Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights

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INTRODUCTION

At first glance, the Ninth Circuit's recent decisions in *Farrakhan v. Gregoire*, affirming that the criminally convicted may be legally deprived of the right to vote,[1] and *Serra v. Lappin*, concluding that American prisoners may be forced to work for

* Yale Law School Class of 2010; Legal Fellow, Equal Justice Initiative, Montgomery, Alabama. Thank you to Professor Kathleen Cleaver, for bringing to New Haven the class I expected to find in Constitutional Law, creating a space to discuss and refine the thoughts that led to this article, and being an inspiration. Thanks also to Professor Michele Landis Dauber of Stanford Law School, Ryan Haygood of the NAACP Legal Defense Fund, Bryan Stevenson of the Equal Justice Initiative, Dorsey Nunn of Legal Services for Prisoner's with Children and the late David Lewis of Free At Last—all of whom, in your own ways, have inspired and nurtured in me a commitment to the rights of formerly and currently incarcerated people, a conceptualization of this work as a continuation of the civil rights movement, and a persistent hope in the power of legal advocacy. Thank you to my family for their endless support and, finally, thank you to Gonzaga University School of Law and the Gonzaga Law Review for providing the opportunity to present and publish this article.

1. 623 F.3d 990, 993-94 (9th Cir. 2010).

no pay,[2] seem inconsistent with the American values and freedoms so often thought to be codified in this nation's Constitution. In fact, as this article asserts, these outcomes are made possible by historical flaws inherent in that very document, introduced during a period when racial subjugation and exploitation were values many sought to protect. Understanding this history is vital to explaining—and correcting—these contemporary judicial outcomes.

Through the mid-nineteenth century, the vast majority of blacks in America were slaves,[3] human chattel imported from Africa beginning before the United States existed. Ironically, at the time the Declaration of Independence was written—which, of course, declared "all men" to be created equal and inspired the American colonies to separate themselves from their oppressive English rulers—African slaves in the territory were bought and sold like property.[4]

More than eighty years later, Supreme Court Chief Justice Roger B. Taney's infamous 1857 opinion in *Dred Scott v. Sandford* gave judicial endorsement to what had long been practical reality: black people possessed "no rights which the white man was bound to respect."[5] They were not, and could not be, national citizens entitled to the rights and recognition accorded the title.[6]

The Reconstruction period that followed President Abraham Lincoln's Emancipation Proclamation and the end of the Civil War in 1865 seemed to mark a new era.[7] Congressional advocates of emancipation and further reform of the South expressed a sense of legislative duty; to these representatives, the North that had freed the slaves and preserved the Union had a responsibility to ensure blacks' legal protection through permanent, federally enforced constitutional action.[8] Within five years of the war's end, and less than fifteen years after Taney's pronouncement in *Dred Scott*, constitutional amendments were ratified to abolish slavery,[9] extend

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2. 600 F.3d 1191, 1195, 1200 (9th Cir. 2010).

3. *See* Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* 115 tbl.A-1 (U.S. Census Bureau, U.S. Dep't of Commerce, Working Paper No. 76, 2005), *available at* http://www.census.gov/population/www/documentation/twps0076/twps0076.html. According to the federal census, there were approximately 4.4 million black people living in the United States in 1860. *Id.* Less than 500,000 were free and more than 3.9 million were enslaved. *Id.*

4. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—the Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 987, 993 (1987).

5. 60 U.S. (19 How.) 393, 407 (1857).

6. *Id.* at 454.

7. EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869, at 29 (1990).

8. *Id.* at 79-80.

9. U.S. CONST. amend. XIII.

citizenship to all native-born blacks and voting rights to black men over the age of twenty-one,[10] and explicitly outlaw racially discriminatory voting laws.[11]

However, this grant of freedom and rights was not without qualification. The Thirteenth Amendment outlawed all forms of slavery and involuntary servitude, "except as a punishment for crime whereof the party shall have been duly convicted…."[12] Similarly, the Fourteenth Amendment declared that no state could abridge the voting rights of male citizens over age twenty-one, "except [as punishment] for participation in rebellion, or other crime . . . ."[13] Later hailed as proud historical achievements that finally blanketed *all* the nation's citizens in freedom and democracy,[14] these constitutional amendments actually left—and still leave—an entire category of citizens unprotected and vulnerable.

The consequences of this incomplete grant of rights became apparent soon after the end of Reconstruction. Southern state governments fully regained control of their courts and legislatures when federal troops pulled out of the South less than fifteen years after the war's end.[15] The Constitution's new promise of black political and legal equality was an obstacle to the reinstitution of the region's traditional power structure: white supremacy.[16] No longer able to rely on the institution of slavery to maintain the racial hierarchy, and faced with federal laws limiting preferred alternatives, creative laws were devised to ensure whites' social, political, and economic dominance.[17]

In this context, the constitutionally codified civil rights *exception* for the criminally convicted became an *instruction* on how to legally deprive blacks of their freedom and political rights for centuries to come. Modern prison slavery and felon disenfranchisement are lingering remnants of post-Civil War laws that deliberately

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10. *Id.* amend. XIV.

11. *Id.* amend. XV.

12. *Id.* amend. XIII, § 1.

13. *Id.* amend. XIV, § 2.

14. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting). Decrying the Court's "separate but equal doctrine" as unconstitutional, Justice Harlan argued that the Thirteenth Amendment eliminated prior "badges of slavery or servitude" and "decreed universal civil freedom in this country." *Id.* Additionally, he praised the Fourteenth Amendment as having "added greatly to the dignity and glory of American citizenship, and to the security of personal liberty . . . ." *Id.* He concluded by predicting that "[t]hese two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship." *Id.* Further, women were not afforded the right to vote until the passage of the Nineteenth Amendment. *See* U.S. CONST. amend. XIX.

15. C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 7-8 (1966).

16. DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 14 (1996).

17. *Id.* at 20-21.

manipulated the criminal law for the purpose of relegating blacks to a constitutionally permissible state of second-class citizenship.[18]

Born of Southern efforts to reestablish white supremacy by depriving black Americans of their civil rights under the guise of criminal justice, these laws, and the criminal justice system as a whole, continue to disproportionately impact black people and other minority groups.[19] These consequences illustrate the danger inherent in exempting—as the Thirteenth and Fourteenth Amendments do—whole categories of individuals from the constitutional protections most needed by marginalized minorities. The resulting policies expose the ease with which these exceptions have been, and continue to be, manipulated to undermine the purported national goals of freedom, equality, and democracy.

I. CRAFTING A CASTE SYSTEM: POST-RECONSTRUCTION LAWMAKING IN THE SOUTH

The Civil War and its aftermath fundamentally altered the social, economic, and political landscape of the American South. By freeing the slaves and establishing their rights as citizens on equal political footing with their former masters, the Reconstruction Amendments both *eliminated* the South's primary source of free or cheap labor[20] and *created* substantial political competition for white Southerners whose democratic system had never included a black voting bloc.[21] Ironically, the amendments' criminal exceptions also provided the means to circumvent both of these changes.

A. *Political Oppression Through Felon Disenfranchisement*

Most African Americans still lived in the South following the Civil War, constituting more than forty percent of the region's population, and a majority in states like Mississippi, Louisiana, and South Carolina.[22] Even toward the end of Reconstruction in 1877, black people had established themselves as a formidable Southern political force. Using their new, constitutionally protected voting rights,

18. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 53-54 (2008); OSHINSKY, supra note 16, at 35-37; Ryan Scott King, *Jim Crow is Alive and Well in the Twenty-First Century: Felony Disenfranchisement and the Continuing Struggle to Silence the African American Voice*, *in* RACIALIZING JUSTICE, DISENFRANCHISING LIVES 247, 249-50 (Manning Marable et al. eds., 2007).

19. *See* discussion *infra* Part II.

20. *See, e.g.*, OSHINSKY, *supra* note 16, at 12.

21. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 16-17 (1974).

22. JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 101 (1994).

black men were elected to state and national positions in the 1872 and 1876 elections.[23]

This promising era ended abruptly in 1877, however, when federal troops were withdrawn from the region as part of the Hayes-Tilden "compromise," a political agreement in which Republicans relinquished control over the South in exchange for the Presidency.[24] With federal forces no longer present to enforce the radical new legal equality that had been constitutionally created just a decade earlier, Southern states were eager to regain the power they had lost.[25] The Fourteenth Amendment empowered such states to restrict voting rights on the basis of criminal conviction, providing a means of restraining black voting power.

