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Amendment XIII:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

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INTRODUCTION

"The crime of color" has held sway in various incarnations since the colonial era, the period that Paul Finkelman emphasizes in his article of

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that title.[1] Michelle Alexander characterizes what she calls "mass incarceration in the age of colorblindness" as "the new Jim Crow."[2] Before the "new" Jim Crow came the "old" Jim Crow. Exploring the hinge years between chattel slavery in the South and the "old" Jim Crow of the late 19th and early 20th centuries, this Article focuses on the mid-1860s, concentrating on the closing part of the Civil War as well as the early post-war years.

That brief period brought debate over a proposed Thirteenth Amendment, which embedded in the U.S. Constitution language designed to achieve universal emancipation. This debate revealed the dominant direction taken in penal policy in the South under that amendment. A study of those years reveals a missing link between the pre-emancipation form of slavery and the modern carceral state of mass imprisonment, a link that was formed at the very moment of the declared end to enslavement. Even though the Amendment prohibited slavery in general, it nonetheless made an exception for slavery if imposed as punishment for a crime.

This Article takes Paul Finkelman's focus on the origins and legacy of black as criminal and combines it—at a later time than under chattel slavery—with black as a laborer. With an end declared to individual ownership of enslaved laborers, new questions arose regarding the liberty and labor of former slaves. A legal, political, and economic struggle ensued over who would control black southerners' liberty and labor—that is, whether it would be black southerners themselves who would hold this control. Part I recounts how the Thirteenth Amendment expressly permitted a recurrence of slavery, provided only that such enslavement constitutes a punishment for violating a criminal statute. Part II explores the new forms of slavery that spread across the South in ways more or less consistent with the language of the Thirteenth Amendment.

I. AUTHORIZING SLAVERY THROUGH AN ABOLITION AMENDMENT

A. Maryland, 1866

On December 8, 1866, in Annapolis, Maryland, a crowd gathered at the county courthouse for an auction.[3] A recent advertisement in the *Annapolis Gazette* had called the public's attention to the upcoming event

1. Paul Finkelman, *The Crime of Color*, 67 TULANE L. REV. 2063 (1993).

2. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

3. DENNIS CHILDS, SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY 57 (2015).

with the language "Public Sale . . . a Negro man named Richard Harris, for six months, convicted at the October term, 1866 of the Anne Arundel County Circuit Court for larceny and sentenced by the court to be sold as a slave. Terms of sale—cash."[4] Had the date been a full year earlier, in early December 1865, it would have come before ratification of the Thirteenth Amendment. Yet Maryland abolished slavery in 1864, so the Thirteenth Amendment did not occasion the starting point for a post-slavery environment.[5]

Continuing after ratification, a series of announcements later that month called for sales of other people, among them "a negro man named John Johnson . . . sentenced to be sold" for one year;[6] "a negro man . . . named Gassaway Price . . . to be sold for a term of one year";[7] "a negro woman . . . named Harriet Purdy . . . to be sold for a term of one year";[8] and "a negro woman . . . named Dilly Harris . . . to be sold for a term of two years."[9] The charge originally brought against each of these five people—called "larceny" in the advertisement although it was actually "petit larceny"—specified the theft of a hog, for example, or of a bushel and a half of wheat.[10] For the services of Harriet Purdy for a year, for her alleged theft of a pair of boots, a white man named Elijah Rockhold paid $34.[11]

The Maryland statute under which these men and women were being sold into slavery, slavery for terms of half a year to two years, dated in its most recent incarnation to 1858, though the public auctions of black bodies, ostensibly free, dated back to 1835.[12] The 1858 statute was evidently still in force in 1866, including its pointed identification of "free negroes" as its target, though no longer applying the original minimum sentence of two years. The 1858 law declared that "in all cases hereafter, where free negroes shall be convicted of the crime of simple larceny, to the value of five dollars and upwards, . . . they shall be sentenced to be sold as slaves for the period

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4. *Id.*

5. CHARLES WAGANDT, THE MIGHTY REVOLUTION: NEGRO EMANCIPATION IN MARYLAND, 1862–1864 (1964).

6. CHILDS, *supra* note 3, at 57–58.

7. *Id.* at 58.

8. *Id*.

9. *Id.*

10. *Id.*

11. *Id.* at 58–59. The payment of $34 went from Elijah Rockhold to the sheriff and Anne Arundel County, not to Harriet Purdy. All of the property involved in the transaction, from the boots to the cash to Harriet Purdy's black body, had been, or in Harriet Purdy's case became, the property of whites. *Id.*

12. *Id.* at 59–60.

of not less than two nor more than five years."[13] As to the charge, larceny was the chosen focus of this instrument of punishment, "to be sold as slaves" for all "crimes against the State," provided that defendants were "free negroes."[14]

Before universal emancipation came in the 1860s, Maryland had a substantial population of free people of color, the largest of any state in the nation.[15] Moreover, Baltimore was home in 1860 to more free people of color than any other American city.[16] The antebellum state, monopolized by white Marylanders, had found a way to curtail, or expropriate, the freedom of free people of color. This subjugation of free people of color was achieved by putting the law of crime and punishment to work to bring them back down to a condition of unfreedom—or, viewed another way, to colonize them within the territory of the state by propelling them beyond the boundaries of freedom.

