

**“Racial Opportunism”: The Role of the Constitution in Society’s Manifestation of a New  
Racial Caste System by Way of the Prison Industrial Complex**

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My interest in civil justice sparked my sophomore year when I read *Just Mercy* by Bryan Stevenson. Stevenson's experience with the criminal justice system and its treatment of African Americans was deeply disturbing. The prison system--a major aspect of American society I had never placed much thought into--became a central part of the injustices I saw in a country claiming "life, liberty, and the pursuit of happiness" for all. Its most protected values of equality and freedom seemed to distance themselves even further from reality. Flipping through the pages of the book, my face was plastered with a frown or a furrowing of the brows, because I was constantly being confronted with another terrifying aspect of the African American life in America that I had been so blissfully unaware of.

As a result of the shocking and terrifying discoveries about the American criminal system, I began to have a very strong sense of excitement to learn more about something as widespread and vital to our perception of society. With this also came a sense of fear. Being a white woman, I knew I was going into this project with my own subconscious and conscious racial biases. I felt that I wasn't the right person to immerse myself into a topic that concerned people I couldn't directly relate to, and I feared I would misstep or attempt to shield myself from a truth that challenged previous racial beliefs, diminishing my understanding of the topic. I came to the revelation that this fear of involving oneself in racially charged topics greatly contributed to the racism still heavily prevalent in our society. Separating myself from an issue that involved another racial group neglected my role in the problem and successfully othered a minority. It deemed the issues they were facing as something they needed to deal with on their own. Instead of addressing our racial biases, we attempt to deny their existence, leading them to remain interwoven in the fabric of our society.

Eager to learn more about the “checks and balances” of the criminal justice system, and how it operates, I developed the following research question: How have the interpretations of the Constitution, as well as societal norms and understandings of race, evolved and shaped the prison industrial complex? I aim to answer this question through four major themes present in my research: understanding the Constitution and its amendments, equal protection and the revocation of constitutional rights, incarcerations parallels to slavery, and societal interpretations and acceptance. The topic of the Constitution on its own involves many aspects relating to the history of the Constitution’s inception, each amendment's history, the Supreme Court’s interpretation of these amendments (past and present), and their usage--as seen through the courts. I chose to evaluate the Thirteenth Amendment in this depth, as the topic of the prison industrial complex centers around it, but only provided summaries of the Fourth, Eighth, Fourteenth, and Fifteenth Amendments--as needed. This literature review focuses on the impact of the Constitutional amendments on the prison industrial complex--and the system of mass incarceration--as well as analyzing the prison industrial complex as a carefully positioned system designed to halt the progress of African Americans, effectively isolating them from society. After researching the intricacies of my question and its scope, I developed the following thesis: The history of the Constitution--and its amendments--is racially biased. The Supreme Court’s usage and interpretation of the Constitutional Amendments neither accounts nor corrects these biases, and has been described by Constitutional experts as racially discriminatory. The Constitution can be viewed as a tool, used to maintain the prison industrial complex as a system of control over African Americans. Experts agree that racial disparities can be seen throughout the prison industrial complex--in convictions, sentencing, and life after release. This system of control hides under a smoke screen created by those in power, and relies on societal indifference and

misunderstanding of its true intentions, to become the new “racial caste system” of the United States.

### **Understanding the Constitution and its Amendments**

Before delving into the effects of the Constitution on the prison industrial complex, it is important to understand how the Constitution functions, starting with its Founders intent. In her book, *The New Jim Crow*, Michelle Alexander argues that at the beginning of its creation the Constitution’s intent was to protect the racial hierarchy and ensure racial subordination. She examines white’s need for control and how they achieved this through the Constitution:

The structure and content of the original Constitution was based largely on the effort to preserve a racial caste system--slavery--while at the same time affording political and economic rights to whites, especially propertied whites...the Constitution was designed so the federal government would be weak, not only in its relationship to private property, but also in relationship to the rights of states to conduct their own affairs. The language of the Constitution itself was deliberately colorblind (the words *slave* or *Negro* were never used), but the document was built upon a compromise regarding the prevailing racial caste system (32).

In this sense, the Constitution’s goal was to preserve the system of slavery, as opposed to giving every United States citizen equal rights. This racialized intent remains because it is not explicit. Alexander says, “the words *slave* or *Negro* were never used”, this deliberately colorblind language makes it difficult to extrapolate and prove the ways in which the Constitution operates as an oppressive document. Colorblindness refers to the idea that we are living in a society that no longer makes race based decisions.

Despite the Founders’ efforts to shield the public from their blatant disregard for African American life, there is a somewhat clear understanding that they were, in fact, not considered

citizens under the Constitution. Supreme Court Justice Taney's Opinion in the *Scott v. Sandford* Case in 1857 sets the scene by explaining where African Americans' place is in the Constitution at the time of its creation:

'They are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them' (The Racialization of Crime and Punishment..., 630).

This was a time when African Americans were deemed inferior to whites, so their exclusion from the category of citizens denies them the rights typically afforded by said citizens. The Supreme Court is tasked with understanding and interpreting the Constitution case by case. Chief Justice Taney understood the matter of African Americans in the Constitution as a simple thing: "They are not included, and were not intended to be included, under the word 'citizens' in the Constitution." All of this leads to their inability to claim "the rights and privileges" which the Constitution "provides for and secures to citizens of the United States".

This case decision provides a clear segway into the subsequent discussion of the Thirteenth Amendment when it says that "whether emancipated or not" African Americans "had no rights or privileges" in the eye of the Constitution without the interference of government powers. This means that the protections of the Thirteenth Amendment may not be what we are all led to believe.

The Thirteenth Amendment made the abolishment of slavery a reality, becoming a major part of history in the African American struggle for freedom. So how did we get from a Constitution built on the idea that African Americans deserve no rights and cannot be regarded as citizens, to the passing of an Amendment that gives them the freedoms that they so rightfully deserve? According to Associate Professor of Law, William M. Carter Jr, in his article “Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery”, the drafters of the Thirteenth Amendment *wanted* the Amendment to not only provide African Americans with Constitutional rights, but eliminate the remnants of slavery as well:

To the Thirteenth Amendment’s drafters, ‘[f]reedom was much more than the absence of slavery. It was, like slavery, an evolving, enlarging matrix of both formal and customary relationships rather than a static catalog. In short, the Amendment’s framers wished not only to end slavery itself but also ‘to act so as to obliterate the last vestiges of slavery in America’ (1331-1332).

The drafters of the Thirteenth Amendment were aware of the implications of the abolishment of slavery on the lives of African Americans. They recognized that there would be so called “Badges and Incidents of Slavery”, referring to the injustices that African Americans would continue to face after the abolition of slavery. This is why the clause in the Thirteenth Amendment that allows Congress to create legislature for these “Badges and Incidents of Slavery” was created, so that the Thirteenth Amendment would continue to protect African American rights as America’s relationship with slavery and race evolves. In short, Carter perceives the Amendment’s Framers intent as honorable, as they truly intended for the Amendment to protect African American rights in the foreseeable future.

In order to understand the following sections and the interpretations of the Thirteenth Amendment, it is important to investigate the exact language of the Amendment. Section one of

the Thirteenth Amendment states the abolishment of slavery in the United States, and places under its jurisdiction: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”. Section two of the Amendment gives Congress the power to create new legislation to support the abolition of slavery: “Congress shall have power to enforce this article by appropriate legislation.” Scholars have carefully considered the specific language in the Thirteenth Amendment to determine the Framers’ intent and objectives.

The previous interpretation of the Framers objectives when drafting the Amendment, gives us a look into how we should interpret the Amendment’s language, leading us to how it should be enforced through our Justice System. In his article “Race, Rights, and the Thirteenth Amendment...”, Carter furthers his claims by stating that the interpretation of the Thirteenth Amendment must evolve as the effects of slavery on African Americans do:

...the Amendment must be interpreted in an evolutionary manner, but with specific regard to the experience of the victims of human bondage in the United States (i.e., African Americans) and the destructive effects that the system of slavery had upon American society, laws, and customs (1312).