Felon disenfranchisement can be traced back to ancient Europe, where individuals convicted of infamous crimes were routinely punished with "civil death," which included, among other things, losing all citizenship rights.[26] English settlers imported this idea into their colonial laws upon their seventeenth century arrival to North America.[27] After the Revolutionary War was won and America established as an independent nation, the framers of the Constitution allowed disenfranchisement laws to persist by giving each state broad authority to design its own voter qualification procedures.[28] This power, coupled with the "criminal exception" encoded within the Fourteenth Amendment, allowed felon disenfranchisement to be used as a racially discriminatory measure immediately following Reconstruction and continuing into the present day.

Although the Fourteenth and Fifteenth Amendments banned the explicit race-based disenfranchisement of black people, each state has the authority to set its own voter qualification standards under Article I, Section 4 of the Constitution.[29] In addition to poll taxes, literacy tests, grandfather clauses, and violent intimidation,[30] felon disenfranchisement emerged as a legal means of preventing black people from voting. Though some historians argue that the Fourteenth Amendment's

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23. *Id.* at 87.

24. WOODWARD, *supra* note 15, at 7-8.

25. *Id.*

26. Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1049 & n.13; Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL. 491, 492 (2004).

27. *See* Ewald, *supra* note 26, at 1060-61.

28. *See id.* at 1062-63; Manza & Uggen, *supra* note 26, at 492.

29. U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

30. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disenfranchisement from the KKK to the Grandfather Clause* (pt. 3), 82 COLUM. L. REV. 835, 835-36, 842 (1982).

"participation in rebellion or other crime" provision was clearly intended to apply narrowly to the former Confederacy,[31] the language allowed for broader application and Southern lawmakers did not hesitate to use the provision as a discriminatory tool.

Indeed, in 1901 the president of the Alabama constitutional convention stated that the purpose of the proceedings was "to establish white supremacy in this State" to the extent permissible "within the limits imposed by the Federal Constitution."[32] Similarly, delegates to the 1890 Mississippi constitutional convention intentionally sought to craft a disenfranchisement law that would "apply disproportionately to African American offenders."[33] State legislators achieved racially discriminatory results through race-neutral language by carefully tailoring their laws to only disenfranchise those convicted of specific "furtive offenses," such as theft and burglary—crimes believed to be most often committed by black people.[34]

Even the Mississippi Supreme Court acknowledged the motivation and effectiveness of this lawmaking technique in an 1896 decision discussing its recently enacted electoral laws:

> It is in the highest degree improbable that there was not a consistent, controlling directing purpose governing the convention by which these schemes were elaborated and fixed in the constitution. Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites,—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. *Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.* A voter who should move out of his election precinct, though only to an adjoining farm, was declared ineligible until his new residence should have continued for a year. Payment of taxes for two years at or before a date fixed many months anterior to an election is another requirement, and one well

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31. Manza & Uggen, *supra* note 26, at 493.

32. 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA: MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, at 8 (1940) (statement of John B. Knox, convention president), *available at* http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901_proceedings_vol1/day2.html, *quoted in* Hunter v. Underwood, 471 U.S. 222, 229 (1985), *and* King, *supra* note 18, at 249.

33. King, *supra* note 18, at 249.

34. Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 540-41 (1993); *see also* King, *supra* note 18, at 249.

> calculated to disqualify the careless. Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not.[35]

Though felon disenfranchisement was just one of many legal forms of political oppression employed in the South following Reconstruction,[36] it has proven the most enduring and long lasting, largely due to its explicit constitutional endorsement.[37] Empowered by the criminal exception to citizenship rights, Southern lawmakers were able to manipulate felon disenfranchisement as a means to legally and constitutionally prevent black people from exercising their political power.

B. *Forced Labor Through Convict Leasing*

In addition to unprecedented black political competition, the post-Civil War South faced a fundamentally altered economic system. During the existence of slavery, the region's agrarian economy depended upon the labor of enslaved black workers who, being more property than employee, were allotted enough food and lodging to survive but were forbidden any other basic freedoms.[38] Emancipation and the ratification of the Thirteenth Amendment rendered such labor conditions illegal and the former Confederate states, facing war damage and massive casualties, could not rely on the familiar black laborers upon whose backs many a plantation and fortune had been built.[39] Historian David M. Oshinsky describes the seemingly hopeless position of white planters:

> Desperate planters and farmers struggled simply to survive. Their slaves had been freed; their currency was worthless; their livestock and equipment had been stolen by soldiers from both sides. In the fertile Yazoo Delta [of Mississippi], "plows and wagons were as scarce as mules, with no means to buy new ones. The cavalryman fortunate enough to have been paroled with his horse . . . was the envy of his neighbor."
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> Many of these farms were now tended by women and elderly men, the war having wiped out more than one-quarter of the white males in Mississippi over the age of fifteen.[40]

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35. Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896) (emphasis added).

36. Schmidt, *supra* note 30, at 836.

37. *See* discussion *infra* Part III.

38. *See* OSHINSKY, *supra* note 16, at 11-16; Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 4 (1997).

39. OSHINSKY, *supra* note 16, at 12-13.

40. *Id.* (footnote omitted) (quoting FRANK E. SMITH, THE YAZOO RIVER 170 (Carl Carmer ed., 1954)).

Former slaves were not immune to the harsh realities of the desolate Southern economy; while owners of dying plantations or struggling farms desperately worked to salvage subsistence living from their property and goods, black people rarely possessed property or goods from which to make such a living.[41] Many former slave masters pressured former slaves to enter "lifetime [work] contracts," hoping that the black population's economic desperation and fear of violent intimidation would enable the recreation of slavery.[42] In 1865, for example, a former South Carolina slave master ordered black people formerly enslaved on his plantation to enter into such agreements.[43] Four refused and were driven off the plantation without pay.[44] When armed guards were dispatched to "retrieve them," two were killed, one escaped, "and the fourth, a woman, was recaptured and tortured."[45] Despite these terrorizing tactics, former slaves generally remained unwilling to relinquish their newfound freedom.[46]

The federally run Freedman's Bureau eventually refused to approve lifetime labor contracts.[47] Then, largely spurred by coercive labor practices in the New Mexico territories, Congress restricted slavery-like contracts by enacting the Anti-Peonage Act of 1867.[48] Under Congressional authority to pass laws enforcing the Thirteenth Amendment, the Anti-Peonage Act prohibited forced labor, even as a form of debt repayment.[49] Due to the Thirteenth Amendment's criminal exception, however, the law had no application to prisoners convicted of a crime.[50] For black Southerners, this would prove a fateful omission.

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41. *Id.* at 15.

42. BLACKMON, *supra* note 18, at 27.

43. EDWARD ROYCE, THE ORIGINS OF SOUTHERN SHARECROPPING 72 (1993).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Ch. 187, 14 Stat. 546 (codified as amended at 18 U.S.C. § 1581 (2006); 42 U.S.C. § 1994 (2006)).

49. PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 1901-1969 ix (1972).

50. In 1903, the Middle District of Alabama held that judicial officers who forced convicts to labor while incarcerated were not liable under the Anti-Peonage Act unless those officers were proven to have intentionally facilitated those convicts' unlawful conviction and sentence. *See* Peonage Cases, 123 F. 671, 684 (M.D. Ala. 1903). The court reasoned,

> a person who does no more than to bring the machinery of the law into play from proper motives, or sits in judgment, or executes the sentence, is not criminally responsible, under the statues, for holding or causing the party to be held to 'a condition of peonage' or involuntary servitude.

Id. The Fourth Circuit later embraced this ruling, concluding that officers who force lawfully convicted individuals to labor are effectively immune from prosecution absent some smoking-gun evidence of a conspiracy to return the convicts to a condition of peonage. *See* Taylor v. United States, 244 F. 321, 329 (4th Cir. 1917).

The free black population was often blamed for the South's defeat and desperate post-war condition.[51] Their marginalized position rendered them particularly vulnerable to persecution and exploitation at the hands of the criminal justice system, especially one designed for that very purpose.[52] Former slaves' new status as "freed" men and women, coupled with the Thirteenth Amendment's language permitting involuntary servitude as punishment for crime or rebellion, provided the South with an opportunity to create a new population of slave laborers with laws that, although ostensibly colorblind, would effectively reestablish the white supremacist power structure so fundamental to the region's operation.

As early as fall 1865, the Mississippi legislature passed a series of "Black Codes" outlining prohibited acts that constituted crimes when committed by free black people.[53] These laws criminalized "vagrancy" and enticement to vagrancy, pressuring black people to return to their former plantations.[54] Other prohibited behaviors included causing any "disturbance of the peace," speaking or acting in any way that insulted others, treating animals cruelly, possessing firearms, vending alcohol, or serving as a Christian minister without a license.[55] Legislators also sought to enforce social separation of the races by declaring intermarriage punishable with lifetime imprisonment.[56] These laws joined already existing and selectively enforced prohibitions against theft.[57]

The link between black labor and evolutions in post-Civil War Southern criminal lawmaking is most clearly illustrated by statutes that branded black people criminals for not working:

> An 1865 Mississippi statute required African American workers to enter into labor contracts with white farmers by January 1 of every year or risk arrest. Four other states legislated that African Americans could not legally be hired for work without a discharge paper from their previous employer—effectively preventing them from leaving the plantation of the white man they worked for.

