

Who Pays the Price? Reframing Exploitation Through the Economics of Externalities

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INTRODUCTION

From polluted rivers to underpaid farmworkers, many of society's most persistent injustices share a common pattern: those who profit rarely bear the true cost of what they produce. Economists call this phenomenon a 'negative externality,' and law at its best exists to correct it. Externalities most frequently describe market inefficiencies, but legal advocates can strategically use the framework to illustrate societal issues, such as labor exploitation. This paper asks: Why are the costs of a good permitted to disperse throughout society (to be externalized) instead of imposing that cost on the party who benefits? This framework functions not merely as an analytic tool but as a normative one, signaling that when private actors displace social costs, the law has a role in bringing those costs back within their sphere of responsibility.

Part I introduces the economic theory of externalities, as commonly portrayed through environmental pollution. Part II establishes that the institution of slavery externalized the cost of labor to the enslaved population. Part III explores how modern-day law and policy allows companies to benefit from externalizing the true cost of immigrant labor. Finally, Part IV considers additional avenues for this externality approach to illuminate contemporary civil rights problems. Reframing injustices through the lens of externalities is powerful because it links incentives that drive unjust action to clear, widespread, and frequently unaccounted for societal costs.

I. EXTERNALITIES AND THE LAW

Externalities exist when there is a difference between private and social cost.¹

Externalities create inefficiencies in markets because the private cost of a good (or the market price) does not reflect the cost spread to society as a whole.² Producers in efficient markets bear each of the costs associated with their production. Economists recognize that societal well-being is maximized only when social costs are minimized.³ Further, economists realize that government action is necessary in the presence of market inefficiencies that increase costs that society bears.⁴

In response to negative externalities, governments intervene by forcing markets to change and internalize the real cost of goods.⁵ States have adopted creative mechanisms to internalize externalities. One such solution is the cap-and-trade system, where states agree to “cap” emissions over a given geographical area and create a market to “trade” those emissions.⁶ The result is lower emissions because the cost of emissions is being borne financially (internalized)

¹ Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141 (1979); Thomas Hebling, *Externalities: Prices Do Not Capture All Costs*, INT’L MONETARY FUND, <https://www.imf.org/external/pubs/ft/fandd/basics/pdf/helbling-externalities.pdf>.

² Thomas Hebling, *Externalities: Prices Do Not Capture All Costs*, INT’L MONETARY FUND, <https://www.imf.org/external/pubs/ft/fandd/basics/pdf/helbling-externalities.pdf>.

³ *Id.*

⁴ Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141 (1979).

⁵ *Id.*

⁶ Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVT’L. L. REV. 293, 297 (2008).

by the emitters.⁷ Additionally, unjust enrichment can remedy negative externalities, as one party benefits from spreading their costs at the expense of society.⁸

Environmental pollution is a frequent example of a negative externality. Imagine a company that makes a product and pollutes a river as a result. The company makes production decisions based on the incentives ahead of them and might not consider the indirect cost to those indirectly harmed from the pollution.⁹ However, everyone down river of this company must then deal with the company's decision. This could lead to a multitude of impacts from physical and mental illness, decreased life expectancy, and many others. The injustice of the situation is that the costs of polluting that river might not be borne by the company (at least initially).¹⁰

The presence of externalities means there is market inefficiency. Therefore, the corresponding internalization through either government intervention, private markets, or otherwise, can be understood as correcting an inefficiency, not imposing of unjust cost (or penalty) on the producer.¹¹

While externalities commonly explain discrepancies between the private and social costs resulting from environmental pollution, there is an opportunity for the legal field to apply this methodology to other areas of interest, including labor exploitation. This mechanism of shifting harm outward mirrors how many civil-rights harms operate, with private benefits accruing to

⁷ *Id.*

⁸ Dennis Klimchuk, *Unjust Enrichment and Reparations for Slavery*, 84 B.U. L. REV. 1257, 1273 (2004); Jordyn Selznick, *Enrichment, Exploitation, and the Evasion of Responsibility: A Proposal to Apply the Equitable Doctrine of Unjust Enrichment to Bridge the Accountability Gap and Provide Remedies to the Victims of Forced Labour Abroad*, 83 U. TORONTO FAC. L. REV. 169, 177 (2025).

⁹ Hebling, *supra* note 2.

¹⁰ *Id.*

¹¹ Robert U. Ayres & Allen V. Knesse, *Production, Consumption, and Externalities*, AM. ECON. REV. 282, 293 (1969).

some while the social costs fall on marginalized groups. Below, we will explore how the concept of externalities explains the increased private benefit and the permitted social costs of both slave labor and modern-day immigrant labor in the United States. Each part will assess a social issue through the framework of externalities: (1) private benefit, (2) wide social cost, and (3) efforts to internalize.

II. SLAVE LABOR IN THE UNITED STATES

A. *Economic Logic of Slavery: Labor without the Price*

The chattel slave economy of America was predicated on the denial of personhood for the promise of economic gain through uncompensated labor. While slave owners grew rich, the physical and psychological cost of this institution was imparted to the enslaved and their descendants.

