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## In Practice but Not in Name: the Futility of the Thirteenth Amendment in Protecting Against Forced Labor in Correctional Facilities and Detention Centers in the U.S., 55 UIC L. Rev. 549 (2022)

Holly Etheridge

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IN PRACTICE BUT NOT IN NAME: THE  
FUTALITY OF THE THIRTEENTH  
AMENDMENT IN PROTECTING AGAINST  
FORCED LABOR IN CORRECTIONAL  
FACILITIES AND DETENTION CENTERS IN  
THE U.S.

HOLLY ETHERIDGE\*

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I. INTRODUCTION

“Slavery did not end in 1865; it just evolved.” ~ Bryan Stevenson<sup>1</sup>

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1. *Best of the Axe Files: Bryan Stevenson*, AXE FILES, at 13:28 (June 1, 2020),

Dominique Morgan, a former inmate at an Omaha correctional facility, worked twelve hours a day in prison kitchens for 2.25 dollars per day.<sup>2</sup> After taxes, Morgan would take home fifty-four dollars a month at this job.<sup>3</sup> Most of the money earned would go towards necessities such as phone calls which could cost upwards of five dollars a call.<sup>4</sup> Morgan shared that they would spend a whole day's worth of work on one stick of deodorant.<sup>5</sup>

While the initial decision to become employed was voluntary, the working conditions were "grueling", and the correctional facility cared little about their wellbeing.<sup>6</sup> Morgan was diagnosed with HIV, and there were days where they physically could not handle the stress of spending twelve hours on their feet, yet if Morgan refused to work, they could face repercussions such as solitary confinement.<sup>7</sup>

Such treatment is not confined to correctional facilities. It is also seen in immigration detention centers around America.<sup>8</sup> At an Immigration and Customs Enforcement ("ICE") detention facility in Aurora, Colorado, detainees described being forced to work.<sup>9</sup> For up to eight hours a day, five days a week, detainees clean bathrooms, windows, patient rooms and staff offices, wax floors, and prepare and serve meals -- all for little to no pay.<sup>10</sup> ICE claims the work is voluntary and never required, but detainees share that such work is forced.<sup>11</sup> If they refuse to work, they are threatened with solitary confinement.<sup>12</sup>

These anecdotes are examples of the treatment inmates receive around the country. When those who are imprisoned refuse to work, they are threatened with punishment to coerce said work.<sup>13</sup> Such

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www.omny.fm/shows/the-axe-files-with-david-axelrod/best-of-the-axe-files-bryan-stevenson [perma.cc/RLG8-4GTV]. Morgan's pronouns are they/them. *Id.*

2. Darius Rafieyan & Cardiff Garcia, *The Uncounted Workforce*, NPR, at 2:45 (June 29, 2020), [www.npr.org/2020/06/29/884989263/the-uncounted-workforce](http://www.npr.org/2020/06/29/884989263/the-uncounted-workforce) [perma.cc/4N5Z-ARBP].

3. *Id.* at 3:00.

4. *Id.* at 3:02.

5. *Id.* at 3:15.

6. *Id.* at 3:35.

7. *Id.*

8. Jonathon Booth, *Ending Forced Labor in ICE Detention Centers: A New Approach*, 34 GEO. IMMIGR. L.J. 573, 584 (2020).

9. Kristine Phillips, *Thousands of ICE Detainees Claim They Were Forced Into Labor, a Violation of Anti-Slavery Laws*, WASH. POST (Mar. 5, 2017), [www.washingtonpost.com/news/post-nation/wp/2017/03/05/thousands-of-ice-detainees-claim-they-were-forced-into-labor-a-violation-of-anti-slavery-laws/](http://www.washingtonpost.com/news/post-nation/wp/2017/03/05/thousands-of-ice-detainees-claim-they-were-forced-into-labor-a-violation-of-anti-slavery-laws/) [perma.cc/K28R-LMXN].

10. *Id.*

11. *Id.*

12. *Id.*

13. Judith Resnik et al., *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 NW. U.L.

experiences are modern forms of forced labor – something that ought to have been illegal but has persisted in our society to this day. The Punishment Clause of the Thirteenth Amendment has allowed for such practices to legally occur in our country, and they have taken on different shapes when challenged either by the courts, statutorily, or per public outcry.

This Comment discusses the Thirteenth Amendment’s failure to end forced labor in America and put whites and nonwhites on an equal social playing field. Part II discusses the purpose and passage of the Thirteenth Amendment and its Punishment Clause and tracks through history the practices of indentured servitude. Part III argues that the Punishment Clause has allowed for forced labor to persist in our society. As new forms of slavery and indentured servitude meet challenges, oppressors find new ways to morph and disguise these social ills, thus continuing the pervasive oppression of Black individuals and other people of color. Part IV of this Comment proposes amending the Thirteenth Amendment to eliminate the Punishment Clause, thus criminalizing the practice of slavery and indentured servitude in its entirety. However, this singular effort would likely not be enough to combat the modern forms this has taken. To solidify concrete change, defunding of major police forces in our country and other common law and statutory reform is necessary.

## II. BACKGROUND

Section II discusses the history of the Thirteenth Amendment’s ratification, focusing primarily on the Punishment Clause.<sup>14</sup> This section also traces the forms of forced labor or the tactics that were used to perpetuate this social ill throughout our country’s history. These include wide-spread vagrancy laws that ensued immediately post ratification of the Thirteenth Amendment,<sup>15</sup> convict leasing

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REV. 45, 50-1 (2020).

14. See Anne Wooster, *Application of Section 1 of 13th Amendment to United States Constitution, U.S. Const. Amend. XIII, § 1, Prohibiting Slavery and Involuntary Servitude -- Labor Required by Law or Force Not as Punishment for Crime*, 88 A.L.R.6th 203 (2013) (discussing the ratification of the Thirteenth Amendment, specifically with regard to the Punishment Clause).

15. See Shirley Lung, *Criminalizing Work and Non-Work: The Disciplining of Immigrant and African American Workers*, 14 U. MASS. L. REV. 290, 324 (2019) (stating that “newly freed Black people have to be stringently controlled” and a way this was done was through vagrancy laws).

and debt peonage,<sup>16</sup> and the War on Drugs.<sup>17</sup> It further discusses the counter arguments of menial labor not being comparable to slave labor and improved race relations in the twenty-first century.

### A. *Ratification of the Thirteenth Amendment and the Purpose of the Punishment Clause*

The Thirteenth Amendment states that “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.”<sup>18</sup> The Supreme Court held in the *Civil Rights Cases* that this post-war amendment does not merely nullify the states in establishing or upholding slavery and indentured servitude, but it has a “reflex character” too, “decreeing universal civil and political freedom throughout the United States.”<sup>19</sup> This reflex character affirms the amendment applies not just to a specific class of people, but to all.<sup>20</sup> The Thirteenth Amendment prohibits holding any individuals as slaves and indentured servants, regardless of the manner in which that status was brought about.<sup>21</sup>

When debating the Punishment Clause, the political parties held differing views.<sup>22</sup> When the amendment was being drafted, Democrats saw this exception as moot.<sup>23</sup> They saw the amendment’s prohibition as so fundamentally inconsistent with the Constitution that it would permanently alter this sacred document.<sup>24</sup> Because

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16. See Cecil J. Hunt II, *Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration*, 49 U. BALT. L. REV. 313, 327 (2020) (stating that convict leasing was used to help aid the labor shortage in the South); see Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 935 (2019) (“The Thirteenth Amendment provided the means for acquiring more slave labor in the postbellum slave economy.”).

17. See 13TH (Netflix 2016) (Explains how the War on Drugs was a modern way of keeping Black people incarcerated through associating certain drugs with Black communities and heavily criminalizing them).

18. U.S. CONST. amend XIII.

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

20. Wooster, *supra* note 14, at 205.

21. *Id.*

22. The political parties have switched ideologies since this time. See Eric Rauchway, *When and (to an extent) why did the parties switch places?*, CHRONICAL OF HIGHER EDUC., (May 20, 2010), [www.chronicle.com/blognetwork/edgeofthewest/when-and-to-an-extent-why-did-the-parties-switch-places](http://www.chronicle.com/blognetwork/edgeofthewest/when-and-to-an-extent-why-did-the-parties-switch-places) [perma.cc/LL5X-698E] (explaining how and when the Democratic party began to stand for more federal government and the Republican party began to disfavor a strong, central government when they had previously stood for the opposite).

23. James G. Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U.L. REV. 1465, 1470 (2019).

24. *Id.*

their main concern was the prohibition, they were less concerned with the exception. Thus, Democrats read the prohibition narrowly and the exception broadly.<sup>25</sup> They interpreted the amendment as a right to locomotion, as obviously one who is enslaved or indentured has no right of locomotion.<sup>26</sup>

On the other hand, Republicans believed the Thirteenth Amendment would fundamentally alter the Constitution but in a way that would restore it to its true meaning instead of ruining it.<sup>27</sup> Republicans ran on a platform “assert[ing] that freedom was the normal state of United States’ territory.”<sup>28</sup> They held that the true way to interpret this amendment was for it to be used to eliminate all oppressive aspects of the current system and elevate nonwhites to the same social level as whites.<sup>29</sup> The Thirteenth Amendment, according to Republicans, not only freed slaves but gave them the right to make fundamental choices about their jobs and families.<sup>30</sup>

Since Republicans wanted to abolish all sentiments of slavery and sought the Thirteenth Amendment to do this, it is odd that they would accept such a clause. However, at the amendment’s ratification, its supporters focused mainly on its proposal and ratification and likely failed to foresee how the Punishment Clause could be abused.<sup>31</sup> Work as punishment was also seen as a more moral alternative than what was offered at the time as punishments including death and other bodily harm for even minor offenses.<sup>32</sup> Additionally, prison populations were small, so when ratified, it seemed as though the exception would not be an issue for many.<sup>33</sup>

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25. *Id.* at 1470-71.

26. *Id.*

27. *Id.*

28. Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 316 (2004).

29. Pope, *supra* note 23, at 1472 (“This included more than slavery and forced servitude but also rights to contract and property as well as enjoying access to the courts.”).

30. *Id.*

31. *Id.* at 1477-748.

32. *Id.*

33. *Id.*

## *B. The History and Progression of Forced Labor in Post-Civil War America*

### *1. Vagrancy Laws*

The prison population did not stay small for long.<sup>34</sup> With the passage of the Thirteenth Amendment, there were suddenly four million freed individuals in the South without employment.<sup>35</sup> Widespread vagrancy laws ensued, making it unlawful for an individual to be unemployed.<sup>36</sup> These laws effectively incarcerated many of those newly freed because it empowered police forces to arrest *en masse* Black individuals who were without employment contracts.<sup>37</sup> If those who were incarcerated could not pay their bail or other fees, they could then be lent out to work for whoever would pay such fees.<sup>38</sup>

These laws defined vagrancy broadly, describing one who at first glance had “no visible means of support” to be a vagrant.<sup>39</sup> These laws also enacted a “head” tax that if one could not pay was a sign of vagrancy.<sup>40</sup> Additionally, if one went in search of higher

34. 13TH (Netflix 2016), at 03:31 (“After the Civil War, African Americans were arrested *en masse*. It was our nation’s first prison boom.”).

35. *Thirteenth Amendment Ends Slavery but Makes Way for a Different Kind*, N.J. STATE BAR ASS’N (Oct. 28, 2019), [www.njsbf.org/2019/10/28/thirteenth-amendment-ends-slavery-but-makes-way-for-a-different-kind/](http://www.njsbf.org/2019/10/28/thirteenth-amendment-ends-slavery-but-makes-way-for-a-different-kind/) [perma.cc/2EDS-N8MH].