Whether before or after the "end" of slavery, these "slaves" were not to be held in perpetuity, but for a period of years. Even after all black Marylanders had moved into the category of free people, the statute lost none of its ferocity, nor did it shed its racial specificity. These circumstances could exist because the Thirteenth Amendment expressly allowed state actions such as those taken by Maryland authorities.

B. The Thirteenth Amendment and Slavery as Punishment

At the same time the Thirteenth Amendment prohibited slavery in general, it expressly permitted enslavement, or involuntary servitude, as "a punishment for crime whereof the party shall have been duly

13. *Id.* at 60.

14. *Id.*

15. Erin Bradford, University of Virginia Library, *Free African American Population in the U.S.: 1790–1860*, GEOSTAT HISTORICAL CENSUS BROWSER, http://ncpedia.org/sites/default/files/census_stats_1790-1860.pdf [https://perma.cc/6T3N-PB45] (last visited Aug. 1, 2016). Even not counting the city of Baltimore, Maryland had more free residents of color in 1860 than any other state.

16. Maryland State Archives, *Black Marylanders 1860: African American Population by County, Status & Gender*, LEGACY OF SLAVERY IN MARYLAND, http://slavery.msa.maryland.gov/html/research/census1860.html [https://perma.cc/3LTJ-YBDA] (last visited July 31, 2016); *see also* IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 136, 181 (1974).

convicted."[17] This language is almost exactly the same as the Northwest Ordinance of 1787, which served as a model for the Amendment.[18]

Although this exception proved to be very important, even the best modern scholarship on the Thirteenth Amendment has overlooked or understated it. Legal scholar Alexander Tsesis mentions at one point that the Amendment "did not bar involuntary servitude as a form of criminal punishment."[19] Yet Tsesis deploys expansive language in saying that the Amendment "prohibited all the vestiges of involuntary slavery [*sic*], whether imposed by public or private actors."[20] Additionally, he seems to neglect the exception when writing that "Congress drafted the Thirteenth Amendment broadly enough to end any contemporary or future manifestations of involuntary servitude."[21] Perhaps Section 2 of the Amendment suggests such a possibility in the future, but even if so, Section 1 certainly did not have that effect.

Political historian Michael Vorenberg's fine study of the origins of the Thirteenth Amendment mentions but does not explore the ominous possibilities retained in the Amendment.[22] He references the Northwest Ordinance as the source of the language that "neither slavery nor involuntary servitude" would be permitted in the territory covered by that ordinance, but he scarcely notices the exception in both the Ordinance and the Amendment that slavery would still be permitted as a punishment for crime.[23]

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17. U.S. CONST. amend. XIII, § 1.

18. Article 6 of the Northwest Ordinance reads:

> There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT art. VI (U.S. 1787); *see also* JACK RAKOVE ET AL., THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY (Frederick D. Williams ed., 1989).

19. ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 52 (2004).

20. *Id.* at 104–05.

21. *Id.* at 61.

22. MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2004).

23. *Id*. at 55–57. Vorenberg mentions the punishment provision, but does not pursue the matter. *Id.* at 56, 241. A more recent writer does not even take note of

The Thirteenth Amendment could have used language that banned slavery outright and left only involuntary servitude available as a punishment for crime. The 1857 Iowa Constitution did so for that state.[24] In fact, Iowa Representative James F. Wilson's proposal in December 1863 of a version of what became the Thirteenth Amendment carried over the distinction between slavery as absolutely banned and involuntary servitude as nonetheless permitted as a punishment.[25] Just a few years earlier, the congressman had been a member of the constitutional convention that had developed the language in the new state's charter,[26] and now he adapted that language to a new purpose: "Slavery, being incompatible with a free government, is forever prohibited in the United States; and involuntary servitude shall be permitted only as a punishment for crime."[27]

The Senate Judiciary Committee, however, borrowed more directly from the 1787 Ordinance, and the distinction slipped away, though not without resistance. During deliberations on the Senate floor, Charles Sumner of Massachusetts objected.[28] He understood, he said, that the

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the Northwest Ordinance's exception. LEONARD L. RICHARDS, WHO FREED THE SLAVES? THE FIGHT OVER THE THIRTEENTH AMENDMENT 231 (2015). Some treatments of actual practice as it took shape in southern states, by contrast, emphasize the operations of the exception. *See* PETER WALLENSTEIN, FROM SLAVE SOUTH TO NEW SOUTH: PUBLIC POLICY IN NINETEENTH-CENTURY GEORGIA 196–207 (1987); ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 17–36 (1996). One scholar has ably examined the issue in Congress. Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983 (2009).

24. THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1138 (Francis Newton Thorpe ed., 1909). The Iowa Constitution provided that "there shall be no slavery in this State; nor shall there be involuntary servitude, unless for the punishment of crime." *Id*. The Kansas Constitution similarly stated that "there shall be no slavery in this state; and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted." *Id.* at 1242.

25. VORENBERG, *supra* note 22, at 50.

26. BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774–1996, at 2072 (Joel Treese ed., 1997).

27. CONG. GLOBE, 38th Cong., 1st Sess. 21 (1863). *See also* VORENBERG, *supra* note 22, at 50.

28. CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864).

language under consideration "starts with the idea of reproducing the Jeffersonian ordinance."[29] The 1787 language may have served in its day, he pointed out, but it ought not persist, three-quarters of a century later, in an amendment banning slavery throughout the nation. He stated, "Now, unless I err, there is an implication from those words that men may be enslaved as a punishment of crimes whereof they shall have been duly convicted."[30] Sumner proposed that there be no space in the amendment to permit slavery to continue under any guise.[31]

Nonetheless, the particular exception to the proposed general constitutional ban, clearly permitting slavery under the Thirteenth Amendment as a sentence for crime, remained in the version the Senate adopted. The House agreed to that language, and the proposed amendment made its way to the states for ratification.[32] The venerable language of the Northwest Ordinance carried too much gravitas for Congress to do more than tinker with it, as proponents of the Amendment sought to secure sufficient support to ensure its passage.[33]

One of the basic constitutional questions in 1865 was whether the 11 defeated states of the former Confederacy should be included in the denominator of states, three-fourths of which had to ratify before the proposed amendment could go into effect. The number of states would either be all 36 or only the 25 that had stayed in the Union. With Congress having adjourned without specifying which approach should be taken, the Lincoln administration determined to count all 36 states in the denominator.[34]

With that determination, the approval by 27 states was the minimum required to meet the three-quarters threshold. Therefore, ratification depended on the approval of at least five of the former Confederate states. The threshold of 27 could not be reached even if all 25 non-Confederate states ratified. In any case, the Union slave states of Delaware and Kentucky both rejected the Amendment, as did New Jersey.[35]

President Andrew Johnson, successor to President Lincoln, demanded that the former Confederate states ratify the Amendment before political restoration could take place—that is, before elected prospective members

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29. *Id.*
30. *Id*.
31. *Id.*
32. *Id.*; VORENBERG, *supra* note 22, at 112, 197–210.
33. VORENBERG, *supra* note 22, at 38, 56–57, 59.
34. *Id.* at 54, 222–33.
35. *Id.* at 232. These were the same three states that Lincoln failed to carry in the 1864 presidential election. *Id.* at 174.

could take their seats in either house of Congress.[36] This ultimatum encouraged enough states to ratify throughout 1865 that Georgia's acquiescence in early December of that year supplied the requisite 27th state.[37] Secretary of State William E. Seward therefore announced on December 18 that the Thirteenth Amendment had become part of the Constitution.[38]

C. "They Can Establish Any System of Crimes and Punishment They Please"[39]

People involved in the framing and the ratification of the Thirteenth Amendment focused their attention on Section 2, regarding enforcement, rather than on Section 1, which contained the punishment exception. During the ratification process, many state legislators expressed concern that the Thirteenth Amendment might empower Congress to legislate on the status and rights of African Americans, whether in the former slave states or in the rest of the nation.[40] Northern Democrats, in Indiana for example, as well as legislators in Union slave states, notably Kentucky, voiced a commitment to retain state jurisdiction in such matters.[41] As Vorenberg points out, even Republicans tended to agree that the Amendment did not by itself confer black citizenship, let alone black political rights.[42] Illinois repealed its black code at about the same time that it ratified the Amendment, without connecting the two gestures; Kentucky legislators proposed that any ratification by their state by no means conferred on former slaves any more rights than free people of color had been previously accorded.[43] In general, it seemed that under the Thirteenth Amendment, states would retain authority to legislate on the status of black residents, even though chattel slavery was abolished.[44] Aside from any such concerns or understandings, the exception to universal freedom from enslavement, as sketched in the Amendment's

36. *Id.* at 227–32.
37. *Id*. at 233.
38. *Id*.
39. SIDNEY ANDREWS, THE SOUTH SINCE THE WAR, AS SHOWN BY FOURTEEN WEEKS OF TRAVEL AND OBSERVATION IN GEORGIA AND THE CAROLINAS 371 (1866).
40. VORENBERG, *supra* note 22, at 216–18, 220–22.
41. *Id.*
42. *Id.* at 221–22.
43. *Id.* at 217, 220.
44. *Id*. at 222.

clause permitting slavery as punishment for crime, implied continued state jurisdiction over the law of crime and punishment.