The history of efforts to stop African Americans' upward movement in society since the passing of the Thirteenth Amendment demonstrates a need for an evolutionary interpretation. The effects of slavery are ever changing, as the American society continually finds ways to promote and sustain the racial hierarchy. It started with the Black Codes: a collection of strict state and local laws which were enacted after the emancipation proclamation as a way for whites to demonstrate their racial superiority and sustain the power dynamic that had existed for so long. The laws were outrageous and led to disenfranchisement and imprisonment, during which African Americans were forced into labor, sometimes on plantations. Following the removal of the Black Codes,

there was Jim Crow: an assortment of state and local statutes that legalized segregation, and barred African Americans from activities that would promote their assimilation into society. Today, we are faced with what is undoubtedly the new racial caste system in America--mass incarceration.

A crucial aspect of the Thirteenth Amendment interpretation is understanding the meaning and confinements of the word “punishment” in the first section of the Amendment. This word plays a huge role in the way that the Thirteenth Amendment is applied in prisons, because it too needs a definition--a definition that can change what the Thirteenth Amendment deems constitutional or unconstitutional. The Eighth Amendment gets the closest to providing this definition by prohibiting the federal government from imposing excessive fines, and more importantly, by sentencing citizens to cruel or unusual punishment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Unfortunately, the Eighth Amendment does not clarify what falls under the category of “cruel or unusual punishment”, so there is no way to know what types of punishment are considered unconstitutional. This leaves the parameters of “cruel and unusual” up to the Supreme Court’s interpretation and gives little context for what types of “punishment for a crime” (13th Amendment) are considered constitutional by the Eighth Amendment.

In his article “A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?”, Administrative Law Judge Raja Raghunath attempts to focus the definition of “cruel and unusual punishments” in the Eighth Amendment by following the evolution of its meaning to today. The 8th Amendment’s meaning from the Court during the 19th century was that is prohibited torture and unnecessary infliction of pain. At the beginning of the 20th century, the Supreme Court decided that punishment should be based on severity of a crime,



and that certain punishments--if unreasonable--would constitute as cruel. Fifty years later, the Supreme Court decided that the definition of cruel and unusual punishment would have to grow with society, and what society understood as cruel and unusual, taking into account the preservation of a person's dignity when inflicting punishment (428). Essentially, the limits of "cruel and unusual punishment" were more explicit towards the beginning of the Amendments introduction, deeming torture and unnecessary infliction of pain as unconstitutional. As time progressed, the Supreme Court's interpretation became more ambiguous, basing its decisions on the severity of a crime and the circumstances of the punishment. Now, what constitutes as cruel and unusual is reliant on our colorblind society because "the words of the Amendment are not precise," and "their scope is not static," (428), meaning their interpretation must adjust to fit society's standards. This concept of an evolving definition of "cruel and unusual punishment" closely follows the intent of section two of the Thirteenth Amendment.

In her article "Mass Incarceration: Slavery Renamed", Samantha Pereira argues that because of the current Supreme Court interpretation of punishment under the 8th Amendment, the protection of prisoners from cruel treatment has become very limited: "...the 8th Amendment is largely ineffective in protecting prisoners because the punishments are not unusual nor cruel according to the Constitution" (45-46). Prisoners are left largely unprotected, because our society is expected to define cruel and unusual. The problem is that our society (for the most part) does not consider imprisonment, and the treatment of those imprisoned, as cruel, and certainly not unusual.

Because there are essentially no limitations on punishment, prisons exploit their inmates to the fullest extent, striving to achieve the same goals as slavery once did. The large influx of African American inmates over the past 50 years helps propel these goals, providing free labor

and affording the prison industrial complex with a group to deem inferior. Without protection from the Eighth Amendment, “punishment for a crime” can quite literally be anything, and the punishment clause offers no protection to those facing forced prison labor.

But can one be punished for having a particular skin color? Can being punished on the basis of race be considered “cruel and unusual”? The questions of punishment lead us to interpretations of the Thirteenth Amendment, which has allowed for the perpetuation of slavery through the creation of the new racial caste system that is mass incarceration. The Framers of the Thirteenth Amendment left a loophole within the Amendment most commonly referred to as the convict clause or exception clause. The exception clause reads that slavery shall not exist in the United States “...except as a punishment for crime whereof the party shall have been duly convicted...” A direct reading of this section would make one believe that the Constitution is making slavery in prisons Constitutional.

In her article “Mass Incarceration: Slavery Renamed”, Samantha Pereira references the convict clause in the Thirteenth Amendment to argue a similar point: “This means that slavery is completely legal under certain circumstances and is almost expected to be used to punish convicted individuals” (44). The concept of imprisonment being the new racial caste system that is keeping African Americans at the bottom of the social and racial hierarchy continues to be the product of slavery, except this time it has been woven into the Thirteenth Amendment to make it Constitutional. Pereira even goes as far as saying that the punishment of prisoners is “almost expected to be used” as a form of slavery that is legal under the circumstances of imprisonment.

In his article “The Social and Intellectual Origins of 13thism”, historian Daryl Michael Scott gives a more thorough definition for this social movement, 13thism: “13thism is best understood as a narrative of African American history that developed from an intellectual

movement that places the Thirteenth Amendment's exception clause or "loophole" at the heart of explaining the rise and perpetuation of mass incarceration" (2). The concept of 13thism acts as a label, placing mass incarceration at the center of the continued oppression of African Americans in the United States.

How does the convict clause play a role in this? Could the founders have purposefully placed it into the Constitution in hopes of perpetuating slavery? The influx of incarcerated African Americans since the abolition of slavery, has helped satisfy these hopes, but was this the original intent? Daryl Michael Scott looks to historian Rebecca M. McLennan, an expert on the history and law of 13thist interpretations, to get a better understanding of why the convict clause became a part of the Thirteenth Amendment:

'As the framers of the Thirteenth and Fourteenth amendments were apparently well aware, *an unqualified, truly universal, proscription of slavery and involuntary servitude would have effectively rendered most Northern penal systems illegal*. Hence, the framers explicitly exempted penal varieties of involuntary servitude from the scope of the Thirteenth Amendment' (The Social and Intellectual Origins of 13thism, 30).

McLennan sees the convict clause as an exclusion that was inevitable for the drafters of the Thirteenth Amendment. With the abolition of all forms of slavery came abolition of many other forms of punishment employed by the United States government, one of them being the treatment of prisoners. If the convict clause had never been included in the Thirteenth Amendment, the forms of punishment used by prisons would be deemed unconstitutional, thus Northern penal systems would be deemed *illegal*. To avoid this, the Framers of the Thirteenth Amendment chose to include an exception clause, one that had many unintended consequences, as it not only allowed for prisons to remain legal, but as we will see, allowed the prison system to expand at an astronomical rate, targeting African Americans in the process.

Scott follows the evolution of slavery through new forms of racial subordination after the 13th Amendment was passed. He uses a quote from political activist and academic Angela Davis, to describe the new forms of slavery, all of which were consistent with the Thirteenth Amendment:

‘The Thirteenth Amendment putatively freed black labor from the total control to which it was subjected during slavery. New forms of quasi-total control developed—sharecropping, tenant farming, the convict system and the most dramatic evidence of the persistence of slavery, the convict lease system’ (The Social and Intellectual Origins, 25-26).

Essentially, the Thirteenth Amendment made it much more challenging to openly use black labor, but white people in power found new ways to continue their economic advancement by whatever means possible. Davis highlights some of the new forms of control that were employed to maintain whites superiority over African Americans such as: “...sharecropping, tenant farming, the convict system and the most dramatic evidence of the persistence of slavery, the convict lease system.” Davis considers the convict lease system to share the most similarities to slavery, a structure that was made Constitutional by the convict clause in the Thirteenth Amendment.