36. Lung, *supra* note 15, at 325.

37. *Id.*

38. *Black Code*, ENCYCLOPEDIA BRITANNICA, [www.britannica.com/topic/black-code](http://www.britannica.com/topic/black-code) [perma.cc/TP4M-NDU4] (last visited Mar. 28, 2022).

39. Lung, *supra* note 15, at 436.

40. Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1612 (2015) (citing DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* 2-3 (1978)). The Mississippi law

“[B]arred blacks from renting land and farming on their own outside city limits; required every freedman to enter into a labor contract or face vagrancy charges; mandated arrest for breach of contract ‘without good cause,’ prevented blacks from leaving one employ for another by imposing civil and criminal penalties for attempts to “entice” a laborer from his master; imposed criminal penalties for such malleable offenses as running away, displaying lewd behavior, and being an idle or disorderly person; allowed convicted blacks to be hired out at auctions in order to pay their fines and costs; and authorized a ‘head’ tax on all blacks between the ages of eighteen and sixty, for which failure to pay was evidence of vagrancy, triggering further penalties.”

Birkhead, *supra*, at 1612.

paying work, they were also subject to violating such laws.<sup>41</sup>

## 2. *Convict Leasing*

The practice of leasing out prisoners for labor was known as the practice of convict leasing.<sup>42</sup> Convict leasing was a practice where a middleman would pay the fees of an incarcerated individual, sublease these individuals out to entities that would pay for these workers, and finally keep the profits earned from paying the convict's court fees and the price paid by the corporation or individual for their labor.<sup>43</sup> The vagrancy laws gave plantation owners and other large corporations a supply of individuals to lease out.<sup>44</sup> These companies and individuals who leased out these convicts did so at such little cost, they were essentially provided free labor.<sup>45</sup> With the Southern economy in shambles after relying for over a century on slave labor, this practice helped to keep costs low.<sup>46</sup>

The work leased convicts performed was dangerous, including work in coal mines, railroad camps, and more.<sup>47</sup> The conditions were also hazardous.<sup>48</sup> For example, these workers had to stand all day waist deep in the swamp water.<sup>49</sup> To keep costs low, lessors would perpetuate these hazardous conditions by providing little to no clothing, undrinkable water, and rancid food in small rations, or sometimes no food at all.<sup>50</sup> Such cost cutting measures created deadly environments for leased convicts, and the average life span of a leased convict was five years.<sup>51</sup> Alabama's convict leasing system resulted in the deaths of forty-one percent of leased prisoners in 1870.<sup>52</sup> When these practices were brought before the Supreme Court of Virginia, the court held that prisoners, while incarcerated, were "slave[s] of the state," and if inmates were then

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41. Lung, *supra* note 15, at 327.

42. *Slavery By Another Name* (PBS 2012), at 16:33.

43. Hunt, *supra* note 16, at 325.

44. Pope, *supra* note 23, at 1480.

45. Hunt, *supra* note 16, at 329.

46. *Slavery By Another Name* (PBS 2012), at 26:11 ("Convict miners cost fifty to eighty percent less than free miners and could be worked six days a week." Additionally, "their presence allowed companies to depress wages and resist unions. When one could obtain Black labor, at almost no cost, profits for that business were enormous.")

47. Hunt, *supra* note 16, at 329.

48. *Id.*

49. *Id.*

50. *Id.*

51. Wendy I. Peloso, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, 1463 (1997).

52. *Id.* at 1464.

leased out, this did not create any per se constitutional violations.<sup>53</sup>

### 3. *Peonage*

Public outcry ensued regarding convict leasing after 128 leased convicts were killed in a mine explosion and newspaper reporting brought other atrocities to light.<sup>54</sup> The Civil Rights Act of 1866 also made it illegal to provide harsher punishment to one because of their race.<sup>55</sup> However, even with the public outcry and this legislation, the practice of debt peonage occurred alongside convict leasing, perpetuating this vicious cycle of forced labor for Black people.

Peonage involved capturing and incarcerating Black people who owed debts.<sup>56</sup> This typically began when a Black individual broke the law and could not pay fines and fees, resulting in someone else paying and then striking a coercive deal with the Black person to work off the debt.<sup>57</sup> Sometimes, even the debtor's wife and children were forced to join, thus throwing the entire family into indentured servitude.<sup>58</sup>

Debt peonage outlived convict leasing because courts in the South did not believe peonage was a human rights violation, holding that a peon was not coerced, but instead "a freeman, with political as well as civil rights," and that one "entered into the relation from choice, for a definite period, as the result of mutual contract."<sup>59</sup> Courts also held that having status as a peon was not confined to any race.<sup>60</sup> This view was largely upheld in many local courts

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53. *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871). This case discussed an act of the General Assembly in 1870, which provided

"[T]hat it shall be lawful for the governor of the Commonwealth to hire out, as in his judgment may be proper, such able-bodied convicts in the penitentiary, whose terms of service at the time of hiring do not exceed ten years, as can be spared from the workshops therein, to responsible persons, to work in stone quarries, or upon any railroad or canal in this State, or for any other suitable labor;"

and makes it the duty of the governor in executing this act, to provide for the safe keeping and return to the penitentiary of convicts hired or employed under its provisions. *Id.* at 769.

54. Peloso, *supra* note 51, at 1464.

55. Pope, *supra* note 23, at 1484 ("The statute made it a crime for any person to subject, under color of law or custom, any inhabitant of the United States 'to different punishment, pains, or penalties . . . by reason of his color or race, than is prescribed of white persons.'). This law attempted to put white people and Black people on equal footing in order to combat the racial disparities in criminal punishment observed at the time. *Id.*

56. Goodwin, *supra* note 16, at 947-48.

57. Birkhead, *supra* note 40, at 1616.

58. Goodwin, *supra* note 16, at 947-48.

59. *The Peonage Cases*, 123 F. 671, 673 (M.D. Ala. 1903).

60. *Id.*

throughout the South.<sup>61</sup>

Legislative acts such as the Anti-Peonage Act of 1867 attempted to abolish the practice of peonage in New Mexico.<sup>62</sup> However, such statutory acts were largely a futile effort considering they were rarely invoked.<sup>63</sup>

The Supreme Court attempted to make headway into banning this practice in *Clyatt v. United States*.<sup>64</sup> Here, the Supreme Court held that “peonage, however created, is compulsory service, involuntary servitude.”<sup>65</sup> The Court stated that the Thirteenth Amendment “denounces a status or condition, irrespective of the manner or authority by which it is created.”<sup>66</sup> While peons could release themselves from their servitude by paying, the Court recognized this practice was forced and coerced, and the Court held this was an unconstitutional violation of the Thirteenth Amendment.<sup>67</sup>

The premise that work is forced even if one can pay their debts illuminates the issue in *United States v. Reynolds*, where a Black man kept incurring debts frivolously added by his masters, making repayment nearly impossible and ensuring life-long indentured servitude.<sup>68</sup> The Court in this case ruled debt peonage

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61. Birckhead, *supra* note 40, at 1618.

62. 42 U.S.C. § 1994 (2022) (originally enacted as the Peonage Abolition Act of March 2, 1867, ch. 187, § 1, 14 Stat. 546) (Stating that

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.)

63. Birckhead, *supra* note 40, at 1618.

64. *Clyatt v. United States*, 197 U.S. 207, 215 (1905).

65. *Id.*

66. *Id.* at 216.

67. *Id.* at 215, 218.

68. *United States v. Reynolds*, 235 U.S. 133, 139-40 (1914). Ed Rivers was convicted in an Alabama court of petit larceny, fined fifteen dollars, and made to pay costs of \$43.75. Reynolds appeared as surety for Rivers. *Id.* at 139. Rivers entered into a written contract with Reynolds to work on his farm for nine months and twenty-four days for six dollars per month to pay his debt. *Id.* Roughly a month into his contract, Rivers refused to work any longer for Reynolds. *Id.* at 140. Reynolds then had Rivers arrested on the charge of violating the contract of service. *Id.* He was convicted, fined the sum of one cent for violating this contract, and made to pay additional costs in the amount of \$87.05. *Id.* G. W. Broughton acted as Rivers’ surety and entered into a similar contract with Broughton to work for him as a farmhand at the same rate for

unconstitutional as well, for he was “kept chained to an ever turning wheel of servitude to discharge the obligation which he has incurred to his surety.”<sup>69</sup>

Despite the Anti-Peonage Act and the landmark Supreme Court decision in *Clyatt* and *Reynolds*, peonage persisted in the South.<sup>70</sup> Southerners did not perceive debt peonage to be morally or ethically wrong because the practice had been accepted by the community for decades.<sup>71</sup> Judges and legislators were fearful of sparking white anger, so the practice persisted despite legal challenges.<sup>72</sup> Public support for debt peonage had effectively spilled over into the legislatures and courts, ensuring these issues were not taken seriously.<sup>73</sup> This made criminal investigations and convictions of peonage a rarity.<sup>74</sup>

### C. *Forced Labor in the Twentieth and Twenty-First Centuries*

#### 1. *The War on Drugs*

In recent decades, the United States has seen alarming spikes in the prison population, which sits today at around 2 million.<sup>75</sup> This number is contrasted with over 357,000 in 1970.<sup>76</sup> Black individuals compose forty-seven percent of those incarcerated despite making up only sixteen percent of the U.S. population.<sup>77</sup>

When Richard Nixon was elected in 1969, he declared a “War on Drugs” and called for law and order throughout America’s

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fourteen months and fifteen days. *Id.* In the second case this case deals with, *Broughton*, E. W. Fields was convicted in an Alabama state court in 1910 for selling mortgaged property. *Id.* He was fined fifty dollars and costs in the amount of \$69.70. *Id.* Thereupon Broughton, as surety for Fields, paid the sum. *Id.* Fields contracted to work for Broughton as a farm and logging hand for nineteen months and twenty-four days for six dollars per month to pay the fine and costs. *Id.* After roughly two months of working for Broughton, Fields refused to work any longer. Broughton had Fields arrested for violating his contract. *Id.*

69. *Id.* at 146-47, 150.

70. Birkhead, *supra* note 40, at 1623.

71. *Id.* at 1623.

72. Douglas A. Blackmon, *America’s Twentieth-Century Slavery*, WASH. MONTHLY (Dec. 27, 2012), [www.washingtonmonthly.com/magazine/janfeb-2013/americas-twentieth-century-slavery/](http://www.washingtonmonthly.com/magazine/janfeb-2013/americas-twentieth-century-slavery/) [perma.cc/A9TN-FFJK].

73. *Id.*

74. *Id.*

75. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022).

76. 13th (Netflix 2016), at 15:10.

77. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 392 (2002).

cities.<sup>78</sup> As every war needs an enemy, Nixon’s advisor, John Ehrlicman said that the White House had two major enemies – “the antiwar left and Black people,” and since they could not outrightly criminalize either, they “associate[d] Blacks with heroin, and criminalize[d] [it] heavily” in order to “disrupt [that] commun[ity].”<sup>79</sup>

In October 1982, President Ronald Reagan formally declared this War on Drugs outright.<sup>80</sup> During this War, the Reagan administration began a campaign to change public perception about drugs and drug users with the goal to “demonize” and “ostracize” such illicit substances and individuals.<sup>81</sup> At this time, however, drug use was declining among many different groups in the U.S.<sup>82</sup>

As part of the War on Drugs, the Reagan administration established sentencing for cocaine and crack offenses and distinguished between the two drugs even though there are no physiological differences between the two substances.<sup>83</sup> The sentencing disparities between these two crimes were stark, as one who was charged with intent to distribute crack cocaine received a sentence similar to one who was charged with only possessing cocaine in its powder form but with quantities in excess of one hundred times more than the crack cocaine.<sup>84</sup>

Additionally, Black individuals at this time were overly represented on the news as criminals.<sup>85</sup> This painted a picture of

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78. 13TH (Netflix 2016), at 17:14.

79. *Drug War Confessional*, VERA, [www.vera.org/reimagining-prison-webumentary/the-past-is-never-dead/drug-war-confessional](http://www.vera.org/reimagining-prison-webumentary/the-past-is-never-dead/drug-war-confessional) [perma.cc/RGM5-5HWH] (last visited Apr. 27, 2022).

80. Nunn, *supra* note 77, at 386.

81. *Id.* at 387 (citing EVA BERTRAM ET AL., *DRUG WAR POLITICS: THE PRICE OF DENIAL* 112 (1996)).

82. Nunn, *supra* note 77, at 390 (In a survey by the National Institute on Drug Abuse,

respondents [eighteen] to [twenty-five] years of age reporting marijuana use during the preceding year dropped by approximately [fifteen] percent between 1979 and 1982, and continued to decline sharply throughout the decade of the [eighties]. Reported use of cocaine by the same age group also dropped by approximately [fifteen] percent between 1979 and 1982, and continued to decline throughout the decade. Finally, [eighteen] to [twenty-five]-year-olds who reported using alcohol during the preceding year rose only slightly from 1979 to 1982, but also declined sharply following a peak in 1985.).

83. *Id.* at 396.

84. *Id.* at 396-97.

85. Azi Paybarah, *Media Matters: New York TV news over-reports on crimes with black suspects*, POLITICO (Mar. 23, 2015), [www.politico.com/states/new-york/city-hall/story/2015/03/media-matters-new-york-tv-news-over-reports-on-crimes-with-black-suspects-020674](http://www.politico.com/states/new-york/city-hall/story/2015/03/media-matters-new-york-tv-news-over-reports-on-crimes-with-black-suspects-020674) [perma.cc/TGU2-XWVA]. Black Americans

the Black man as what was known as a “super predator.”<sup>86</sup>

The War on Drugs escalated into a war on all crime during the Clinton administration. In 1994, President Clinton passed a True Crime Bill that allocated \$10.8 billion for state and local law enforcement with \$8.8 billion going towards hiring new police officers; \$2.6 billion for federal law enforcement; \$9.7 billion for prison construction; and \$7.1 billion for crime prevention.<sup>87</sup> This bill allowed for over one hundred thousand law enforcement officers to police the streets and led to the militarization of police forces around the country.<sup>88</sup> With the passage of this bill, the United States saw an increase in the incarcerated population, nearly doubling in size from 1990 to 2000.<sup>89</sup> In 2001, nearly half of the prison population was Black.<sup>90</sup>

At this time, the public was rattled by the cocaine crisis, for “prominent criminologists were warning of an impending ‘blood bath’ brought on by young super predators if something were not done soon.”<sup>91</sup> In 1992, the U.S. Public Health Service Substance Abuse and Mental Health Services Administration reported that seventy-six percent of drug users in the United States were white, fourteen percent were African American, and eight percent were Hispanic.<sup>92</sup>

## 2. *For-Profit Prisons and Detention Centers*

With the 1994 True Crime Bill paving the way for a more expansive prison system, for profit prisons gained prominence. Corrections Corporation of America (“CCA”) began as a small company in 1983.<sup>93</sup> In order to grow, they soon began making contracts with states to build prisons.<sup>94</sup> To ensure a return on these investments, these contracts required the states to keep these prisons filled regardless if crimes were being committed.<sup>95</sup> These

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in 2014 were arrested in fifty-four percent of murder cases, fifty-five percent of theft cases, and forty-nine percent of assaults. *Id.* However, they were shown on TV news stories for as suspects in sixty-eight percent of murder stories, eighty percent of stories about thefts, and seventy-two percent of stories about assaults. *Id.*

86. 13th (Netflix 2016), at 28:47.

87. Richard Rosenfeld, *The 1994 Crime Bill: Legacy and Lessons -- Overview and Reflections*, 32 FED. SENTENCING R. 147 (2020).

88. 13TH (Netflix 2016), at 40:10.

89. *Id.* at 40:55.

90. *Id.* 43:23.

91. Rosenfeld, *supra* note 87.

92. Nunn, *supra* note 77, at 395 (citing *1995 Report to the Congress: Cocaine and Federal Sentencing Policy*, U.S. SENTENCING COMM’N 34 (1995)).

93. Nunn, *supra* note 77, at 395.

94. *Id.*

95. *Id.*; 13TH (Netflix 2016) at 58:00.

prisons get paid per inmate.<sup>96</sup> These for-profit prison corporations began to work with hegemonic lobbying agencies, such as the American Legislative Exchange Council (“ALEC”), pushing for stricter crime laws.<sup>97</sup>

Nineteen percent of all prisoners in the country are held in for-profit prisons.<sup>98</sup> In these facilities, there is grave mistreatment of inmates due to a lack of adequate staffing.<sup>99</sup> The prison officers in facilities have falsified hours to make it look like more officers are working at any given time.<sup>100</sup> Additionally, the ratio of inmates to guards is inadequate.<sup>101</sup> These officers are taught to ask fighting inmates to stop, and if the inmates refuse the order, the officer must back away.<sup>102</sup>

Not only are these for-profit correctional facilities inadequately staffed, but they are marked by negligent care, for “[a]n ACLU investigation found that these prisoners were underfed, housed in filthy conditions, and held in rat-infested cells lacking working toilets or lights.”<sup>103</sup> The work at such facilities “allows offenders who are gainfully employed to pay a significant portion of their cost of incarceration while serving their sentence in a community facility.”<sup>104</sup> This allows companies to make more profit. When one of the major corporations running for-profit prisons began their inmate work program, a county saved sixty-thousand dollars on labor fees.<sup>105</sup>

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96. Erik Larson, *Customer Service, Quality Control, Employee Morale -- Business is a Whole Different Ball Game When You're Running a Prison for Profit*, INC. MAG. (June 1, 1988), [www.inc.com/magazine/19880601/803.html](http://www.inc.com/magazine/19880601/803.html) [perma.cc/KMC6-RV5J] (“Under the Bay County contract, as under all CCA's contracts, the company is paid a per diem rate for each inmate. For the first 310 inmates, Bay County pays CCA \$31.01 each per day. The rate drops roughly [ten dollars] for the next [twenty], then plummets to only \$7.88 a day for every inmate over 330.”).

97. 13TH (Netflix 2016) at 59:15 (“Through ALEC, CCA had a hand in shaping crime policy across the country, including not just prison privatization but also the rapid increase in criminalization.”).

98. Laura I. Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt*, 55 HARV. C.R.C.L. L. REV. 1, 46 (2020) [hereinafter Appleman I].

99. Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 586 (2018) [hereinafter Appleman II].

100. *Id.*

101. *Id.* at 587. At mealtimes, there can be a few as two guards to manage 800 prisoners. *Id.* Additionally, in general population, there can be one guard for every 176 inmates. *Id.*

102. *Id.*

103. *Id.* at 588 (citing Complaint at 2-4, *Dockery v. Epps*, No. 3:13-cv-326, 2013 WL 2361045 (S.D. Miss. May 30, 2013)).

104. Appleman II, *supra* note 99, at 588.

105. Larson, *supra* note 96.

For-profit facilities also include ICE detention camps. CoreCivic (formerly CCA) and GEO Group, two of the nation's largest for-profit prison corporations, own seventy percent of the ICE detention centers.<sup>106</sup> From 2008 to 2016, these two companies made roughly two billion dollars in revenue solely from ICE contracts.<sup>107</sup> To cut costs, these detention facilities employ very few people, and as a result, the detainees are forced against their will to perform labor that should be performed by employees.<sup>108</sup> Such work includes cleaning and cooking for little to no pay.<sup>109</sup> If the detainees refuse, they are threatened with solitary confinement.<sup>110</sup>

Similar to the for-profit prisons, these companies make money by keeping beds filled. In 2010, Congress passed a law that ICE detention facilities have no fewer than thirty-four thousand beds.<sup>111</sup> The more beds they fill, the less they have to employ facility maintenance and other individuals to help run these detention centers.<sup>112</sup>

Prisons today operate such work programs in their facilities under the rhetoric of rehabilitating prisoners.<sup>113</sup> They attempt to make prisoners "productive members of society" upon release and reduce recidivism rates within the legal system.<sup>114</sup> However, prisoners have exposed that this work is not truly voluntary or rehabilitative.<sup>115</sup> When prisoners do refuse to work, they are thrown into solitary confinement or face other punishment.<sup>116</sup>

To combat this mass incarceration and police brutality of

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106. Appleman I, *supra* note 98, at 46.

107. Booth, *supra* note 8, at 584.

108. *Id.*

109. Phillips, *supra* note 9.

110. *Id.*

111. Booth, *supra* note 8, at 584.

112. *Id.* at 584.

113. Amanda Dick, *The Immature State of the Union: Lack of Legal Entitlement to Prison Programming in the United States as Compared to European Countries*, 35 ARIZ. J. INT'L & COMP. L. 287, 295 (2018).

114. *Id.*

115. See Rafieyan & Garcia, *supra* note 2 (explaining the story of Dominique and how they were forced to work through painful HIV symptoms or face solitary confinement); see also Alon Harish & Alexis Shaw, *Man Forced to Work in Prison Sues Under Anti-Slavery Amendment*, ABC NEWS (Aug. 9, 2012), [www.abcnews.go.com/US/man-alleging-prison-labor-violated-anti-slavery-amendment/story?id=16970464](http://www.abcnews.go.com/US/man-alleging-prison-labor-violated-anti-slavery-amendment/story?id=16970464) [perma.cc/Y98D-6BFT] (stating that a man who was incarcerated was forced to work doing the prison's laundry, and if he did not work, he was threatened with solitary confinement); see also Kevin Rashid Johnson, *Prison Labor is Modern Slavery. I've Been Sent to Solitary For Speaking Out*, GUARDIAN (Aug. 23, 2018), [www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike](http://www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike) [perma.cc/4YYS-P57T] (detailing that prisoners were forced to work in fields at gun point by the prison guards who traipsed the fields on horseback, and if they refused to work, they were not merely threatened with solitary but actually sent there).

116. *Id.*

people of color, there has been a call to action to defund major police forces throughout our nation.<sup>117</sup> In the fiscal year of 2020, the ten largest cities in the United States spent between \$330-671 million per capita on police forces.<sup>118</sup> The “divest to invest model” takes a portion of these funds and allocates it to other aspects of communities such as education, combating homelessness, and other root causes of systemic policing of poor communities of color.<sup>119</sup> This idea even reached Congress, where a bill was introduced in the House in June 2020 named the Justice in Policing Act.<sup>120</sup> Part of this act sought to restrict funding from the Byrne Memorial Justice Assistance and Community Oriented Policing Services grant programs.<sup>121</sup> These two programs have helped expand police funding by over two hundred percent since 1980.<sup>122</sup>

Unfortunately, this movement has lessened in popularity from 2020 to today in 2022. In his State of the Union Address on March 1, 2022, President Biden stated that “we should all agree the answer is not to defund the police.”<sup>123</sup> However, this statement was qualified with “[we must] fund them with resources and training . . . needed to protect our cities.”<sup>124</sup> Since 2020, many jurisdictions have increased their budgets.<sup>125</sup> Examples are Chicago Mayor Lori Lightfoot requesting \$80 million and California Governor Gavin Newsom seeking \$300 million to combat crime.<sup>126</sup>

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117. Stephen Rushin & Rodger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 282 (2020).