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51. OSHINSKY, *supra* note 16, at 14-15.

52. *Id.* at 20-22.

53. *E.g.*, Act of Nov. 29, 1865, ch. 23, 1865 Miss. Laws 165; Act of Nov. 25, 1865, ch. 4, 1865 Miss. Laws 82; Act of Nov. 24, 1865, ch. 6, 1865 Miss. Laws 90; *see also* OSHINSKY, *supra* note 16, at 20.

54. Act of Nov. 25, 1865 §§ 5-8, 1865 Miss. Laws at 83-85 (requiring blacks to maintain written authorization to reside or work, and prohibiting blacks from quitting their jobs without cause); Act of Nov. 24, 1865 §§ 1-2, 1865 Miss. Laws at 90-91 (deeming blacks without such authorization to be vagrants); *see also* OSHINSKY, *supra* note 16, at 21.

55. Act of Nov. 29, 1865 §§ 1-2, 1865 Miss. Laws at 165-66; *see also* OSHINSKY, *supra* note 16, at 21.

56. Act of Nov. 25, 1865 § 3, 1865 Miss. Laws at 82; *see also* OSHINSKY, *supra* note 16, at 21.

57. OSHINSKY, *supra* note 16, at 16-18; *see also* Gilles Vandal, *Property Offenses, Social Tension and Racial Antagonism in Post-Civil War Rural Louisiana*, 31 J. SOC. HIST. 127, 133, 134 tbl.4 (1997).

> In the 1880s, Alabama, North Carolina, and Florida enacted laws making it a criminal act for a black man to change employers without permission.[58]

Before long, this brand of criminal laws spawned an overwhelming population of black convicts in Mississippi and the many states that had codified their own Black Codes.[59] While a black prisoner was a rarity during the slavery era (when slave masters were individually empowered to administer "discipline" to their human property),[60] the solution to the free black population had become criminalization. In turn, the most common fate facing black convicts was to be sold into forced labor for the profit of the state.[61]

Beginning as early as 1866, Southern states adopted systems of convict leasing through which farmers or businesses could temporarily "purchase" primarily black prisoners to do agricultural or other forms of work at a very low cost to the lessee, and a very high profit to the lessor.[62] The high potential for profit and high demand for laborers created substantial corruption and abuse of the criminal justice system.[63] Countless individuals were sentenced to years of forced labor when unable to pay the court fees associated with prosecution for minor "crimes."[64] In 1895, after investigating the health conditions of a Mississippi prison mine, Dr. Thomas Parke, a Jefferson County health inspector, observed: "'The largest portion of the prisoners are sentenced for slight offenses and sent to prison for want of money to pay the fines and costs. . . . They are not criminals . . . .'"[65]

The deplorable working conditions and disregard for laborer safety common at convict leasing labor sites, as well as state-run penal plantations such as Mississippi's

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58. BLACKMON, *supra* note 18, at 53-54.

59. *E.g.*, Act of Feb. 16, 1866, No. 100, 1865-1866 Ala. Acts 111; Act of Dec. 15, 1865, No. 112, 1865-1866 Ala. Acts 119; Act of Feb. 6, 1867, No. 35, 1867 Ark. Acts 98; Act of Jan. 15, 1866, ch. 1466, 1865 Fla. Laws 23; Act of Jan. 12, 1866, ch. 1467, 1865 Fla. Laws 28; Act of Jan. 12, 1866, ch. 1468, 1865 Fla. Laws 30; Act of Jan. 11, 1866, ch. 1469, 1865 Fla. Laws 31; Act of Mar. 12, 1866, No. 240, 1865-1866 Ga. Laws 234; Act of Mar. 9, 1866, No. 252, 1865-1866 Ga. Laws 240; Act of Mar. 9, 1866, No. 253, 1865-1866 Ga. Laws 240; Act of Mar. 7, 1866, No. 254, 1865-1866 Ga. Laws 241; Act of Dec. 19, 1865, No. 4731, 1864-1865 S.C. Acts 271; Act of Dec. 21, 1865, No. 4733, 1864-1865 S.C. Acts 291; *see also* OSHINSKY, *supra* note 16, at 21 ("The Mississippi Black Codes were copied, sometimes word for word, by legislators in South Carolina, Georgia, Florida, Alabama, Louisiana, and Texas.").

60. Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, 30 SOC. PROBS. 555, 555-56 (1983) ("In a real sense, the convict lease system was a functional replacement for slavery; it provided an economic source of cheap labor and a political means to re-establish white supremacy in the South.").

61. BLACKMON, *supra* note 18, at 54.

62. *Id.* at 54-56.

63. *Id.* at 108-09.

64. *Id.*

65. *Id.* (first omission in original).

infamous Parchman Farm, led historian David M. Oshinsky to conclude that this form of involuntary servitude permitted by the Thirteenth Amendment was actually *worse* than slavery.[66] Antebellum slave masters typically made a substantial investment in purchasing a slave and thus had significant incentive to protect the health and safety of the black laborers on their plantations.[67] In contrast, convict leasing rates were very low, and the region's corrupt criminal justice system guaranteed a plentiful supply of laborers such that it was "cheaper" to *replace* workers who died of illness or injury than it would be to implement practices aimed at preventing harm altogether.[68]

In the decades after the Civil War "freed the slaves" and the Constitution was amended to "abolish slavery in America," countless men, women, and even children toiled and often died in the conditions of forced labor, under the auspices of law and order, neatly tucked into the easily manipulated criminal exception to the Thirteenth Amendment. For Southern lawmakers intent on reestablishing a pool of black forced labor and white dominance over it, this loophole provided a means to do so constitutionally, with little risk of federal intervention. Hiding behind the criminal law as justification, these states paved the way for a twentieth century fraught with the same violations of rights, economic oppression, and inhumane treatment that had marred the black experience in America for centuries before. As Douglas A. Blackmon writes in *Slavery by Another Name*:

> For the next eighty years, in every southern state, the questions of who controlled the fates of black prisoners, which few black men and women among armies of defendants had committed true crimes, and who was receiving the financial benefits of their re-enslavement would almost always never be answered.[69]

II. MODERN MANIFESTATIONS

In her 2010 book, civil rights lawyer and legal scholar Michelle Alexander refers to the modern American criminal justice system as "the New Jim Crow."[70] This accusation is based on the observation that today's prisons confine overwhelming numbers of black men,[71] the knowledge that criminal justice has historically been

66. OSHINSKY, *supra* note 16, at 44.

67. *See id.*; Wahl, *supra* note 38, at 4.

68. OSHINSKY, *supra* note 16, at 44.

69. BLACKMON, *supra* note 18, at 54.

70. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 14 (2010).

71. The Bureau of Justice Statistics recently estimated that white males are incarcerated at a rate of 456 per 100,000 residents; for Hispanic or Latino males the rate was 1252 per 100,000 residents; for black males the rate was 3059 per 100,000 residents. PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SER. NO. NCJ

used as a tool of racial oppression,[72] and the insight that, in modern society, one's status as "convict" has become a permanent badge of inferiority relegating millions of Americans to "permanent second-class citizenship."[73] Alexander writes: "Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race."[74]

The historical use of felon disenfranchisement and prison slavery following the Civil War was enabled by the criminal exceptions to the Thirteenth and Fourteenth Amendments and intended to perpetuate racial subjugation. Today, those intended effects continue on a larger scale and with strikingly similar racial results.

A. *The Continued Use of Felon Disenfranchisement*

Nearly a century after the Civil War, as most of the nation's black population continued to reside in the South,[75] thinly-veiled racialized voting laws like poll taxes, literacy tests, and felon disenfranchisement succeeded in all but eliminating the voting power of black communities in the South.[76] As late as the 1960 presidential election, a mere thirty-one percent of Southern blacks voted, compared to seventy-five percent of Southern whites and eighty-one percent of non-Southern blacks.[77] As political research reveals, the impact of these practices was not restricted to the Southern region; in fact, these practices influenced the outcomes of national elections and the trajectory of American politics as a whole.[78]

In their 2006 book titled *Locked Out: Felon Disenfranchisement and American Democracy*, Jeff Manza and Christopher Uggen note that Southern white political dominance, achieved through the disenfranchisement of Southern blacks, allowed for the development of the "one-party 'solid South,'" which "routinely elected and

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236096, PRISONERS IN 2010 app. at 27 tbl.14 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

72. ALEXANDER, *supra* note 70, at 12-13.

73. *Id.*

74. *Id.* at 13.