Slavery in the United States began in 1619 with the introduction of twenty Africans to the English colony of Jamestown, initially to serve as indentured servants.¹² Slave Codes were introduced in 1705 and codified the legal status of African American slaves.¹³ Planters shifted their labor from indentured servanthood to slavery due, in part, to a shrinking class of indentured servants.¹⁴ Indentured servants, as voluntary workers, likely would not have consented to the crowded transportation that was used on imported slave laborers.¹⁵ The introduction of slavery had less to do with a personal dislike for people of color, and more to do with the fact that

¹² Charles Shaw, *A Different Perspective: Slavery and It's Affect on the African-American Way of Life in America* 21 (Xlibris US 2007).

¹³ *Id.*

¹⁴ *Id.* at 22.

¹⁵ Klas Ronnback, *Were slaves cheap laborers? A comparative study of labor costs in the antebellum U.S. South*, 62 LAB. HIST., 721, at 723 (2021).

slavery provided the means and ability for exploitation.¹⁶ In this way, the shift to slavery reflects the core economic logic underlying externalities: planters capture the private benefit from forced labor while offloading vast human costs onto the enslaved.

Scholars agree that economic motives were a fundamental reason for slavery in the United States.¹⁷ The Dutch West India Company and other slavers considered slaves to be the least costly source of labor for their North American ventures.¹⁸ The lowered cost of labor to work in crucial industries made slavery a dominant force that propelled North American economic growth.¹⁹ Evidence shows that slave labor could be acquired at a significantly lower cost than free labor in the United States.²⁰ Slaves were cheaper to obtain and transport than indentured servants.²¹

As a young nation, America relied heavily upon its exports of agricultural products like tobacco, rice, cotton, sugar, and many more.²² Slaves directly supported those industries by decreasing the input cost of labor.²³ One scholar noted that “the production of cotton and sugar alone served as the base of American capitalism and European economic growth.”²⁴ Slave labor

¹⁶ Shaw, *supra* note 12, at 23.

¹⁷ Ronnback, *supra* note 15, at 721.

¹⁸ Klas Ronnback, *Were slaves cheap laborers? A comparative study of labor costs in the antebellum U.S. South*, 62 LAB. HIST., 721, at 723 (2021); Renee K Harrison, *Black Hands White House: Slave Labor and the Making of America* 19 (Fortress Press 2021).

¹⁹ Renee K Harrison, *Black Hands White House: Slave Labor and the Making of America* 23 (Fortress Press 2021).

²⁰ Ronnback, *supra* note 15, at 722.

²¹ *Id.* at 723.

²² Harrison, *supra* note 19.

²³ *Id.*

²⁴ *Id.* at 24.

made these commodities available at a fraction of the cost of production by paid laborers.²⁵ This makes clear that slavery's appeal stemmed from the extraordinary private benefits it delivered through lower labor costs, greater crop output, and soaring profits.

Meanwhile, laws were being passed to give economic incentives to slaveowners. In 1662, a law was passed that stated that “the child of an African woman who was a slave would be born as a slave, even if the father were a free Englishman.”²⁶ In 1669, a law was passed to allow the brutal treatment of slaves, stating “if any slave resist his master . . . and by the extremity of the correction should chance to die, that his death shall not be accounted [a] felony, but the master be acquitted from molestation, since it cannot be presumed that malice should induce any man to destroy his own estate.”²⁷ In 1705, it became lawful “for any person or persons . . . to kill and destroy such slaves by such ways and means as he . . . shall think fit, without accusation or impeachment of any crime for the same.”²⁸ To ensure there were no financial cost to the slaveowner, a 1705 law permitted the government to financially reimburse the owner for the loss of a slave.²⁹

Each of these laws perpetuates an institution of pure exploitation, systematically insulates slaveowners from the costs of violence and coercion, and provides no accountability for the mistreatment of human beings. Effectively, these laws externalized the true cost of labor and human suffering onto the enslaved.

²⁵ *Id.* at 25.

²⁶ Benjamin Campbell, *Richmond's Unhealed History* 66 (Brandylane Publishers 2011).

²⁷ *Id.* at 69.

²⁸ *Id.* at 70.

²⁹ *Id.*

Though there was an initial acquisition cost when the slave owner purchased a slave, those owners would not have the additional cost of continued wages that would be paid to traditional workers. Thomas Jefferson, speaking about one of his women slaves, said “what she produces is an addition to the capital. . .”³⁰ Here, Jefferson reiterates this very benefit known by slaveowners, that they can pay a one-time fee for an ever-increasing population of labor.

Alternatives to slave labor were present. Poor whites in the Southern United States comprised as much as one-third of the white population, and that many would have worked for wages.³¹ Additionally, wages paid to free workers in the South were lower than their counterparts in other parts of the United States.³² As Frederick Douglas put it “the white laboring man was robbed by the slave system of the just results of his labor, because he was flung into competition with a class of laborers who worked without wages.”³³

The South relied heavily upon slave labor to keep their economy churning. Even though the South had better options for their economy, they were able to subsidize industries that were central to its growth.³⁴ Because of slavery, cotton prices were lower than they otherwise would have been.³⁵ Further, regardless of the efficiency or productivity of slave labor, the planters or owners were nonetheless profiting from their labor.³⁶ Slavery “enriched slave-owners, but

³⁰ Harrison, *supra* note 19, at 19.