In the months between Robert E. Lee's surrender at Appomattox and the ratification of the Thirteenth Amendment, Sidney Andrews, a young white journalist from Illinois, spent three months traveling through Georgia and the Carolinas.[45] Reporting on the state constitutional convention in South Carolina, in which the proposed Thirteenth Amendment was being debated, he recounted how a delegate had pointed out that, under the exception, a state might "re-establish the condition of slavery by a system of crimes and punishments impliedly authorized by that clause."[46] From southwestern Georgia, Andrews reported the language of a former Confederate general, John T. Morgan, as published in a local newspaper: "He urged that, as the Constitution gives the power to inflict involuntary servitude as a punishment for crime, a law should be so framed as to enable the judicial authorities of the State to sell into bondage again those negroes who should be found guilty of certain crimes."[47]

One scarcely had to be in favor of such a move to be mindful that it had many supporters. One white man in Georgia, discussing "selling [freedmen] into slavery again" stated,

> I know a good many of these men they've sent to the Legislature; and I know there'll be private talk this session, even if there isn't open effort, to make the penal code take him back into the condition of slavery. Why, I know men right here in this very town who believe in making the breaking of a contract a crime for which the nigger may be sold. They can do it. They can establish any system of crimes and punishments they please. I don't say they will do that, but I know many men who would vote for doing it. You Northern men can't see much of the real feeling here. Get the troops away and the State into Congress, and I give you my solemn word that I believe three fourths of the counties in the State would vote for such a penal code as would practically reduce half the negroes to slavery in less than a year.[48]

These declarations or observations by people in South Carolina and Georgia clearly struck Sidney Andrews as ominous. Those comments demonstrated that Maryland's post-war use of its pre-war law targeting

45. ANDREWS, *supra* note 39.
46. *Id.* at 323–24.
47. *Id.* at 324.
48. *Id.* at 371.

free people of color fit a widespread set of attitudes and behaviors, one that reflected how little the Thirteenth Amendment might do to transform the law of race and crime and punishment.

D. An "Honest Construction of the Anti-Slavery Amendment"[49]

By no means did the Thirteenth Amendment bring an end to enslavement in the United States. The reporting from Sidney Andrews during the summer of 1865 pointed toward the possibility, even likelihood, of slavery's persistence, as did the language of the Amendment itself. The rhetoric from late 1866 in Maryland's Anne Arundel County, if anomalous, is only so in its frank use of the term "slave" as punishment for conviction of an alleged crime. Moreover, surely members of Congress had sufficient awareness of the brutalities of slavery to be cognizant of the meaning of the exception in the Thirteenth Amendment.[50] Then again, those same people might well have never conceived of the extent of the slavery the Amendment permitted or the degree of brutality the exception might entail.

The Thirteenth Amendment did not put an end to the viability of Maryland's pre-war provision for enslavement as punishment for crime, even though the punishment was for a period of time and not forever. Rather, the exception made slavery as a punishment for crime an entirely legal concept. The degree to which Maryland authorities might continue to target free people of color, a vastly enlarged group even in that state, was an open question.

As public authorities in southern states moved quickly to adopt some form of selling or leasing of convicts to private citizens, many members of Congress perceived that the Thirteenth Amendment left work to be done, beyond the continuing question of what legal rights black southerners who were never accused of a crime should have.[51] Widespread examples of Richard Harris's experience in Maryland, auctioned off to a private citizen as a "slave," looked to some members of Congress as far too much like slavery, and the practice certainly did not leave convicts under the control of public authorities.

Acting on these concerns, Congressman John A. Kasson of Iowa introduced a resolution in January 1867 to clarify the intent of the Thirteenth Amendment's exception.[52] He proposed using Section 2 to

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49. CONG. GLOBE, 39th Cong., 2nd Sess. 348 (1867).
50. Howe, *supra* note 23, at 996–1008.
51. THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965).
52. CONG. GLOBE, 39th Cong., 2nd Sess. 324 (1867).

address what had become a readily apparent deficiency in Section 1. His resolution explained the intent of the Thirteenth Amendment framers:

> [To prohibit] slavery or involuntary servitude forever in all forms, except in direct execution of a sentence imposing a definite penalty according to law, which penalty cannot, without violation of the Constitution, impose any other servitude than that of imprisonment or other restraint of freedom under the immediate control of officers of the law and according to the usual course thereof, to the exclusion of all unofficial control of the person so held in servitude.[53]

Before the House voted on Kasson's resolution, he explained that it sought "the honest construction of the anti-slavery amendment to the Constitution."[54] The resolution to enforce the Thirteenth Amendment passed the House by a vote of 121 to 25; the Senate, however, postponed consideration of it "indefinitely."[55]

Thus, a post-ratification clarification of the Thirteenth Amendment's intended meaning slipped away, much as Senator Sumner's objection had back in 1864.[56] The failure of the resolution came two months before Congress enacted the first of its Reconstruction Acts.[57] A new form of politics came to the former Confederate states, but the convict-lease system unfolded regardless.