118. Diedre McPhillips, *How Much America’s 10 Largest Cities Spend on Police*, U.S. NEWS (June 11, 2020), [www.usnews.com/news/cities/articles/2020-06-11/how-much-the-10-largest-us-cities-spend-on-police](http://www.usnews.com/news/cities/articles/2020-06-11/how-much-the-10-largest-us-cities-spend-on-police). New York City spends the most amount on their police budget, sitting at \$671 million. *Id.* The other cities are Chicago at \$660 million, Philadelphia at \$488 million, San Jose at \$455 million, Los Angeles at \$436 million, Phoenix at \$429 million, Houston at \$403 million, Dallas at \$385 million, San Diego at \$384 million, and San Antonio at \$330 million. *Id.*

119. Rushin & Michalski, *supra* note 117, at 282-83.

120. Stacy M. Allen, *Law Enforcement: “Daddy Changed the World”: How the Death of George Floyd May Impact the Law*, 58 HOUSTON LAWYER 18 (2020).

121. *Id.*

122. *Id.*

123. Aaron Blake, *Biden tries to nix ‘defund the police,’ once and for all*, WASH. POST (Mar. 2, 2022), [www.washingtonpost.com/politics/2022/03/02/biden-nix-defund-police/](http://www.washingtonpost.com/politics/2022/03/02/biden-nix-defund-police/) [perma.cc/QM4J-9VWF].

124. *Id.*

125. T.W. Starr, *Has ‘defund the police’ turned into ‘refund the police’ in 2022?*, KTBS 3 (Mar. 17, 2022), [www.ktbs.com/news/has-defund-the-police-turned-into-refund-the-police-in-2022/article\\_20d1a6f2-a3c9-11ec-9841-73dc9c197c16.html](http://www.ktbs.com/news/has-defund-the-police-turned-into-refund-the-police-in-2022/article_20d1a6f2-a3c9-11ec-9841-73dc9c197c16.html) [perma.cc/75FK-8ZG5].

126. *Id.*

### D. Race Relations in America Today

A common rhetoric today is that race relations are better than they were during slavery.<sup>127</sup> The idea is that since race relations have improved, the Thirteenth Amendment achieved its goals of not just ending forced labor but also elevating Black people to the same social status as whites. This argument is facially plausible, for Black citizens now get their day in court as opposed to the courthouse doors being shut to people of color centuries ago. However, incredibly high burdens were enacted by the Supreme Court in *McClesky v. Kemp* when they held evidence of intentional discrimination was needed to prove discrimination in statutes.<sup>128</sup>

Additionally, laws akin to those seen at the beginning of Reconstruction such as the vagrancy laws nearly criminalizing Blackness are no longer seen. However, police forces around the country have found ways around this through “stop and frisk” techniques which have the same practical effects of locking up *en masse* Black Americans. The Supreme Court held in *Terry v. Ohio* that if a police officer reasonably believes that an individual has a weapon, the officer can detain and search them.<sup>129</sup> In 2012, the New

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127. *Race Relations*, GALLUP NEWS, [www.news.gallup.com/poll/1687/Race-Relations.aspx](http://www.news.gallup.com/poll/1687/Race-Relations.aspx) [perma.cc/2GW8-QT8P] (last accessed Mar. 30, 2022). In 2021, thirty-five percent of adults in America are “satisfied” or “somewhat satisfied” with the position of Black people in America. *Id.*

128. *McClesky v. Kemp*, 481 U.S. 279, 298 (1987). In this case, a Black man shot and killed a police officer in the commission of a robbery in Georgia. *Id.* at 283. He was convicted of this murder and sentenced to death. *Id.* at 285. McClesky’s lawyer filed a Fourteenth Amendment claim, arguing that the Georgia capital sentencing process is discriminatorily administered. *Id.* at 286. Counsel relied on a study showing that “found that prosecutors sought the death penalty in [seventy percent] of the cases involving [B]lack defendants and white victims; [thirty-two percent] of the cases involving white defendants and white victims; [fifteen percent] of the cases involving [B]lack defendants and [B]lack victims; and [nineteen percent] of the cases involving white defendants and [B]lack victims.” *Id.* at 287. In order to succeed on a Fourteenth Amendment claim, however, one must prove purposeful discrimination. *Id.* at 293. Because McClesky’s lawyer failed to provide evidence of discriminatory intent in McClesky’s specific case, the Court held this claim failed. *Id.* at 294.

129. *Terry v. Ohio*, 392 U.S. 1, 10 (1968). In this case, three young Black men were walking along a street nearly a dozen times. *Id.* at 6. After more odd behavior, a police officer approached the three men. *Id.* at 6-7. When the officer presented himself as an officer and asked for their names, they quietly mumbled to him. *Id.* at 7. The officer proceeded to grab Terry, spin him around, and pat him down. *Id.* He found an illegal weapon on Terry’s person when he did this. *Id.* On a motion to suppress, Terry argued this search was in violation of his Fourth Amendment rights. *Id.* at 8-9. The Court held that “the police should be allowed to ‘stop’ a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to “frisk” him for weapons.” *Id.* at 10. They held that this is what occurred in the situation with Terry, and therefore the search was lawful. *Id.* at 31.

York Police Department conducted over 530,000 *Terry*-style stops, and ninety percent of these were conducted on Black and Latino individuals.<sup>130</sup> Police officers contend that *Terry* stops are not conducted solely based on one's skin.<sup>131</sup> However, social science shows implicit racial bias is prevalent in deciding criminality.<sup>132</sup> A sociological study was done where individuals were read stories about a crime and no physical descriptions were given of the perpetrator, yet seventy percent of participants believed the perpetrator was Black.<sup>133</sup>

Additionally, Black children can receive the same education as white children. However, the school-to-prison pipeline and disproportionate levels of out of school punishment for Black children set them up for a future behind bars. Black students make up sixteen percent of the student population in our country, yet they are subject to thirty-four percent of the expulsions and forty-two percent of the out of school suspensions.<sup>134</sup> White students are subject to the same rates of punishment even though they compose a much higher percentage of the school population.<sup>135</sup> Black students are more likely to see punishment for subjective behavior such as disrespect, excessive noise, threatening behavior, and loitering.<sup>136</sup> This is contrasted with objective behaviors white individuals are punished for such as smoking, vandalism, and leaving without permission.<sup>137</sup> Discipline rates are disproportionate even in preschool; young Black children are being suspended at double the rates of white children while they comprise only eighteen percent of the preschool population.<sup>138</sup> This missed school has a direct correlation to incarceration rates, for educational attainment accounts for a twenty-three percent gap in incarceration rates

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130. *Analysis Finds Racial Disparities, Ineffectiveness in NYPD Stop-and-Frisk Programs; Links Tactic To Soaring Marijuana Arrest Rate*, NYCLU (May 23, 2013), [www.nyclu.org/en/press-releases/analysis-finds-racial-disparities-ineffectiveness-nypd-stop-and-frisk-program-links](http://www.nyclu.org/en/press-releases/analysis-finds-racial-disparities-ineffectiveness-nypd-stop-and-frisk-program-links) [perma.cc/FZR8-9NGY].

131. Steve Pomper, *Stop & Frisk Keeps Cops and Communities Safe*, NAT'L POLICE ASS'N, [www.nationalpolice.org/stop-frisk-keeps-cops-and-communities-safe/](http://www.nationalpolice.org/stop-frisk-keeps-cops-and-communities-safe/) [perma.cc/6UM2-8Z6Y] (last visited Mar. 30, 2022).

132. MICHELLE ALEXANDER, *THE NEW JIM CROW* 133 (10th Anniversary ed., 2020) (citing Franklin D. Gilliam & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News of the Viewing Public*, 44 AM. J. POL. SCI. 560-73 (2000)).

133. ALEXANDER, *supra* note 132, at 133.

134. Sarah E. Redfield & Jason P. Nance, *The American Bar Association Joint Task Force on Reversing the School-to-Prison Pipeline Preliminary Report*, 47 U. MEM. L. REV. 1, 48 (2016).

135. *Id.* They compose fifty-one percent of the school age population. *Id.*

136. *Id.* at 27.

137. *Id.*

138. *Id.* at 17-8.

between white and Black individuals.<sup>139</sup> To illuminate this point, in 1999, 992 Black students graduated from Illinois state universities; also in 1999, over seven thousand young Black men were introduced to the Illinois criminal justice system.<sup>140</sup>

Lastly, Black individuals have the right to vote today – a right they did not have as enslaved people. However, there are laws today that ban citizens with felony records from voting.<sup>141</sup> With all these practices in place today to ensure the incarceration of millions of Black citizens, these laws have intentionally targeted the Black vote with the purpose of disenfranchising people of color.<sup>142</sup>

### III. ANALYSIS

#### A. *Ratification of the Thirteenth Amendment and the Purpose of the Punishment Clause*

The Thirteenth Amendment has proved to be futile in its goal of combating slavery and indentured servitude. The purpose of the Thirteenth Amendment was to abolish said practices throughout the United States.<sup>143</sup> This is evidenced by the original intent of the Republicans in their feverish advocacy for the amendment's ratification to bring in a new era of racial cohesion and place Black people and white people on the same social plane.<sup>144</sup> The grave attitude set forth by Democrats in 1865 further cemented the purpose of the Thirteenth Amendment, for they understood it as an attempt to abolish slavery and indentured servitude in its entirety and a beginning of equity for all races.<sup>145</sup> This is proven further by their expansive view of the Punishment Clause, for it was their only way to cling to the inhumane practices of the past.<sup>146</sup> Since the Thirteenth Amendment's ratification, these practices have continued to cyclically pervade our society in new, more contemporary forms as a result of the Punishment Clause, rendering the Amendment's true purpose moot.<sup>147</sup>

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139. *Id.* at 58.

140. ALEXANDER, *supra* note 132, at 236.

141. *Id.* at 197.

142. *Id.* at 198-200.

143. Pope, *supra* note 23, at 1471-73.

144. *Id.*

145. *Id.*

146. *Id.*

147. Goodwin, *supra* note 16, at 911.

*B. How the Punishment Clause Perpetuated Forced Labor in America Through Vagrancy Laws, Convict Leasing, and Peonage*

1. *Vagrancy Laws*

The vagrancy laws that plagued the South immediately after the ratification of the Thirteenth Amendment became the first way to perpetuate forced labor in America.<sup>148</sup> These laws were passed not for public protection or deterrence, but instead for labor control.<sup>149</sup> They were designed so that the white plantation owners still had an influx of cheap or free labor.<sup>150</sup> By making employment compulsory in an agrarian economy with a large amount of the work supplied by plantation owners and large corporations, the South was effectively coercing Black people back into the same atrocities they were just freed from.<sup>151</sup> This was the intentional consequence of the vagrancy laws – jailing Black people *en masse* and forcing them back to work to repair the broken Southern economy.<sup>152</sup>

The methods for rounding up these individuals were also effective and ensured that the goal of exploiting Black labor was met.<sup>153</sup> The “head tax” that was enacted, charged upon Black individuals ages eighteen to sixty, allowed for many freed individuals to be charged for merely existing in a public space.<sup>154</sup> This effectively incarcerated many newly freedmen, employed or not, for if they had no money to pay the tax, it was considered vagrancy and grounds for imprisonment.<sup>155</sup> These laws limited mobility as well, for if a Black individual went out in search for a new, higher-paying job, they faced the consequence of violating vagrancy laws.<sup>156</sup> At this time,

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148. *Id.* at 949. The Southern legislature wasted no time implementing these laws, for they were contributing to the freedmen’s reentry into forced labor as soon as 1888 – less than three full years after the Thirteenth Amendment was ratified in 1865. *Id.*

149. Pope, *supra* note 23, at 1491.

150. Lung, *supra* note 15, at 326.

151. *Id.* at 325.