³¹ Ronnback, *supra* note 15, at 724.

³² *Id.* at 733.

³³ *Id.*

³⁴ Gavin Wright, *Slavery and the Rise of the Nineteenth-Century American Economy*, 36 J. ECON. PERSP. 123, 142 (2022).

³⁵ Ronnback, *supra* note 15, at 734.

³⁶ Stanley L. Engerman, *The Effects of Slavery Upon the Southern Economy: A Review of the Recent Debate*, 4 EXPL. ENTREPRENEURIAL HIST., 71, at 82 (1967).

impoverished the southern region and did little to boost the U.S. economy as a whole.”³⁷

Together, these dynamics show how slavery maximized the private benefit to enslavers while pushing the true human and economic costs onto the enslaved.

B. *The Social Cost of Slavery: Labor with a Social Cost*

The costs of slavery, however, were much more widespread. Chattel slavery in the United States was a perverse legal institution. Slaves were treated as property through the use of warranties, wills, and claims of conversion.

In 1854, a suit was brought against Jeremiah Stover on account that a slave named Ann was “unsound” when purchased, constituting a breach of warranty.³⁸ Slaves were frequently bequeathed through wills, continuing the enslavement from generation to generation.³⁹ Upon their death or injury, slaves were treated as damaged property through conversion. One such case was in 1844, when Elizabeth Howard sued for conversion of property after the death of a slave named Braden, whom she lent to the City of Columbus.⁴⁰ The court in that case compared Braden to a horse, stating if a “horse is hired as a saddle horse, the hirer has no right to use the horse in a cart.”⁴¹ In 1852, George Cleland sued his uncle, Thomas Waters, after Cleland mortgaged Sawney, his slave, to pay for medical school.⁴²

³⁷ Wright, *supra* note 34, at 124.

³⁸ Patrick A. Dawson, *Slaves, the Law, and the Banality of Horror*, 23 J. S. LEGAL HIST. 161, at 163 (2015).

³⁹ *Id.* at 164.

⁴⁰ *Id.* at 165.

⁴¹ *Id.*

⁴² *Id.*

These are a sample of ways slaveowners would use human beings as property, and there are likely many more. Collectively, these cases reveal a stark social cost: a legal system that normalized the reduction of human lives to transferable assets, enabling private gain while hiding the deep human suffering that made such transactions possible.

While treated as property, enslaved people were also subjected to awful health conditions. Extreme variability in nutrition and a high requirement of work effort are responsible for high rates of still-birth and neonatal mortality, at rates of more than twice those of the white population.⁴³ Slavery squeezed families into tight, unhygienic quarters where workers faced high risks of infection.⁴⁴ Enslaved women were forced to work until they gave birth to their children, who would likely be sentenced to the same laborious reality they face.⁴⁵ Enslaved people had scarce access to healthcare, forcing them to treat themselves.⁴⁶ Studies show that the lack of healthcare for enslaved peoples lives to be “markedly shorter than white people and free black people, a sign of malnourishment.”⁴⁷

Slavery dampened what otherwise could have been a vibrant Southern economy by disincentivizing innovation, limiting educational levels of the enslaved, and ultimately preventing many African Americans from contributing their potential.⁴⁸ A 1740 South Carolina law sought to limit or completely deny African Americans from acquiring literacy or attending

⁴³ Richard H. Steckel, *A Dreadful Childhood: The Excess Mortality of American Slaves*, 10 SOC. SCI. HIST. 427, at 450 (1986).

⁴⁴ Robert L. Reece, *Slave Past, Modern Lives: An Analysis of the Legacy of Slavery and Contemporary Life Expectancy in the American South*, 53 J. BLACK STUD. 678 at 684 (2020).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Ronnback, *supra* note 15, at 734.

school.⁴⁹ In 1819, a Virginia law similarly made it unlawful for enslaved or free African Americans to assemble, attend schools, or gain literacy, but also imposed a penalty of 20 lashes for any violator.⁵⁰ The pro-slavery movement saw education for the enslaved as something “only madmen would risk” because it may inspire thoughts of freedom.⁵¹ As a result of these policies and beliefs, “on the eve of the Civil War, it is estimated that only 5 to 10 percent of the nearly four million enslaved African Americans in the region had acquired some degree of literacy.”⁵²

The social cost was staggering: an entire population was denied the tools of literacy and learning, decreasing their range of opportunities and ultimately impoverishing the South’s cultural and economic development for generations.

Slavery’s impacts are still felt, even generations after it’s abolition. As of 2021, African American life expectancy in Southern United States still lagged behind national average.⁵³ Well into the 20th century its legacy persisted through voting restrictions, segregated schools and neighborhoods, discrimination in housing finance, skewed voting pools, and unequal access to jobs.⁵⁴ Taken together, these enduring inequalities amount to a wide social cost. Though slavery itself ended, it still imposed its structural burdens onto communities and institutions long after.

⁴⁹ Christopher M. Span, *Post-Slavery? Post-Segregation? Post-Racial? A History of the Impact of Slavery, Segregation, and Racism on the Education of African Americans*, 114 NAT’L SOC. FOR STUDY OF ED. 53, at 56 (2015).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Reece, *supra* note 44, at 679.

