent (HAC) standard errors.\(^{36}\) In my attempt to identify potential mechanisms in the analysis section below I also add controls for urban and Black population percentage in the outcome year, as well as crime and arrest rates and a measure of police officers per capita for 1990-2010.\(^{37}\)

Note however, that my implementation of these methods is not meant

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\(^{34}\)Defined as the standard deviation in altitude across county points, from Hornbeck and Naidu (2014).

\(^{35}\)In keeping with the rest of the literature I here employ UN Food and Agriculture Organization measures of soil suitability for cotton. However, this is not my preferred model since I question the validity of soil suitability as an instrument for slavery, both because it is only observed post-treatment and because both soil type more broadly and cotton in particular may plausibly influence incarceration outcomes other than via slavery. My concern about this instrument increases with every new paper that finds a significant effect of cotton suitability on a new outcome, for each such finding chips away at the exclusion restriction for every other one.

\(^{36}\)For these I estimated spatial kernels using a Matérn function, following Kelly (2020). I also recorded the Moran statistic of spatial auto correlation for all my residuals.

\(^{37}\)Only the Black population percentage consistently eliminates the significantly negative effect of slavery on Black incarceration rates in the Jim Crow era.
as an unqualified endorsement. As I discuss in the conclusion, I have a number of reservations about standard interpretations of the long-run slavery regression.\footnote{Causal inference is rendered problematic in these models by the great length of time that separates treatment from observation (in many specifications 150 years or more), since the longer the delay the more opportunities there are for omitted variables to confound observed effects. Very long time delays also pose problems for isolating causal mechanisms, since both mechanisms and confounders can have persistent effects of their own, generating feedback effects that make it difficult to identify any original signal. Additionally, as I explain in the discussion, the county unit, or even spatial variation more broadly, may not be the most appropriate way to observe the carceral legacy of slavery.}

5 Results

Figure 7 shows the relationship between 1860 county-level percent slave and incarceration rates by race (and racial disparity) for all years and Southern counties for which I have assembled data. The top row of this figure indicates that a historical legacy of slavery has no significant impact on white incarceration at the county level, but a consistently negative impact of Black incarceration that appears to diminish in size over time, with 2010 being the first year in which the negative relationship is no longer significant in bivariate and geographic control specifications. The bottom left panel of figure 7 indicates that the racial disparity in incarceration is also negatively associated with a county-level legacy of slavery, although this effect is restricted to the 1870–1940 period. The bottom right panel shows that there is a positive effect of percent slave on total incarceration in 1880, 1910 and 1920, but this effect appears to be due to the disproportionate number of African Americans in the Black Belt, who are still generally incarcerated at higher rates than whites even though they are incarcerated at lower rates than African Americans in other parts of the South.\footnote{The effect of slavery on total incarceration rates becomes negative in every year when controlling for the county’s Black population share in the outcome year.}

Add paragraph on effect size.

6 Discussion

While the absence of a positive effect of slavery on later rates of African American incarceration may be sufficient to cast doubt on the replacement thesis, the presence of a robust and sizable negative effect in the Jim Crow
era calls for an alternative account of slavery’s carceral legacy capable of explaining this surprising result.

To understand what might be driving low incarceration rates in the former slave counties of the Black Belt, it may be useful to disaggregate the incarceration rate into its proximate determinants. As figure 8 shows, the incarceration rate in a given locality is roughly a cumulative function (combining past and present levels) of the crime rate in that locality, the rate at which local law enforcement has arrested accused criminals, the rate at which local juries and lawyers have convicted those arrested, the use of prison (rather than other punishments like fines, suspended sentences and executions) by local judges, and the average prison term they assign.

These different proximate determinants of the incarceration rate may in turn be associated with various hypothesized mechanisms, further back in the causal chain, linking slavery to incarceration. The left side of figure 9 shows the hypotheses most often stated or implied in the existing literature. In the replacement thesis, which is typically assumed to flow through racism (Acharya et al., 2018) or labor repression (Rubio, 2019), a legacy of slavery is typically presumed to affect incarceration rates (and racial disparity in incarceration) through the more punitive (and racially biased) actions of police, lawyers, juries, and judges; while the literature on slavery’s culture of violence might also lead us to expect higher rates of violent crime in the Black Belt.

On the right side of figure 9 I list some potential mechanisms that could either confound slavery’s legacy or reflect an alternative (dueling?) legacy that could be responsible for driving down incarceration rates for African Americans in the Black Belt. Hypothesized positive effects on Black incarceration (or racial disparity in incarceration) are depicted as red arrows in figure 9, negative effects with black arrows. The latter include potential confounders, like ruralness and weak state capacity (although the latter may also be seen as a legacy of slavery) as well as distinct alternative legacies, such as lynching, paternalism and what I call “judicial peonage.” In this section I will explore each potential mechanism in turn.

6.1 Ruralness and crime

One possible explanation for the observed negative effect of slavery on Black incarceration might be that a history of slavery is associated with a more rural population and economy, in part because mobile slave collateral enabled slaveowners to buy up land in areas whose soil and climate was most suited to agricultural specialization. It is certainly true that counties with a history
of slavery tended to be rural, and that they remain more rural than the average Southern county today. If rural areas tend to have lower crime rates (as they often do today) then this socio-economic legacy of slavery might be sufficient to explain lower Black incarceration rates in former slave counties. In this case the replacement thesis might still be valid, for a positive effect of slavery on the severity of punishment might be confounded by the negative effect of ruralness on crime.

However, there are a number of problems with this hypothesis. First, ruralness in the United States has not always been negatively associated with crime. For much of American history rural areas appear to have had higher rates of homicide than cities.\footnote{Roth (2009). We might assume that some forms of property crime are always more likely to occur in urban areas, but it is difficult to tell since comprehensive county-level crime data is not available prior to the 1990s.} Second, even if we assume that rural counties had overall lower crime rates because they provide fewer opportunities to come into conflict with or exploit strangers (or because they may have greater levels of social cohesion) these things should apply to both Black and white residents alike. Thus ruralness alone would not be able to explain why Black incarceration rates in particular (and thus also racial disparity in incarceration) tend be lower in former slave counties. Third, economic historians have long argued that slavery shaped the South’s economic development long after it was abolished, either by locking it into a specialization in certain export crops or by undermining the formation of towns and cities (Wright, 1986). If that’s true then it is not clear we can view the persistent ruralness of former slave counties as independent of the legacy of slavery.