152. *Id.*

153. *Id.*

154. Birckhead, *supra* note 40, at 1612.

155. Hunt, *supra* note 16, at 326.

156. Lung, *supra* note 15, at 327. (Stating that

By criminalizing non-work, unemployment, or the refusal to work for a particular employer, the vagrancy acts directly attacked the right of black workers to move freely and mobility was crucial to asserting one’s freedom and control. Laws restricting mobility arose because freed black men and women were moving to better their wages and job conditions,

it was literally a crime for a black man to be found in public without proof of having a job working for a white man. It was also criminal for a black person to be alone in public, walk down a road, or walk across a field. Having been freed from slavery but with generally no place to go, many freedmen ‘found themselves designated [as] ‘trespassers,’ ‘disturbers of the peace,’ ‘vagrants,’ or ‘loiterers.’<sup>157</sup>

Because these vagrancy laws were created to exploit Black labor in the South and coerce Black individuals back into the same environment they suffered before the Thirteenth Amendment’s passage, they effectively continued the scheme of forced labor. This rendered the Thirteenth Amendment futile in protecting against such inhumane practices. The Thirteenth Amendment’s Punishment Clause created this loophole and encouraged the passing of vagrancy laws which forced four million freed people into employment contracts.

## 2. *Convict Leasing*

As a result of vagrancy laws, Southern correctional facilities were able to lease out hundreds of thousands of prisoners, effectively “reinst[ating] ‘slavery in all but its name.’”<sup>158</sup> The Thirteenth Amendment’s Punishment Clause legally allowed for prisons to sell those who were arrested *en masse* into labor through a middleman to large corporations, plantation owners, and individuals or entities looking for cheap labor.<sup>159</sup> There was an influx of Black prisoners in the South due to sweeping vagrancy laws and other statutory measures targeting Black individuals.<sup>160</sup> With this surplus of incarcerated individuals, many in the South saw the opportunity for profit. This allowed for and encouraged these entities to maintain the status quo of the commodification of Black labor.

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moving from one local employer--or planter--to another, moving back and forth between types of work, moving to reunite their families, and moving to find better opportunities for their children.).

Temporary unemployment for any amount of time was grounds to be subject to these laws, therefore making it even more difficult to quite a current job in hopes of seeking a higher paying job, for if you were not caught for the specific reason of leaving your previous job, one would likely get caught without an employment contract while out and about as result of the “head tax.” *Id.*

157. Hunt, *supra* note 16, at 326.

158. *Vagrancy Act of 1866*, ENCYCLOPEDIA VA., [www.encyclopediavirginia.org/entries/vagrancy-act-of-1866/](http://www.encyclopediavirginia.org/entries/vagrancy-act-of-1866/) [perma.cc/WTW2-FAJP] (last visited Mar. 30, 2022).

159. Hunt, *supra* note 16, at 325.

160. *Id.* at 326 (citing KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA*, xiv (2019)). The Black Codes were aimed with “almost surgical precision” at Black freedmen and essentially criminalized the status of just being Black in public, or as one scholar described it, “living while black.” Hunt, *supra* note 16, at 326.

This practice continues to prove the Thirteenth Amendment did not accomplish the purposes it was meant to, for convict leasing perpetuated forced labor in America. The Thirteenth Amendment's Punishment Clause actually empowered those in the South to lease out convicts. Therefore, the Thirteenth Amendment not only failed to achieve its goals, but it served as the driving force to allow for convict leasing to occur.

### 3. *Peonage*

For many years, courts in the South believed peonage was voluntary and mutual between a freedman with rights and one willing to purchase his labor.<sup>161</sup> However, this sentiment fails to capture the practice's true atrocities.

This practice follows the story of a Black individual being arrested or fined for breaking a law, not being able to pay, and a third party paying off the debt.<sup>162</sup> This individual was forced to work for this third party or face going to jail.<sup>163</sup> If an individual whose labor had been bought attempted to leave or failed to complete their work, they would add another case to their record, perpetuating forced servitude.<sup>164</sup> In some instances, a Black individual's entire family would be forced to join in the labor.<sup>165</sup>

This practice proves that the vicious cycle of forced labor in our country did not end even after convict leasing. The labor was continually forced upon peons, for if they did not work until their debt was paid off, they were sent back to prison, and thus the cycle repeats.<sup>166</sup> They did not enter into these contracts willingly as courts in the South liked to believe.<sup>167</sup> This coercive system continued to oppress Black people and force them into indentured servitude even after the official practice was deemed illegal.<sup>168</sup> Peonage is more proof that the Thirteenth Amendment was futile in protecting Black people against forced labor.

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161. *The Peonage Cases*, 123 F. at 673.

162. Goodwin, *supra* note 16, at 947-48.

163. Birkhead, *supra* note 40, at 1616 ("Courts asserted that the peonage system was not the equivalent of involuntary servitude because although the employer could not force the worker to stay, the worker could be punished for leaving."). This included seeking other forms of employment, leaving for personal reasons, and others. *Id.*

164. Birkhead, *supra* note 40, at 1616.

165. Goodwin, *supra* note 16, at 947-48.

166. Birkhead, *supra* note 40, at 1616.

167. Goodwin, *supra* note 16, at 247-48.

168. *Clyatt*, 197 U.S. at 215, 218.

*C. How the Punishment Clause Has Allowed Forced Labor to Persist into Modern Day Through the War on Drugs and Mass Incarceration*

At its inception, Nixon's War on Drugs seemed to concerned citizens as a campaign to protect America.<sup>169</sup> However, the underlying motives paint a darker picture, aimed at the incarceration of Black people.<sup>170</sup>

Nixon's advisor, John Elrichman, stated that

You want to know what this [war on drugs] was really all about? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.<sup>171</sup>

This statement proves the government was targeting Black individuals. By creating associations between certain drugs and Black people and heavily criminalizing the use of those drugs over others, they intentionally incarcerated *en masse* Black individuals.<sup>172</sup> This practice was continued by the Reagan administration when they heavily criminalized the use and

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169. Markus D. Dubber, *Policing Possession: The War On Crime And The End Of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 832-33 (2001) (stating that

As a war on violent criminals, the crime war has attracted a great deal of attention. Over decades, the media have eagerly recorded its campaigns and initiatives, kicked off with great fanfare by generations of legislators (and would-be legislators) anxious to incorporate the tough-on-crime plank into their political platform. The crime war's failures have made for particularly and persistently good news, as criminal violence continued even in the face of an all-out campaign to eradicate it. These failures led not to calls for the abandonment of the campaign, but for its expansion and more rigorous prosecution.).

170. *Id.* (Stating that

To understand the war on crime, however, one must go beneath the sensational and well-covered surface of crimes of violence suffered by innocent citizens at the hands of murderers, rapists, robbers, kidnapers, and other assorted miscreants. There, in the murky depths of criminal law in action, one finds the everyday business of the war on crime: the quiet and efficient disposal of millions of dangerous undesirables for offenses with no human victim whatsoever.).

171. *Drug War Confessional*, *supra* note 79.

172. 13TH (Netflix 2016), at 18:19.

distribution of crack cocaine over similar drugs.<sup>173</sup>

The media also helped change the public perception of the Black male. True crime television and the news painted the Black man as a “super predator” – America’s most dangerous individual, in the words of then-First Lady Hillary Clinton.<sup>174</sup> By showing Black males as criminals at disproportionate rates, a devastating view of Black men was created.<sup>175</sup> This led to the further incarceration of Black people, for public pressure caused the passage of legislative measures and judicial outcomes of criminal cases at the time.<sup>176</sup> This public pressure helped the passage of the 1994 True Crime Bill.<sup>177</sup> This crime bill gave police forces all over the nation the resources to begin acting out in furtherance of said biases and round up Black people *en masse*, similarly to the effect of Southern vagrancy laws.

Once the War on Drugs imprisoned millions of Black people, they could be put to work in prison as a result of the Punishment Clause. Prisons have voluntary work and vocational training programs,<sup>178</sup> and while these programs begin as voluntary, they

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173. Nunn, *supra* note 77, at 396-97.

174. 13TH (Netflix 2016), at 28:47.

175. *See Id.* at 28:47-34:30 (Explaining that this caused the image of the Black man to be synonymous with criminality, and this caused fear of Black people in all of America – even in Black communities).

176. *Id.* The Central Park Five were incarcerated for years before DNA evidence found them innocent of the brutal rape they were convicted of. *Id.* at 29:47. Further, the True Crime Bill enacted mandatory minimum sentencing, forcing the judiciary into a corner when it came to sentencing criminal defendants, for Judges were unable to dispense justice as they saw fit and instead had to sentence based off of statutes. *Id.* at 37:35. at This was also observed in regard to the Three Strikes Law encompassed in this bill that gave a mandatory life sentence for any criminal defendant convicted of their third felony regardless of what those felony charges were. *Id.* 37:00. If judges were able to dispense justice case by case, the judge would be able to avoid such harsh consequences. The argument against case-by-case sentencing is it causes disparities within the criminal justice system. Paul Larkin & Evan Bernick, *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, HERITAGE FOUND. (Feb. 10, 2014), [www.heritage.org/crime-and-justice/report/reconsidering-mandatory-minimum-sentences-the-arguments-and-against](http://www.heritage.org/crime-and-justice/report/reconsidering-mandatory-minimum-sentences-the-arguments-and-against) [perma.cc/5SJD-5R9G]. However, equality and equity are two different ideas, and when dispensing justice, equity is of more importance than equality. To aid this pass incarceration epidemic, we must take a more human approach to dispensing justice, and to do this, it helps to look at each individual and their unique circumstances. ALEXANDER, *supra* note 132, at 322.

177. 13TH (Netflix 2016), at. 41:50. (“Back then, there was an outcry over the rising crime rate. People from all communities were asking that action be taken.”)

178. Dick, *supra* note 113, at 295.

soon become a means of coercion.<sup>179</sup> Inmates can fall ill, yet if they try to take a day off, they are still forced to work under the threat of solitary confinement.<sup>180</sup> There are even recorded instances of prisoners being held at gun-point, and forced to continue working.<sup>181</sup>

In for-profit prisons, this reality is much worse. Since for-profit prisons are gravely understaffed, inmates either have to work or not eat, have no clean clothes and linens, and endure unsanitary premises.<sup>182</sup> This understaffing also causes a lack of adequate protection, resulting in large amounts of violence in for-profit prisons.<sup>183</sup> The Punishment Clause has allowed for these injustices to occur today, for as long as individuals are incarcerated, they can be forced to do this type of work against their will.