⁵⁴ Ronald W. Walters, *The Impact of Slavery on 20th and 21st Century Black Progress*, J. AFRICAN AM. HIST. 110 at 112 (2012).

C. *Efforts to Internalize*

It is important to recognize that steps have been taken to internalize some of the costs that slavery once externalized, though much remains unfinished. The 13th Amendment was enacted with a clear focus on labor conditions and the exploitation of laborers,⁵⁵ yet post-Civil War labor laws routinely worked against the interests of African Americans.⁵⁶ Modern debates about reparations underscore how deeply the social costs of slavery persist and how incompletely they have been addressed.⁵⁷

This unfinished work reflects a recurring pattern in American labor history, one where the burdens of production are shifted onto marginalized workers. As the next section shows, modern immigrant labor reveals the same underlying dynamic: private benefit secured by externalizing the true costs of labor onto vulnerable communities.

III. MODERN DAY IMMIGRANT LABOR IN THE UNITED STATES

A. *Economic Logic of Immigrant Labor: A Supply of Cheap Labor*

In modern labor markets, immigrant workers frequently occupy a role in society that mirrors the earlier economic logic, and corresponding externalities of slavery. Employers receive a significant benefit from suppressed wages and reduced legal protections. Meanwhile, the costs of policies that permit such gain include continuing poverty, fear of deportation, and unsafe working conditions with little potential recourse.

⁵⁵ Lea S. VanderVelde, *Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 440 (1989).

⁵⁶ David Bernstein, *Only One Place of Redress: African Americans, Labor Regulations, & the Courts from Reconstruction to the New Deal* 111 (Duke University Press 2001).

⁵⁷ Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 835 (2006).

The United States economy has changed over the past century to have a higher reliance on immigrant labor.⁵⁸ In 2021, there were approximately 8 million undocumented workers in the United States.⁵⁹ Immigrants have a higher proportion of low-wage labor and a higher rate of injury at work than non-immigrants.⁶⁰ Paradoxically, immigrants also have a disproportionately high share of the nations patent filings.⁶¹ Immigrant labor is so important to the U.S. economy that DHS has previously deemed undocumented workers as “essential.”⁶² Nonetheless, managers only have a responsibility to respond to the incentives before them.⁶³ Therefore, managers frequently think of externalities as a “cost of business.”⁶⁴ The economic reliance on immigrant labor sharpens managerial incentives to treat injury and low wages as externalized costs that can be absorbed by workers rather than borne by the firm in order to sustain profit.

Labor intensive industries frequently have low profit margins, leading to low pay for their workers.⁶⁵ Because Immigrants have language barriers and other cultural obstacles, they are more willing than non-immigrants to work in these low-skill, low-pay positions.⁶⁶ Employers

⁵⁸ William I. Robinson & Xuan Santos, *Global Capitalism, Immigrant Labor, and the Struggle for Justice*, 2 CLASS, RACE & CORPORATE POWER 5 (2014).

⁵⁹ Jennifer J. Lee, *Legalizing Undocumented Work*, 42 CARDOZO L. REV. 1893, 1894 (2021).

⁶⁰ Rebecca Smith, Amy Sugimori & Luna Yasui, *Low Pay, High Risk: State Models for Advancing Immigrant Workers’ Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 600 (2004).

⁶¹ The Effects of Immigration on the United States Economy, PENN WHARTON BUDGET MODEL (Jan. 27, 2016), <http://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy>.

⁶² Lee, *supra* note 59.

⁶³ Matthew G. Nagler, *The Strategic Significance of Negative Externalities*, 35. MANAGERIAL & DECISION ECON. 248, 255 (2014).

⁶⁴ *Id.*

⁶⁵ Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L. J. at 2182 (1994).

⁶⁶ *Id.*

often prefer to employ immigrants precisely because of their acute vulnerability and tendency to not report abuses when workplace violations arise.⁶⁷

One example is post-Hurricane Katrina New Orleans. After the devastating hurricane, worker regulations loosened in an effort to boost the construction economy.⁶⁸ The need for immediate low-wage work and subcontractors made immigrants a crucial component of rebuilding the city.⁶⁹ In this context, contractors and developers captured the substantial private benefits of rapid reconstruction and reduced labor costs by shifting the risks of injury and instability onto immigrant workers.

A second example is the COVID-19 pandemic, when the U.S. economy was reeling from a global lockdown. Immigrations and Customs Enforcement paused some enforcement measures during the pandemic near health care facilities.⁷⁰ The government also decided to protect some agricultural jobs during this time.⁷¹ Further complicating this situation is the reality that ICE agents who detect workplace violations can impose lower sanctions if the employers assist in detecting undocumented immigrants.⁷² This is a form of selective internalization. The government is willing to protect immigrant workers and establish “essential” status when it is most beneficial, while refusing to provide immigrants with further legal protection.

⁶⁷ *Id.*

⁶⁸ Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOCIO. Q. 593, at 598 (2011).

⁶⁹ *Id.*

⁷⁰ Miriam Jordan, *Farmworkers, Mostly Undocumented, Become ‘Essential’ During Pandemic*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/04/02/us/coronavirus-undocumentedimmigrant-farmworkers-agriculture.html>.