75. Richard Morrill, *A Century of Change in the US Black Population, 1910 to 2010*, NEW GEOGRAPHY (Oct. 21, 2011), http://www.newgeography.com/content/002490-a-century-change-us-black-population-1910-2010 (finding that as late as 1960, a majority of African Americans—11.31 million of 18.97 million, or 59.6%—resided in the South).

76. Schmidt, *supra* note 30, at 835 ("In 1880, a majority of black males in the Southern states voted, and voted Republican in opposition to the white Democratic regimes. Ten years later, the black vote was greatly reduced, though it was still numerous enough to swing close elections. By the turn of the century, it was virtually eradicated, and it would languish in this state until the second half of the twentieth century.").

77. Carol A. Cassel, *Change in Electoral Participation in the South*, 41 J. POL. 907, 910 fig.9 (1979).

78. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 48 (2006).

reelected conservative southern Democrats . . . ."[79] Under Congress's institutional rules, these long-serving representatives "were able to acquire enormous leverage through seniority in the congressional committee system."[80] This influence was used to advocate traditionally conservative ideological values like "states' rights and the social order of the southern plantation economy."[81]

Due to their monopolization of Southern politics and the various methods employed to disenfranchise black voters, these representatives' influence was also largely disproportionate to the size of their actual constituencies. Generally, congressional districts were apportioned representation based on population counts.[82] Because Southern districts included their sizeable black communities, the disenfranchisement of Southern blacks translated into the super-enfranchisement of Southern whites. For example, in a fifty percent black Southern district where no blacks voted, each white vote held twice the influence of a Northern vote cast in a fully enfranchised district. In this way, the disenfranchisement of Southern blacks empowered Southern whites at the democratic expense of most everyone else.

In response to post-World War II civil rights activism, the federal government took action to restrict facially neutral forms of voter discrimination beginning in the 1950s and 1960s. This included ratification of the Twenty-Fourth Amendment in 1964, which outlawed all forms of poll taxes,[83] and the Voting Rights Act of 1965, in which Congress exercised authority under the Fifteenth Amendment to effectively outlaw literacy tests and other voter qualifications designed to abridge black citizens' access to the ballot.[84] In light of these victories, however, no federal action was taken to outlaw felon disenfranchisement or eliminate the criminal exception to constitutional voting rights.

After unsuccessful legal challenges in the 1970s and 1980s,[85] felon disenfranchisement gained widespread publicity following the 2000 presidential election.[86] At the time, Florida was one of several states that permanently disenfranchised individuals with felony convictions even after their prison sentences

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79. *Id.*

80. *Id.*

81. *Id.*

82. *See* U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ."); *see also* KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA 103-04 (2005).

83. U.S. CONST. amend. XXIV, § 1 provides as follows:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

84. 42 U.S.C. §§ 1973 to 1973Bb-4 (2006).

85. *See* discussion *infra* Part III.

86. MANZA & UGGEN, *supra* note 78, at 199.

had ended.[87] As a battleground state for the American presidency, Florida voting policies were heavily scrutinized and thrust onto the national and international stage.[88] According to official figures from the U.S. Federal Election Commission, George W. Bush won Florida's popular election by a mere 537 votes.[89] Researchers estimate that the state's laws disenfranchised 827,000 Floridians—a majority of whom were black and Latino.[90]

Nationally, researchers today estimate that more than five million Americans, or one in forty-one adults, are disenfranchised by a patchwork of state laws.[91] More than two million of these otherwise eligible voters have completed their criminal sentences.[92] Black men are disenfranchised at "a rate seven times the national average," and a total of 1.4 million, or thirteen percent of the nation's entire black male population, cannot vote as a result of criminal conviction.[93] Based on present rates of incarceration, three out of every ten black men will lose the right to vote at some point in their lifetimes.[94]

Though forty-eight of the fifty states actively employ some form of felon disenfranchisement policy to restrict the voting rights of individuals while in prison, or even after release,[95] the most restrictive laws are commonly found in the very

87. *Id.* at 8.

88. *See, e.g.*, Tom Brune, *Ex-Con Vote Ban Called Unfair; Fla. Felon Policy Tilted Outcome, Some Critics Say*, NEWSDAY, Dec. 14, 2000, *available at* 2000 WLNR 599146; Arianna Huffington, *American Democracy's Disgrace in Florida*, BALT. SUN (Dec. 10, 2000), http://articles.baltimoresun.com/2000-12-10/news/0012090404_1_jeb-bush-compromise-florida-vote.

89. FED. ELECTION COMM'N, FEDERAL ELECTIONS 2000: PRESIDENTIAL GENERAL ELECTION RESULTS BY STATE (2001), *available at* http://www.fec.gov/pubrec/fe2000/tcontents.htm.

90. MANZA & UGGEN, *supra* note 78, at 192; FLA. DEP'T OF CORR., INMATE POPULATION OF JUNE 30, 2000 20 (2000), *available at* http://www.dc.state.fl.us/pub/annual/9900/PDFs/InmatePop19-33.pdf.

91. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2011), *available at* http://sentencingproject.org/doc/publications/fd_bs_fdlawsinusMar11.pdf.

92. *Id.*

93. *Id.*

94. *Id.*

95. Only Maine and Vermont impose no voting restrictions on individuals with felony convictions, while incarcerated or afterward. All other states and the District of Columbia have enacted such constitutional or statutory restrictions. *See* ARK. CONST. amend. 51, § 11(a)(4); HAW. CONST. art. II, § 2; IDAHO CONST. art. VI, § 3; ILL. CONST. art. III, § 2; KY. CONST. § 145(1)-(2); LA. CONST. art. I, § 10(A); NEV. CONST. art. 2, § 1; R.I. CONST. art. II, § 1; S.D. CONST. art. VII, § 2; WASH. CONST. art. VI, § 3; W. VA. CONST. art. IV, § 1; ALA. CODE § 17-3-31 (LexisNexis 2007); ALASKA STAT. § 15.05.030(a) (2010); ARIZ. REV. STAT. ANN. § 16-101(A)(5) (2006); CAL. ELEC. CODE § 2201(c) (West 2003); COLO. REV. STAT. § 1-2-103(4) (2011); CONN. GEN. STAT. ANN. §§ 9-45(a) to 9-46(a) (West 2009); DEL. CODE ANN. tit. 15, § 6103(a)-(c) (2007); D.C. CODE §§ 1-1001.02(2)(D), .07(a)(1)

same Southern states where slavery and Jim Crow once thrived. Indeed, scholars assert that the number of African Americans currently unable to vote due to felony disenfranchisement has resulted in a modern-day Jim Crow era.[96]

Even after a recent wave of state legislative reforms,[97] the most restrictive and racially disproportionate felon disenfranchisement laws continue to be found in former Confederate states.[98] Kentucky and Virginia are the only states that currently impose lifetime voting bans on individuals with felony convictions, which may only be overcome through gubernatorial pardon.[99] As the table below illustrates, this region's punitive voting laws have very real consequences: nine of the eleven former Confederate states have statewide disenfranchisement rates greater than the national average, and eight states exhibit African American disenfranchisement rates greater than that of the United States as a whole.

Jurisdiction	Total Disenfranchisement (%)[100]	Black Disenfranchisement (%)[101]
United States	2.4	8.3
Alabama	7.4	15.3
Arkansas	2.8	9.0
Florida	9.0	18.8
Georgia	4.4	9.6

(LexisNexis Supp. 2011); FLA. STAT. ANN. § 97.041(2)(b) (West Supp. 2011); GA. CODE ANN. § 21-2-216(b) (Supp. 2011); IND. CODE ANN. § 3-7-13-4(a) (LexisNexis 2002); IOWA CODE ANN. § 48A.6(1) (West Supp. 2011); KAN. STAT. ANN. § 21-6613(a)-(b) (Supp. 2011); MD. CODE ANN., ELEC. LAW § 3-102(b)(1) (LexisNexis 2010); MASS. ANN. LAWS ch. 51, § 1 (LexisNexis Supp. 2011); MICH. COMP. LAWS ANN. § 168.492a (West 2008); MINN. STAT. ANN. § 201.014(2)(a) (West 2009); MISS. CODE ANN. § 23-15-19 (2007); MO. REV. STAT. § 115.133(2) (Supp. 2011); MONT. CODE ANN. § 13-2-402(4) (2011); NEB. REV. STAT. § 32-313(1) (2008); N.H. REV. STAT. ANN. § 607-A:2(I)(a) (LexisNexis 2003); N.J. STAT. ANN. § 19:4-1(6)-(8) (West Supp. 2011); N.M. STAT. ANN. § 31-13-1(A) (Supp. 2011); N.Y. ELEC. LAW § 5-106(2) (McKinney 2007); N.C. GEN. STAT. § 163-55(a)(2) (2009); N.D. CENT. CODE § 12.1-33-01(1)(a) (West 1997); OHIO REV. CODE ANN. § 2961.01(A)(1) (LexisNexis 2010); OKLA. STAT. ANN. tit. 26, § 4-101(1) (West Supp. 2011); OR. REV. STAT. ANN. § 137.281(1), (3)(d) (West Supp. 2011); 25 PA. CONS. STAT. ANN. § 1301(a) (West 2007); S.C. CODE ANN. § 7-5-120(B)(3) (Supp. 2010); TENN. CODE ANN. § 2-2-106(a)(4) (Supp. 2011); TEX. ELEC. CODE ANN. § 11.002(a)(4) (West Supp. 2011); UTAH CODE ANN. § 20A-2-101(2)(b) (LexisNexis Supp. 2011); VA. CODE ANN. § 53.1-231.2 (2009); WIS. STAT. ANN. § 6.03(1)(b) (West Supp. 2011); WYO. STAT. ANN. § 22-3-102(a)(v) (2011).