Comprehensive county-level crime data is not available prior to the 1990s, but the empirical data that we do have are not very consistent with a confounding effect of ruralness on crime. When Gouda and Rigterink (2017) regressed 1860 slave shares on county-level violent crime rates in 2000 (using measures from the FBI’s Uniform Crime Reports and Michael Maltz) they found a positive effect.\footnote{Gouda and Rigterink (2017) show that this result is robust to controlling for population density in 2000, which is negatively associated with violent crime rates in their model.} When I control for the rate of violent and property crime (UCR data) in my modern-day county-level regressions on incarceration rates the negative coefficient on historic slave percentages is unaffected (see figure 11).\footnote{The regressions behind figure 11 are estimated differently than figure 7. In these specifications I pooled all modern years for which Vera’s race-specific county-level incarceration data was available and ran regressions on a panel of county-years from 1990 to 2015 with state and year fixed effects. Here I included three separate dependent variables:} Finally, as figure 10 shows, adding controls for
the contemporary share of the population that is urban (census data) has little effect on the negative impact of historic slave percentages in my regressions, yet the (positive) effect of urbanness often loses significance when controlling for the 1860 slave share. All these results strongly suggest that the observed negative effect of slavery on Black incarceration are not driven by an independent dampening effect of ruralness on crime.

Note, however, that the weakness of the rural hypothesis does not invalidate the possibility that differential crime rates may help to explain the observed low incarceration rates in the Black Belt. It just means we need to come up with an alternative account of how a legacy of slavery might be (negatively) associated with African American crime. While county-level data on crime is not available for most of the period during which we observe a significant negative effect of slavery on Black incarceration (1870-1940), Gabriel Lenz has digitized county-level homicide mortality for Blacks and whites in 1939-1940. He shows that Black (but not white) southern homicide rates are negatively correlated with 1860 percent slave in that year. Yet rather than attributing that finding to any generically non-violent feature of rural

the prison incarceration rate, the total (jail plus prison) incarceration rate, and the rate of prison admissions. In these models the negative effect of historic slavery is strongest for the total incarceration rate and lowest for the prison admission rates. Note that in this panel specification the effect on white incarceration is also negative and significant, but much smaller (figure 11 has a different x axis scale for Blacks and whites). The first row includes all the time-invariant 1860 controls in my baseline model: geographic, social, and economic. In the second row I add time-varying annual county-level controls for population density, the unemployment rate, the poverty rate, republican vote share in the most recent elections, and two measures of ruralness. Of these only the poverty rate reduced the negative effect of historic slavery, while everything else made the effect more negative. In the third row I added contemporary controls for the rate of violent crime, the rate of property crime, and the number of police officers per capita. County-level crime data were taken from the FBI's Uniform Crime Reports. County-level data on police employment are from the FBI Criminal Justice Information Services Division (by request), and the BJS Directory of Law Enforcement Agencies. Of these only the police per capita measure reduced the coefficient on historical slave percentage. In the fourth row I add contemporary demographic controls for the age, gender and racial breakdown of a county's population. Including the contemporary Black population share eliminates the significance of the negative effect of the historical slave percentage in all specifications. Note, however, that the effect of slavery does not become positive when controlling for contemporary demography, as the replacement thesis might lead us to expect.

The coefficients reported in figure 10 are for model 2. In other specifications I employ different measures of rurality, including population density, the share of the population employed in agriculture and the total value of cultivated land, as well as dummy variables for a county that has been designated rural by the census. Although some of these variables are available for fewer years, in no year does controlling for them eliminate the negative effect of slavery on Black incarceration rates.
life, Lenz interprets it as symptom of a) a weak planter-controlled state that was uninterested in policing African Americans, leading to the emergence of a compensatory “do-it-yourself justice” in urban Black neighborhoods and b) a degree of “protection” from violence offered by paternalist planters in the Black Belt. I will consider these alternative legacies of slavery in so far as they may impact other determinants of incarceration, returning to Lenz’s hypothesis about their impact on crime in the conclusion.

6.2 Low state capacity and policing

An alternative interpretation of my results might be that arrest and conviction rates tended to be lower in former slave counties because they tended to have weak local states, and specifically to have an under-funded and less professional system of policing and prosecution. It is true that former slave areas of the South have always tended to be relatively poor, to tax their citizens at lower rates, and to have lower numbers of police per capita (at least in the 1990s and 2000s when county-level data on policing is available), than the rest of the South. Weak state capacity could simply be a function of ruralness and poverty, but it could also be an independent legacy of slavery. We know that slaveowners often sought to restrain judicial power whenever it threatened to interfere with the personal power they exerted over their slaves. We also know that Southern Democratic landowners, when they reclaimed state legislatures after the defeat of Reconstruction, tended to cut taxes and restrict state services to poor Blacks and whites alike. If they also pursued these austerity measures at the local level then we might expect to see more ineffectual policing (or prosecution), and lower rates of arrest per capita.

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44Lenz argues that Black homicide rates in the urban South in 1939 were the highest ever observed in any place or time in US history. See Lenz, unpublished manuscript, *Unprotected*, 2021.

45Independent, that is, of slavery’s purely economic legacy, and more than simply a function of the correlation between slavery and ruralness.

46Where antebellum courts and law enforcement expanded their reach (in cities and in border states) this inevitably led to the unwanted interference of sheriffs, courts and legislators in the power of slaveowners to violently discipline their human property (Ayers, 1986). Waldrep (1998) argues that attempts to maintain a dual system of legal protection for whites and lawless violence for slaves broke down as law enforcement outgrew the racial limits imposed on it, due to institutional momentum, federal pressure, the anomalous position of free Blacks, and divisions among whites over slavery. Merritt (2017) suggests that influences also ran in the other direction, such that the antebellum Southern legal system, which was “primarily structured around incarcerating poor whites,” adopted many of the trappings of slavery, including widespread whipping and the auctioning of (white) prisoners.
crime (or conviction per arrest) in the Black Belt counties they had the most political and economic control over (especially after disenfranchisement).

Yet there are empirical reasons to doubt the weak state capacity hypothesis. Just as we did for the rural hypothesis, we can to some extent control for the supposed mechanism in this case. From 1990 on we can control for both the number of police officers per capita and the number of arrests per reported crime, and although controlling for these variables does reduce the negative effect of slavery on Black incarceration, it does so only to a very slight degree, and the effect remains statistically significant (see figure 11). Moreover, we can proxy for state capacity using data on county tax revenue in 1870 and 1880, and controlling for either total revenue or the revenue share of estimated county income does not noticeably reduce the negative effect of percent slave on Black incarceration in any of my models.