⁷¹ *Id.*

⁷² Fussell, *supra* note 68, at 597.

Nancy Silva, an undocumented immigrant farmworker, had spent much of her life in the U.S. evading law enforcement because of her non-citizen status.⁷³ However, during the pandemic, she was given a letter from her employer, at the direction of the Department of Homeland Security, that she was “critical to the food supply chain.”⁷⁴ Speaking of the impact of this sort of recognition from the government, Silva stated “It’s like suddenly they realized we are here contributing.”⁷⁵ While Silva gained recognition from the government at a critical time for the economy, Silva and other undocumented field workers could in fact, have still been deported at any time.⁷⁶ Workers noted the irony that they were seen by the government as both illegal and essential.⁷⁷

For undocumented workers, employers expressly and implicitly threaten to report them to immigration authorities if they complain or otherwise do not comply.⁷⁸ Employers are incentivized to employ immigrant laborers because of their low wages and presumed conflict avoidance.⁷⁹ Undocumented worker vulnerability intensified after the passage of the Immigration Reform and Control Act of 1986 (“IRCA”). IRCA prevents employing undocumented immigrants and imposes penalties for violations.⁸⁰ Following the passage of IRCA, employers found ways forward, including hiring immigrants with knowingly false documentation, recognizing that those immigrants have little to no opportunity for recourse if their rights are

⁷³ Jordan, *supra* note 70.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Foo, *supra* note 65.

⁷⁹ Fussell, *supra* note 68, at 597.

⁸⁰ Foo, *supra* note 65, at 2182-2183.

violated.⁸¹ Many employers simply claim they had a good faith belief that the immigrant had an authentic green card.⁸²

In 2002, the Supreme Court decided *Hoffman Plastic Compounds v. NLRB* and found that the National Labor Relations Act (“NLRA”) does not guarantee undocumented workers backpay if they are illegally fired.⁸³ Following *Hoffman*, immigrant workers have even fewer enforceable rights under the law.⁸⁴ The dissent in *Hoffman* argued that the majority opinion provides an incentive for employers to break the law by removing any requirement to compensate victims of employers who violate the law.⁸⁵ The *Hoffman* precedent puts both employers and the law in tension with immigrant workers, making it easier for employers to maintain low cost labor and externalize the harms of exploitation. In California alone, it is estimated that hundreds of thousands of workers, most of whom are immigrants, have been deprived of billions of dollars in wages owed to them under federal minimum wage and maximum hours laws.⁸⁶ By allowing employers to retain the economic gains of unlawful termination while denying workers their due compensation, *Hoffman* entrenches the structure that private benefit for firms are preserved and the social costs are borne by immigrant laborers.

⁸¹ *Id.* at 2183.

⁸² *Id.*

⁸³ Smith, Sugimori & Yasui, *supra* note 60, at 601-602.

⁸⁴ *Id.*

⁸⁵ *Id.* at 604.

⁸⁶ Foo, *supra* note 65, at 2180.

B. *The Social Cost of Exploitation: Low Worker Protections Harm Immigrants*

Immigrants are frequently exploited even though they are an important part of the U.S. economy. First, immigrants frequently have language barriers that make it difficult to communicate effectively with employers.⁸⁷ Second, even with a disproportionately high rate of patent filings and innovation, immigrants are paid at lower rates than non-immigrants.⁸⁸ As of 2009, while Latino immigrants made up 7.2 percent of the total U.S. force, “they filled 11.5 percent of food preparation and serving positions, 22.8 percent of meat and poultry processing positions, 36.9 percent of farming, fishing, and forestry positions, and 18.3 percent of construction positions.”⁸⁹

Although there are some worker protections in place for documented immigrants, those protections are not equally present for undocumented immigrants.⁹⁰ The reduction in protections decreases the incentive to enforce undocumented workers rights.⁹¹ One investigation done by the San Francisco Examiner uncovered that immigrants are “beaten and abused because of their race and intimidated because of their often tenuous legal status in the country.”⁹² Those undocumented immigrants already face difficulties due to their status, including: fear of deportation, inability to leave their employer, and lack of English speaking proficiency.⁹³ These

⁸⁷ Pablo A Ormachea & William A Langer, *Delivery of Legal Services to Immigrant Small Business Owners: The Problems and a Model to Solve Them*, 3 DEPAUL J. SOC. JUST. 213, 222 (Spring 2010).

⁸⁸ Smith, Sugimori & Yasui, *supra* note 60.

⁸⁹ Fussell, *supra* note 68, at 596.

⁹⁰ Smith, Sugimori & Yasui, *supra* note 60, at 604.

⁹¹ Smith, Sugimori & Yasui, *supra* note 60, at 605; Lee, *supra* note 59, at 1905.

⁹² Foo, *supra* note 65, at 2183.