96. *See, e.g.*, King, *supra* note 18, at 251-61; *see also generally* ALEXANDER, *supra* note 70.

97. *See* discussion *infra* Part III.B.

98. *See infra* note 100.

99. KY. CONST. § 145; VA. CODE ANN. § 53.1-231.2.

100. *Interactive Map*, THE SENTENCING PROJECT, http://sentencingproject.org/map/map.cfm#map (last visited Dec. 19, 2011).

101. *Id.*

Kentucky	6.0	23.7
Louisiana	3.0	6.8
Mississippi	6.9	13.2
North Carolina	1.2	3.3
South Carolina	1.6	3.7
Texas	3.3	9.3
Virginia	6.8	19.8

B. *The Varied Forms of Modern Prison Labor*

Due to economic shifts, the convict leasing and penal plantation systems that were created and thriving in the South for decades following the Civil War, began to diminish in influence and scale by the 1940s.[102] The Southern agricultural economy's foundation in cotton was devastated by the crop's sinking price and boll weevil epidemic after World War I.[103] Similarly, technical advances in industrial trades, such as mining and transportation, greatly reduced the demand for crude and dangerous manual labor that convicts had supplied.[104]

Facing growing international condemnation of America's domestic race relations, the Federal Bureau of Investigation began investigating convict leasing contracts and work sites with high fatality rates in the first half of the twentieth century.[105] Amidst increased external oversight and diminished financial incentives, Southern states largely abandoned the most horrific forms of prison labor that had, for decades, placed little worth on convicts' lives and resulted in countless deaths by illness, injury, and outright murder.[106] Nevertheless, forced field labor continues to be a feature of incarceration in several former slaveholding states where prisons are located on the very same plantations slaves toiled more than 150 years ago.

One such "prison farm" is Louisiana State Penitentiary, also known as "Angola" state farm.[107] Composed of a block of former slave plantations "repurposed" as a prison farm following the Civil War, it is the nation's largest per acreage prison.[108] Inmates, eighty percent of who are black, plant and pick crops of cotton, sometimes for more than sixty hours per week, at an hourly rate of four to twenty cents.[109] As recently as 1951, harsh work conditions and guard brutality at the prison were so great that inmates cut their own Achilles tendons in protest.[110] The picture was the

102. BLACKMON, *supra* note 18, at 365-77.
103. *Id.*
104. *Id.*
105. *See id.* at 360-64.
106. *See id.* at 360-65.
107. Maya Schenwar, *Slavery Haunts America's Plantation Prisons*, TRUTHOUT (Aug. 28, 2008), http://archive.truthout.org/article/slavery-haunts-americas-plantation-prisons.
108. *Id.*
109. *Id.*
110. *Heel Tendons Cut in Gaol Protest*, AGE, Feb. 28, 1951, at 4, *available at* http://

same at a similar prison farm in Mississippi.[111] Although litigation and reform have reduced violence and led state corrections officials to reframe prison slave labor as a source of educational and vocational opportunities, the involuntary servitude continues largely unchallenged. As recently as 2002, according to the Criminal Justice Institute's *Corrections Yearbook*, sixteen percent of prisoners in Louisiana, seventeen percent of those in Texas, and a staggering forty percent of prisoners in Arkansas were compelled to perform farm labor.[112] In a 2008 article on the topic, a Louisiana prison activist commented, "Angola is disturbing every time I go there . . . . It's not even really a metaphor for slavery. Slavery is what's going on."[113]

The forms of prison slavery that most closely resemble the antebellum institution are concentrated in a few Southern states, yet the model of using prisoners as a source of cheap labor has been widely duplicated by other industries and in other regions. As the economy has evolved, prison labor has found a place in private industry, earning profits for many states and corporations outside of the South.

Federal laws passed under the interstate commerce power during the Great Depression sought to restrict the use of prison labor in private industrial production.[114] This was an effort to protect the jobs of non-prison workers (often referred to as "free labor") who could not compete with the low-wage prison labor supply.[115] The Hawes-Cooper Convict Labor Act of 1929[116] and the Ashhurst-Sumners Act of 1935[117] prohibited interstate trading of prison-made goods and substantially blunted the private market for prison labor.[118] Efforts to amend those statutes in the 1970s culminated with the Justice System Improvement Act of 1979.[119] Intended to foster a more accountable, economically efficient, and scientifically based justice system, this law created the National Institute of Justice

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news.google.com/newspapers?nid=1300&dat=19510028&id=nrVVAAAAIBAJ&sjid=vr0DAAAAJBAJ&pg=2935,6603888.

111. OSHINSKY, *supra* note 16, at 171-79.

112. CRIMINAL JUSTICE INST., INC., THE CORRECTIONS YEARBOOK 118 (2002).

113. Schenwar, *supra* note 107.

114. *See* 18 U.S.C. §§ 1761-1762 (2006).

115. *See id.*; *see also* Karen Miller, *Prison Labor—Facts and Issues*, PRISON TALK (Apr. 6, 2005, 12:43 AM), http://www.prisontalk.com/forums/showthread.php?t=117050.

116. Ch. 79, 45 Stat. 1084 (repealed 2005).

117. Ch. 412, 49 Stat. 494 (codified as amended at 18 U.S.C. §§ 1761-1762).

118. In particular, 18 U.S.C. § 1761(a) provides:

> Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both.

119. Pub. L. No. 96-157, sec. 2, § 827, 93 Stat. 1167, 1215 (codified as amended at 18 U.S.C. § 1761(c) & note; 41 U.S.C. § 6502(3) (Supp. IV 2010)).

and Bureau of Justice Statistics.[120] With regard to incarceration, the law allowed for the privatization of prisons and lifted the ban on interstate trade of goods produced by prison labor.[121] The impact was enormous and led to a massive increase in private prison labor sales, from $392 million in 1980 to $1.31 billion in 1994.[122]

The basis of support for expanded prison labor programs is diverse. Some advocates insist that work plays a vital and beneficial role in the rehabilitation process—teaching both discipline and work ethic—which provide inmates with job skills that can prove valuable upon release.[123] To others, work should be part of the punishment of prison, and paid labor provides the state a means of recouping money to offset the cost of incarceration and provide for victim funds.[124] A less often articulated, though clearly influential, source of support for prison labor is the substantial profit potential it offers to private corporations that opt to produce their goods in this way, foregoing union-negotiated wages and benefits for prisoners who rarely earn minimum wage.[125]

Regardless of the particular or combined motives behind the political and public endorsement of inmate work, private industry has become deeply embedded in the prison labor scheme.[126] The War on Drugs and increasingly harsh state and federal sentences spawned unprecedented rates of incarceration in the past three decades.[127] The timing of this increase in the prison population coincides remarkably well with the congressional repeal of restrictions on private use of prison labor.[128] According to the Bureau of Justice Statistics, more than 2.3 million Americans were incarcerated in prison or jail in 2008, compared to just 501,886 in 1980.[129] That represents a more than 400% increase over less than thirty years. National census figures, on the other hand, indicate the American population increased by less than thirty-five percent

120. U.S. DEP'T OF JUSTICE, SER. NO. J 1.2: J 97/5, REAUTHORIZATION MEETING ISSUE PAPERS: JUSTICE SYSTEM IMPROVEMENT ACT OF 1979, at 1, 118 (1979).

121. *See* Justice System Improvement Act of 1979 sec. 2, § 827(a), 93 Stat. at 1215.

122. Reese Erlich, *Prison Labor: Workin' for the Man*, COVERTACTION Q., Fall 1995, at 58, 60.

123. *See* Kerry L. Pyle, Note, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. REV. 151, 169-75 (1997). *But see* Paul Wright, *Making Slave Labor Fly: Boeing Goes to Prison*, PRISON LEGAL NEWS, Mar. 1997, *reprinted in* PRISON NATION 112, 116 (Tara Herivel & Paul Wright eds., 2003).