There are also theoretical problems with the weak state capacity hypothesis, especially as it pertains to policing. First, while it’s clear why large Southern landlords sought to restrict taxation and limit the social services that the state offers their laborers, it’s not clear why they would be interested in maintaining an under-funded or ineffective policing force (whether sheriffs, militia or police), especially given that from the 1890s those forces would have been under their complete control (I will address the relationship between landlord power, police and lynching in the next section). Second, it is possible that restrictions on policing could increase crime rates, which could in turn counter-balance any negative effect on the rate of arrest per crime.\footnote{Note that Gabriel Lenz shows Black homicide rates were higher in Jim Crow era cities than at any point in American history, and he convincingly argues that this was an effect of deliberate under-policing of Black urban neighborhoods, directed in part by landlord-controlled state legislatures that had a material interest in worsening the conditions of urban African Americans (thereby restricting the outside options of their Black tenants). But if under-policing explains the higher crime rates (and presumably in part the higher Black incarceration rates) in the urban South, it is hard to see how it can also explain the lower incarceration rates in the Black Belt. Moreover Lenz does not demonstrate that planters were able to control urban policing.}

Third, as in the supposed rural mechanism flowing through crime, it is easy to see why an underfunded sheriff might make fewer arrests (and an underfunded prosecutor might achieve fewer convictions), but it is hard to see why limits on police funding or police capacity should specifically reduce the Black arrest rate, thereby contributing to a lower racial disparity in incarceration.
6.3 Lynching and racial terror

One hypothetical mechanism that has no difficulty in accounting for the lower rates of racial disparity in incarceration in the Black Belt would be if there were a trade-off between incarceration and lynching (which we know primarily targeted African Americans). A narrow conception of such a trade-off could point to the fact that someone who is lynched will, by definition, not be found in prison, and will in many cases not even be arrested, thus driving down the conviction rate (or the arrest rate) in a county with high rates of lynching. A broader conception, taking account of the terror that lynching inspired among African Americans in particular, might lead us to expect lower Black crime rates in counties with more lynching because the cost of even being accused of a crime was so much higher for Africans Americans in such places.

Many scholars have pointed to historical links and statistical correlations between slavery and lynching, which they have attributed to the habituation of whites in former slave counties to the brutalization of African American laborers, or to a more specific persistence among former slave-owning landlords and their descendants of the above-mentioned suspicion of law and courts, and a preference for taking matters of punishment into their own hands (or the hands of their overseers) when it came to Black laborers. To explore the narrower version of the trade-off hypothesis (a mechanical reduction in incarceration rates due to lynchings) I first identified the county and race of all known Southern lynch victims from 1883 to 1941 using the data made available by Seguin and Rigby (2019) and combined them with data on extra-judicial killings of African Americans from 1865 to 1880 that were made available to me by the Initiative (2020). I then added all victims of extra-judicial killings in the previous decade to my race-specific prisoner counts for the census years 1870, 1880, 1910, 1920, 1930 and 1940, and re-estimated a race-specific rate of incarceration plus lynching for each year. Re-running the regressions with this rate had no effect on my results, which is perhaps not surprising because of the small number of lynch victims relative to prison population. As table 3 indicates, the number of confirmed African American lynch victims in the South in any decade was never more than 5%

Yet any substitution of vigilante violence for incarceration may not merely have been cultural, for incarceration entailed more fiscal costs and may in certain circumstances be less susceptible to local elite control. The preservation of an informal system of punishment may also have required weakening formal criminal justice institutions, reducing the capacity of police and courts to identify, convict and incarcerate potential prisoners. See discussion in previous subsection.

48 Yet any substitution of vigilante violence for incarceration may not merely have been cultural, for incarceration entailed more fiscal costs and may in certain circumstances be less susceptible to local elite control. The preservation of an informal system of punishment may also have required weakening formal criminal justice institutions, reducing the capacity of police and courts to identify, convict and incarcerate potential prisoners. See discussion in previous subsection.
of the African American prison population at the start of the decade.\textsuperscript{49}

To address the broader version of the lynching hypothesis (the terror induced by lynching reducing crime) I added a control in each decade from 1870 to 1940 for the rate of lynching of African Americans in that county over the previous decade.\textsuperscript{50} Surprisingly when I ran my regression with this control the negative effect of slavery on African American incarceration rates increased in most years and specifications. The reason for this appears to be that the rate of African American lynching is in fact negatively associated with a county’s dependence on slavery in 1860 (see figure 12). As a result, far from a trade-off between the lynching and incarceration of Southern African Americans, there is in fact a positive association between the two (see figure 13).

The negative association between Black lynching and slavery may be surprising to readers of the quantitative literature which has sometimes reported a positive association. However, this literature has generally relied upon a rate of lynching defined as the number of Black lynch victims divided by the total county population (e.g. Reed 1972; Acharya et al. 2018, p. 139) which appears to be driven by the fact that the Black population were historically concentrated in former slave areas. Yet this result is actually consistent with contemporary accounts which emphasized that African Americans had a lower chance of being lynched in the Black Belt (James, 1940; Raper, 1933), as well as the work of historians who have identified the majority white frontier regions as have the highest rates of Black lynching, largely as a reaction to Black in-migration (Ayers, 1986).\textsuperscript{51}

6.4 Paternalism and sentencing

James (1940) suggests that lynching was less common in the Black Belt be-

\textsuperscript{49}Note that these prisoner population numbers (from the census) are often undercounts because they exclude some or all county jail inmates.

\textsuperscript{50}White lynchings were such rare events that a decennial lynch rate would be a largely meaningless variable.

\textsuperscript{51}To test whether this variable also explains the negative effect of slavery on Black incarceration I separately ran all my regressions with the previous decennial change in the Black population as an additional control. I found that this was positively associated with Black incarceration, but that the addition of this control did not eliminate the effect of slavery. The contemporary Black population share does eliminate the effect of slavery, but since these variables are both closely correlated and causally intertwined it is difficult to disentangle the one from the other. Note that this does not invite a “racial threat” interpretation of the result, since the prediction of the racial threat theory would be a positive association of Black population share and Black incarceration, whereas in fact these variables are negatively associated.
cause powerful planters protected their tenants from the mob. If so then such “protection” would be consistent with what scholars of the postbellum cotton economy have described as landlord “paternalism”\(^5\) These scholars have argued that landlords commonly represented their tenants in court proceedings, providing some protection from severe and racially biased punishments faced by unattached African Americans. If so such paternalist behavior might explain lower incarceration rates in former slave counties where which tended to have larger and more paternalist landlords. Presumably through representing their tenants or leaning on local judges and prosecutors (who in rural counties were typically themselves large landowners) such paternalist landlords may have been able to negotiate lower sentences for their tenants, which according to Alston and Ferrie (1999) would have increased tenant loyalty, reduced tenancy turnover, and potentially lowered the cost of tenant labor. If this form of paternalism was in operation we would thus expect to tenants, and specifically African American tenants, receiving shorter sentences for equivalent offenses in former slave counties.