⁹³ Lilly Yu et al., *Labor Trafficking in Construction and Hospitality: A Topical Brief* (RTI Int’l 2021) <https://www.rti.org/publication/labor-trafficking-in-construction-and-hospitality-topical-brief-i>.

pressures mount and leave many undocumented workers vulnerable to gang violence, trafficking, sex work, and employment by unreputable agencies.⁹⁴

One such impact on undocumented immigrants is called the “deportation threat dynamic.”⁹⁵ The four steps in this dynamic are: (1) an undocumented immigrant finds employment, (2) someone (usually the employer) assumes that migrant is undocumented, (3) that person exploits the immigrant’s labor, and (4) the immigrant does not report the crime to law enforcement.⁹⁶ In short, due to fear of deportation, immigrants accept poor conditions and even wage theft from their employers.⁹⁷ Remedy for this wage theft is rare, as it requires the employee who has been stolen from to report the abuse to the Department of Labor. However, the Department of Labor historically lacks the resources to properly investigate such claims.⁹⁸ Therefore, the remedy for wage theft for the wage of an undocumented worker may make the victim’s situation worse off than before.⁹⁹

C. *Efforts to Internalize*

Immigrant labor reform must encompass both employment and immigration law to be successful long term.¹⁰⁰ Protecting immigrant labor means nothing if the immigrant can be deported or has no recourse against their employer if they are wronged. Tougher labor laws must

⁹⁴ Robinson & Santos, *supra* note 58, at 6.

⁹⁵ Fussell, *supra* note 68, at 593.

⁹⁶ *Id.* at 595.

⁹⁷ See *id.* at 597. Adding to this dynamic is the high level of funding and rhetoric surrounding immigration enforcement as of 2025. The One Big Beautiful Bill Act (“OBBBA”) expanded the U.S. immigrant detention system and gave DHS \$45 billion to continue enforcements, among other things. The OBBBA will also, of course, enrich private prison companies who have continued to support Trump’s agenda. *The Anti-Immigrant Policies in Trump’s Final “Big Beautiful Bill,” Explained*, NAT’L IMMIGRATION L. CTR., <https://www.nilc.org/resources/the-anti-immigrant-policies-in-trumps-final-big-beautiful-bill-explained/>.

⁹⁸ *Id.*

⁹⁹ Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 UC IRVINE L. REV. 655, at 644 (2014).

be combined with the ability to enforce those laws both at the state and federal level.¹⁰¹ Through these measures, employers will no longer be able to profit from exploiting labor and externalizing their costs to society. These reforms function as a mechanism of internalization by forcing employers to bear the full costs of labor practices that have long been shifted onto immigrant workers and the broader public.

IV. ADDITIONAL FIELDS EXPLAINED BY EXTERNALITIES

In addition to the impacts of labor incentives and laws that affect workers, there are other fields where social harms can also be understood through the lens of externalities. Two examples are (1) housing discrimination and (2) mass incarceration. Together, these examples broaden the scope of the externality framework outside of the labor market field. Further, the examples of housing discrimination and mass incarceration will reinforce the central notion that many systems are structured in such a way to diffuse costs to society and enable private and institutional actors to capture benefits.

A. Externalities in Housing Discrimination

Housing discrimination externalizes long-term geographic injustice. When restrictive policies are used to discriminate in housing, the excluders export the costs of their discrimination onto other communities. Protection of property values or the previous racial makeup of a neighborhood come at a cost. The cost is concentrated poverty and reduced access to opportunity.

¹⁰⁰ Ruth Milkman, *Immigrant Workers and the Future of American Labor*, 26 ABA J. LAB.& EMP. L. 295, 308 (2011).

¹⁰¹ Foo, *supra* note 65, at 2212.

I. *Private Benefit with Wide Social Costs*

It is no secret that housing access has been used to discriminate against groups of people in the United States. Prior to the passage of the Fair Housing Act, blacks and Hispanic customers were intentionally misinformed about available housing.¹⁰² A 1970 report by the National Committee Against Discrimination in Housing found that blacks encounter real estate agents and brokers who refused to deal with them and are met with evasion, misrepresentation, information withholding, and delaying tactics in an effort to dissuade these minority housing seekers from gaining housing.¹⁰³ In a study, minority housing seekers were less likely to be told positive comments by the agent, about the house, apartments, or complexes they were interested in.¹⁰⁴

As early as the nineteenth century, deeds for houses in the U.S. contained restrictive covenants preventing homeowners from, among other things, renting or selling to African Americans.¹⁰⁵ In 1926, the U.S. Supreme Court affirmed the legality of restrictive covenants, stating that since the covenants were voluntary and private, they were not something the state should police.¹⁰⁶ In 1948, the Supreme Court case *Shelley v. Kramer* declared that government assistance in enforcing racial covenants was prohibited by the 14th Amendment of the Constitution.¹⁰⁷

¹⁰² John Yinger, *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination* 35 (Russell Sage Foundation 1995).

¹⁰³ *Id.* at 46.

¹⁰⁴ *Id.* at 35.

¹⁰⁵ Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 78 (Liveright Publ'g Corp. 2017).

¹⁰⁶ *Id.* at 82.

¹⁰⁷ *Id.* at 85.