124. Wright, *supra* note 123, at 112-118.

125. *Id.*

126. EVE GOLDBERG & LINDA EVANS, THE PRISON-INDUSTRIAL COMPLEX AND THE GLOBAL ECONOMY 7-8 (PM Press Pamphlet Series, Pamphlet No. 0004, 2009).

127. Pyle, *supra* note 123, at 153-54.

128. *See* GOLDBERG & EVANS, *supra* note 126, at 8-11.

129. *Key Facts at a Glance: Correctional Populations*, BUREAU OF JUSTICE STATISTICS (Dec. 19, 2011), http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm.

during the same time period.[130] As noted above, these inmate populations are disproportionately poor, black, and Latino.[131]

Because internal prison workforces cannot absorb all the inmates in "need" of jobs with positions as institutional librarians or dishwashers, there are now more prisoners than available work.[132] For states, corporations, and advocates of prison labor, private industry provides the perfect employers to fill the gap, even if attracting them requires exempting prisoners from minimum wage laws and repealing some of their most basic civil rights protections.[133]

Though precise statistics on prison labor are rarely collected and difficult to confirm, an estimated "90,000 state and federal convicts work in a variety of public and private enterprises while serving time."[134] Most inmates work in state-owned enterprises but, as of approximately ten years ago, private businesses have contracted with at least thirty-six states for prison workers.[135] Total sales from these industries grossed more than $800 million, $83 million of which were in the private sector.[136] Some states have even made prison leasing compulsory. Oregon, for example, passed a ballot initiative in 1994 which "mandates that all prisoners must work 40 hours per week, and requires the state to pro-actively market prison labor to private employers."[137]

Indeed, while "old fashioned" prison labor still exists, such as the farm labor discussed above and the chain gangs resurrected in Alabama, Arizona, Florida, and elsewhere,[138] most "modern" prison labor involves industry, in which inmates

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130. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 8 tbl.1 (2012), *available at* http://www.census.gov/prod/2011pubs/12statab/pop.pdf (estimating the 1980 American population at 226,542,199); *2008 Population Estimates*, U.S. CENSUS BUREAU tbl.1, http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=01000US&-ds_name=PEP_2008_EST&-_lang=en&-mt_name=PEP_2008_EST_G2008_T001&-format=&-CONTEXT=dt (last visited Dec. 19, 2011) (estimating the 2008 American population at 304,059,724).

131. *See supra* note 71.

132. *See* Wright, *supra* note 123, at 116; *see also* Pyle, *supra* note 123, at 176 (citing studies which found that many inmates want to work).

133. Wright, *supra* note 123, at 113.

134. *Id.* at 112.

135. Alan Whyte & Jamie Baker, *Prison Labor on the Rise in US*, WORLD SOCIALIST WEB SITE 1 (May 8, 2000), http://intsse.com/wswspdf/articles/2000/may2000/pris-m08.pdf; *see also* Wright, *supra* note 123, at 112-113 (claiming that private businesses contracted with at least twenty-five states in 1997).

136. Wright, *supra* note 123, at 112-13.

137. Gordon Lafer, *The Politics of Prison Labor: A Union Perspective*, AM. PROSPECT, Oct. 2001, *reprinted in* PRISON NATION, *supra* note 123, at 120, 120.

138. *See* Yale Glazer, Note, *The Chains May Be Heavy, but They Are Not Cruel and Unusual: Examining the Constitutionality of the Reintroduced Chain Gang*, 24 HOFSTRA L. REV. 1195, 1195 & n.3 (1996); Tessa M. Gorman, Comment, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 442-43 (1997); Mark Curriden, *Hard Time*, A.B.A. J., July 1995, at 72,

perform factory work for low or no wages and without the ability to organize for better pay or benefits.[139] The exploitation is especially apparent when one considers that, after state deductions for taxes, costs of incarceration, and victim restitution funds, many prison workers with private industry jobs make around $1.50 per hour.[140] Worse, those employed in state-owned industries often earn less than $0.50 per hour.[141]

There are many examples of government and private businesses cashing in on this opportunity. Federal Prison Industries employed around 21,000 federal inmates as of 2000, producing a wide range of products sold to federal agencies and private businesses for total sales of $600 million per year and annual profits of over $37 million.[142]

In efforts to cut costs and prevent threatened labor strikes among its workforce, the Boeing Corporation relocated its Seattle-based factories in 1996, with an eye toward employing a less demanding workforce.[143] One factory was moved to the Washington State Reformatory, twenty-five miles away, and the other relocated to China.[144] In a March 1997 article, activist and former prisoner Paul Wright likened the plight of inmate workers to the oft-criticized conditions under which foreign workers toil for American companies overseas.[145] After discussing a local newspaper article that critiqued the coercive and exploitative labor practices in Boeing's Chinese factory, Wright discussed how many of the same charges could potentially be levied at the prison work site:

> If the *Seattle Times* had come to the Washington State Reformatory to describe the setup that these companies enjoy, it could [also] have written, "Employees live right next to the factory premises. They are forbidden to form any type of trade union, much less an independent one. For those who step out of line on the shop floors of Washington prisons, there is the notorious Intensive Management Unit of 'reeducation through sensory deprivation' fame."[146]

But Boeing in Washington State is not alone. In 1993, Lockhart Technologies closed its Austin, Texas plant, eliminating 130 circuit board assembly jobs that paid ten dollars an hour and replacing them with inmates from the nearby Lockhart

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74; Tracey Meares, *Weak Link: For Many, Commercializing the Chain Gang is Akin to Commercializing Slavery*, U. CHI. MAG., Feb. 1996, at 48, 48, *available at* http://magazine.uchicago.edu/9602/9602Voices.html.

139. Wright, *supra* note 123, at 114-17.
140. *Id.* at 115-16.
141. *Id.* at 116.
142. Whyte & Baker, *supra* note 135.
143. Wright, *supra* note 123, at 113.
144. *Id.* at 113-14.
145. *Id.* at 114-16.
146. *Id.* at 114-15.

Correctional Facility who made minimum wage, required no benefits or workman's compensation coverage, and worked in a state-subsidized facility on prison grounds for which the company paid just one dollar in rent per year.[147] In recent years, an Ohio supplier of Honda automobile parts paid inmates two dollars per hour to perform the same work unionized free workers had done for twenty to thirty dollars per hour;[148] an Arizona company closed its unionized slaughterhouse to open a prison operation at much lower cost;[149] and in 1997, within one year of opening a production facility in a Wisconsin prison, the Fabry Glove and Mitten Company's inmate workforce, paid $5.25 per hour, had grown to 100 while its "free labor force," paid $11 per hour, had shrunk from 205 to 120.[150]

Prison labor is not just a prisoner issue. A few years after the implementation of Oregon's mandatory prison labor law, for example,

> [t]housands of public sector jobs [had] been taken over by prisoners; workers in the private sector [had] been laid off when their firms lost contracts to prison-based industries; and with the cost of supervising a full-time work force, the state for the first time in its history [was] spending more on corrections than on higher education.[151]

Similar to the way disenfranchisement weakens the voting power of voters in states that do not disenfranchise, or do so at a substantially lower rate than other states, mandatory, widespread prison labor floods the employment market with low-wage laborers. This kind of domestic outsourcing enriches private business by exploiting prison workers *and* depriving non-prison workers of the living wages and employment benefits they have unionized and fought to achieve.[152]

Although prison labor today may look different than it did a century ago, it continues to primarily serve the purpose of exploiting the poor and black for the benefit of the rich and powerful and maintenance of the status quo.

> The drive to make prisons pay—while racking up a hefty profit for the industry—fits well with the continuing transformation of America into a nation of small government, big corporations, and big prisons. . . . [I]t gives the public a false impression that meaningful reform is taking place. Meanwhile, it takes pressure of [sic] a system that cannot provide enough decent jobs, and uses

147. *Id.* at 116-17.
148. Lafer, *supra* note 137, at 121.
149. *Id.*
150. Adrian Lomax, *Prison Jobs and Free Market Unemployment*, *in* PRISON NATION, *supra* note 123, at 133.
151. Lafer, *supra* note 137, at 120.
152. *Id.*

> incarceration as the remedy for the ills of poverty, unemployment, inadequate education, and racism.[153]

Faced with uncertain times and changing social order, the post-Civil War South criminalized the newly freed black population and sought to obscure the era's pressing social changes as problems of "crime" necessitating prison-based correction. Similarly, the American public is today misled to support mass incarceration as a panacea for contemporary social challenges while corporations profit from the lie, poor racial minorities are labeled "criminal" and freely exploited, and the Constitution turns a blind eye.