To test this hypothesis I transcribed individual level convict data recorded in the biennial reports of the Mississippi State Penitentiary. These record all convicts within the penitentiary system, including those leased out to private contractors. Crucially they also record the race, county of conviction, offense and length of sentence. I then ran a multi-level HLM model of individuals within counties within years, where the individual sentence length is the dependent variable and the county-level slave percentage is the independent variable of interest:

\[
\text{Sentence}_{iyc} = \beta_0 + \beta_1 \text{Slavery}_{1860} + \eta Y_{iyc} + \delta_y + \alpha_o + \epsilon_{iyc} \tag{4}
\]

Where \(Y_i\) is a vector of individual-level covariates including race, sex, age, age squared, and offense, and \(\delta_y\) and \(\gamma_c\) and \(\alpha_o\) are random effects for year, county and offense type (property, violence, and other). The inclusion of the dummy variable for offense as well as the random effects and the

\(^5\)Some have associated “paternalism” with a cultural legacy of slaveownership (Genovese, 1974), while others see it as a strategic reaction of (former-slaveowning) landlords to labor scarcity immediately after abolition (Jaynes, 1986; Alston and Ferrie, 1999). In either case the paternalist behavior of Southern landlords would include non-monetary services to their tenants (either on credit or in kind) including limited forms of old-age assistance, medical care, conflict resolution, hunting privileges, support for schools and churches, and emergency assistance. Alston and Ferrie (1999) argue that these services reduced the cost of tenant labor by generating personal dependency, and thus reducing turnover and the need for monitoring. However this would depend on landlords remaining the exclusive providers of such services, without competition from local governments.
other individual level covariates, allows me to gage the effect of slavery on a judge’s sentencing decision while holding these other factors constant. But to ensure that the effect is not driven by unobserved variation in the severity of offenses I also re-ran the analysis with a sample restricted to convicts accused of homicide. Figure 14 shows the results of the data broken down by race and offense type. In no year did judges in former slave counties give shorter sentences to Black convicts (controlling for age, sex and offense), and there were several years when they assigned significantly longer sentences. In the late 1870s and early 1880s, the period when Mississippi’s notorious “pig laws” were in effect, property offenses were punished with greater severity in former slave counties. Yet curiously the same former slave counties that were sending African American convicts to the Mississippi penitentiary for longer terms also sent proportionally fewer convicts. Figure 15, which relies on the same data aggregated to the county level to estimate annual incarceration rates, shows that just like the South as a whole, former slave counties in Mississippi generally had lower incarceration rates for African Americans, with the difference being greater for property offenses. To explain this puzzling result I now turn to a lesser known aspect of the relationship between large landowners, Black tenants, and the Southern court system.

6.5 Judicial peonage

Of course the fact that landlords commonly represented their tenants in court or paid their lawyer fees does not imply that they were motivated to actually protect African American tenants from a brutal and racist judicial system. On the contrary, since much of the judicial and extra-judicial brutality of that system was (by the mid 1870s) tolerated or administered by landlord-controlled state and local governments it might be more accurate to speak

53 Mississippi’s pig laws, widely understood as means of controlling Black labor (akin to the earlier “Black codes”) classified as grand larceny the theft of “any hog, pig, shoat, cow, calf, yearling, steer, bull, sheep, lamb, goat or kid, of the value of one dollar or more”, for which defendants could then face up to five years in prison. The law was repealed in 1888.

54 When restricting the sample to homicides (not shown) the pattern is similar to that for violent offenses depicted in figure 14 but the positive effect of slavery on sentence length is greater.

55 This negative effect is only statistically significant in 1883, 1885 and 1891. Note that in these regressions incarceration rates are measured only with state prisoners, excluding the jail inmates that are included in my 1880 national estimates.
of a protection racket. Moreover, in offering to represent (or hire a lawyer to represent) African Americans in court landlords may have been seeking more than to instill a feeling of loyalty. And such rackets appear to have extended beyond the immediate relation between a landlord and his or her existing tenants.

By negotiating and then paying the fines, court costs and lawyer fees of either their own tenant or an unattached (typically African American) laborer it appears that many landlords were engaging in a form of peonage that effectively circumvented the 13th amendment and federal anti-peonage laws that the Supreme Court continued to enforce during the Jim Crow era. So-called “criminal surety” laws established the legality of this arrangement in several Southern states, but there is evidence it was a customary practice in many rural areas of the South. No systematic study of this practice has yet been made, but we can find much anecdotal evidence of it in contemporary African American writings about Southern courts. Since the details of this practice are not well known, and other evidence is not readily available, I will quote at length from several of these accounts.

The anonymous author of a 1904 article “The New Slavery in the South—An Autobiography”, referring to himself only as “A Georgia Negro Peon” writes:

One of the usual ways to secure laborers for a large peonage camp is for the proprietor to send out an agent to the little courts in the towns and villages, and where a man charged with some petty offense has no friends or money the agent will urge him to plead guilty, with the understanding that the agent will pay his fine,
and in that way save him from the disgrace of being sent to jail or the chain-gang! For this high favor the man must sign beforehand a paper signifying his willingness to go to the farm and work out the amount of the fine imposed. When he reaches the farm he has to be fed and clothed, to be sure, and these things are charged up to his account. By the time he has worked out his first debt another is hanging over his head, and so on and so on, by a sort of endless chain, for an indefinite period, as in every case the indebtedness is arbitrarily arranged by the employer. In many cases it is very evident that the court officials are in collusion with the proprietors or agents, and that they divide the “graft” among themselves. 59

In the same year Du Bois (then working in Atlanta University) conducted a survey of views about crime and punishment among African Americans in Georgia (Du Bois, 1904). Many of the responses that he published echo the account of the “Georgia Negro Peon.” For instance, in answer to Du Bois’ question about whether or not crime was increasing, one respondent in the Black Belt (Jefferson county) replied:

There are from forty to fifty misdemeanor convictions a year in our courts. The major part of them get white men to pay their fines, for which they work double the time. These white men run kind of force labor farms. 60

Another respondent (in Jackson county) writes “a good number of the law-breakers are bonded out of jail, and the court allows a lot of them to be paid out and they are made slaves of by the big men of our county.” Other respondents suggest that landlords either encouraged some forms of crime among African Americans or framed them for the purpose of binding their labor:

59 Peon (1904).
60 This respondent, who like others chose to remain anonymous from fear of reprisals, continues: “The Negroes’ treatment in court is usually fair, as there is no indignant public sentiment against these petty crimes. The offender, after his arrest, is generally taken by the arresting officer to some white man, who is the Negro’s choice; there a bond is made and the fellow put to work. When court convenes, the Negro and his employer appear, and after some legal formality the offender is fined. The fine is paid and the criminal goes back to work. I am not a pessimist, but owing to the demand of labor in this county and the means employed by the large land owners to secure it, I truly believe misdemeanor crimes are on the increase.”
The white man is already anxious for [the Negro] to get into something in order that he can tie him. This is what some of them call controlling labor. There are hundreds of Negroes working on farms and public works with some white man on his bond or working out fines.\footnote{This response was from Oconee county. Another respondent in Jewell writes that crime is on the rise due to “the white man who makes himself a protection for the Negro’s crime.” See also a respondent from Dawson who writes of a tragic case where “[t]he fine was paid by the landlord and the [guilty] man was kept on the place” while an innocent boy associate was sent to the chain gang. A respondent whose fear of reprisal led him to ask Du Bois not to mention his “bloody and oppressive” county writes “Crime is rapidly increasing; blind-tigers, petty theft, concealed weapons, church disturbances. In some parts of this county absolute slavery reigns; men and women are whipped and driven cruelly from before the dawn until dark. There are men whose fines are paid and are worked at the rate of $4.50 per month.”}

Finally Mary Church Terrel, in her extensively researched 1907 article “Peonage in the United States: The Convict Lease System and the Chain Gangs”, writes:

Colored men are convicted in magistrates’ courts of trivial offenses, such as alleged violation of contract or something of the kind, and are given purposely heavy sentenced with alternative fines. Plantation owners and others in search of labour, who have already given their orders to the officers of the law, are promptly notified that some available labourers are theirs to command and immediately appear to pay the fine and release the convict from gaol only to make him a slave. If the negro dares to leave the premises of his employer, the same magistrate who convicted him originally is ready to pounce down upon him and send him back to gaol. Invariably poor and ignorant, he is unable to employ counsel or to assert his rights (it is treason to presume he has any) and he finds all the machinery of the law, so far as he can understand, against him. There is no doubt whatever that there are scores, hundreds perhaps, of coloured men in the South today who are vainly trying to repay fines and sentences imposed upon them five, six or even ten years ago.\footnote{Terrell 1907, p. 308. See also Nate Shaw’s All God’s Dangers (1974) which discusses Shaw’s insistence that he serve his full sentence (for a confrontation related to the Sharecroppers Union) rather than accept offers of parole that would endebt him to a landowner.
6.6 Judicial peonage: evidence from the Georgia Penitentiary

Was the practice of judicial peonage suppressing incarceration rates in rural Southern counties by holding potential prisoners in the field rather than the penitentiary or convict camp? If so the negative effect of slavery on incarceration might simply reflect the greater economic and political power of planters in former slave counties, itself driven by cotton suitability and elite persistence (Ager, 2013). One way to test this hypothesis would be to recognize that a landlord’s interest in paying the fines and legal fees of a tenant would depend on the scarcity of labor at a given time and place. When labor is abundant both the cost and risk of a tenant breaking their contract is reduced, since it is unlikely they will find better opportunities elsewhere, and even if they do they can be easily replaced. Thus we should expect the negative effect of the historical slave share on Black incarceration to be reduced or eliminated by negative shocks to agricultural labor demand (or positive shocks to labor supply). Moreover, since courts seem to have been more willing to tolerate the intercession of landlords when it comes to non-violent offenses (which were also more likely to be punished by fines that landlords could pay) one would expect such shocks to reduce the negative effect of slavery for non-violent offenses more than for violent offenses.

To address this question I have turned to the records of the Georgia penitentiary. Georgia has been described as the “ideal type” of the Southern convict lease system (Mancini, 1996, p.83), and as a textbook case of prison labor as “slavery by another name” (Blackmon, 2009). It thus provides an ideal case with which to examine the replacement thesis. As mentioned above, Muller (2018) explored Georgia penitentiary records and found the pattern of low incarceration in the Black Belt. While Muller focussed on a single year of records (1880), and matched convicts to the census, in this section I draw on the Central Register of Convicts, a set of entry books recording state prisoners over a period of 150 years. Crucially for my pur-

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63 Georgia built its first penitentiary, like most Southern states, in the antebellum period, when almost all convicts were white (Bonner, 1971). The penitentiary building was burnt down by Sherman’s forces during the occupation of Atlanta, but the military governorship that followed set about rebuilding the prison, while leasing out convicts as a temporary measure. However, the Republican legislature that came to power under Reconstruction opted to continue the lease, which had proved to be a profitable venture. The “penitentiary” would come to refer to the entire state prison system, including all state convicts leased to private contractors, with the penitentiary building in Midgeville mostly acting as a way station, an auction house, or a hospice for those too old or sick to work.

64 Report of the Principal Keeper of the Georgia Penitentiary for the year 1880

65 These entry books were microfilmed by the Georgia State Archives and digitized by
poses, these data contain information not only on the race and county of
county of conviction of prisoners, but also the offense with which they were accused.
For this analysis I extracted data on race, offense, and county of conviction
for 230,341 Georgia state prisoners who were convicted between 1817 and
1970.66

The evidence from the Georgia penitentiary is consistent with the judicial peonage hypothesis. Figure 16 shows the annual trend in commitments
to the penitentiary from 1865 to 1920 broken down by race, whether the
conviction was for a violent or property offense, and whether it occurred in
the Black Belt.67 The figure shows that trends in penitentiary commitments
by race for violent offenses differed little inside and outside the Black Belt
region of the state. The dashed vertical line represents the Convict Law
of 1874 which legalized judicial peonage in the state. After the passage of
the law the figure indicates that outside of the Black Belt African American
conviction rates remained at a relatively high rate for the rest of the 1870s, a
decade characterized by economic crisis and the violent “redemption” of the
state by white Democrats. Yet within the Black Belt the number of African
Americans convicted of property offenses began to fall sharply following the
passage of the law, and remained at a much lower rate that in non-Black
Belt counties until 1920.

It’s notable that the peak years for African American prison commit-
ments for property offenses in the Georgia Black Belt (1875, 1899 and 1915)
were also the years that saw the sharpest drop in cotton prices. In these years
the difference between Black conviction rates inside and outside the Black
Belt were also minimized. This is consistent with an economically driven rise in crime in cotton growing areas, but in such conditions of labor surplus
landlords may also have had less incentive to use judicial peonage as a means
of tying labor. Other work on shocks to Southern agricultural labor markets
provide results that are consistent with this interpretation. The Boll Weevil

the Ancestry World Archives Project.