Discrimination was present in the mortgage market as well. According to a study in the 1990s, black applicants who “applied to the same lenders, had the same economic characteristics, and purchased the same types of properties as white applicants would be turned down at a 24.6 percent rate compared to the 14.0 percent rate for whites.”¹⁰⁸ Researchers in housing discrimination describe this policy as “redlining,” and use it to describe other instances where applicants are denied mortgage opportunities based on property location.¹⁰⁹

As a result of practices like redlining, steering, and racial covenants, white home values appreciated at a much higher rate than housing of African Americans.¹¹⁰ Housing discrimination against blacks and Hispanics “constrains the ability of many black and Hispanic people to go to good schools, to find jobs, and to accumulate home equity.”¹¹¹ As Rothstein puts it, “it took nineteen years before a federal appeals court ruled that the covenants themselves violated the Fair Housing Act and that recording deeds with such clauses would constitute state action in violation of the Fourteenth Amendment.”¹¹²

The cost of discrimination in housing will be felt by society for generations.¹¹³ In the short term, those forced to rent due to housing prices face increasing rent burdens. In the long term, those who were prevented from receiving the same wealth benefits that their white counterparts face lower economic mobility and persistent racial wealth gaps.¹¹⁴ These outcomes

¹⁰⁸ Yinger, *supra* note 102, at 69.

¹⁰⁹ James R. Barth, Joseph J. Cordes & Anthony M. J. Yezer, *Redlining in Housing Markets: Mortgages and Minorities in the U.S.*, 5 J. SOC. & POLI. STUD., 221 (1980).

¹¹⁰ Rothstein, *supra* note 105, at 179; Yinger, *supra* note 102, at 51.

¹¹¹ John Yinger, *Housing discrimination is still worth worrying about*, 9 HOUS. POL’Y DEBATE 893, at 920 (1998).

¹¹² Rothstein, *supra* note 105, at 90.

¹¹³ *Id.* at 179.

¹¹⁴ *Id.* at 179.

illustrate wide social costs that extend beyond individual victims to burden society with entrenched inequality, reduced economic mobility, and long-term distortions in wealth distribution.

II. *Efforts to Internalize*

As a result of these discriminatory policies, the Fair Housing Act of 1968 was an attempt to internalize the cost of this market inefficiency.¹¹⁵ The Fair Housing Act prevented the private discrimination occurring through racially restrictive covenants.¹¹⁶ The Civil Rights Act of 1964 and the Voting Rights Act worked in conjunction with the Fair Housing Act to internalize some of the previously externalized costs. The Fair Housing Act's necessity is partially due to the complete exclusion of "Fair Housing" in the otherwise comprehensive Civil Rights Act of 1964.¹¹⁷ Separately, the Voting Rights Act of 1965 acknowledged that the 15th Amendment grants Congress "broad power to devise specific remedies for voting discrimination and to apply those remedies to particular locations."¹¹⁸ These law helped tear down the structures that allowed discrimination in housing and elsewhere, leading to internalization of previously externalized costs.

B. *Externalities in Mass Incarceration*

The modern carceral state represents another form of externalized social cost. Private prison corporations extract political and economic gain from harsh punitive policies. The

¹¹⁵ *Id.* at 177.

¹¹⁶ *Id.* at 177.

¹¹⁷ Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOWARD L.J. 841, 834 (2005).

¹¹⁸ Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 533 (1973).

corresponding harm, however, is spread out through family separation, increased unemployment, disenfranchisement, and more intergenerational trauma.

As of 2015, the United States comprised only 5 percent of the world's population, but has nearly 25 percent of the world's prisoners.¹¹⁹ While national incarceration rates began the steep rise as early as 1973, there was a 222 percent increase in incarceration rate in state prisons from 1980 to 2010, and this increase is primarily attributable to policy changes, not crime increase.¹²⁰

I. *Private Benefits*

The carceral system in the United States generates substantial amounts of money. However, the ideological and profiteering system does not account for the broad social costs spread throughout society as a result.

Two central players in the movement to continue growing the carceral state are correctional officers and private prison management.¹²¹ Correctional officers and their unions prefer criminal laws and sentencing that require more prisons.¹²²

Private prison management also prefers more punitive laws and longer sentences.¹²³ Private prisons make money on a per-prisoner basis rather than as a flat fee regardless of the quantity of prisoners.¹²⁴ To avoid the potential for low occupancy, prisons negotiate contracts with states where states promise to incarcerate a pre-specified number of citizens in the private

¹¹⁹ Arthur Lurigo, *The Golden Anniversary of Mass Incarceration in America*, 104 PRISON J. 271, at 277 (2024).

¹²⁰ *Id.* at 277.

¹²¹ Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, at 93 (2016).

¹²² *Id.* at 94.

¹²³ *Id.* at 96.

¹²⁴ Eisenberg, *supra* note 121, at 96.

prisons for a number of years.¹²⁵ As of 2016, many of these contracts guarantee prison occupancy rate of 95 percent for up to twenty years.¹²⁶ Prison management has a desire for tougher laws, harsher guaranteed punishments, and for states to assist them in making money for the long term.