The Thirteenth Amendment has also failed to keep illegal indentured servitude from occurring within our country's borders.<sup>184</sup> At ICE detention centers, detainees who have not been duly convicted of any crime are forced to work against their will.<sup>185</sup> Similar to the for-profit prisons, these detainees are forced to cook

179. Goodwin, *supra* note 16, at 900-05. (Stating that

In some prisons and jails, inmates receive no pay or literally only pennies per hour for their labor, engendering analogies to slavery adapted to life behind bars. In Alabama, prisoners earn no pay for what are referred to as 'non-industry jobs,' although for work programs facilitated by the state for private industries (making couches, barbecue grills, and other items), a prisoner can earn \$0.25 to \$0.75 per hour. The same is true in Arkansas, Florida, and Georgia. In other states that pay for 'non-industry' jobs, the wages are hardly better; in Arizona, pay can be as little as \$0.15 per hour or up to \$0.20 in Louisiana - with some exceptions for private industry jobs, which might fetch \$1.00 per hour.).

Also in this article, Goodwin shared a story of women inmates being forced to fight wildfires. *Id.* at 899. They were being paid \$2 an hour for their life-threatening work. *Id.*

180. Rafieyan & Garcia, *supra* note 2.

181. Kevin Rashid Johnson, *Prison Labor is Modern Slavery, I've Been Sent to Solitary for Speaking Out*, *GUARDIAN* (Aug. 23, 2018), [www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike](http://www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike) [perma.cc/4YYS-P57T].

182. Appleman II, *supra* note 99, at 588.

183. *Id.* at 587 (Stating that

The few officers provided by these private prison companies are trained to step back and not get involved. CCA advises its prison guard trainees to not break up an inmate fight, or even call for backup. Instead, guards are instructed to ask the prisoners to stop fighting, and if they refuse, to just walk away ... On the segregated solitary confinement wards, CCA guards routinely fail to check on the prisoners every thirty minutes, as they are required to do, creating an unsafe environment for at-risk inmates. Guard towers surrounding the CCA correctional facilities are frequently unmanned, permitting inmate escapes.).

184. Phillips, *supra* note 9.

185. *Id.*

and clean for themselves.<sup>186</sup> The threat of punishment further cements this labor as indentured servitude in violation of the Thirteenth Amendment.<sup>187</sup>

The War on Drugs and its legislative progeny effectively incarcerated millions of Black people in the United States.<sup>188</sup> Once this mass incarceration was underway, these inmates were able to be forced into servitude. Roughly a century and a half has passed since the ratification of the Thirteenth Amendment, and still to this day, its goal of ending indentured servitude has proved a futile venture. Black people in the year 2020 are still being incarcerated *en masse* and sent to correctional facilities where they are forced to work.

A counter to this argument is that work in prisons is done through work rehabilitation programs.<sup>189</sup> Work rehabilitation programs operate under the guise of preparing incarcerated individuals to reenter society.<sup>190</sup> The rhetoric surrounding the practice is that labor is not meant to punish or be forced upon incarcerated people, but instead used as a tool to help keep behavior in check while in prison and reduce recidivism rates post release.<sup>191</sup> This work starts out voluntarily with individuals opting into these programs and actively seeking employment within the correctional facility.<sup>192</sup> Additionally, this work does not have to be grueling, such as sewing.<sup>193</sup>

186. *Id.*

187. *Id.*

188. *See* 13TH (Netflix 2016) (Showing that the War on Drugs was pioneered to target Black communities and the legislation that stemmed from it had a direct effect upon Black communities).

189. Dick, *supra* note 113, at 295.

190. *Id.*

191. Gerald G. Gaes et al., *Adult Correctional Treatment*, 26 CRIME & JUST. 361, 398 (1999) (stating that these “programs can improve inmates’ institutional behavior, reduce recidivism, and promote involvement in pro social activities after release”); Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 4-5 (2019) (“Working in prisons is assumed to cure idleness, teach specific skills, and provide the incarcerated person with a work ethic. The experience of working is considered a redemptive end in itself, regardless of the working conditions or whether they are paid a fair wage.”).

192. Rafieyan & Garcia, *supra* note 2.

193. Chandra Bozelko, *Op-Ed: Think Prison Labor is a Form of Slavery? Think Again*, L.A. TIMES (Oct. 20, 2017), [www.latimes.com/opinion/op-ed/la-oe-bozelko-prison-labor-20171020-story.html](http://www.latimes.com/opinion/op-ed/la-oe-bozelko-prison-labor-20171020-story.html) [perma.cc/EL4W-DUKJ]. The author argues that prison work is not modern slavery. *Id.* Less than half of the prison population – roughly 800-900,000 out of 2.3 million – works. *Id.* Many jobs inmates work are menial as well. *Id.* She also states that when she was in prison and worked, she was being a productive member of society. *Id.* Bozelko mentioned that when a private company hires out work, they are required to

However, while the work may be voluntary at its inception, it soon becomes forced.<sup>194</sup> When the work is performed under such circumstances, its initial voluntariness becomes moot and the labor becomes forced. This is what the Thirteenth Amendment was trying to protect against.<sup>195</sup> While the rhetoric surrounding these rehabilitation programs sounds virtuous, in practice it is a guise to mask the cycle used to entrap Black Americans into forced labor.<sup>196</sup>

This work includes tasks that are not grueling or inhumane such as sewing.<sup>197</sup> However, it cannot be argued that this work is not taxing. No one should have to do even menial tasks under coercion and threats.<sup>198</sup> Even though prison labor looks different than slavery, it still holds the same ideals.

#### *D. Why Race Relations in America Have Not Improved Since 1895*

It is a common rhetoric that race relations in America have come far from the days of slavery and that Black people do not face discrimination today.<sup>199</sup> If this is true, the Thirteenth Amendment accomplished what it set out to do.<sup>200</sup> There are differences between slavery and the mass incarceration that we see today. Incarcerated individuals are not bought nor are they treated as property. They are considered citizens, and they can vote. A Black man has held the highest office within our country and was even elected for two terms. Facially, it appears as though race relations in our country have done a one-hundred-and-eighty degree turn from the days of

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pay minimum wage, and the reason the inmates see little to none of those wages is because the state garnishes them. *Id.* She argues that if there is one to blame, it is not corporate America, but the justice system in our country. *Id.* However, this is precisely why the Thirteenth Amendment has proved futile in protecting against modern slavery, for the criminal justice system gives way to the legalized commodification of prisoners. Simply because the work is menial or less than half of the prison population works does not change the fact this work becomes forced, and it is the product of the criminal justice system in America.

194. Rafieyan & Garcia, *supra* note 2.

195. Pope, *supra* note 23, at 1471-73.

196. Cao, *supra* note 191, at 29-30.

197. Bozelko, *supra* note 193.

198. Johnson, *supra* note 181.

199. Juliana Manasce Horowitz et al., *Views of Racial Inequality*, PEW RSCH. CTR. (Apr. 9, 2019), [www.pewresearch.org/social-trends/2019/04/09/views-of-racial-inequality/](http://www.pewresearch.org/social-trends/2019/04/09/views-of-racial-inequality/) [perma.cc/LSF8-M4XC]. Thirty-seven percent of adults in America today believe that slavery has “not much” or “no impact at all” on Black people today in America. *Id.* While this may not necessarily prove the point that race relations are better today than they were prior to 1865, it does, however, provide evidence that people believe that the Thirteenth Amendment must have accomplished both of its goals in eliminating forced labor and leveling out the playing field socially for whites and nonwhites. *Id.*

200. Pope, *supra* note 23, at 1472.

slavery.

However, this is false rhetoric. While Black and brown people cannot be incarcerated *en masse* for the color of their skin today, the criminal justice system in our country is inherently designed to disenfranchise people of color. It is by this design that the Thirteenth Amendment has continued to prove futile in its goals of putting an end to forced labor and elevating the social status of nonwhites.<sup>201</sup>

The first way this is shown is Black individuals have no way to prove discrimination within the criminal justice system.<sup>202</sup> In *McCleskey v. Kemp*, the Supreme Court held that in order to prove a claim of racially based discrimination in sentencing, the defendant has to prove the statutory scheme was implemented with the intentional effect of discrimination.<sup>203</sup> This is a near-impossible task, for it would require an express admission of racially discriminatory intent and these admissions are rare.<sup>204</sup> Additionally, defendants are unable to request from the prosecution charging patterns and motives.<sup>205</sup> This decision allows for discriminatory laws to continue and effectively bars any judicial remedy.<sup>206</sup> By effectively barring any way for Black defendants to prove discrimination, the Supreme Court maintained the status quo of Black people not being able to have their day in court. Decisions like *McClesky* reaffirm the argument that the Thirteenth Amendment has proved futile, for courts can easily incarcerate Black defendants who will then be subject to forced labor.

Law enforcement in our country is also designed to target Black and brown individuals. This is evidenced by techniques police officers engage in to “fight crime” such as “stop and frisk” policies allowed by the Supreme Court in *Terry*.<sup>207</sup> These techniques are overwhelmingly used on people of color.<sup>208</sup> In seventy-one out of seventy-six precincts under NYPD jurisdiction, Black and brown people accounted for over fifty percent of these stops.<sup>209</sup> In thirty-six of these precincts, they accounted for over ninety percent.<sup>210</sup>

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201. *Id.*

202. ALEXANDER, *supra* note 132, at 139.

203. *McClesky*, 481 U.S. at 298.

204. ALEXANDER, *supra* note 132, at 139.

205. *Id.* Long-standing evidentiary rules have barred defendants from seeking such discovery. *Id.* Similar rules also bar jury deliberations from being public, even when the jury has allowed said deliberations to be publicly accessible. *Id.*

206. ALEXANDER, *supra* note 132, at 139.

207. *Terry*, 392 U.S. at 10.

208. *Analysis Finds Racial Disparities*, *supra* note 130.

209. *Id.*

210. *Id.*

Even in the ten precincts with the lower Black and brown population, they still account for over seventy percent of these “stop and frisk” measures.<sup>211</sup> This is largely due to the implicit racial bias that people, including police officers, harbor when it comes to considering who is a criminal.<sup>212</sup> The majority of people in America believe Blackness is synonymous with criminality, resulting in the disproportionate policing of Black individuals.<sup>213</sup> While techniques used to round up *en masse* people of color looks different than those used at the beginning of reconstruction, the purpose is still the same: the incarceration of Black and brown Americans.<sup>214</sup> This proves that race relations in America have truly not changed, for the mass incarcerations of millions of Black people based on implicit bias continue to happen today although the methods are different. Therefore, the Thirteenth Amendment has proved futile in its purpose of curbing forced labor upon Black people, illuminating the point America has not truly come as far as many like to believe this country has.<sup>215</sup>

Those in favor of “stop and frisk” policies say that such practices do not harm race relations, for police officers do not stop people solely because they are Black.<sup>216</sup> However, as a sociological study has found, these biases are implicit.<sup>217</sup> While an officer may not say they are stopping someone because of their race, our current society has been conditioned to see Black people as inherently criminal.<sup>218</sup>

Children are subject to such discrimination within the criminal justice system too.<sup>219</sup> Black students are punished at the same rates as white students, yet they encompass a third less of the population.<sup>220</sup> Additionally, the behaviors Black students are punished for are highly subjective, allowing for implicit bias to play

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211. *Id.*

212. ALEXANDER, *supra* note 132, at 133-34 (“Decades of cognitive bias research demonstrates that both unconscious and conscious biases lead to discriminatory actions, even when an individual does not want to discriminate.”).