III. REFORM EFFORTS THROUGH LITIGATION AND LEGISLATION

Efforts to challenge the continued disenfranchisement of felons and the enslavement of incarcerated Americans face a considerable roadblock: these types of human rights violations are explicitly permitted by the Constitution's criminal exception to the Thirteenth and Fourteenth Amendments. While litigation and legislative reform efforts have had limited success in the context of felon disenfranchisement, penal slavery has proven largely impenetrable to such methods of change.

A. *Litigation*

Litigation challenging felon disenfranchisement policies under the Equal Protection clause has proven largely unsuccessful.[154] In *Richardson v. Ramirez*, for example, the U.S. Supreme Court upheld California's disenfranchisement laws, holding that the Fourteenth Amendment explicitly authorizes states to deny the vote on the basis of "'participation in rebellion, or other crime'" such that voting restrictions that do so cannot violate that same amendment.[155]

Subsequent litigation suggests that evidence of unequal enforcement or intentional discrimination could render a felon disenfranchisement policy invalid under the Equal Protection Clause, yet few plaintiffs have been able to satisfy the necessary burden of proof.[156] The sole successful challenge to prevail before the Supreme Court was the 1985 case of *Hunter v. Underwood*, in which an Alabama constitutional provision that disenfranchised those convicted of "crimes involving

153. Wright, *supra* note 123, at 118.

154. William Walton Liles, Commentary, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 619-22 (2007).

155. 418 U.S. 24, 43, 54, 56 (1974) (quoting U.S. CONST. amend. XIV, § 2).

156. Thiess v. Md. Admin. Bd. of Election Laws, 387 F. Supp. 1038, 1043 (D. Md. 1974).

moral turpitude" was held to have both racially discriminatory intent and impact.[157] Nevertheless, laws that closely mirror the language and scope of the Fourteenth Amendment remain virtually immune to judicial challenge under the Equal Protection Clause.[158]

Efforts to mount challenges under section 2 of the Voting Rights Act ("VRA"), on the grounds that the laws have a disparate racial impact, have also waged an uphill battle. Many lower courts have held that disenfranchisement cannot be challenged under the VRA at all, due to its explicit constitutional approval.[159] A landmark victory for the disenfranchised was recently had in the Ninth Circuit case, *Farrakhan v. Gregoire*, when a three-judge panel struck down Washington State's disenfranchisement law as a violation of the VRA.[160] The decision, released January 5, 2010, noted the plaintiffs' compelling evidence of racial discrimination in Washington's criminal justice system and overturned the lower court.[161] Unfortunately, an en banc rehearing by the Ninth Circuit ultimately reversed the decision on dubious grounds.[162]

Citing the Supreme Court's infamous 1987 decision in *McCleskey v. Kemp*[163]—which rejected compelling statistical evidence of racial disparity in application of the death penalty—the Ninth Circuit's seven-page opinion held that a VRA challenge to a felon disenfranchisement law requires a finding that there is *intentional* discrimination in the state's criminal justice system.[164] Because the plaintiffs had not provided evidence of such intent, Washington's felon disenfranchisement law—which empowers a racially discriminatory criminal justice system[165] to deny the vote

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157. 471 U.S. 222, 232-33 (1985) (noting that a state law violates the Equal Protection Clause where "impermissible racial motivation and racially discriminatory impact" is shown).

158. Liles, *supra* note 154, at 624, 628.

159. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 714-17 (2006).

160. Farrakhan v. Gregoire (*Farrakhan I*), 590 F.3d 989, 1016 (9th Cir. 2010), *rev'd en banc*, 623 F.3d 990.

161. *Id.* at 1012, 1016. Specifically, the court concluded as follows:

> Plaintiffs' evidence suggests not only that Washington's criminal justice system adversely affects minorities to a greater extent than non-minorities, but also that this differential effect cannot be explained by factors other than racial discrimination. . . . Plaintiffs have demonstrated that the discriminatory impact of Washington's felon disenfranchisement is attributable to racial discrimination in Washington's criminal justice system; thus, that Washington's felon disenfranchisement law violates § 2 of the VRA.

Id.

162. *See* Farrakhan v. Gregoire (*Farrakhan II*), 623 F.3d 990, 994 (9th Cir. 2010).

163. 481 U.S. 279, 292-33, 297 (1987).

164. *Farrakhan II*, 623 F.3d at 994.

165. In a 2006 trial court order, the Eastern District of Washington made a finding of fact that the plaintiffs' expert reports presented "compelling evidence of racial

to twenty-five percent of the state's black men[166]—was held legal and immune to challenge under federal law.[167] As plaintiffs' counsel Ryan P. Haygood subsequently noted, the court's reliance on an intent standard as an excuse to ignore the overwhelming racialized *impact* of this disenfranchisement law deprives plaintiffs of relief in the very forum most likely to grant it:

> [B]y reverting to the overt *intent* standard for section 2 challenges and disregarding the *resulting impact* a remarkable set of proven and undisputed facts have on the plaintiffs' voting rights, the court not only trampled on the congressionally established results-focus standard governing section 2 cases, but it also effectively foreclosed any realistic possibility of relief for plaintiffs bringing felon disenfranchisement challenges. In the end, the court allowed the racism permeating Washington's criminal justice system to continue to contaminate and fundamentally undermine the state's democratic processes.
>
> The ironic and disheartening result of all this—beyond its unfortunate precedential impact—is that Washington's disproportionately disfranchised racial minorities are left with only one hope for change: to rely on the same political process that has already cast them out.[168]

The Thirteenth Amendment's criminal exception has largely precluded legal challenges to laws mandating inmates work in state-owned or private industry,[169] and even exempts prison workers from standard employment protections.[170] *Gates v. Collier* was a 1974 federal case sparked by civil rights investigations into conditions at Mississippi's Parchman Farm prison.[171] Though the litigation did result in judicial rulings that mandated major reforms of the prison's disciplinary systems and other procedures, the claim was based in the Eighth Amendment and did not explicitly challenge the fundamental practice of involuntary servitude in the prison setting.[172]

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discrimination and bias in Washington's criminal justice system." Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *6 (E.D. Wash. July 7, 2006), *rev'd*, 590 F.3d 989 (9th Cir. 2010).

166. Jonathan Martin, *Washington State Felons Should Have Voting Rights, Federal Court Rules*, SEATTLE TIMES (Jan. 5, 2010, 9:33 PM), http://seattletimes.nwsource.com/html/localnews/2010708869_felons06m.html.

167. *Farrakhan II*, 623 F.3d at 994.

168. Ryan P. Haygood, *Disregarding the Results: Examining the Ninth Circuit's Heightened Section 2 "Intentional Discrimination" Standard in* Farrakhan v. Gregoire, 111 COLUM. L. REV. SIDEBAR 51, 65 (2011), http://www.columbialawreview.org/assets/sidebar/volume/111/51_Haygood.pdf.

169. *See supra* note 50 and accompanying text; *infra* note 174 and accompanying text.

170. Wright, *supra* note 123, at 117 (noting one employer's pleasure at not having to provide employee benefits or worker's compensation to prison employees).

171. 501 F.2d 1291, 1295 (5th Cir. 1974).

172. *Id.* at 1300-01, 1305 (addressing various instances of cruel and unusual punishment at the prison).

Most recently in *Serra v. Lappin*, federal prisoners mounted a claim in the Ninth Circuit, alleging that their low pay in prison jobs was a constitutional violation under the Fifth Amendment.[173] In affirming the lower court's dismissal of the claim, the Court of Appeals relied on the Thirteenth Amendment's criminal exception, writing:

> Current and former federal prisoners allege that the low wages they were paid for work performed in prison violated their rights under the Fifth Amendment and various sources of international law. Plaintiffs sued officials of the Bureau of Prisons for damages and injunctive and declaratory relief. *We conclude that prisoners have no enforceable right to be paid for their work under the Constitution* or international law, and we affirm the district court's dismissal of the action.[174]

In addition to the sizeable doctrinal hurdles that hinder these claims, some commentators posit that prison inmates are especially unlikely to form the kind of alliances necessary to attract the resources to mount such a case. This is because, unlike felon disenfranchisement, the experience of prison labor is largely contained within the prison walls.[175]

B. *Legislation*

Legislative efforts of reform are less hampered by the constitutional obstacle, but must grapple with the difficult political reality of "tough on crime" rhetoric.[176] In an age when politicians are wary of being labeled "soft" on criminals and the general public largely supports increasingly punitive criminal policies, it is difficult to mount a grassroots movement to empower the criminally convicted.[177] Nevertheless there has been recent success.

The publicity accorded felon disenfranchisement following the 2000 presidential election spawned grassroots and legislative efforts throughout the country, resulting in

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173. 600 F.3d 1191, 1195 (9th Cir. 2010).

174. *Id.* (emphasis added).