When examining the Thirteenth Amendment, it is important to acknowledge the two major powers in the United States government which are tasked with interpreting the Constitution: Congress and the Supreme Court. In section two of the Thirteenth Amendment, the Framers intentionally stated that “Congress shall have power to enforce this article by appropriate legislation”, as a way to ensure that the evolution and growth of slavery through new racial caste systems would be interrupted by new legislation being passed by Congress, specifically addressing modern day issues facing African Americans rights to freedom. The

Thirteenth Amendment has granted Congress the power to create legislation to protect a greatly underrepresented population from its past with slavery. As it currently stands, unfortunately, the intent of section two of the Thirteenth Amendment has been greatly overlooked by Congress, as minimal legislation has been passed to address the current race based issues facing African Americans.

William M. Carter Jr. examines Congress' role in interpreting what constitutes as a "badge or incident of slavery" under the Thirteenth Amendment in his article "Race, Rights, and the Thirteenth Amendment..." Carter calls on the original intent of the Thirteenth Amendment as a way to identify Congress' role in enforcing the Amendment with proper legislation:

...it is entirely reasonable as a matter of 'original intent' to interpret the Reconstruction Amendments as vesting Congress with broad, and even primary, enforcement power. The historical evidence does not, however, support the judiciary's complete exclusion from providing redress for the badges and incidents of slavery (1355).

His understanding of Congress' role is that it has been given primary enforcement power, and its neglect of this vital role is not backed by the "original intent" of the Thirteenth Amendment Framers. Thus, our judiciary system's exclusion of redress for the badges and incidents of slavery should not be considered Constitutional. Carter goes on to explain why the role of defining and enforcing the badges and incidents of slavery has fallen upon Congress:

...as a pragmatic matter of institutional capacity and propriety, Congress possesses factfinding and policymaking powers that courts do not. In some circumstances, the question of whether a particular condition or form of discrimination constitutes a badge or incident of slavery could be so highly fact-specific that answering the question would require tools that courts do not readily possess (Race, Rights, and the Thirteenth Amendment..., 1354).

Determining the full scope of the badges and incidents of slavery requires many tools that lower courts do not possess. Thus, the role has been placed onto Congress, an institution better qualified to investigate the lengths to which legislation seeking redress for the badges and incidents of slavery, should extend to.

So what happens when Congress doesn't create legislation to further the protections of the Thirteenth Amendment? Carter explains that although Congress has been given the power to add additional legislation to eliminate the badges and incidents of slavery, lower courts can also exercise their power in the absence of Congress' legislation (1319). The issue with this is that because the badges and incidents of slavery are not explicitly stated in the Constitution, courts "do not readily possess" the same resources as Congress to decipher them: "I believe that courts have been unwilling to extend the Amendment to its full scope at least in part because the badges and incidents of slavery prohibited by the Thirteenth Amendment remain so undefined" (*Race Rights and the Thirteenth Amendment...*, 1319). Carter believes that the vague mention of the badges and incidents of slavery in the Constitution, halts courts from offering the full scope of protections that fall under the Thirteenth Amendment.

What is arguably the most prominent issue with Congress' neglect of their duties to create legislation is that without it, the badges and incidents of slavery are greatly neglected by the courts. Carter mentions *Jones v. Alfred H. Mayer*, a case that created skepticism in the Supreme Court as to whether the amendment alone extends to the badges and incidents of slavery without legislation from Congress (*Race Rights and the Thirteenth Amendment...*, 1329). This presents a grave problem because of the lack of legislature from Congress. Without it, the Supreme Court struggles to interpret the Thirteenth Amendment as encompassing

protection from the badges and incidents of slavery, leaving a multitude of injustices facing African Americans.

In “Interpreting the 13th Amendment”, Alexander Tsesis furthers this point by using the opinion of Laurence H. Tribe a legal scholar and professor of law at Harvard University, to sum up the power Congress has obtained through section two of the Thirteenth Amendment:

‘Congress possesses an almost unlimited power to protect individual rights under the Thirteenth Amendment. Seemingly, Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination or subordination and thus an aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment’ (1354).

Congress essentially possesses an “unlimited power” in transforming the meaning of the 13th Amendment and creating a definition that makes common badges and incidents of slavery fall under the 13th Amendment’s protection. If Congress were to exercise this power, the Thirteenth Amendment would be able to protect U.S. citizens from the remnants of slavery in our society--and entire systems resembling slavery--such as the prison industrial complex.

Unfortunately, all of this is theoretical. If Congress were to choose to pass legislation falling under the category of badges and incidents of slavery, it isn’t certain that this legislation would go into action. Around the time of the ratification of the Thirteenth Amendment, Congressmen shared an understanding that they had been tasked to uphold the rights of every United States citizen--including newly freed African Americans--through the power to create transformative legislation. Unfortunately, The Supreme Court did not believe legislation of this sort should be passed: “The Supreme Court soon restrained Congress from passing legislation that might have achieved these and other progressive goals” (Interpreting the Thirteenth

Amendment, 1340). This demonstrates The Supreme Court's ability to block Congress from enacting it's powers of enforcement over the 13th Amendment. The Supreme Court is given this power through its decisions in an assortment of cases that set the tone for what is and isn't considered Constitutional under the Thirteenth Amendment. What does this have to do with Congress? It means that Congress' efforts to pass legislation can be halted by Supreme Court decisions. This was seen in the *Slauter-House Cases*, as well as the *1883 Civil Rights Cases*:

The decision auspiciously found that the Thirteenth Amendment did not grant Congress authority to prohibit discrimination in public places of accommodation. That outcome heralded judicial countenance of Jim Crow laws that persisted until 1954 (Interpreting the Thirteenth Amendment, 1340-1341).

When Congress chooses to pass legislation under the Thirteenth Amendment it needs to be in line with previous Supreme Court decisions so that Congress doesn't risk overextending its legislative authority.

To understand the following sections, it is important to introduce the Fourth Amendment. The Fourth Amendment is vital to citizen's feeling of safety, as it offers protection from unwanted intrusions into one's home and unreasonable searches and seizures. It forces the police to go through protocol when participating in activities that tend to be invasive:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Essentially, the Fourth Amendment is in place to keep the government in check, ensuring that United States citizens are given the right to proper procedures when it comes to entering their



house and participating in searches and seizures. It gives citizens the right to exercise their rights when faced with forces such as the police.

Tracey Maclin, a professor of law at Boston University specializing in criminal procedure, explains how the vague wording in the Fourth Amendment--and Eighth Amendment--leaves much to be desired:

The Fourth Amendment, for example, says we all have a right to be free from unreasonable searches and seizures. The Constitution doesn't tell us what unreasonable is or isn't, for that matter, the Eighth Amendment, the provision against cruel and unusual punishment. Again, another vague, open ended phrase (personal interview with Tracey Maclin, 09:57).

The Fourth Amendment, as well as the Eighth Amendment, give us very little context for the limits of “unreasonable searches and seizures” and “cruel and unusual punishment”, leaving these very important Amendments largely up to interpretation by the Supreme Court. Maclin goes on to explain how the lengths of the Constitution’s protections are determined by the Supreme Court:

...the Constitution doesn't tell us anything, generally speaking. I mean, it says the age of the president has to be a certain age and you can't be a senator or a member of Congress unless you are a certain age. But after those sort of very rare provisions, the Constitution is an open ended provision and we leave it to the judiciary to tell us what answers the Constitution compels... (personal interview with Tracey Maclin, 10:53).

Maclin explains how the Constitution is a tool that guides the Supreme Court in its decisions.

The document provides a rough outline as to what is and is not Constitutional, and in the end the Supreme Court’s interpretation is the Supreme Law in the United States. This means that the direction in which the court swings shifts as the people sitting on the Supreme Court change.