213. *Id.* at 246.

214. Ric Simmons, *Terry in the Age of Automated Police Officers*, 50 SETON HALL L. REV. 909, n. 164 (2020).

215. Pope, *supra* note 23, at 1472.

216. Pomper, *supra* note 131. This officer described his experience using such techniques, and he states that never has he stopped anyone because of their race. *Id.* He mentions that there are many criteria used to determine reasonableness such as time of day, location, clothing, sketchy behavior, and if they are known to local law enforcement to be a habitual problem maker. *Id.*

217. ALEXANDER, *supra* note 132, at 133.

218. *Id.* at 246. (“Whiteness mitigates crime whereas blackness defines the criminal.”). “In the era of mass incarceration, what it means to be criminal in our collective consciousness has become conflated with it means to be black.” *Id.* “To be a black man is to be thought of as a criminal.” *Id.*

219. Pope, *supra* note 23, at 1472.

220. Redfield, *supra* note 134.

a factor in their punishment.<sup>221</sup> This is contrasted with white students who are punished for primarily objective behaviors.<sup>222</sup> Such disparities are even evidenced in preschool before children have fully developed a sense of right and wrong, let alone understand the concept of race.<sup>223</sup> If race relations in this country have improved, such stark disparities would not be evidenced in our school system today. These disparities are also cause for Black students developing lives behind bars.<sup>224</sup> Statistically, the more time they spend out of the classroom the higher chance of developing a criminal background.<sup>225</sup> These disparities show that whites and nonwhites have yet to be put on an equal playing field.<sup>226</sup>

Finally, while the Thirteenth Amendment has allowed Black people to vote in our country today, this vote is suppressed.<sup>227</sup> The right to vote is likely taken away from felons in nine of fifty states.<sup>228</sup> In only two states, Maine and Vermont, and D.C. does one with a felony record have the uninhibited right to vote.<sup>229</sup> Because the criminal justice system is set up in a way to ensure Black people are incarcerated in large numbers, laws inhibiting a felon's right to vote directly disenfranchises Black voters.<sup>230</sup> This prevents the Black citizenry from exercising their fundamental right to vote new politicians into office that could implement more nondiscrimination policies.<sup>231</sup> The criminal justice system was intentionally made to

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221. *Id.* at 27.

222. *Id.*

223. *Id.* at 17-8. A Black four-year old had a tantrum as most preschool-age children do. *Id.* at 12. A sheriff's deputy was called to handle the situation. *Id.* The deputy brought the boy to the sheriff's station in handcuffs before his mother could get to the school for her son. *Id.* When she arrived at the station, the handcuffs had been replaced with shackles. *Id.* This is not an isolated incident, for this child and "far too many more of our young people will indeed be carted off like a criminal." *Id.*

224. *Id.* at 58.

225. *Id.*

226. Pope, *supra* note 23, at 1472.

227. ALEXANDER, *supra* note 132 at 198-201.

228. *State Voting Law Laws & Policies for People with Felony Convictions*, PROCON.ORG (last updated Apr. 6, 2022), [www.felonvoting.procon.org/state-felon-voting-laws/](http://www.felonvoting.procon.org/state-felon-voting-laws/) [perma.cc/RK72-VHWV].

229. ALEXANDER, *supra* note 132, at 198-201.

230. *Id.*

231. *See id.* A convicted felon shared her frustrations with not being able to vote. *Id.* "I've lost all voice or control over my government." *Id.* at 201. This individual is upset that she is unable to vote in referendums that impact her child and their education. *Id.* She is also angry about the fact that she no longer has a say in where her tax money goes. *Id.* Another convicted felon shared his story of frustration, especially after serving in military during the Vietnam War. *Id.* at 199. He shared that "[he] put his life on the line for this country. To [him], not voting is not right; it led to a lot of frustration, a lot of anger." *Id.*

suppress the Black vote.<sup>232</sup> This intentionality proves that race relations have not improved in America and the Thirteenth Amendment did not accomplish its goal.

#### IV. PROPOSAL

To put an end to the cyclical forced labor of Black individuals and the unequal social plane of whites and nonwhites, the Thirteenth Amendment's Punishment Clause must be eradicated.<sup>233</sup> This proposal will also explain other measures to cement this erasure, such as defunding major police forces across the nation and reforming statutory laws and the common law.

##### A. *Removal of the Thirteenth Amendment's Punishment Clause*

The first step toward ending the legal commodification of Black labor is to do away with the Thirteenth Amendment's Punishment Clause.<sup>234</sup> By removing the Punishment Clause, the Thirteenth Amendment's true purpose of eradicating the practice of slavery and indentured servitude could be better fulfilled. It will get rid of the legal loophole that has existed for centuries and perpetuated the vicious cycle of black individuals being forced into servitude.

Amending the Constitution may be seen as a drastic measure by opponents who believe race relations in our country have been cured with things like the passage of the Thirteenth Amendment, or more modernly, the election of former President Barak Obama.<sup>235</sup> However, this is a tangible measure that can be enacted with little to no change in the lives of average white Americans and create momentous change for Black Americans that are fighting to end issues such as police brutality and disproportionate levels of wrongful incarceration.

Amending the Constitution can be done in one of two ways – either by two-thirds of both houses of Congress proposing a Constitutional amendment or if two-thirds of the states call a

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232. Monika Taliaferro, *Defund To Refund The Vote: Dismantling The Criminal Justice System's Impact On Voting*, 13 ELON L. REV. 193, 194 (2020).

233. U.S. CONST. amend XIII.

234. *Id.* (“ . . . except as a punishment for crime whereof the party shall have been duly convicted. . .”).

235. Alex M. Johnson, Jr., *What the Tea Party Movement Means for Contemporary Race Relations: A Historical and Contextual Analysis*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 201, 202-03 (discusses the idea that with the election of former President Barak Obama, many believed that race relations were improving in our country; however, the “use of racial exceptionalism to exalt racial equality masks the hegemony of whites in race relations that produces the subordination of persons of color.”).

Constitutional convention.<sup>236</sup> Lay people may not be familiar with the specific text of the Constitution and may not be as well versed with the Punishment Clause.<sup>237</sup> By bringing to light this loophole for legalized slavery, there may be enough momentum to bring a Constitutional convention or enough pressure to bring this idea to elected officials' attention.

### B. *Defunding Police Forces Across the Nation*

While commodification of Black people would be illegal following the removal of the Punishment Clause, other measures are necessary to help ensure the practice is eradicated completely. The first measure to help aid this process is for American cities to defund their police forces. This calls for the restructuring of city budgets to invest more money in programs targeting the root causes of crime and divesting money from police forces.<sup>238</sup>

In the 2020 fiscal year, the ten largest U.S. cities have on average fourteen percent of their annual budget dedicated to police forces.<sup>239</sup> This ranges from six percent of the city's total budget as seen in New York to eighteen percent in San Antonio.<sup>240</sup> These expenditures come out to over six billion dollars in New York.<sup>241</sup> Beginning in the summer of 2020, a mass movement sparked throughout our nation's cities to divest funds from these massive budgets for the police and invest them in other areas of the community from education to mental health, homelessness, and more.<sup>242</sup>

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236. U.S. CONST. art. X.

237. Chris Cillizza, *Americans Know Literally Nothing About the Constitution*, CNN (Sept. 13, 2017), [www.cnn.com/2017/09/13/politics/poll-constitution/index.html](http://www.cnn.com/2017/09/13/politics/poll-constitution/index.html) [perma.cc/B6W4-XQBG]. The research poll used in this article shares that thirty-seven percent of Americans cannot name a single protection afforded by the First Amendment. *Id.* If thirty-seven percent of citizens cannot answer such a simple question, it is doubtful many know the nuances of the Thirteenth Amendment and that slavery is a legal punishment for those who have been duly convicted.

238. Christy E. Lopez, *Defund the Police? Here's What That Really Means.*, WASH. POST (June 7, 2020), [www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means/](http://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means/) [perma.cc/X52X-CCT9].

239. McPhillips, *supra* note 118.

240. *Id.*

241. Ella Koeze & Denise Lu, *The N.Y.P.D. Spends \$6 Billion a Year. Proposals to Defund It Want to Cut \$1 Billion*, N.Y. TIMES (June 20, 2020), [www.nytimes.com/interactive/2020/06/20/nyregion/defund-police-nypd-budget.html](http://www.nytimes.com/interactive/2020/06/20/nyregion/defund-police-nypd-budget.html) [perma.cc/G3EX-3YSX].

242. *Defunding The Police: What Would It Mean For The U.S.?*, NPR (June 11, 2020), [www.npr.org/2020/06/11/875311086/defunding-the-police-what-would-it-mean-for-the-u-s](http://www.npr.org/2020/06/11/875311086/defunding-the-police-what-would-it-mean-for-the-u-s) [perma.cc/7V6B-QNDF].

Currently in most cities, police deal with homelessness.<sup>243</sup> Homelessness is seen almost as a crime instead of an issue caused by a plethora of other factors – most beyond one’s own control.<sup>244</sup> Reapportioning part of the police budget to fight homelessness helps to tackle a root cause of criminality rather than using the money for after-the-fact policing.<sup>245</sup> Appropriating money to fight homelessness would result in fewer arrests for homelessness and poverty crimes, therefore directly correlating to lower incarceration rates.<sup>246</sup> By investing money into helping individuals obtain jobs and housing, resources are provided to help people succeed. This reduces rates of recidivism and therefore incarceration rates overall.<sup>247</sup>

With poverty rates disproportionately affecting Black communities, arrests based on poverty crimes and homelessness disproportionately impacts Black citizens and further lead to the mass incarceration and forced servitude of Black people.<sup>248</sup> Since Black communities feel the effects of poverty at higher rates, providing these resources logically will help combat the mass incarceration currently plaguing Black communities.

Similarly, mental health and substance abuse calls make up a sizable portion of emergency department services – one in eight

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243. Joy H. Kim, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals' Lack of Choice*, 95 N.Y.U. L. REV. 1150, 1154 (2020).

244. *Id.* at 1178-84.

245. *Id.* at 1152-53 (Stating that

In 2019, the National Law Center on Homelessness and Poverty conducted a survey of 187 cities to illustrate the prevalence of laws criminalizing homelessness. Such laws come in various forms: [thirty-seven] percent of cities surveyed ban camping, [twenty-one] percent ban sleeping in public, [fifty-five] percent ban sitting and lying down in public, [thirty-five] percent ban loitering, loafing, and vagrancy, and [thirty-eight] percent ban begging citywide. And these are not stagnant trends. The existence of city-wide bans in every category previously listed has increased since 2006: City-wide bans on camping increased by [ninety-two] percent, sleeping by [fifty] percent, sitting and lying down by [seventy-eight] percent, loitering, loafing, and vagrancy by 103 percent, and begging by 103 percent.).

246. See Monica C. Bell et. al., *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1313 (2021) (explaining the idea that allocating funds to help fight homelessness and poverty reduces recidivism rates, therefore lowering incarceration rates overall).

247. *Id.*

248. Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, AM. ACADEMY OF POL. & SOC. SCI. (Nov. 18, 2013), [www.journals.sagepub.com/doi/abs/10.1177/0002716213502921](http://www.journals.sagepub.com/doi/abs/10.1177/0002716213502921) [perma.cc/VTL9-S96P] (“The prison boom has increased the black-white gap in child homelessness by about [sixty-five] percent.”).

visits.<sup>249</sup> These responders include armed police who, when improperly trained, mishandle mental health crises and misinterpret them as violent outbursts.<sup>250</sup> This can lead to the misuse of force instead of de-escalation techniques that are more appropriate for mental health crises.<sup>251</sup> By divesting police funds to mental health services and substance abuse programs, this root cause of criminality can be better addressed.