66 The records include the Reverend Martin Luther King Jr., who was briefly held in
Reidsville state prison following a sit-in at Rich’s department store in Atlanta on October
19, 1960. After the manager of Rich’s dropped charges King was transferred to Reidsville
on the grounds that his actions constituted a violation of probation stemming from a
failure to update his driver’s licence from Alabama to Georgia earlier that year. He was
released after intercession on his behalf from President Kennedy. It was from Reidsville
that King wrote a famous letter to his pregnant wife Coretta (Carson, 2001).

67 For the purposes of this figure I define the Black Belt as a county in which more than
a third of the population in 1860 was enslaved and less than a quarter was living in a city.
I divided the race-specific annual prisoner counts by annually interpolated county-level
population by race from the decennial census.

31
represented a substantial negative shock to cotton agriculture, and has been associated with a shift away from sharecropping.\textsuperscript{68} Both Rubio (2019) and Muller and Schrage (2019) analyze the effect of the Boll Weevil infestation on county-level Black incarceration. Muller and Schrage (2019) find that Black prison admissions for property offenses increased in Georgia counties affected by the Boll Weevil over the period 1915-1920, while admissions for violent offenses showed little change. Although they don’t examine interactions with a county’s history of slavery, they do interact with a measure of the extent of cotton cultivation that is likely correlated with slavery. Here they find, consistent with judicial peonage, that convictions for property offenses rise most sharply in counties with a larger share of cotton cultivation.\textsuperscript{69}

Figure 17 displays the effect of county-level historic slave population share on rates of penitentiary commitment from the 1820s to the 1950s. For each decade I ran separate regressions on Black and white commitments (top and bottom row) for property and violent offenses (black and grey dots).\textsuperscript{70} The figure reveals disproportionately low levels of Black (as opposed to white) incarceration in historic slave counties that are similar in degree to those observed for all Southern counties in 1870. It also reveals that this negative effect only began after the Civil War, and, perhaps most importantly, is significantly stronger when it comes to prison commitments for property offenses. Notably the negative impact of the legacy of slavery on incarceration for property offenses falls in the early 1890s, a period of severe economic depression and populist insurgency that coincided with a historical peak in lynchings.\textsuperscript{71} While an explicit test of the judicial peonage hypothesis must await further exploration of court records, these patterns are consistent with the theory that the practice of landlords paying fines and legal

\textsuperscript{68}See Ager et al. (2017); Bloome et al. (2017).

\textsuperscript{69}Rubio (2019), who examines the effect of the boll weevil across more states and a longer period of time, appears to find an opposite (negative) effect on Black incarceration. Apparently consistent with this effect, Feigenbaum et al. (2020) find that the boll weevil reduces lynchings. However, since Rubio (2019) finds an overall positive impact of historical county-level slave percentage on 1870-1940 incarceration (the opposite effect to the one I have identified) and only reports the interaction of the boll weevil with percent slave (as opposed to the direct effect analyzed by Muller and Schrage (2019)) it is not clear how to interpret these divergent results.

\textsuperscript{70}I use standard classifications of property and violent offenses and exclude non-standard offenses from these counts. I estimate the Black incarceration rate prior to 1860 as the share of free Blacks that were committed to the penitentiary. I separately ran regressions on the bivariate relationship and with all controls employed in my preferred models.

\textsuperscript{71}The rise of lynchings may indicate a withdrawal of landlord protection consistent with a reduced need to tie labor (Tolnay and Beck, 1995), while populism may have presented a challenge to judicial peonage. I intend to explore these hypotheses in future research.
costs of African American tenants charged with misdemeanors offenses was partly responsible for driving down incarceration rates in former slave counties during the Jim Crow era.

7 Conclusion

In this article I have shown that if we measure the use of prison by the rate of incarceration then we do not observe, in the US or elsewhere, that places that have historically relied more heavily on slavery have subsequently also made more use of prisons. This came as a surprise to me, as I had been influenced by the replacement thesis and had assumed that the commonly observed correlates of historical slavery (poverty, inequality, violent crime) would also be positively associated with incarceration. It was even more surprising to discover that there was a sizable negative effect of slavery on the incarceration of former slaves and their descendants in the United States, especially in the period 1870-1940.

I have not, however, claimed that this is the only or even the best measure of slavery’s carceral legacy. In addition to a place-based measure of incarceration one could also explore slavery’s individual carceral legacies by following the lives of former slaves and former slaveowners as they navigated the antebellum criminal justice system. Like individuals, cultural legacies of slavery do not respect county boundaries, and may be traced not only in literature and cultural products that pertain to punishment, but also in the institutional codes of prisons and the racialized stigma attached to prisoners. Finally, I have argued elsewhere that America’s exceptionally punitive judicial system may be due to a longterm legal and economic legacy of slavery, driven by constitutional limits to redistribution and constraints that former slaveowners imposed on African American mobility (Clegg and Usmani, 2020). We should not necessarily expect to observe a robust effect

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72 One advantage of such an approach, when compared to the county-level regression, is that it would allow us to trace individuals not only across time, but also across place. Patterns of migration can be explicitly mapped, such that we would no longer be implicitly ignoring all those former slaves who were arrested and incarcerated outside the county where they had been enslaved in 1860. It would also allow us to explore the possibility that former slaveowners who became penitentiary wardens or state legislators may have been able to influence statewide carceral policy. A more difficult but potentially rewarding research program would trace kinship relations, which would allow us not only to incorporate in our analysis those in 1870-1900 with family connections to slavery, but would also enable us to explore similar patterns amongst the 2nd, 3rd, 4th, etc., generations.

73 As Einhorn (2008) and Waldstreicher (2010) have argued, the US constitutions’s emphasis on state’s rights, particularly with respect to matters of taxation and criminal
of any of these additional legacies of slavery at the county or state level, yet they are not for that reason any less worthy of investigation than the legacies explored in this article. But there are also additional potential legacies that we might expect to observe at those levels if the data were available.