The Supreme Court's role in the application and enforcement of the Constitution is extremely important to analyze, because just as Tracey Maclin told me "the Constitution doesn't tell us anything." Determining what the Supreme Law is and upholding it, is up to the Supreme Court. In *The New Jim Crow*, Michelle Alexander discusses some of the choices that the Supreme Court has made, specifically around the Fourth Amendment and its protections: "The Supreme Court has ruled that walking a drug-sniffing dog around someone's vehicle (or someone's luggage) does not constitute a 'search,' and therefore does not trigger Fourth Amendment scrutiny" (88). The Fourth Amendment is supposed to protect individuals from being searched under unreasonable circumstances. If someone is stopped and refuses to be searched--as is their Constitutional right--the Supreme Court allows them to be searched via different methods. The Supreme Court has the ability to essentially remove a Constitutional Amendment--such as the 4th--from a defendants' line of defense.

This can be very disheartening. The exact document that is supposed to guarantee us the most basic of rights, can be stripped of its power. Will we have to seek other ways to achieve equal rights and be granted the protections the Constitution is supposed to give us? Dorothy E. Roberts article: "The Supreme Court 2018 Term", explores the uses of the Constitution in prison abolition and reform:

Prison abolition activists and scholars rarely seek support for their claims in constitutional law. Nor have they included an abolitionist interpretation of the Constitution in their vision of a transformed society without prisons. Some not only have eschewed constitutional law as a means to achieve prison abolition but also have argued that constitutional law serves to facilitate and legitimate state violence against black and other marginalized people. This oppositional approach to the Constitution is understandable given that so much of the Supreme Court's

constitutional jurisprudence since its inception in the slavery era has been anti-abolitionist (8).

Roberts does not consider the Constitution to be a document we should look to for assistance with progressive goals. She believes that in the past, it has been seen as having a negative effect on efforts to minimize racialized terror in America. She also mentions the Supreme Court's role and how its interpretation of the Constitution has been seen as "anti-abolitionist." Robert's does give us a glimpse of hope when she looks back at the Constitution's usage as an abolitionist document:

Yet the Constitution was interpreted by past freedom activists as an abolitionist document: many antislavery activists viewed the Constitution as a foundation for their arguments and for developing an alternative reading that called for freedom and democracy (The Supreme Court 2018 Term, 8).

The Constitution's past as an abolitionist document means it could have a future in halting the progress of mass incarceration.

With all this being said, it is important to understand what we are capable of achieving through law. William Carter puts it in simple terms: "It is not unknown for the law to create a right without expressly (or even implicitly) creating an individually enforceable remedy for violations of that right (Race, Rights, and the Thirteenth Amendment, 1350)." The Constitution will only serve us if we let it.

### **Equal Protection and the Revocation of Constitutional Rights**

Previously, I broadly discussed the Constitution and how it operates, focusing on the 13th Amendment and the abolition of slavery. I also examined how mass incarceration ties into the

Constitution. The following themes that I explore will focus on mass incarceration as the perpetrator of the new racial caste system. This theme will go over the revocation of Constitutional rights from those with a criminal record.

Firstly, it is important to familiarize yourself with what is considered equal protection under the Constitution. Section one of the Fourteenth Amendment states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment claims that States should not--in any way--deny United States citizens their rights. In addition, all citizens should be allowed proper due process. Essentially, every United States citizen should be given the same rights, no matter what. As has been discussed in the previous theme regarding the Constitution, the Constitution tends to make a lot of claims of equality for all and not follow through with them. Unfortunately, the Fourteenth Amendment does not differ in this respect, especially when it comes to those convicted of a crime. In her book *The New Jim Crow*, Michelle Alexander quotes a young black man with a felony conviction who is applying for the section 8 Housing Choice Voucher Program (an application granting low-income households government funds to cover a portion of their rent): “I asked for an application for Section 8. They asked me if I had a felony. I said, ‘yes’...They said. ‘Well, then, this application isn’t for you’” (180). Thanks to his felony conviction, he cannot receive funds to help pay for a basic necessity such as housing. This illustrates one of the many injustices those with criminal records face, and how the revocation of such rights affects their jobs, family, and self worth. Michelle Alexander puts felons rights simply: “Today a

criminal freed from prison has scarcely more rights, and arguably less respect, than a freed slave or a black person living ‘free’ in Mississippi at the height of Jim Crow” (*The New Jim Crow*, 176). Criminals do not possess the rights that have been supposedly given to them by the Fourteenth Amendment.

Samantha Pereira analyzes past Supreme Court decisions to identify the Supreme Court’s view on the revocation of Constitutional rights for criminals: “In *Ruffin v. Commonwealth* (1871), the court emphasizes that criminals forfeit their rights as part of their punishment...” (Mass Incarceration: Slavery Renamed, 45). Pereira believes that the Supreme Court has added “revocation of constitutional rights” to the list of punishments convicts should endure.

One of these rights is disenfranchisement. To understand disenfranchisement, it is important to note the exact wording of the Fifteenth Amendment giving every United States citizen the right to vote: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude (Section 1, Fifteenth Amendment).” The Fifteenth Amendment clearly states that citizens have the right to vote, and that this right should not be violated by anyone. So how is disenfranchisement legal? Michelle Alexander shares the opinion of the United Nations Human Rights Committee: “...the United Nations Human Rights Committee has charged that U.S. disenfranchisement policies are discriminatory and violate international law” (*The New Jim Crow*, 198). It isn’t considered legal, but it comes down to the Supreme Court, and in its opinion disenfranchisement is proper punishment for felony convictions.

In their article “The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex”, Rose Brewer and Nancy Heitzeg share how widespread disenfranchisement is:

Felony disenfranchisement is permanent in 14 states. Forty-eight states do not permit prison inmates to vote, 32 states disenfranchise felons on parole, and 28 states prohibit probationers from voting. Nationally, 40 million felons are disenfranchised; 2% of the nation on average cannot vote as a result of a felony conviction (628).

Fourteen states permanently cast aside persons convicted of a felony and deny them the right to vote. Nearly every state bars inmates from voting. Over half deny felons on parole and probationers to vote. 40 million votes are lost to disenfranchisement, equal to 2 percent of our nation's vote.

This is a crisis. Not only are U.S. citizens being denied the right to vote, but as Michelle Alexander says in *The New Jim Crow*, it is affecting election results as well:

Following the election, it was widely reported that, had the 600,000 formerly incarcerated people who had completed their sentence in Florida been allowed to vote, Al Gore would have been elected president of the United States rather than George W. Bush (200).

If the disenfranchised population had been allowed to vote, the elected president of the United States would have been someone else. Disenfranchisement is tainting the exact democratic process America is so proud of.

In addition, government aid to those with criminal pasts is often cut short. Many of the services offered by the government are not available to those with a felony conviction. Alexander shares how many convicted felons are denied food stamps permanently: "...thousands of people with felony drug convictions in the United States are deemed ineligible for food stamps for the rest of their lives" (197). Eligibility for food stamps comes from a household's income and assets. So if someone qualifies for food stamps it means that their gross income is below the poverty line, and they do not possess enough assets to afford necessities such as food. Revoking access to

food stamps is a punishment with grave consequences for many families who cannot afford to lose the scarce amount of aid the government has allotted them.

Finding quality and affordable housing is also a major problem for those with a felony conviction. Alexander introduces us to two pieces of legislation which greatly disadvantaged those with felonies and drug convictions by excluding them from many housing benefits and illegalizing discrimination by housing agencies:

In its final form, the act [Anti-Drug Abuse Act of 1988], together with the Quality Housing and Work Responsibility Act of 1998, not only authorized public housing agencies to exclude automatically (and evict) people with drug convictions and felonies; it also allowed agencies to bar applicants *believed* to be using illegal drugs or abusing alcohol---whether or not they had been convicted of a crime (*The New Jim Crow*, 181).

Not only does this legislation allow for discrimination against those with prior felony convictions, but it explicitly allows for racial biases to be expressed by housing agencies without any reasoning behind their exclusions except for their intuition that an applicant is engaging in substance abuse. This is reminiscent of the stop-and-frisk rule which has essentially become an exception clause in the Fourteenth Amendment:

Known as the stop-and-frisk rule, the *Terry* decision stands for the proposition that, so long as a police officer has ‘reasonable articulable suspicion’ that someone engaged in criminal activity *and* dangerous, it is constitutionally permissible to stop, question, and frisk him or her--even in the absence of probable cause (*The New Jim Crow*, 80).

