

5-21-2018

## Mass Incarceration: Slavery Renamed

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### Recommended Citation

Pereira, Samantha (2018) "Mass Incarceration: Slavery Renamed," *Themis: Research Journal of Justice Studies and Forensic Science*: Vol. 6, Article 3.

Available at: <https://scholarworks.sjsu.edu/themis/vol6/iss1/3>

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# Mass Incarceration: Slavery Renamed

## **Abstract**

This paper aims to analyze the connections between slavery and mass incarceration. It begins by giving background information regarding the topic and setting the framework to argue that slavery was never abolished, but was instead continued using mass incarceration. The paper then goes on to further explain this concept by examining the constitutional and judicial laws in the United States, slave plantations and prisons, with regard to geographical, architectural, and operational design, and finally, the role of society in both systems. The framework for continuing slavery was set with the passing of the 13th Amendment and has since been expanded with every decision to strengthen mass incarceration.

## **Keywords**

mass incarceration, prison, 13th amendment, slavery

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**Abstract**

This paper aims to analyze the connections between slavery and mass incarceration. It begins by giving background information regarding the topic and setting the framework to argue that slavery was never abolished, but was instead continued using mass incarceration. The paper then goes on to further explain this concept by examining the constitutional and judicial laws in the United States, slave plantations and prisons, with regard to geographical, architectural, and operational design, and finally, the role of society in both systems. The framework for continuing slavery was set with the passing of the 13<sup>th</sup> Amendment and has since been expanded with every decision to strengthen mass incarceration.

## **Introduction**

The United States has a disappointing history of abusing particular groups of people, specifically through slavery. Individuals are still mistreated today, but the main mechanism to do so is through mass incarceration. Many people believe that slavery is a problem of the past and that mass incarceration is completely unrelated to the powerful institution that once controlled half of the country. After the Civil War, slavery was formally abolished as a common practice for citizens, but it was never abolished completely. The process of mass incarceration started immediately after the 13<sup>th</sup> Amendment was passed. Mass incarceration is the practice of incarcerating a terrifying number of individuals, especially minorities, but it goes deeper than just incarceration—mass incarceration is a way of life. This way of life did not appear overnight though.

Over hundreds of years, purposeful decisions were made to design society to rely on prisons and exploiting minorities, and there are internal biases in the criminal justice system that have been reinforced since before slavery ended. The Southern states relied on slavery for their economic system and they found ways to make up for the loss of free labor. African Americans had a special set of laws and could, for example, be arrested for not having a job (Davis, 2003). This forced many former slaves to take a job with their former owners or risk being arrested and sent to work for them for free. The legislation in Mississippi even made it illegal for an African American to “run away [from a job]” (Davis, 2003, p. 29), meaning they could not quit. Catching “criminal” African Americans became such a common occurrence that the commotion of the chase was background noise and easy to ignore. As described in W.E. B. Du Bois’s *Jesus Christ in Texas* (1920), people could make a nonchalant

comment such as, “another one of those convicts escaped, I suppose. Really, they need severer measures” (p. 74) before returning to the structure of their planned dinner parties. While there are not any specific laws that blatantly name African Americans today, there are laws that are systematically targeted towards African Americans and other minorities. The criminal justice system, as a whole, has an inherent bias towards minorities and it disproportionately arrests, convicts, and incarcerates them. A system as powerful and complex as this could only have been developed by combining the legal system with societal need. This paper analyzes the connections between slavery and mass incarceration through law, design, and society in order to suggest that slavery was never abolished and was instead solidified as a practice in the United States.

## **Law**

### **Constitutional Law**

Slavery became a permanent system through constitutional law. The 13<sup>th</sup> Amendment is commonly thought to have abolished slavery, but it actually solidified the practice in the country. The full amendment says, “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” (United States Constitution, Amend. XIII). This means that slavery is completely legal under certain circumstances and is almost expected to be used to punish convicted individuals. Former slave states even revised their Slave Codes to create new Black Codes (Davis, 2003). These new laws made various acts illegal if the individual charged was black, including possessing a firearm which was a right supposedly guaranteed and protected by the 2<sup>nd</sup> Amendment (Davis, 2003). South Carolina, for example, had

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vagrancy laws to pressure former slaves into signing contracts with their employers (Constitutional Rights Foundation, n.d.). The South Carolina laws even allowed “black orphans and the children of vagrants or other destitute parents” to be forced into an apprenticeship with white “masters” (Constitutional Rights Foundation, n.d., para. 15). States exploited the loophole in the 13<sup>th</sup> Amendment and created a criminal justice system designed to incarcerate a mass amount of colored individuals to be used as slaves. The same group of people that were being used during slavery continued to be used after slavery was “abolished” through mass incarceration.