175. *See* Rania Khalek, *21st Century Slaves: How Corporations Exploit Prison Labor*, ALTERNET (July 21, 2011), http://www.alternet.org/story/151732/21stcentury_slaves%3A_how_corporations_exploit_prison_labor; *see also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1627-35 (2003) (discussing the significant administrative obstacles to prisoner lawsuits enacted over the past twenty years).

176. STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER 37, 75-78, 81 (1984); Stuart A. Scheingold, *Politics, Public Policy, and Street Crime*, 539 ANNALS AM. ACAD. POL. & SOC. SCI., 155, 156-57, 161-62 (1995); William J. Chambliss, Professor, George Washington Univ., Policing the Ghetto Underclass: The Politics of Law and Law Enforcement, Presidential Address at the Annual Meeting of the Society for the Study of Social Problems (Aug. 1993), *in* 41 SOC. PROBS. 177, 191 (1994).

177. SCHEINGOLD, *supra* note 176, at 37; Scheingold, *supra* note 176, at 156, 161-62; Chambliss, *supra* note 176, at 191.

substantial reform over the past ten years. A coalition of activists, disenfranchised felons, and college students in Rhode Island effectively mounted a multi-year public awareness and education campaign that culminated in a successful 2006 ballot referendum that ended the disenfranchisement of non-incarcerated felons in the state.[178] The referendum passed with just 51.25% of the vote and represented the first time a disenfranchisement law was struck down by popular vote.[179]

Legislature-initiated reform has been somewhat more common. According to the Sentencing Project—a national criminal justice research organization—twenty-three states amended their disenfranchisement policies between 1997 and 2010, resulting in the re-enfranchisement of at least 800,000 people.[180] Today, only Virginia and Kentucky continue to impose lifetime disenfranchisement on individuals with felony convictions.[181] At the federal level, Congress is considering the Democracy Restoration Act, which would automatically restore citizens' federal voting rights upon release from prison.[182]

In the area of prison labor, grassroots and legislative advocacy in recent decades has often worked against the goals of reform. The 1994 Oregon Ballot Initiative and 1979 repeal of former restrictions on private use of prison labor demonstrate the extent to which contemporary political trends and public sentiment favor expanding rather than restricting the criminal exception to slavery prohibitions.[183]

However, as discussed above, the impact of prison labor is far-reaching;[184] increased recognition of the common detriment imposed on both prison and nonprison workers by an exploitative system of prison labor could present an opportunity for coalition building and grassroots efforts for reform. Decades ago, few would have expected that a political and public will to reform felon disenfranchisement statutes throughout the country would develop and prove

178. Daniel Schleifer, *Unlocking the Vote: Activists and Disenfranchised Former Felons Restore Voting Rights in Rhode Island*, NATION, Dec. 18, 2006, *available at* http://www.thenation.com/article/unlocking-vote-activists-and-disenfranchised-former-felons-restore-voting-rights-rhode-islan.

179. *Id.*

180. NICOLE D. PORTER, THE SENTENCING PROJECT, EXPANDING THE VOTE 1-2 (2010), *available at* http://www.sentencingproject.org/doc/publications/publications/vr_expandingtheVoteFinalAddendum.pdf.

181. *Id.* at 13, 28; *see also supra* note 99 and accompanying text.

182. The Act was introduced in the Senate on July 24, 2009, *see* S. 1516, 111th Cong. (2009), and in the House of Representatives on June 16, 2011, *see* H.R. 2212, 112th Cong. (2011); *see also Democracy Restoration Act*, BRENNAN CTR. FOR JUSTICE (Dec. 20, 2011), http://www.brennancenter.org/content/resource/democracy_restoration_act_of_2011; Editorial, *Ex-Offenders and the Vote*, N.Y. TIMES, Mar. 22, 2010, at A26, *available at* http://www.nytimes.com/2010/03/22/opinion/22mon3.html?scp=1&sq=%22ex-offenders+and+the+vote%22&st=nyt.

183. *See supra* notes 121, 137 and accompanying text.

184. *See* discussion *supra* Part II.B.

successful in the span of a decade, yet that is just what happened.[185] Perhaps such a future can be achieved for prison slavery as well.

IV. THINKING BIGGER: ENDING CONSTITUTIONALLY CODIFIED INJUSTICE

In the struggle against felon disenfranchisement and prison slavery, victories achieved through partial legislative reform and all-too-rare favorable judicial rulings are tenuous forms of progress. Laws can be repealed, judicial decisions overturned; in the meantime, the voting powers of millions of Americans—and the legitimacy of our democracy—hang in the balance.

The disenfranchisement and enslavement of American citizens derives its constitutional legality under the criminal exceptions to the Thirteenth and Fourteenth Amendments. This fact has largely shielded the policies from widespread public disapproval and obscured their racial roots. As political debate and media coverage have created and reinforced the perception of crime as a racial issue, this nation has come to expect and accept higher rates of arrest and imprisonment among black and Latino communities.[186] The War on Drugs, largely a war waged against poor communities of color,[187] has drastically increased the number of blacks and Latinos with felony records despite statistics revealing that rates of drug use are remarkably similar across racial groups.[188] As long as these rates of arrest and imprisonment are accepted as legitimate, their collateral consequences, including the loss of the right to vote and the autonomy to decide when, where, and whether to work, will be viewed as acceptable punishments.

Public support for reforming felon disenfranchisement laws has grown,[189] and may continue to spark significant grassroots legislative reform like that witnessed in Rhode Island. Forced convict labor faces an even steeper uphill battle, largely because it impacts those hidden from public view and within the prison walls. The practice has failed to garner widespread public denouncement for decades and

185. *See supra* note 180 and accompanying text.

186. Lisa D. Moore & Amy Elkavich, *Who's Using and Who's Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 AM. J. PUB. HEALTH 782, 782-84 (2008).

187. CLARENCE LUSANE, PIPE DREAM BLUES: RACISM AND THE WAR ON DRUGS 44-46 (1991); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 105-07 (1995); *see also* Chambliss, *supra* note 176, at 191-92.

188. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. (SMA) 11-4658, RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH 21 (2011), *available at* http://www.samhsa.gov/data/NSDUH/2k10Results/Web/PDFW/2k10Results.pdf (showing blacks' drug use rate at 10.7%, whites' drug use at 9.1%, and Hispanics' or Latinos' drug use at 8.1%).

189. Research has found that 81.7% of Americans favor restoring felons' voting rights at some point after sentencing and less than 16% favor lifetime-voting bans. Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1545 (2003).

continues, in some form, in many prisons throughout the country largely because the general public fails to recognize the practice's detrimental impact upon their own lives. Those disenfranchised and enslaved under the banner of "law and order" lack a powerful lobby and inspire little public sympathy; indeed, they represent precisely the kind of marginalized minority for whom constitutional rights are most important.

In combatting the results of these laws, we must be clear about their origins: we are not dealing with misguided or unintentionally detrimental policies; we are fighting against a national Constitution that, immediately after slavery, provided states a blueprint of how to continue enslaving and oppressing black people as long as they learned to call them "felons" instead of "niggers." Acknowledging that fact requires deconstructing much of the myth of our national democracy, but we must pursue an honest understanding of the historical legacies leading to this moment in order to truly redirect the path.

Advocacy to establish more just treatment of individuals with criminal convictions must include discussion of the constitutional deficiencies that stand as a significant obstacle to that goal. As long as the Thirteenth and Fourteenth Amendments explicitly condone their enslavement and disenfranchisement, the fight for the rights of individuals convicted of crime will be a fight *against* the Constitution, and their fates will depend on the whim of a political system that has spent years blindly fighting a war on crime with no end in sight. After all, what rights can these individuals expect to assert, what judicial protection can they expect to obtain, and what faith can they have in the endurance of legislative reform, while living in a country whose Constitution explicitly permits their enslavement and political disempowerment?

The criminal exceptions codified in the Constitution permit much of the widespread discrimination the criminally convicted currently face, by lending legitimacy even to laws the Thirteenth and Fourteenth Amendments do not explicitly sanction, and feeding a broader public perception that the criminally convicted are a group who can justifiably be deprived of any and all rights at the whim of a legislative act. At the same time, felon disenfranchisement and prison slavery remain two of the most visible—and impenetrable—forms of exploitation to which they are exposed. The criminally convicted are uniquely vulnerable precisely because the same constitutional defects that allowed these policies to be created as explicit and overt forms of racial subjugation in the years following the Civil War now prevent them from being judicially challenged. They are harmful remnants of a shameful era that continue to perpetuate racial injustice, inequality, and oppression. As long as these exceptions remain a gaping hole in the constitutionally guaranteed rights of citizenship, the criminally convicted will remain vulnerable to whatever abuse and oppression is aimed at them, and the nation's nineteenth century promise of freedom and equality will remain unfulfilled.