In both these scenarios, it is incredibly easy for racial profiling to be used without inacting the protections of the Fourteenth Amendment. Housing agencies do not require probable cause to deny people housing, and police do not require it either when it comes to stopping people.

In addition to limits on housing opportunities, there is also discrimination in the business sector: “Nearly every state allows employers to discriminate on the basis of past criminal convictions” (*The New Jim Crow*, 186). Criminal records are readily available, and many employers require a clean criminal record, disqualifying many from employment opportunities. Alexander goes further to discuss how failure to secure employment affects those with a criminal record--aside from the negative effects on self esteem. According to a survey on state parole agencies: “...forty of the fifty-one jurisdictions surveyed (the fifty states and the District of Columbia) required parolees to ‘maintain gainful employment.’ Failure to do so could mean more prison time” (*The New Jim Crow*, 185). Not only are parolees excluded from job opportunities--making it difficult to find employment--but also if they fail to do so they also risk serving more time in prison.

The real question is: What does all this have to do with mass incarceration perpetuating and creating a new racial caste? Well, who is in prison? All of this has to do with those convicted of felonies, more specifically drug related felonies. This is where the War on Drugs comes into play.

In the first theme, I used an opinion from Justice Roger B. Taney stating that African Americans have no rights that whites are bound to respect. Michelle Alexander connects this Supreme Court opinion to the label of felon: “The Supreme Court’s famous proclamation in 1857-- ‘[the black man] has no rights which the white man is bound to respect’-- remains true to a significant degree today, so long as the black man has been labeled a felon” (*The New Jim Crow*, 241). The equal protection clause works at eliminating laws that perpetuate the thought that “[the black man] has no rights which the white man is bound to respect”, but the government passes new ones targeting the same people under a different label.



Michelle Alexander explains how the system of mass incarceration works to trap African Americans:

...the War on Drugs is a vehicle through which extraordinary numbers of black men are forced into the cage...Vast numbers of people are swept into the criminal justice system by the police, who conduct drug operations primarily in poor communities of color...Police can stop, interrogate, and search anyone they choose for drug investigations...In fact, police are allowed to rely on race as a factor in selecting whom to stop and search...effectively guaranteeing that those who are swept into the system are primarily black and brown (*The New Jim Crow*, 230).

To summarize, the War on Drugs allows for African Americans to be specifically targeted by law enforcement for drug related crimes. This process then allows for primarily African Americans to be placed into the prison system, convicting them of a felony, and giving them a permanent criminal record. In *Kimbrough v. United States*, the bench opinion states: "... a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine" (1). Depending on the type of cocaine, the sentencing guidelines differ dramatically. Alexander explains how the disparity between crack cocaine and powder cocaine sentencing guidelines is racially motivated: "Among other harsh penalties, the legislation [Anti-Drug Abuse Act of 1986] included mandatory minimum sentences for the distribution of cocaine, including far more severe punishment for distribution of crack---associated with blacks---than powder cocaine---associated with whites" (*The New Jim Crow*, 67). Since powder cocaine is associated with white people, and crack cocaine is associated with black people, consider the following scenario. If a white person were to be selling powder cocaine, and a black person were to be selling crack cocaine, the white person could potentially sell 100 times more powder cocaine and

receive the same sentence as the black person. This is how African Americans are put into the prison system and kept there.

Alexander explains the scale of the War on Drugs and its effects on our prison system: “The impact of the drug war has been astounding. In less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug conviction accounting for the majority of the increase” (*The New Jim Crow*, 70). The majority of this influx is made up of African Americans.

The last stage of this system is after release. Alexander describes this stage as the “period of invisible punishment.” Highlighting voting rights, access to government aid, housing, and job opportunities as things taken away from felons--or more specifically, African Americans.

This should be viewed as an equal protection *crisis*. Alexander believes that the Supreme Court has made the resolution of this crisis unattainable: “...the Supreme Court has made it virtually impossible to challenge racial bias in the criminal justice system under the Fourteenth Amendment, and it has barred litigation of such claims under federal civil rights laws as well” (*The New Jim Crow*, 137). Any attempt at deeming the components and results of the War on Drugs as showing racial bias under the Fourteenth Amendment would immediately be struck down by the Supreme Court. This is all to make the point that all efforts made to disadvantage the incarcerated, and formerly incarcerated, are efforts to disadvantage African Americans.

### **Incarcerations Parallels to Slavery**

Michelle Alexander begins *The New Jim Crow*, with a startling account of the Cotton family’s voting history:

Cotton's great-great-grandfather could not vote as a slave. His great-grandfather was beaten to death by the Ku Klux Klan for attempting to vote. His grandfather was prevented from voting by Klan intimidation. His father was barred from voting by poll taxes and literacy tests. Today, Jarvis Cotton cannot vote because he, like many black men in the United States has been labeled a felon and is currently on parole (1).

Five generations of Cotton men have been unable to vote. Cotton's history shows the different oppressive forces African Americans have encountered in their fight for voting rights. Starting with slavery, then white supremacist groups such as the KKK, then poll taxes and literacy tests which were imposed during the time of the Black Codes, to today, with the label of felon and the system of mass incarceration--all of this outlines the progression of the system of control in the United States and its evolution over the past 150 years. This theme will focus on the present system--the prison industrial complex and its parallels to the institution of slavery, since they are undoubtedly linked.

In this theme, I will formally be introducing a new term: the prison industrial complex (PIC). Since this theme will be looking at the structure of the prison system, the phenomenon of mass incarceration cannot be used as a label since it is essentially referring to an influx of prisoners into the prison system, and not the operational system of American prisons.

Dorothy Roberts provides a definition, that examines the PIC's origins, scope, and usage:

Critical Resistance founders developed the concept of the 'prison industrial complex' to name the expanding apparatus of surveillance, policing, and incarceration the state increasingly employs to solve problems caused by social inequality, stifle political resistance by oppressed communities, and serve the interests of corporations that profit from prisons and police forces (The Supreme Court 2018 Term, 6).

Just as slavery was an intricate system developed to keep African Americans from obtaining humanity, citizenship, and freedom--the prison industrial complex gives a name to the new system the United States is using to stifle the progress of minority groups, such as African Americans.

Before delving into new parallels between the prison industrial complex and slavery, it is important to note that the previous theme on equal protection and the revocation of Constitutional rights is clearly linked via the transitive property. Revocation of rights and the loss of equal protection center around the labels of criminal and felon, both perpetuated by the prison system. The system of slavery used the label of slave and denied slaves Constitutional rights--both of which overlap with the rights felons are denied today.

The right to vote is one of the topics discussed in the previous theme. Disenfranchisement as a whole is very reminiscent of denying slaves the right to vote since they weren't considered citizens. Yet today, convicted felons are denied this right. Michelle Alexander analyzes another aspect of the incarcerated's vote that shares a very strong connection to slavery:

Under the usual-residence rule the Census Bureau counts imprisoned individuals as residents of the jurisdiction in which they are incarcerated. Because most new prison construction occurs in predominantly white, rural areas, these communities benefit from inflated population totals at the expense of the urban, overwhelmingly minority communities from which people in prison frequently come...This policy is disturbingly reminiscent of the three-fifths clause in the original Constitution, which enhanced the political clout of slaveholding states by including 60 percent of slaves in the population base for calculating Congressional seats and electoral votes, even though they could not vote (*The New Jim Crow*, 240).

In simpler words, the way voting is currently handled capitalizes upon the incarcerated. Despite their inability to vote, the prison population is counted as a part of the voting population, with the

majority of prisons being located in white rural areas. Alexander explains how this gives white communities more electoral votes, while minority communities suffer a loss of electoral votes, since the majority of the incarcerated come from these communities. This is reminiscent of the 3/5ths clause which counted slaves as a part of slaveholding states, increasing predominantly white populations electoral power.