II. SLAVERY IN THE POST-CIVIL WAR SOUTH

The sentence that Maryland authorities in Anne Arundel County imposed in December 1866 upon Richard Harris developed into a writ-small version of what occurred in the American South in the generations after slavery had been formally abolished.[58] Slavery had been banned "except as a punishment for crime whereof the party shall have been duly convicted."[59] Writ large, the experience of Richard Harris became

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53. *Id.*
54. *Id.* at 348.
55. *Id.* at 348, 1600.
56. *See* discussion *supra* Part I.B.
57. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988).
58. *See* discussion *supra* Part I.A.
59. U.S. CONST. amend. XIII, § 1.

emblematic of much of the South, not just in the late 1860s but well into the 20th century.

A. John Henry—Prototypical Post-War Slave

Legend has it that John Henry, a black man in the post-emancipation South, died while racing a machine to drill a railroad tunnel through an Appalachian mountain.[60] John Henry was an actual person, a native of New Jersey, who turned 18 years old near the end of the Civil War.[61] In April 1866, he was arrested in Virginia on the charge of a petty crime.[62] Eventually, he was consigned to what proved to be the incipient convict-leasing system. The 19-year-old John William Henry was sentenced to ten years in the Virginia Penitentiary; then in 1868, he was leased to work on the Chesapeake and Ohio Railroad.[63] Inmate John Henry did not remain in the custody of state authorities, nor did he remain within the territory of Virginia. In 1871, he died near Talcott, West Virginia, halfway through his sentence.[64]

According to the Thirteenth Amendment, people born as slaves in the pre-war South were supposed to die free in the post-war world. That supposition did not, however, fit the case of John Henry. Instead, born a free man in the North before the Civil War, he fell into slavery in the South soon after the war ended and died there a slave.

The case of John Henry demonstrates that the area that utilized the convict-leasing system stretched well beyond the Deep South. The system lasted from soon after the end of the Civil War until long after John Henry's early death, and in fact well into the 20th century. Pre-war enslavement was tremendously damaging to millions of people. In contrast, the new form of enslavement directly affected fewer people, though still tens of thousands.[65] Regardless, this new form proved far more deadly.

The paltry actions for which such heavy penalties were exacted must also be brought into the conversation. The examples from Maryland,

60. SCOTT REYNOLDS NELSON, STEEL DRIVIN' MAN: JOHN HENRY—THE UNTOLD STORY OF AN AMERICAN LEGEND 1–2 (2006).

61. *Id*. at 38–39.

62. *Id.* at 41–47.

63. *Id.* at 54–69, 78.

64. *Id.* at 5–6, 88–92.

65. The Louisiana State Prison alone had roughly 1,000 inmates in 1900. MARK T. CARLETON, POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM 45 n.32 (1971).

including the conviction and sentencing of Richard Harris, illustrate the pattern for one month in one county in the Border South.[66] John Henry supplies another example—one from the Upper South. It might be true that John Henry actually stole something—though the author who excavated his story expresses some doubt, and even greater doubt that the value reached as high as the fairly low level that might bring into play the ten-year sentence he received.[67] Regardless, the routine penalties seem radically out of line for the alleged crime. Rather, as Sidney Andrews's informants suggested to him in 1865, it was easy to contrive a system of crime and punishment that could reduce "free" people to slavery.[68]

B. Chattel Slavery, Convict Lease, Chain Gang

In the South, in the decades following the Civil War, the forms of convict labor included most notably the convict-lease system and the chain-gang system. The convict-lease system came first, and most former Confederate states developed the system, in which convicts were contracted out to private enterprises, such as mining, agriculture, timbering, or railroad construction.[69]

Each system, whether the convict lease or the chain gang, featured a variety of punishments—beyond the punishment of confinement at hard labor—that, to employ the terms in the Eighth Amendment, no matter how "cruel," proved by no means "unusual." Georgia's Reconstruction constitution banned whipping "as a punishment for crime";[70] the state's first lessee, however, rejected any notion that the ban also applied to "the internal discipline of the Penitentiary."[71] Later in the century, a Georgia governor agreed with the distinction, stating, "Whipping Bosses are not Agents of the State."[72] As a Georgia prosecutor explained in 1904, "[Convicts] will not do a good day's work unless [the bosses] whip

66. *See supra* Part I.A.