While the incarceration rate captures some key aspects of the severity of punishment (such as the tendency of judges to send people to prison and opt for more severe (longer) sentences) another important measure is prisoner mortality, whether through disease and violence (measures of prison conditions) or through legal executions (a measure of the perceived severity of offense as well as punitiveness). As Vandiver et al. (2007) have shown, former slave states are also more likely to execute prisoners in the modern era (although they do not appear to be more likely to execute African Americans) any my own analysis (figure 19 below) shows that there is a slight positive association between a Southern county’s reliance on slavery and the number African American prisoners from that county who were executed between 1920–1940.74

I have also collected a limited sample of state-level data on deaths in custody. These reveal a pattern that sharply diverges from the pattern of incarceration rates. While figure 1 shows the South has tended to have lower incarceration rates than the North (especially for African Americans), figure 18 shows that prior to 1950 mortality rates in Southern prisons were very much higher.75 Further research will be necessary to estimate prisoner mortality by race, but scattered reports from the late 19th century indicate that mortality among African Americans in Southern prisons was extraordinar-

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74 Note that while, as described in section 6.4 above, Mississippi judges appears to have given longer sentences to African Americans from former slave counties I have not been able to replicate that pattern in studies of individual level convict records from Tennessee, Mississippi or North Carolina.

75 Regressing the mortality data from Southern states shown in figure 18 on the 1860 state-level slave share indicates that states that were more reliant on slavery also had higher prisoner mortality, although this is likely driven by demographic differences together with the above-mentioned racial disparity in prisoner mortality.
ily high. Research using the individual-level and institutional-level data for Southern prisons that I am currently collecting might ask whether prisons, convict labor camps and chain gangs located in former slave counties had significantly higher mortality rates than other Southern prisons.

Even if Southern incarceration rates don’t meet our pre-conceived expectation of slavery’s legacy, it might seem obvious that the brutality of the Southern prison was a legacy of slavery. It’s hard to imagine that the convict guard who regularly whipped African American convicts were unaware that they were participating in a Southern tradition. And it’s clear that when Louisiana and Mississippi created prison farms (Parchman and Angola) on former slave plantations—partly as a response to a popular outcry against convict leasing—they had every intention of running them along their former lines.76 The analogies are glaring because they are intentional. But precisely for that reason we should be wary of taking them at face value.77

As the titles of several books on the subject make clear (Worse than Slavery; One Dies Get Another) the exceptionally high rates of mortality in Southern prisons and convict labor camps may be seen as something that distinguished them from slave plantations. After all, slaves were expensive commodities that slaveowners could ill afford to lose.78 We might think of this, drawing on Patrick Wolfe, as a distinction between a “logic of elimination” and a “logic of exploitation” (Wolfe, 2016). But just as Southern prisons are in some ways misrepresented by the analogy with the slave plantation, they may also misrepresented by analogy with the concentration camp or reservation. That’s because those institution were indeed designed to contain and partially eliminate entire populations, whereas the brutal conditions of Southern prisons and convict labor camps seem to have been intended, as I explain in more detail below, to affect not just those within these institutions, but also (indeed primarily) on those without.

Moreover, if the postbellum South could be largely considered “an armed camp for intimidating Black folk” (Du Bois, 1907), it’s arsenal nonetheless differed greatly across the region. As I have shown, both judicial and extra-judicial brutality against African Americans was concentrated not in the

76 Albeit with the significant difference that a minority of whites would now also pick cotton under the overseer’s watch.

77 Just as the French revolutionaries draped themselves in the garb of the Roman republic, postbellum prison officials may have posed as antebellum slaveowners in part to mask actual pattern of change.

78 Some of the most dangerous work on plantations was carried out by hired white laborers for this reason. See e.g. Irish workers digging irrigation ditches in Louisiana swamps.
traditional Black Belt, but rather in the frontier and urban regions of the
South (in the sense that rates of Black incarceration and lynching were higher
in such areas). Noting this, Muller (2018) argues that the function of brutal
punishment was not only to control black tenant laborers, but also (perhaps
mostly) to reinforce the social order of Jim Crow in the cities.

Such brutal reinforcement may have been more necessary in the cities
because that’s where African Americans had the most opportunity to free
themselves from dependence on landowners. But although urban whites were
typically the ones implementing these forms of brutal punishment (both
judicial and extra-judicial), it is clear that rural white elites also had an
interest in maintaining towns and cities as places of both lawful and lawless
violence. For they were concerned not only to prevent challenges to the
Jim Crow order that threatened to arise in urban areas, but also to put a
dampener on migration of Black tenants away from the plantation. Thus
in addition to the mechanism of judicial peonage that I have emphasized in
this article, I believe that future work on this topic would do well to explore
Gabriel Lenz’s hypothesis that exceptionally high rates of violent crime in
Southern towns may also partly explain the relatively lower incarceration
rates in the Black Belt.  

Where does that leave what I have called “the replacement thesis”? No
doubt many historians of the South would dismiss it as a vague functionalism
unworthy of consideration by specialists. At the same time I suspect the
replacement thesis persists because it contains a grain of truth. Just as
Lincoln announced in his second inaugural that “all knew that [slavery] was
somehow the cause of the [Civil] war,” it is fair to say that today all know
that slavery is somehow connected to mass incarceration. Yet if we don’t
explain that somehow we are left with vague functionalist claims about the
need (whose need?) to “discipline” African American bodies, and we risk
attributing to “white supremacy” an independent life of its own, disconnected
from the political economic foundations that gave it life and can take it away.

What I hope to have shown in this article is that there is a functional
continuity between slave plantations and Southern prisons, but that contin-
uity did not primarily consist in the visible similarities of the institutions

\[79\] In his unpublished manuscript Lenz argues that planter elites slashed policing budgets
in Southern cities following the defeat on Reconstruction because they were intent that
cities should become exceptionally dangerous places for African Americans to reside.

\[80\] There is undoubtedly a broader tendency to make vague functionalist claims about the
relationship between slavery and incarceration in the US, and functionalism is arguably
endemic to the quantitative literature on persistence, since identifying mechanisms at such
long temporal ranges is notoriously difficult.
(though they were often visibly similar) nor even in the similar identities of those they confined (who were similar in racial but not in gender terms, and were incomparable in number) but rather in the sense that both institutions had as one of their actual functions the control of labor. Yet here the differences are also stark, for the labor controlled by the slave plantation primarily took place in the plantation itself, whereas the labor controlled by the prison (in spite of the scale of convict leasing) primarily took place (and still takes place today) outside the prison, in workplaces that don’t look very much like prisons, but over which the prison casts a long shadow.

In this sense what I have called “judicial peonage” is merely an extreme example of the ways that the threat of prison is always held over racially stigmatized and disenfranchised groups with limited means of subsistence and precarious access to employment. If there is a function to that threat I suspect it lies less in the psychological wages it might provide to the white majority than the material power that it gives to the potential employers of such a precarious workforce. It thus might be worth concluding this draft with the words of a recently retired Georgia politician that points to a contemporary legacy of the forms of peonage that have long characterized “justice” in that state:

“Incarceration fits in like this,” he said. “If you’ve got a record, you’re at the mercy of an employer. He can hire you if he wants to, or not. And if he hires you, he can tell you what he’s going to pay you. You can’t demand a higher wage, because you’re lucky to have a job. [...] Incarceration cheapens labor.”