Another major similarity between slavery and the PIC can be found in the world of free labor. Approximately two decades before the ratification of the Emancipation Proclamation, a practice called convict leasing began, lasting until the late 1920's. Convict leasing was when prisons would "lease" their prisoners to companies in need of free labor. Often, prisoners would be leased to private railways, mines, and even large plantations. Convict leasing provided states with a large profit margin due to the large, and more importantly, *free* labor force prisoners provided. Working conditions were inhumane, dangerous, and often deadly. All of this sounds pretty similar to slavery, doesn't it? The only real exception is that instead of the institution of slavery fueling convict leasing, it was the prison industrial complex, and instead of the free labor coming from slaves, it was coming from the incarcerated population. Benjamin Weber analyzes convict leasing in the Panamá Canal Zone in his article "The Strange Career of the Convict Clause: US Prison Imperialism in the Panamá Canal Zone". Weber gives us a glimpse of the way convict leasing has been characterized by professionals: "Historians of the convict leasing and chain gang era have since characterized it as 'worse than slavery' and 'slavery by another name'" (80). Experts on convict leasing not only believe that convict leasing can be considered "slavery by another name", but they have even gone as far as to say it is "worse than slavery." And let's not forget, convict leasing was completely legal under the Constitution due to the exception clause in the Thirteenth Amendment, essentially begging for a system such as convict

leasing to be developed and instituted in prisons. Weber states that canal officials in the Panamá Canal Zone were well aware of the effects of the Thirteenth Amendment on the limitations of free labor: “Despite apparent ambiguities in charting these degrees of unfreedom, they [canal officials] knew for certain that the Thirteenth Amendment’s convict clause provided that those convicted of a crime would become slaves of the state” (The Strange Career of the Convict Clause..., 90). Weber explains that canal officials knew that although prisoners had some Constitutional rights, the Thirteenth Amendment protections did not apply to free/slave labor due to the convict clause. Weber even uses the term “slaves of the state” to refer to prisoners in the convict leasing system. The system of convict leasing shows a very clear parallel between slavery and the prison industrial complex, and how the Thirteenth Amendment has allowed for the perpetuation of slavery through the PIC.

Another major system that the prison industrial complex relies on is the police system. In the previous theme, I discussed the War on Drugs, and how the police system has fueled mass incarceration. America’s police system has many complexities, and it is tied to many aspects of everyday life. Whether it provides a feeling of safety or fear, it is present in all of our lives--some more than others. For the purpose of this paper, I will not be analyzing the entire police system. Instead, I will focus on its point of origin, and similarities between police officers and slave masters. In “The Supreme Court 2018 Term”, Dorothy Roberts provides a history on the origins of police forces: “The first police forces in the United States were slave patrols” (20). The very system that we rely on to keep us safe today is the same system that was used to monitor and enforce discipline--often using force--upon slaves in the South. In addition to the entire system of policing originating from slavery, Roberts sheds light on relevant slave law: “Although slave law occasionally permitted the application of criminal homicide to convict slaveholders who

killed their slaves, it exonerated those who killed slaves who resisted the slaveholders' lawful authority" (The Supreme Court 2018 Term, 22). This facet of slave law is parallel to the power police have in the court of law today. Police can murder an African American and get away with it, with no conviction and no repercussions for their actions, simply by claiming that they believed the victim was carrying a gun. The connections between slavery and our police system are important to this paper because of the police's role in imprisoning African Americans through mass incarceration. Since their actions show bias towards African Americans in their searches and seizures, and the system of policing in America originated during slavery, it is clear that the very system that feeds the PIC operates on similar practices and lawful authority as former slave holders and patrols.

Samantha Pereira provides yet another major similarity between prisons and slavery, geographic locations:

Many prisons, specifically in Southern states, are located on former plantation sites...For example, the Angola plantation was purchased by the Louisiana government in 1880 to be converted into a prison—the slave housing became prison cells and inmates worked on the land (Mass Incarceration: Slavery Renamed, 47).

Pereira uses the Angola plantation as an example of the conversion of a plantation to a prison. Not only was the plantation turned into a prison, so prisoners were housed on a plantation, but prisoners actually worked the plantation land. Prisoners became slaves, and because of their new label, the law wasn't bound to stop it.

The prison label is a vital part of the way slavery manifests in the PIC. As has been seen throughout this paper, one of the major differences between the former system of slavery and the PIC, is how it is perceived by the population. Since slavery, law has transformed to allow the PIC

to continue to operate. Michelle Alexander argues that much of this is due to the change in label--from slave to prisoner: "The system of mass incarceration is based on the prison label, not prison time" (*The New Jim Crow*, 17). Despite apparent similarities between the two systems, slavery's new guise under the PIC has been extremely difficult to separate when it comes to the law. With this being said, in "Mass Incarceration: Slavery Renamed", Samantha Pereira shares one aspect of the prison label: "In both slavery and mass incarceration, the bodies are always attached to the institution" (48). Today, prisoners are demonized while incarcerated and later slapped with a criminal record, attaching them to the prison system forever, which now figuratively owns them. During slavery, slaves were literally owned by the system. Pereira furthers the point of prisoners physical attachment to their prisons when she provides a specific example in which this can be seen:

A prisoner's body also has the same status geographically as a slave's body. In the case of *Ruffin v. Commonwealth* (1871), Ruffin committed a crime while he was leased to a railroad company in Ohio, but his trial took place in Virginia. Ruffin argued that he was entitled to a new trial located where the crime took place, but the court disagreed because 'in the eye of the law he is always in the penitentiary' (Mass Incarceration: Slavery Renamed, 47).

In this case, Ruffin belonged to the penitentiary just as slaves belonged to slave owners. His person did not belong to him; it belonged to the system that was keeping him captive.

The final similarity which I will discuss, is the death penalty's relation to lynchings. Dorothy Roberts shares a feature of the death penalty's design which explains why society has less negative emotions towards the death penalty as it does with the thought of lynchings: "Today, states primarily use lethal injection in an attempt to make capital punishment 'more palatable,' on the logic that this method bears less resemblance to lynching than electrocution or hanging" (The Supreme Court 2018 Term, 41-42). Roberts makes the connection between the



death penalty and lynchings, and explains how capital punishment has evolved in an effort to separate itself from the practices used by slave masters, and white supremacist individuals and groups, to condemn/punish African Americans.

Rose Brewer and Nancy Heitzeg use a quote from Angela Davis that summarizes this theme by analyzing the worth placed on black bodies in the PIC:

‘Whether this human raw material is used for purposes of labor or for the consumption of commodities provided by a rising number of corporations directly implicated in the prison industrial complex, it is clear that black bodies are considered dispensable within the ‘free world,’ but as a source of profit in the prison world’ (The Racialization of Crime and Punishment...,636).

The prison industrial complex puts the same worth on its prisoners--the majority of which are African Americans--as slavery put on its slave population. Prisoners are used as a source of profit for large corporations through free (during convict leasing) or severely underpaid labor (modern day system). Prisoners have very little value to the PIC because of the constant influx of new prisoners due to the police system which fuels mass incarceration. All of these facets of the PIC’s operational design can be compared to that of slavery’s. Brewer and Heitzeg put it simply: “Although the names and legal legitimations have changed, there is little to distinguish the plantation from the penitentiary” (The Racialization of Crime and Punishment..., 638).

### **Societal Interpretations and Acceptance**

We--as a society--effectively create the systems around us. A system as large as the prison industrial complex does not come into being overnight, nor does it garner enough support to be implemented without having a widely accepted purpose, and it certainly does not remain in place for decades without continued support. It becomes woven into our reality as something that

fulfills our needs--even as our needs change--and implements itself into our history as a necessity. Our world becomes reliant on it to “successfully operate”, thus perpetuating its existence. As the abolition of slavery got closer and closer, white groups in power saw this as a threat to their placement on the social hierarchy. The prison industrial complex provided a cover from this impending doom. It would create a new way to control and oppress African Americans, but this time it would go undetected by the law and the majority of the U.S. population. The way that society would interpret and eventually accept mass incarceration would perpetuate this system, because it would provide it with support and play on people’s conscious and subconscious racial biases.