67. NELSON, *supra* note 60, at 52–53, 57–58.

68. *See supra* Part I.C; ANDREWS, *supra* note 39.

69. EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH 185–222 (1984); CARLETON, *supra* note 65, at 11–58; MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928 (1996).

70. THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 24, at 824. That constitution also declared, in Art. I, Sec. 16, "nor shall any person be abused in being arrested, whilst under arrest, or in prison." *Id*. at 823.

71. LICHTENSTEIN, *supra* note 23, at 53.

72. *Id.* at 143.

them."[73] James W. Abbott, a road engineer visiting the South for the U.S. Department of Agriculture's Office of Public Roads, wrote a U.S. senator that same year, stating, "Wherever they use convict labor on the roads in the South it is nearly all colored, and they control them with the lash."[74]

The enormity of the punishment exception came into vivid view in states such as Georgia, Florida, Alabama, Mississippi, and Louisiana. The analogy of pre-Civil War slavery in the South supplies some avenues for consideration. Slave adults in the antebellum era had very limited ability to protect their family, whether from whipping, sexual abuse, or sale to an unknown and distant place.[75] As for such sales, the slaves recruited to cotton plantations in Mississippi in the 1830s, for example, had all been uprooted. Even in Virginia or Maryland, although a majority of slaves never entered the slave trade in the Deep South, tens of thousands did, and the ramifications of each one who did rippled across families and communities. More than that, other members of those families and communities could never be certain that they would not be next. Therefore, not only enslavement, but also the slave trade—the interstate slave trade in particular—had virtually universal salience among black southerners.[76]

At some point in the first quarter of the 20th century, the former Confederate states abandoned the convict lease for the chain gang, under which inmates worked on public roads.[77] Plantations, railroads, and mines were fine for private uses of expropriated labor, but the automobile brought a new need for labor—labor on public roads. The chain gang was not entirely new, for it was seen almost immediately after the war brought universal "emancipation" and thus freed black bodies for unfree employment in new ways.[78] Not only did the chain gang's dominance come just in time to promote the "good roads" movement, it also freed up men who had previously worked for a few unpaid days each year under the old corvée system.[79]

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73. *Id.* at 183.

74. *Id*. at 184–85.

75. PETER KOLCHIN, AMERICAN SLAVERY, 1619–1877, at 133–68 (2003).

76. *Id*. *See also* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956); STEVEN DEYLE, CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AMERICAN LIFE (2005).

77. WALLENSTEIN, *supra* note 23, at 205; LICHTENSTEIN, *supra* note 23, at 152–85.

78. WALLENSTEIN, *supra* note 23, at 198–99.

79. *Id.* at 196–207. *See also* LICHTENSTEIN, *supra* note 23, at 152–85; PETER WALLENSTEIN, BLUE LAWS AND BLACK CODES: CONFLICT, COURTS, AND CHANGE IN TWENTIETH-CENTURY VIRGINIA 15–35 (2004). The corvée was a tax paid in

One way to highlight the similarities between the pre-war and post-war systems of slavery is to compare two literary productions. Two slave narratives offer a striking comparison of antebellum slavery and the 20th century chain gang: John Brown's *Slave Life in Georgia* and Robert E. Burns's *I Am a Fugitive from a Georgia Chain Gang!* Point after point, Brown's narrative, written by a fugitive from slavery in the 1850s, finds an echo in its counterpart from the 1930s, the narrative written by white northerner Burns.[80] The 1932 movie *I Am a Fugitive from a Chain Gang*, closely based on Burns's book, was part of a wide campaign to end the chain gang, along with the convict-lease system, much as *Slave Life in Georgia* intended to contribute to the emerging literature against antebellum enslavement.[81] The two narratives are companion pieces in their themes of the arbitrariness of power and powerlessness, the utter harshness of living and working conditions, and the intricacies of plotting and implementing an escape.

Yet the contrasts between the pre-war and post-war systems of slavery are striking as well, and the post-war form of enslavement does not fare well in the comparison. Much has been written, for example, on the antebellum "slave family"—whether as a source of solace and community, a means of social control making any attempts by adults to seek to escape less likely, or a social unit suitable for raising the next generation of slaves.[82] The post-war forms of enslavement captured women as well as men,[83] but nowhere did the convict lease or the chain gang display patterns

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labor rather than cash, by free white men as well as by black men, slave or free. *Id*. at 18.

80. JOHN BROWN, SLAVE LIFE IN GEORGIA: A NARRATIVE OF THE LIFE, SUFFERINGS, AND ESCAPE OF JOHN BROWN, A FUGITIVE SLAVE (F. Nash Boney ed., 1991) (1972); ROBERT E. BURNS, I AM A FUGITIVE FROM A GEORGIA CHAIN GANG! (1932).