By addressing root causes such as homelessness, substance abuse, mental health emergency response, and tangential issues, police can be used strictly for responding to dangerous and violent crime. Those divested funds could be reapportioned to social worker first response teams, housing, substance abuse aid, and other programs proven to reduce recidivism and therefore lower incarceration rates.<sup>252</sup>

While this movement received pushback from Americans, major cities defunded their police forces for a time. In the summer of 2020, Austin, Texas cut its police budget by one third and promised to allocate that money to violence protection, abortion services, and food access.<sup>253</sup> Other cities such as New York and Los Angeles cut their police budgets down mere weeks after protests began, quickly responding to their citizens' requests.<sup>254</sup>

Today in 2022, jurisdictions are leaning away from defunding the police and requesting larger budgets for law enforcement.<sup>255</sup> Even if training is the goal for refunding, training has high costs and low payoffs.<sup>256</sup> It also has low rates of combating racial

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249. *Mental Health By the Numbers*, NAT'L ALL. ON MENTAL ILLNESS (Feb. 2022), [www.nami.org/mhstats](http://www.nami.org/mhstats) [perma.cc/BPC6-7MFF] (This is estimated to be roughly 12 million calls a year.).

250. Taled El-Sabawi & Jennifer J. Carroll, *A Model For Defunding: An Evidence-Based Statute For Behavioral Health Crisis Response*, 94 TEMP. L. REV. 1, 3 (2021).

251. Alexis D. Campbell, *Failure on the Front Line: How the Americans With Disabilities Act Should Be Interpreted to Better Protect Persons in Mental Health Crisis From Fatal Police Shootings*, 51 COLUM. HUM. RTS. L. REV. 313, 322-26 (2019). Officers are not always training properly on the symptoms and actions of those suffering a mental health crisis, and because some of this behavior can be erratic coupled with the fact these individuals are sometimes unable to comply with orders, officers become fearful. *Id.* Since they are taught to defend themselves when they have a reasonable fear for their safety, this leads to sometimes "fatal consequences." *Id.*

252. Bell, *supra* note 246, at 1313.

253. Jemima McEvoy, *At Least 13 Cities Are Defunding Their Police Departments*, FORBES (Aug. 13, 2020), [www.forbes.com/sites/jemimamcevoy/2020/08/13/at-least-13-cities-are-defunding-their-police-departments/?sh=d4c886a29e3f](http://www.forbes.com/sites/jemimamcevoy/2020/08/13/at-least-13-cities-are-defunding-their-police-departments/?sh=d4c886a29e3f) [perma.cc/6TBF-D6FC].

254. *Id.*

255. Starr, *supra* note 125.

256. Anthony O'Rourke et al., *Disbanding Police Agencies*, 121 COLUM. L.

violence.<sup>257</sup> The best way to go is to divert funds to programs proven to reduce incarceration rates – not training.<sup>258</sup>

### C. *Statutory and Common Law Criminal Justice Reform*

What society deems as crimes today are social constructs; as a collective society, we have decided which actions are socially undesirable and worthy of punishment. By taking a critical look at what society deems as a harm, we can begin making an effective change.

While marijuana is still a schedule one drug per federal law, many states have begun to legalize it and regulate its sale and usage among citizens.<sup>259</sup> So far, the results of this social experiment have largely been positive. In November of 2020, Oregon decriminalized even more drugs such as cocaine, heroin, and other federal schedule substances as well.<sup>260</sup> This legislation also allocated tax revenue from marijuana sales to rehabilitation centers and other ways to help fight addiction.<sup>261</sup> Instances such as these show that society is not wed to age old perceptions of societal harms. They grow and change, just as our nation does with time. By taking a critical look at what is still deemed as punishable harms, society could decriminalize many actions related to and stemming from homelessness, drug usage, and addiction.

Today, the Oregon law has seen positive effects across the state.<sup>262</sup> Over sixteen thousand people have been helped with their addiction and this legislation has inspired states like Vermont to take similar measures.<sup>263</sup> This proves that not only are we not wed to ways of the past, but changes from age-old ideals can be positive.

Specifically, one area of statutory reform that directly correlates to the incarceration of Black people is the disparity in

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REV. 1327, 1353-55 (2021).

257. *Id.*

258. *Id.*; see Bell, *supra* note 246, at 1313 (Stating that helping homelessness reduces recidivism rates).

259. Earl L. Carter and Earl Blumenauer, *If Marijuana Remains a Schedule I Substance, We Can Never Do the Research Everyone Knows We Need*, NBC NEWS (Apr. 19, 2019), [www.nbcnews.com/think/opinion/if-marijuana-remains-schedule-i-substance-we-can-never-do-ncna997231](http://www.nbcnews.com/think/opinion/if-marijuana-remains-schedule-i-substance-we-can-never-do-ncna997231) [perma.cc/FTM2-5G8T].

260. Thomas Fuller, *Oregon Decriminalizes Small Amounts of Heroin and Cocaine; Four States Legalize Marijuana*, N.Y. TIMES (Nov. 4, 2020), [www.nytimes.com/2020/11/04/us/ballot-measures-propositions-2020.html](http://www.nytimes.com/2020/11/04/us/ballot-measures-propositions-2020.html) [perma.cc/694V-7JJJ].

261. Chloe Nordquist, *Here's how Oregon's drug decriminalization measure is going one year later*, ABC DENVER 7 (Feb. 18, 2022), [www.thedenverchannel.com/news/national/heres-how-oregons-drug-decriminalization-measure-is-going-one-year-later](http://www.thedenverchannel.com/news/national/heres-how-oregons-drug-decriminalization-measure-is-going-one-year-later) [perma.cc/27TM-AK2V].

262. *Id.*

263. *Id.*

sentencing that exists between crack cocaine offenses and powder cocaine offenses.<sup>264</sup> The punishment for trafficking fifty grams or more of crack cocaine is a minimum ten year sentence, whereas the same sentence is imposed for trafficking five thousand grams or more of powder cocaine.<sup>265</sup> Crack cocaine is largely associated with Black individuals, for they make up eighty-two percent of crack cocaine related arrests.<sup>266</sup> The differences in sentencing are futile in protecting the community since both drugs are almost chemically identical, and crack cocaine is no more dangerous or addictive than in its powder form.<sup>267</sup> To begin to eradicate these biases cemented by these statutory disparities, we must remove the stark differences in punishment for what is chemically the same drug.

Further, statutory reform must be made to curb the negative effects the 1994 True Crime Bill inflicted upon communities of color. It was this bill that gave rise to the massive police forces that we see today, thus directly correlating to the mass incarceration of black people.<sup>268</sup> Fixing minimum sentencing laws and allowing judges to assess a defendant's crimes on a case-by-case basis would allow for more fairness in our legal system.<sup>269</sup> The discontinuance of the bill's "three strikes law" is essential because it allows for life sentences after three convictions of certain felonies, regardless of the root cause of the conviction.<sup>270</sup> Repealing this law and implementing laws that allow for more flexibility will lead to fairer treatment for people of color.

Additionally, there needs to be a ban on all for-profit prisons and detention centers. This process has already begun, for one of President Biden's first acts in office was an executive order ending all contracts with for-profit prisons.<sup>271</sup> These prisons are the product of free labor from inmates. There is an economic incentive to fill beds, which creates a perverse incentive to find ways to convict innocent individuals and impose harsher sentences on those duly

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264. 13TH (Netflix 2016), at 24:10 ("These sort of disparities under Reagan quickly exploded into the era of mass incarceration.").

265. *Crack vs. Powder Cocaine: a Gulf in Penalties*, U.S. NEWS (Oct. 1, 2007), [www.usnews.com/news/national/articles/2007/10/01/crack-vs-powder-cocaine-a-gulf-in-penalties](http://www.usnews.com/news/national/articles/2007/10/01/crack-vs-powder-cocaine-a-gulf-in-penalties).

266. *Id.*

267. *Differences Between Crack and Cocaine (& Myths)*, OXFORD TREATMENT CTR. (Aug. 27, 2019), [www.oxfordtreatment.com/substance-abuse/cocaine/crack-vs-cocaine/](http://www.oxfordtreatment.com/substance-abuse/cocaine/crack-vs-cocaine/) [perma.cc/W53Y-MTE3].

268. *Id.*

269. *Id.*

270. *Id.*

271. Morgan Simon, *What Does Biden's "Ban" On Private Prisons Really Mean?*, FORBES (Jan. 27, 2021), [www.forbes.com/sites/morgansimon/2021/01/27/what-does-bidens-ban-on-private-prisons-really-mean/?sh=7d96357173cb](http://www.forbes.com/sites/morgansimon/2021/01/27/what-does-bidens-ban-on-private-prisons-really-mean/?sh=7d96357173cb) [perma.cc/K3RT-EMPN].

convicted.<sup>272</sup> States that have contracts with large corporations like GeoGroup and CoreCivic perpetuate an unfair justice system that works against people of color and furthers the mass incarceration of Black people in America.<sup>273</sup> Together, these proposed measures would result in better addressing multiple root causes of crime, a reevaluation of what we as a collective society deem as socially harmful, and fairer sentencing for convicted offenders. The result would be a more just system of incarceration where a sizable number of inmates across our country are not forced to work against their will.

Passing these statutory measures would bring the Thirteenth Amendment closer to its original intent. In order to pass these measures, we must ask our elected public officials to propose and pass such legislation. We must call and email our representatives, partake in meetings, rallies, and townhalls when our representatives are in town, and be active in government. If we the people do not make our voices heard, no change can be made.

## V. CONCLUSION

The Thirteenth Amendment has been futile in protecting Black people from modern day slavery and indentured servitude. Throughout our nation's history, inhumane treatment has persisted and cleverly adapted to challenges posed by the legislature, judiciary, executive, and the public. When one form of slavery or indentured servitude is shunned or outlawed, its subsequent evil was not far behind. It began with vagrancy laws following four million enslaved people becoming freed individuals with the ratification of the Thirteenth Amendment. Convict leasing grew alongside vagrancy laws and sooner after debt peonage. Decades later, the War on Drugs began, and this paved the way for the present-day mass incarceration of Black people in our nation.

The rhetoric that our country is the "land of the free" is a falsehood for a significant portion of the population. Still today, Black people are forced into labor despite the passage of the Thirteenth Amendment centuries ago. It has failed to protect Black Americans from the slavery and indentured servitude it purports as unconstitutional.

This failure of the Thirteenth Amendment stems from centuries old prejudices and biases backed by nothing but bigotry

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272. *See* 13TH (Netflix 2016) at 58:00 and 01:01:25 (Stating that ALEC worked together with CCA in order to implement policies that helped fill beds in the facilities regardless of crime being committed as well as creating legislation that made it easier to fill ICE facilities owned by CCA by making it legal for law enforcement to stop anyone they believed looked like an immigrant.).

273. *Id.* at 58:0 and 01:06:11.

and lies spread in order to keep Black people oppressed. To make a tangible difference we must begin to make the aforementioned, concrete changes in our criminal justice system – the system that has failed Black Americans for centuries. It is the duty of those with privilege and power to work toward fixing this problem, for it is time we move our country out of the seventeenth century and into a new time.