II. Wide Social Costs

There is a broad social cost to mass incarceration in the United States. Imprisonment impacts the stability of families, which breaks apart the cohesion of neighborhood, and inevitably leads to less employable citizens post release.¹²⁷ From another perspective, incarceration “squanders” human capital and reduces the collective efficacy of society.¹²⁸

The impacts of incarceration spread throughout the entirety of the family unit. Imprisonment leads to an increase in single parent households and corresponding financial strain.¹²⁹ After a parent is incarcerated, children are more likely to “engage in illegal or antisocial behaviors and to reject participation in normative social institutions.”¹³⁰ For some, the imprisonment of a parent can lead to a change in overall life trajectory and even increase the risk of their own future incarceration.¹³¹ When a parent is incarcerated, the child’s school readiness is lowered and the likelihood of being placed in special education classes rises.¹³² For older

¹²⁵ Eisenberg, *supra* note 121, at 96.

¹²⁶ *Id.*

¹²⁷ Lurigo, *supra* note 119, at 284.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Tasseli McKay & William A. Darity Jr., *Who Benefits from Mass Incarceration? A Stratification Economics Approach to the “Collateral Consequences” of Punishment*, ANN. REV. L. & SOC. SCI. 309, at 314 (2024).

children, incarceration of the parent reduces high school graduation percentage by one third.¹³³

These impacts continue, with those children being much less likely to obtain a four-year college degree.¹³⁴

Health related impacts from incarceration are grim. Incarceration increases risk for stress-related physical and mental health conditions for directly impacted individuals.¹³⁵ Incarceration of one's co-parent or partner compromises women's cardiovascular health, increases rate of depressive episodes, and puts them at higher risk of other stress-related health conditions.¹³⁶ At a broader level, it is shown that merely living in the neighborhood with high levels of incarceration puts non-incarcerated residents in higher risk of depression and anxiety.¹³⁷ Further, non-incarcerated Black residents in those neighborhoods have higher rates of cardiovascular problems.¹³⁸

Mass incarceration has a direct effect on the employment opportunities of those who are imprisoned. Incarceration is shown to “bolster the labor market advantage of White Americans relative to Black competitors . . . by marking a large proportion of Black working -age men with felony records; by removing Black working-age men en masse from the labor market; and by promoting statistical discrimination against Black male job applicants, independent of individual conviction history.”¹³⁹ A study in 2017 showed that one third of all adult Black men have a felony

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 320.

¹³⁶ *Id.* at 320.

¹³⁷ *Id.* at 320.

¹³⁸ McKay & Darity Jr., *supra* note 132, at 320.

¹³⁹ *Id.* at 315.

record and 15 percent have spent time incarcerated, while the general U.S. male population stands at 13 percent and 5.5 percent, respectively.¹⁴⁰ Many occupations “categorically exclude” those with conviction histories, and many others make an effort to not hire individuals with felony records.¹⁴¹ Incarceration is shown to decrease week to week wages by 14 to 26 percent.¹⁴² Nationally, mass incarceration diminishes workforce participation and has caused a plateauing of wages.¹⁴³

The carceral system in the United States continues through clear incentive structures. That very same system, meant to remedy past wrongs, so frequently is the source of new and compounding pains and difficulties.¹⁴⁴

III. *Efforts to Internalize*

Internalizing the social costs of the carceral state can start by removing the perverse incentives that make prisons so profitable. Legislatures can make it unlawful to have private agreements between the state and prisons that guarantee a steady flow of prisoners for a period of time. Further, legislators should continue to push for more reasonable sentencing that accounts for racial, social, and economic disparities. A combination of these efforts can force prisons to internalize the costs that they previously spread to society.

¹⁴⁰ *Id.* at 316.

¹⁴¹ *Id.* at 316.

¹⁴² *Id.* at 317.

¹⁴³ *Id.* at 317.

¹⁴⁴ See Part II. While the carceral system is meant to remedy the past wrongs of a given individual, the demographic makeup and forced labor elements of prison make them a modern-day corollary to the institution of slavery.

CONCLUSION

Much of Civil Rights Law can be understood as a mechanism for internalizing social costs. It emerges from a common pattern: (1) Party A acts and does not bear the true cost of their action; (2) Party B bears the cost of that action instead. Civil Rights issues such as labor exploitation, housing discrimination, and mass incarceration are only a few examples that can be explained by externalities. Further, the externality framework of internalizing social costs can be used to guide many current discussions including fair labor and wage enforcement, decarceration policies, education inequality, and even reparations.

Re-framing societies problems as externalities does more than describe a harm – it implicitly points toward a remedy. To call something an externality is to highlight a variance between who causes a cost and who bears it. Once a variance is visible, then conversation naturally shifts to how those costs can be internalized. Through this, externalities function not only as a diagnostic but as a bridge to solutions. If a harm (social cost) is externalized from a private actor, the task becomes finding legal, economic, or policy mechanisms to bring that cost back within the private actor’s decision-making calculus.

Claiming the economic concept of externalities for the purposes of legal advocacy can provide society as a whole with another method to make sense of complex issues and sway policy makers and judges. If civil rights issues can commonly be understood as externalities, then the reform movement becomes one of pushing for internalization or ensuring that the full social cost of an action are borne by those who profit from the action.

Economists consider it efficient for the externality emitter to internalize their costs, and this Article suggests the legal system should adopt that same principle as a matter of justice as

well as efficiency. The externality approach is powerful because it directly links the incentives that motivate unjust conduct with hidden, unaccounted-for, and widespread social costs that law has often failed to confront.