81. For the screenplay, together with an introduction, *see* HOWARD J. GREEN, BROWN HOLMES & SHERIDAN GIBNEY, I AM A FUGITIVE FROM A CHAIN GANG 9, 61 (Tino Balio & John E. O'Connor eds., 1981); *see also* LICHTENSTEIN, *supra* note 23, at 189–90.

82. *See* JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 149–91 (1979); HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925 (1976); ANN PATTON MALONE, SWEET CHARIOT: SLAVE FAMILY AND HOUSEHOLD STRUCTURE IN NINETEENTH-CENTURY LOUISIANA (1992).

83. *See* TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH (2015); SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY (2016).

similar to the distribution of genders, ages, and continuing close familial relations that characterized chattel slavery in the pre-war South.

C. "One Dies, Get Another"[84]

Chattel slavery in the long run-up to the Civil War was deadly. The post-war version proved far more lethal, however, with death rates among work crews—mostly black and mostly young adult male—that tremendously outstripped anything the pre-emancipation United States variants could show, even across the entire slave population, including the elderly and infants.[85] In the first year of Alabama's convict-lease system, the mortality rate ran 20%, in the second year 35%, and in the third year even more.[86] During a three-year period in the late 1870s, 45% of the South Carolina convicts working on one railroad died.[87] In Mississippi in the 1880s, white convicts usually stayed within the prison and therefore had a high likelihood of survival. Black convicts, by contrast, were routinely leased, and those leased had a mortality rate of 17% in 1882, a typical year.[88] Responding to a denunciation of the system, a man who leased convicts in Georgia stated in 1883: "Before the war we owned the negroes. If a man had a good negro, he could afford to take care of him; if he was sick, get a doctor. . . . But these convicts: we don't own 'em. One dies, get another."[89]

So went the dominant attitude among the makers and the beneficiaries of the post-war policy: "One dies, get another."[90] Labor was always valuable, as long as there was work to keep the person productive. After the ratification of the Thirteenth Amendment, however, the laborer who performed that labor was not valuable in any form to the person or corporation to whom he or she was consigned. Under chattel slavery, a

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84. CARLETON, *supra* note 65, at 45.

85. KOLCHIN, *supra* note 75, at 113–14.

86. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 57 (2008); AYERS, *supra* note 69, at 200–01.

87. WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861–1915 at 226 (1991).

88. DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 46 (1996).

89. CARLETON, *supra* note 65, at 45. This statement was made by a "southern man" at the National Conference of Charities in Louisville, Kentucky. *Id*. *See also* MANCINI, *supra* note 69, at 2–3.

90. CARLETON, *supra* note 65, at 45.

person held in bondage represented a substantial cash investment, and collectively slaves often made up the bulk of the value of slave owners' estates.[91] Under the convict-lease system, much less was at stake for the boss, even if no less was at stake for the person held in this new form of enslavement.[92]

Douglas A. Blackmon in *Slavery by Another Name* dramatizes the horrors of the American South in the generations between the Civil War and World War II and the constant jeopardy in which African Americans lived.[93] The post-war system of slavery entailed severe punishment even when it stemmed from no crime by the convict. Blackmon recounts the example of Green Cottenham, who was seized in Alabama in 1908 for "vagrancy"[94] and then was sentenced to 30 days at hard labor.[95] Unable to pay the fees associated with his trial—fees that would line the pockets of Newton Eddings, the man who arrested him and then testified against him—he found himself sold for more than six months.[96] During this time, he was confined to a deep mine, with whipping bosses ready to flog him should he fail to complete his daily task of removing eight tons of coal.[97]

John Davis, another black man in early 20th century Alabama, on his way home from work encountered Robert N. Franklin, a white man whose job, like that of Newton Eddings, entailed conscripting black workers.[98] Detained on no particular charge and sentenced to no particular length of time, Davis found himself to be one of a long string of black men similarly preyed on by Franklin.[99] Yanked away from his gravely ill wife and their children, who were left to fend for themselves, Davis was whisked off some distance to work on a massive cotton plantation alongside many other black men obtained in much the same manner.[100]

John Davis suddenly left farming one day as a free man and soon went to work as an unfree man, still in the agricultural business, but his experience reflected one of the South's great industries—the manufacture

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91. WALLENSTEIN, *supra* note 23, at 40–42.
92. CARLETON, *supra* note 65, at 45–46.
93. BLACKMON, *supra* note 86.
94. *Id.* at 1, 301–02.
95. *Id.* at 1, 302. Before settling on the charge of vagrancy, the court cast about for a suitable charge to bring against the young man, who had been detained for no particular reason. *Id*.
96. *Id*. at 302–23.
97. *Id*.
98. *Id.* at 124–29.
99. *Id*. at 126, 129–33.
100. *Id*. at 117–18, 132–33, 143–44.