The concept of the prison industrial complex has been a part of our society since the abolition of slavery. Since then, our society’s interpretations of race and how they are expressed have changed, today we are living in what is referred to as a “colorblind era.” In *The New Jim Crow*, Michelle Alexander provides a thorough definition for this term, and how it can be seen in our criminal justice system:

In the era of colorblindness, it is no longer socially permissible to use race explicitly, as a justification for discrimination, exclusion, and social contempt. So we don’t. Rather we rely on race, we use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices we supposedly left behind (2).

Direct racism and openly racist ideologies are looked down upon in our society, but those ideologies have not been eradicated. Instead, we attempt to hide them behind the veil of our criminal justice system. We rely on race to choose whom we define as “criminals” and continue to engage with our racial biases through this label.

We are living in an era during which colorblindness has led to the dissociation of race from many societal issues that minorities face. Supposedly, we have gotten past the racialized terror and oppression that has been a part of our history since the founding of America, and aside from isolated incidents of legalized discrimination, race has no role in the law. In their article “The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex”, Rose Brewer and Nancy Heitzeg provide an explanation for the manifestation of colorblindness in the courtroom:

At present, civil justice has been at the center of legal claims of color-blindness, forwarding the notion that if race is no longer the basis for legalized discrimination, then it is no longer relevant to the law at all. It is civil justice that currently claims that when explicit racial discrimination is removed from the language of the law, it is magically removed from any societal impact and any subsequent legal remedy (626).

Brewer and Heitzeg explain the negative effects of colorblindness on civil justice. If racialized discrimination isn't explicit in a case, race can altogether be removed as a factor relevant to the law. So called “badges and incidents of slavery” are completely erased from our history, because today society ignores its racial biases and so does the law.

The concept of colorblindness is highlighted in our society's reaction to Obama's election as the first African American president. The idea that anyone could be president--no matter their skin's color--and that an African American man had taken office, gave the public the confidence that racialized discrimination was no longer fundamental to our country's history, nor relevant to our biases. Michelle Alexander explains how our society's perspective on both the Obama and Clinton administrations shielded both presidents from scrutiny surrounding their systems of control:

In both cases, highly racialized and punitive systems thrived under liberal presidents who were given the benefit of the doubt by those who might otherwise have been critics. Their public displays of affection for communities of color, the egalitarian values they preached, and their liberal or progressive stances on other issues helped to shield these vast systems of control from close scrutiny (*The New Jim Crow*, xlii).

The public's interpretation of these presidencies--the first black president, liberal presidents with progressive stances--hid the much of the systems these presidents were maintaining. How is this tied to colorblindness? Let's view colorblindness as a shield that is hiding our country's clear racial biases. Now, let's view the Obama and Clinton presidencies, and their progressive and liberal stances on issues, as a shield from the "highly racialized and punitive systems" they put in place. This example highlights the influence of our society's interpretations and acceptance of systems of control on the evolution of our world.

Experts on the prison industrial complex agree that a major part of how the PIC operates is based on its ability to avoid public scrutiny. As discussed, the fact that we are living in a colorblind era propels this fact, as it makes proving racial discrimination through the courts very challenging and has changed people's sense of reality. All of this can be boiled down to our society's ignorance and general acceptance of the PIC.

This theme of ignorance and acceptance can be traced back to slavery. Samantha Pereira explores citizens' acceptance of slavery in the south, in her article "Mass Incarceration: Slavery Renamed" by stating, "In the South, slavery was crucial to the economy and citizens accepted it completely" (50). Slavery was normalized for many reasons, but Pereira outlines how it was economically lucrative. Because it benefited white slave holders, their "moral obligations" were not placed in the interest of their slaves, but they were to their families and their economic success. Slavery being "morally wrong" was a fact they could afford to ignore, and they did.

Pereira ties the acceptance of slavery to the acceptance of mass incarceration and the PIC. Today, citizens support mass incarceration because they are told that it makes their communities safer. Normalizing slavery allowed for its perpetuation because it was weaved into peoples sense of reality, just as incarceration is now.

As we have seen throughout history, every oppressive system comes with a reason that is, at the time, a socially acceptable reason to overlook the evils of a system. Michelle Alexander expands on citizens acceptance of slavery through the War on Drugs: "...the calls for 'war' at a time when the media was saturated with images of black drug crime left little doubt about who the enemy was in the War on Drugs and exactly what he looked like" (*The New Jim Crow*, 132). The War on Drugs provided a perfect image of who and what mass incarceration was fighting against. It gave citizens an "innocent" and respectable reason to support an oppressive system, and an excuse to support it. The prison industrial complex, and mass incarceration were fighting who they deemed "an enemy of the people"--African American men. This system was benefiting white people, so why stop it?

Alexander examines the role of the media, and one's surroundings, in the denial of the evils of mass incarceration:

Denial is facilitated by persistent racial segregation in housing and schools, by political demagoguery, by racialized media imagery, and by the ease of changing one's perception of reality simply by changing television channels (*The New Jim Crow*, 226).

Alexander addresses the very facts that the era of colorblindness would deny. There is still "racial segregation in housing and schools...political demagoguery...racialized media imagery" all of which accounts for a major part of the fabrics of our society, and despite the desire for a society which is not racially biased, biases are extremely difficult to separate from what we know

as true. Our surroundings play a large role in our ignorance, as they play a large role in constructing our beliefs. Alexander mentions the media's role when she says, "the ease of changing one's perception of reality simply by changing television channels." It's as easy as pressing a button on a remote to view a different side to a conflict. This of course can be viewed as a positive thing, as the media provides us with vast amounts of information. But, it is as easy to properly inform yourself on an issue as it is to remove yourself from reality and lean into ignorance, and the media has made this accessible and effortless.

Returning to the concept of acceptance, I have discussed how people view the PIC as a system that is beneficial to them, and how this allows for sits favorability across the United States. Another aspect of acceptance is the notion that the PIC is beneficial to those incarcerated. Raja Raghunath argues for the return of what he calls "The Hard Road", or convict leasing. He believes that if the Thirteenth Amendment was properly enforced, convict leasing would return. This literature review does not argue for this, but Raghunath introduces us to past interpretations of convict leasing, and how outsiders excused what was essentially slavery, by "marketing" it as an act done to benefit prisoners who were leased:

'[t]hose who support prisoner labor explain that it contributes to the discipline of the prison population, combats idleness, allows the prisoner to pay back the state for the costs of incarceration, and teaches marketable skills that can be used upon re-entry to the community' (A Promise the Nation Cannot Keep..., 414).

Supporters of prison labor often market it as a system used to benefit society by improving prisoners' work ethic and teaching them things they can use when they assimilate back into society. Raghunath then introduces us to a statement made by the Department of Justice after its investigation into the convict leasing system:

‘[d]espite the statutory language articulating a rehabilitative purpose...the statutory provisions reviewed indicate that the primary benefit from the establishment of prison industries is to be derived by the state’ (A Promise the Nation Cannot Keep..., 414-415).

After thorough investigation, convict leasing’s deemed “rehabilitative purpose” was misleading and only designed for the purpose of persuasion. The system’s main beneficiary was the state, and not the prisoners leased. This example of convict leasing can be transposed onto the entire system of mass incarceration. To the public, it is presented as a system keeping our communities safe, and rehabilitating those who could threaten that safety. Societal interpretations, such as this one, have led to inaction, and this inaction has led to the perpetuation of a racially discriminatory and oppressive system.