81

References


81Norton and Smith 2019


Christopher Waldrep. *Roots of Disorder: Race and Criminal Justice in the*


### Table 1: Southern prisoners in regression sample, descriptive statistics by county

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<td>299862.00</td>
<td>55215.58</td>
<td>49882.89</td>
</tr>
<tr>
<td>proportion free black</td>
<td>0.00</td>
<td>0.26</td>
<td>0.01</td>
<td>0.03</td>
</tr>
<tr>
<td>rail connection</td>
<td>0.00</td>
<td>1.00</td>
<td>0.25</td>
<td>0.44</td>
</tr>
<tr>
<td>water connection</td>
<td>0.00</td>
<td>1.00</td>
<td>0.44</td>
<td>0.50</td>
</tr>
<tr>
<td>slave share (1850)</td>
<td>0.00</td>
<td>0.93</td>
<td>0.29</td>
<td>0.21</td>
</tr>
</tbody>
</table>

All variables measured in 1860 unless otherwise specified.

**Table 2: Descriptive statistics: time-invariant control variables**

<table>
<thead>
<tr>
<th>Decade</th>
<th>Black lynch victims (entire decade)</th>
<th>Black prisoners (at start of decade)</th>
<th>A/B</th>
</tr>
</thead>
<tbody>
<tr>
<td>1880s</td>
<td>731</td>
<td>14,778</td>
<td>0.05</td>
</tr>
<tr>
<td>1890s</td>
<td>1092</td>
<td>22,656</td>
<td>0.05</td>
</tr>
<tr>
<td>1900s</td>
<td>838</td>
<td>22,876</td>
<td>0.04</td>
</tr>
<tr>
<td>1910s</td>
<td>566</td>
<td>33,648</td>
<td>0.02</td>
</tr>
<tr>
<td>1920s</td>
<td>304</td>
<td>23,070</td>
<td>0.01</td>
</tr>
</tbody>
</table>

Sources: Lynch victims: Seguin and Rigby (2019); prisoners: census

**Table 3: Southern Black lynch victims and prisoners 1881–1930**

**Figures**
**Figure 1:** US incarceration rates, by race and region (1870-2010)

Sources: Census, Bureau of Justice Statistics. North = all states in which slavery was illegal in 1860, South = all states in which slavery was legal in 1860. All states that didn’t exist or were territories in 1860 are excluded.
Figure 2: Slavery (1750) and incarceration (2010) in the western hemisphere
Estimates of New World slave populations were mostly taken from Nunn (2008) and Engerman and Higman (1997), with the addition of Bermuda (Jarvis, 2012), Bolivia (Lipski, 2006), Costa Rica (Rout, 1976), El Salvador (MacLeod, 2007), Guatemala (Lutz, 1997), Honduras (Tompson, 2012) and Nicaragua (Gabbert, 1992). In Latin America these numbers generally include Indian slaves, though a great deal of uncertainty surrounds those estimations. Total population estimates are from Bulmer-Thomas (2003). 2010 incarceration rates are from World Prison Brief (2020).
Figure 3: Effect of 1830 slave share on country-level incarceration rates in the British Caribbean, by year (1839-1914)

The figure displays the coefficient on slave percentage (measured in 1830) in separate linear regressions on subsequent annual incarceration rates in 14 British Caribbean colonies, controlling for population density measured in 1838. These data were collected by the British colonial office from local magistrates and compiled in annual colonial office “Blue Books.” They were transcribed by Christian Dippel who kindly shared them with the author. See Dippel et al. (2016) for more details.
Figure 4: Brazilian incarceration rates by state, 2013–2018

Figure 5: Brazilian incarceration rates by state and year, 1907–2019
Figure 6: Effect of historic slave share on state-level incarceration and prison admission rates, by race and year (1870-2010)

This figure displays bivariate regression coefficients of slave percentages on post-emancipation Black and white incarceration rates from 1870 to 2010 (by decade and state). Decennial Black and white prisoner counts from 1870 to 1990 were kindly shared by Christopher Muller, who assembled them from census reports and national prison surveys. I interpolated to the decade when these were reported for non census years and supplemented them with modern incarceration and prison admission data from the Bureau of Justice Statistics (BJS). I measure the prevalence of slavery as the mean slave share of the state’s population, as reported in the decennial US census, from 1790 to 1860, allowing me to explore variation in slavery’s legacy among Northern states which reported zero slave populations in 1860.
Figure 7: Effect of 1860 slave share on logged county-level incarceration rates by race, all Southern counties in selected census years
incarceration rate \approx \text{crime rate} \cdot \text{arrest rate} \cdot \text{use of prison} \cdot \text{sentence length}.

\[
\frac{\text{prisoners}}{\text{population}} \approx \frac{\text{crime population}}{\text{crime}} \cdot \frac{\text{arrests}}{\text{crime}} \cdot \frac{\text{sentenced}}{\text{arrests}} \cdot \frac{\text{years served}}{\text{sentenced}}.
\]

Figure 8: Decomposition of an incarceration rate

Figure 9: Diagram of slavery’s potential effects on (Black) incarceration
Figure 10: Effect of 1860 slave share on contemporaneous urban population share on logged county-level incarceration rates by race, all Southern counties in selected census years.
Figure 11: Effect of percent slave on 1990-2015 incarceration and prison admission rates, by race (county panels with state and year fixed effects)

Figure 12: Lynching per capita (1870-1940) and slavery (1860)
Sources: Beck and Tolnay (1990); Seguin and Rigby (2019)
Figure 13: Lynching per capita (1870-1940) and incarceration rate (1940)
Sources: Beck and Tolnay (1990); Seguin and Rigby (2019)
Figure 14: Effect of county-level slavery on individual-level sentence lengths among Mississippi convicts, by race and offense type.
Figure 15: Effect of slavery on county-level rates of incarceration to the Mississippi penitentiary, by race and offense type.
Figure 16: Annual rate of commitment to the Georgia state penitentiary, by race, offense, and region (1865-1920)
Figure 17: Effect of historic slave share on county-level rates of commitment to the Georgia state penitentiary, by race, offense, and decade (1820s-1950s)
Figure 18: State prisoner mortality by region (selected states)
Sources: State penitentiary reports and Katz et al. (2003)

Figure 19: Executions per prisoner and slavery (Espy and Smykla, 1987)