of unfree workers out of ostensibly free men. Green Cottenham and John Davis found themselves caught up in what one author calls the "daily dragnet" that rounded up men who looked like convict labor material.[101] Newton Eddings and Robert N. Franklin, like many other white men in the Jim Crow South, played the roles of identifying the quarry and rounding up the victims of the daily dragnet.[102]

In light of the workings of the slave regime in the long aftermath of the Civil War, a recent book explores what the author calls "post traumatic slave syndrome."[103] The author, although also touching on the 20th century experiences of black southerners, notably her father, seems to miss the enduring and far more recent immersion in a world in which the post-war form of slavery was an omnipresent fact of life.[104] Counting the number of official convicts might be useful, although at the local level, with John Davis as just one example, there were countless more. Yet counting the people directly affected as family members, including every black man who might consider himself a prospective victim of this particular harassment and terror and every woman and child who lived as hostages to what might befall the men in the family, provides a new perspective. The post-Civil War age of slavery—what Blackmon terms the "Age of Neoslavery"[105]—brought inconceivable physical pain, incalculable psychic pain, and innumerable years of expropriated labor and wealth across the African-American South.

D. Denouement of Slavery Under the Thirteenth Amendment

The Thirteenth Amendment abolished slavery in general. Yet into the 1930s, countless non-slave and therefore purportedly "free" southerners, preponderantly black men, contributed their unfree labor to the development of southern roads and highways.[106] Gradually the convict-lease and chain-gang systems lost their dominance in the South. Convict leasing developed

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101. LICHTENSTEIN, *supra* note 23, at 169. *See also* PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901–1969, at 51–52 (1972).

102. BLACKMON, *supra* note 86, at 129, 137–38.

103. JOY DEGRUY, POST TRAUMATIC SLAVE SYNDROME: AMERICA'S LEGACY OF ENDURING INJURY AND HEALING (2005).

104. *Id*. at 140–42.

105. BLACKMON, *supra* note 86, at 402.

106. One excellent examination, focusing on Georgia, is TAMMY INGRAM, DIXIE HIGHWAY: ROAD BUILDING AND THE MAKING OF THE MODERN SOUTH, 1900–1930, at 129–62 (2014).

tremendous opposition, much of it material rather than ideological,[107] eventually gaining sufficient traction to bring the system to an end. However, inmates might have had a hard time distinguishing the horrific details of the convict-lease system from those of the chain-gang system that followed. In turn, federal programs in the years of the Great Depression and the New Deal discouraged, and in fact banned, the use of chain-gang labor on the roads.[108] The urgent need to find paying work for free men overrode any perceived benefits of the chain gang.[109]

As for the world that followed the chain gang, the attention turned to the carceral state in its more modern incarnation. Black migrants from the South, as they left behind the world of the convict lease and the chain gang, found themselves subject to a different kind of carceral state in the North. Alternative institutions in the South also materialized with the Parchman Penitentiary in Mississippi and the Louisiana State Penitentiary at Angola.[110] As did Parchman and Angola, the gulags of New York and California served as reminders that the story scarcely ended when the convict lease or the chain gang did. What followed grueling labor outside a penitentiary was enforced idleness in a fortress warehouse, often accompanied by solitary confinement for months or years at a time.[111]

CONCLUSION

The post-Civil War edition of slavery, as authorized under the Thirteenth Amendment, persisted for almost as long as the pre-war version under the 1787 Constitution. A crucial exception to the abolition amendment, largely neglected by scholars but virtually omnipresent to contemporaries, facilitated that excruciating fact. Despite the Thirteenth Amendment, or rather in apparent conformity with its terms, southern policymakers found a way to formulate state laws to impress huge numbers of mostly black men into new forms of slavery, which endured for generations—whether in plantation agriculture, coal mining, road building, railroad construction, or the timber industry. To what extent, one

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107. MANCINI, *supra* note 69, at 225–27.

108. WALLENSTEIN, *supra* note 23, at 206–07; LICHTENSTEIN, *supra* note 23, at 190–91.

109. WALLENSTEIN, *supra* note 23, at 207; LICHTENSTEIN, *supra* note 23, at 190–91.

110. For Mississippi *see* OSHINSKY, *supra* note 88; for Louisiana *see* WILBERT RIDEAU, IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE (2010).

111. Alexander, *supra* note 2; HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT (Jean Casella et al. eds., 2016).

might ask, is America in 2016 still Maryland in 1866? In what ways do the three systems differ: the era of chattel slavery and the slave trade, the era of convict leasing and the chain gang, and the era of the carceral state of the early 21st century? The type of institution that might replace the latest incarnation of mass unfreedom, and whether it will be a substantial improvement over all of them, remains to be seen.