Mass incarceration has resulted in terrible conditions for prisoners, both physically and mentally. Many would assume the conditions produced by mass incarceration are in violation of the 8<sup>th</sup> Amendment, which protects against cruel and unusual punishment, but they are not. In *Ruffin v. Commonwealth* (1871), the court emphasizes that criminals forfeit their rights as part of their punishment; this forfeiture holds the same magnitude as any other form of punishment, including “the whipping post, the iron mask, the gag, or the dungeon” (p. 6). The physical forms of punishment listed in open court are intense and some were common punishments used on slaves, but the court felt that they were all appropriate for convicts in a post-slavery society. Forfeiting any and all rights also made it incredibly difficult for individuals to make any legal arguments when fighting their conditions. This aspect of punishment is still prevalent today and post-conviction lawyers focus on protecting prisoners’ rights in all situations. The everyday living conditions that individuals in the criminal justice system face are synonymous with the everyday living conditions associated with slavery, but the 8<sup>th</sup> Amendment is largely ineffective in protecting prisoners because

the punishments are not unusual nor cruel according to the Constitution.

### **Judicial Law**

Judicial law has also contributed to the continuation of slavery through mass incarceration. Sarat and Kearns (2005) argue that *stare decisis* is an obvious way in which “law constructs and uses history” (p. 4) to authorize itself. *Stare decisis* refers to precedence in court decisions, and it attempts to ensure uniformity in similar cases throughout time and location. Legal precedent has been used to formalize slavery in various cases including the Supreme Court decision in *Ruffin v. Commonwealth* (1871). This case was about a prisoner, Woody Ruffin, who was originally tried and convicted in Virginia, and sent to work on a railroad in Ohio through convict leasing. While there, Ruffin murdered a security guard. During the appeals process, the court used this opportunity to explain the status of Ruffin and all other convicted individuals: “[Ruffin] is for the time being the slave of the State” (*Ruffin v. Commonwealth*, 1871, p. 5). This blatantly reaffirms the 13<sup>th</sup> Amendment and the use of prisoners as slaves. The court even went so far as to say prisoners are *civilliter mortuus* which means they are civilly dead, have no rights, and that their property should be “administered like that of a dead man” (*Ruffin v. Commonwealth*, 1871, p. 5). It was not until 1974 in *Wolff v. McDonnell* that the Supreme Court protected some rights of convicts: “A prisoner is not wholly stripped of constitutional protections [upon incarceration]” (para. 4). This appears to be a step in the right direction, but immediately after the court specified that during any procedure, only minimal due process requirements were necessary and that the inmates have no constitutional rights to confrontation, cross-examination, or counsel (*Wolff v. McDonnell*, 1974). This

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decision was made rather recently in history and clearly limits the civil status of inmates. Judicial law has continuously contributed to reaffirming the status of prisoners as slaves through numerous court decisions over the past 150 years.

## Design

### Geographical Design

In addition to laws, prisons have a geographical connection to slavery. Many prisons, specifically in Southern states, are located on former plantation sites. These locations can be visualized in Paul Rucker's art-video, "Proliferation", which portrays the history of physical prison locations in the United States since the country was founded. For example, the Angola plantation was purchased by the Louisiana government in 1880 to be converted into a prison—the slave housing became prison cells and inmates worked on the land (Browne, 2007). The process of transforming old plantations into prisons occurred throughout former slave states to continue production through free labor. A prisoner's body also has the same status geographically as a slave's body. In the case of *Ruffin v. Commonwealth* (1871), Ruffin committed a crime while he was leased to a railroad company in Ohio, but his trial took place in Virginia. Ruffin argued that he was entitled to a new trial located where the crime took place, but the court disagreed because "in the eye of the law he is always in the penitentiary" (*Ruffin v. Commonwealth*, 1871, p. 6). Just as plantations and slave owners put a label on slaves' bodies, mass incarceration and the criminal justice system put a label on prisoners' bodies. In *Ruffin v. Commonwealth* (1871), the court mentions that a convict can only be released by serving their sentence, but even today, people who are released have the title felon attached to their bodies for years, which negatively impacts every aspect of their



lives. In both slavery and mass incarceration, the bodies are always attached to the institution.