A major aspect of racial caste systems is that they promote and sustain the racial hierarchy. At the inception of slavery, poor whites finally moved up from the bottom of the totem pole. Slavery gave them someone to put below them. This led to a higher social status, and created a new sense of reality for them. This change in the world around them benefited them, so they supported it with open arms. Michelle Alexander provides a comprehensive analysis of how appealing to lower-class whites has fueled racial hierarchies:

...the most ardent proponents of racial hierarchy have succeeded in creating new caste systems by triggering a collapse of resistance across the political spectrum. This feat has been achieved largely by appealing to the racism and vulnerability of lower-class whites, a group of people who are understandably eager to ensure they never find themselves trapped at the bottom of the American totem pole (*The New Jim Crow*, 20).

Alexander explains how the success of racial hierarchies is largely due to political inaction. Slavery boosted lower-class whites social status, and when that system ended--desperate to find

another--the Black Codes and Jim Crow immersed--quickly gaining their support. Poor whites viewed Jim Crow as a “return to sanity,” as they had begun to fall back down to the bottom of the social hierarchy (*The New Jim Crow*, 44). Alexander argues that lower-class whites have played a large role in the perpetuation of these racial caste systems, and that their motivations can be seen as an act of self-preservation. This example of lower-class whites can be placed on all groups that benefit from their place on the racial hierarchy. In her book *White Rage: The Unspoken Truth of Our Racial Divide*, Carol Anderson depicts the meaning of black advancement for whites: “If anything, black achievement, black aspirations, and black success are construed as direct threats” (159). The prison industrial complex stunts black achievement by maintaining the racial hierarchy that has disadvantaged them for so long. Due to the fear that toppling this system would disadvantage whites in a significant way, they promote and support the hierarchies' evolution.

As shown throughout this literature review, the prison industrial complex and the system of mass incarceration have taken a lot from the livelihood and achievements of African Americans. Having discussed the prison label and how it keeps African Americans from obtaining the rights they deserve, it’s important to analyze its societal impact. Today, the label of criminal has greatly contributed to a poor perception of “criminals”. Michelle Alexander analyzes how the label of criminal has been more successful at achieving public contempt towards African Americans than prior racial caste systems:

During Jim Crow, blacks were severely stigmatized and segregated on the basis of race, but in their own communities they could find support, solidarity, acceptance---love. Today, when those labeled criminals return to their communities, they are often met with scorn and contempt, not just by employers, welfare workers, and housing officials, but also by their own neighbors, teachers, and even members of their own families (*The New Jim Crow*, 206).



During slavery and Jim Crow, African Americans had the acceptance and support of their families and communities. Now, “criminals” are portrayed as people who need to be exiled from society. This hurts more than anything else--per its design. The label of criminal pushes away even those close to you, because it separates you from your innocence.

Although much of this paper has focused on the legal system that perpetuates slavery, society plays a larger role in keeping the prison industrial complex. Jennifer Taylor depicts how American society hides its true values under the guise of equality and liberty for all, but in reality “racial subjugation and exploitation were values many sought to protect” (Constitutionally Unprotected...,366). Although it may seem as though society has overcome its racial biases, it continues to look out for its best interests. The mass incarceration of African Americans, and the prison industrial complex’s control over black success and equality, affords white people in America with more opportunities and a higher social status. Carol Anderson addresses “white rage”:

As sociologist Tressie McMillan Cottom observed, ‘Whiteness defends itself. Against change, against progress, against hope, against black dignity, against black lives, against reason, against truth, against facts, against native claims, and against its own laws and customs’ (*White Rage*, 172).

“Whiteness defends itself”, through the establishment of the prison industrial complex.

## **Concluding Thoughts**

The Constitution has a history as an oppressive document. At its inception, it did not consider African Americans to fall under the category of citizen, effectively denying them all the

rights and protections the Constitution was meant to provide. The heavily guarded American values of freedom and equality for all did not apply to African Americans, and despite the passing of the Thirteenth Amendment, this fact did not change. The Thirteenth Amendment abolished slavery, but it maintained the system of control over African Americans, this time through the prison system.

The exception clause in the Thirteenth Amendment excluded prisoners from Constitutional rights as “punishment” for their actions. Those in power recognized the potential of the prison system as a form of control over African Americans, and created the phenomenon of the prison label. Once labeled criminals and felons, African Americans are denied: Constitutional rights: the right to vote (disfranchising 40 million people, 2 percent of our voting population), government assistance: food stamps and subsidized housing, and equal opportunities: job and housing. Thus effectively separating them from society, and permanently casting them down to second-class citizenship. The War on Drugs was used as a vessel to increase rates of African Americans in the prison system, as a way to make sure that those being negatively affected by the prison system were the system’s initial targets--African Americans. This marked the inception of mass incarceration.

This overarching system is known as the prison industrial complex: a massive system of control that maintains the power structures our society has put in place. It operates by: continuing the oppression of minority communities, by maintaining the disparity between them and white communities, sustaining the power and impact of the police system on African American life, and serving major corporations financial interests.

The prison industrial complex has shown great parallels to the system of slavery, through its structural and systemic properties. Revocation of rights as a whole acting as one of these

major parallels, as slaves were also denied basic human rights due to the label imposed upon them. Similarly, convict leasing, often referred to as “slavery by another name”, evoked the same practices of forced and free labor, this time on prisoners. The present day police system can be compared in terms of power dynamics between police and African Americans today, and slaves to their masters. In addition, policing’s historical relation to slavery is deep, as the first police were slave patrols. The geographic locations of prisons offer another similarity, since some former plantations have been purchased by the state and turned into prisons where prisoners work the same land slaves once did. The physical ownership of prisoners and slaves can be compared, as prisoners are seen as being owned by the state or penitentiary, just as slaves were owned by their masters. Furthermore, the death penalty has been viewed as fulfilling a similar purpose as lynching and evolving to remove its historical connections to lynchings as a way to avoid public scrutiny. Lastly, the sheer lack of worth placed on black bodies in the prison system can be compared to the worthlessness and disregard for slaves. This long list of similarities are clear and pronounced in the prison industrial complex, but our society uses its power of ignorance and acceptance to support the prison system, thus perpetuating its existence and discrimination towards minorities.

Though the law plays a major role in the perpetuation of the prison industrial complex, arguably, society plays a larger role. Michelle Alexander analyzes our need to look out for our own interests:

Rather it seems that an aspect of human nature is the tendency to cling tightly to one’s advantages and privileges and to rationalize the suffering and exclusion of others. This tendency is what led Frederick Douglass to declare that ‘power concedes nothing without a demand; it never has and it never will’ (*The New Jim Crow*, 320).

When the majority believes that a system is beneficial to them, they feel no need to change their perception and what they view as reality. Any change could result in a loss of power, and no matter the situation others are facing, history shows we will always choose ourselves. Alexander adds a quote from Frederick Douglass to further this point, where he claims he does not believe society's greed for power will change without a significant push. The prison industrial complex has done an incredible job of placing itself into our society as a necessity, a system designed to keep us safe and punish those who are seen as a threat to our safety. It claims to not only be beneficial to us, but also to the incarcerated population, offering a smoke screen of rehabilitation and hiding its true purposes.

This leads to the gaps I saw within my research. There are stacks of articles detailing the history of the Constitution, the interpretations of individual amendments and their implications, the injustices faced by the incarcerated population, the similarities between slavery and prisons, and our role as a society, but none of these articles have offered a solution. The abolition of prisons seems like the obvious next step after villifying it as the "new racial caste" and a system that is clearly discriminatory and comparable to slavery. There are two major problems I see facing the abolishment of prisons. The first one is that, as it stands, our society is not willing to abolish prisons. Those in power benefit from them, and those who support it "blindly" will not waver their support overnight. The second issue I see facing prison abolition is the prison industrial complex's establishment in our society as a necessity. Most of us, including myself, cannot comprehend what a society without prisons would look like. Where would those who are considered a threat to others safety go? How would people pay for their crimes? Would they go unpunished? What Martin Luther King Jr. said forty years ago at the height of the battle for civil rights applies to the issues we face today with mass incarceration and the prison industrial

complex. In order to confront and eradicate the injustices African Americans face through the prison industrial complex, it will take “a radical restructuring of our society” (*The New Jim Crow*, 323).

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