### **Architectural Design**

Another way in which prisons mirror slave plantations is through their architecture. A panoptic design allows many individuals to be watched at all times by one observer and is a common architectural design for prisons. Foucault (1975) describes the design as

Each individual...is securely confined to a cell from which he is seen from the front by the supervisor; but the side walls prevent him from coming into contact with his companions. He is seen, but he does not see; he is the object of information, never a subject in communication. (p. 5)

Prisoners are always being watched by guards while incarcerated, just as slaves were always being watched while on the plantation. Both prisoners and slaves have also been prohibited from communicating with one another, but each found ways around that. Mass incarceration involves more than the prison structure and individuals attached to it; mass incarceration is a way of life and enters into all aspects of society. The panoptic design is used to police the behavior of the public, even as early as childhood. Teachers are the guards who monitor the behavior of the children to ensure they always feel like they are being watched to encourage good behavior; for example, teachers will often claim they have “eyes on the back of their head”. Constant observation is a technique that has been incorporated into the architectural designs of slavery and mass incarceration from the beginning, and has become just as prevalent in society as a whole.

## **Operational Design**

Prisons are also operationally similar to slavery in multiple aspects. On plantations, everything about a slave's life was determined by other individuals, normally the plantation owners and guards. In prisons, everything about an inmate's life is also determined by other individuals. Prison administration revolves around inmates' bodies: "counting them, containing them, observing them, moving them, feeding them, exercising them, working them, restraining them, and releasing them" (Garland, 2011, p. 769). Administrators even decide an inmate's "diet, hygiene, work, medical care, exercise, isolation, and association" (Garland, 2011, p. 769). The operational design of slavery was aimed at breaking the individual slaves by stripping away their humanity and connection to a population. The Stanford Prison Experiment demonstrated that similar results would likely take place in any prison. Prisons are operationally designed to break inmates from the first moment they enter the facility. Guards are permitted to do almost anything to gain control and assert their authority over the prisoners, as was seen very quickly in the Stanford Prison Experiment. Prisoners are not even allowed an identity while incarcerated; they are referred to as a number. Prison guards and administrators are given a lot of freedom with prisoner treatment because they are mostly unregulated (Garland, 2011). Guenther (2012) believes that the "simplest and most devastating" (para. 1) way to destroy an individual is through solitary confinement. When large scale state prisons were being built, there was a competition between the Pennsylvania system, which was exclusively solitary confinement, and the Auburn system, which utilized prison labor. The Pennsylvania system lost to the Auburn system, but solitary confinement can still be found in nearly every prison and

correctional institution in the United States today. Isolation forces individuals to lose a sense of themselves and their “being in the world” (Guenther, 2012, para. 4). The operational designs of slavery and mass incarceration are comparable in the logistics of both institutions and in how they target individuals’ sense of self.

### **Society**

Mass incarceration and slavery could not have become such large institutions without being normalized in society. In the South, slavery was crucial to the economy and citizens accepted it completely. There were even some individuals, such as Thomas Jefferson, who were publicly against slavery but still owned slaves themselves. Plantations and slaves were a part of everyone’s lives in the region. They were always there, but were largely unnoticed. Sandow Birk’s paintings in *Incarcerated: Visions of California in the Twenty-first Century* illustrate this same phenomenon in modern society. Birk’s work focuses on California prisons, but the same concept can be seen throughout the United States. Prisons today are located extremely close to well-populated areas, but residents rarely notice them. The structures blend into the landscape and become almost invisible despite being built in open fields, just as plantations were. Mass incarceration is always portrayed in the media too. The criminal justice system can be seen on television at any time either as a real story on the news or a fictional program. American culture has an “attraction to litigation and legal formality” (Murakawa, 2010, p. 2) which has resulted in a litigious society. Americans are obsessed with the legal system, so much so that they will plan their lives around interactions with the law. Davis (2003) believes, “The prison is one of the most important features of our image environment [and] has caused us to take the existence of

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prisons for granted. The prison has become a key ingredient of our common sense” (p. 18). Individuals are unable to imagine their lives without prisons.

This normalization of the legal and criminal justice systems created an environment where mass incarceration was not only accepted but also demanded. In California, it took over 100 years for the first nine prisons to be built and in less than a decade that number doubled (Davis, 2003). Today, there are 33 prisons in California, a majority of which were built in the past 30 years (Davis, 2003). The prison population in California grew by 500% in less than two decades even though the crime rate was continuously decreasing that entire time (Gilmore, 2007). In the United States as a whole, there are over seven million individuals in the criminal justice system (Murakawa, 2014). The size of the prison population and number of prisons has been able to grow so tremendously because of legislation and public support. Politicians realized that being “tough on crime” and making society safer were promises that all citizens could support, regardless of political ideology. Punitive policies, such as mandatory minimums and the Three Strikes laws, took off in the early 1980s and continued into the late 1990s and early 2000s (Murakawa, 2014). Murakawa (2014) even found a “death penalty bidding war” (p. 131) in her research, where Republicans and Democrats would go back and forth creating more and more death-eligible crimes to beat the other, almost like a game. Politicians did not do this behind closed doors; they did this as a response to the public’s requests. The media would exaggerate stories and politicians would play off the public’s fear and claim that the only solution was more laws and more prisons. Society asked for more prisons and required that legislators do more to eliminate the bad people from society. Slavery grew in a similar

way: citizens were told that the slaves were property and that they were necessary for the economy. Having slaves solved problems like cooking, cleaning, and working in the field. Public support was the only way for institutions such as slavery and mass incarceration to grow, and the public supported both wholeheartedly.

### **Conclusion**

Mass incarceration is a terrible aspect of American society, but it is not an isolated problem. The system developed directly from slavery and the two are still very obviously connected in more than a purely economic way. Most Americans are taught to believe that slavery is something to be ashamed of; but the country has come a long way since then and it is ultimately just a part of the past. Racism is argued to be gone and all people are supposedly treated fairly. Unfortunately, this is not the case. Racism still exists and minorities are mistreated, both by individuals in society and by the justice system as a whole. Mass incarceration did not replace slavery—it continued slavery under a new name. Constitutional law legalized slavery as a permanent practice in the United States and judicial law reinforces the practice with every case referring to legal precedent. The architectural and operational designs are also the same in both systems. The physical, geographical site of many prisons in the United States are even in the exact same locations as former slave plantations. These same strategies for controlling and breaking individuals in mass incarceration and slavery have moved into society as a mechanism to control the public and ultimately, further expand the exploitative systems. Slavery could not have been continued through mass incarceration without the support of the public, which was easily gained through a normalization process. The 13<sup>th</sup> Amendment created a

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loophole for the continuation of slavery, which society has expanded and built off of for over 100 years to create what is now referred to as mass incarceration.

### References

- Birk, S. *Incarcerated: Visions of California in the twenty-first century*.
- Browne, J. (2007). Rooted in slavery: Prison labor exploitation. *Race, Poverty, & the Environment*, 14(1), p. 42-44.
- Constitutional Rights Foundation. *The Southern "black codes" of 1865-66*. Retrieved from <http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html>
- Davis, A. (2003). *Are prisons obsolete?* New York: Seven Stories Press.
- Du Bois, W.E.B. (1920[1999]). *Darkwater: Voices from within the veil*. New York: Dover Publications, Inc.
- Foucault, M. (1975). *Discipline and punish: The birth of the prison*. Vintage Books.
- Garland, D. (2011). The problem of the body in modern state punishment. *Social Research*, 78(3), p. 767-798.
- Gilmore, R. W. (2007). *Golden gulag: Prisons, surplus, crisis, and opposition in globalizing California*. Berkeley: University of California Press.
- Guenther, L. (2012). The living death of solitary confinement. *The New York Times*.

- Murakawa, N. (2010). Symposium on Silverstein's law's allure: Law's strange allure: The power of legal lore beyond the law-politics divide. *Law & Social Inquiry*, 35.
- Murakawa, N. (2014). *The first civil right: How liberals built prison America*. New York: Oxford University Press.
- Rucker, P. (n.d.). "Proliferation".
- Ruffin v. Commonwealth* (1871). 62 Va 790
- Sarat, A. & Kearns, T. R. (2005). *History, memory, and the law*. Ann Arbor: The University of Michigan Press.
- United State Constitution. (1787). Philadelphia.
- Wolff v. McDonnell* (1974). 418 US 539

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