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Punishment Clauses: Amending United States Constitutions to Pursue “Complete Abolition”

By: Sydney Osterweil-Artson

The Universal Declaration of Human Rights (“UDHR”) proclaims, “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”^[1] Though not legally binding, the document denotes international principles of fundamental human rights.^[2] The United States Constitution fails to enshrine the UDHR’s categorical denunciation of slavery and servitude, with the Thirteenth Amendment reading: “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.”^[3]

The Thirteenth Amendment abolished *de facto* slavery, or chattel slavery, yet the Punishment Clause—“except as a punishment for crime”—permits slavery and servitude to be implemented for and in the course of punishment. The Punishment Clause (also coined “Exception Clause” or “Labor Clause”) is a loophole to legally target and incapacitate people, and this “clause legitimized a new system of slavery by offering up incarcerated individuals as a renewed, involuntary workforce, depriving incarcerated individuals of constitutional protection from forced labor.”^[4]

After the 1865 ratification of the Thirteenth Amendment, the Black Codes criminalized and incarcerated Black individuals for minor crimes, such as loitering and vagrancy.^[5] Incarcerated individuals were leased for labor, at times on the plantations on which they were formerly enslaved.^[6] Abundant scholarship positions mass incarceration as an iteration of slavery, evolving throughout the Jim Crow Era, War on Drugs, and proliferation of prisons.^[7]

Modern carceral structures, including prisons, jails, and detention centers, disproportionately target Black and Brown individuals.^[8] The United States has the world’s largest prison population, holding over two million people of its population captive.^[9] In 2019, approximately 65 percent of the United States prison population was Black, despite Black individuals constituting 14.6 percent of the overall population; and as “non-black people of color are represented in the prison population commensurate with their demographic presence in the U.S. society, the criminal justice system bears a specifically antilock character that directly indicts its place within the U.S.’s longstanding status as a slaveholding society.”^[10] In other words, incarceration upholds and perpetuates the white-supremacy of its preceding slavery institutions and social hierarchies.^[11]

Further, the consequences of incarceration pervade communities multidimensionally. Prisons: disturb environments with excessive pollution and toxic chemicals, failing local and federal standards;^[12] pose public health issues;^[13] impose social disorganization and negative social and economic outcomes onto marginalized communities;^[14] impair public safety and exacerbate violence;^[15] and divert public resources and services away from education, transportation, and healthcare.^[16]

The movement to repeal the Punishment Clause represents a necessary, albeit incremental and perhaps nominal, rejection of this nefarious system. Such efforts to amend federal and state constitutions also inch the United States closer to actualizing the UDHR’s unconditional *de facto* prohibition of slavery and servitude.

Colorado was the first state to amend its constitutional slavery provision, amended to read: “There shall never be in this state either slavery or involuntary servitude.”^[17] In 2020, Utah and Nebraska passed bills to repeal their Punishment Clauses.^[18] Approximately twelve states have similar legislative measures in progress.^[19]

The “California Abolition Act” (hereinafter “ACA 3”), announced by Senator Sydney Kamlager, proposes to abolish California’s slavery loophole.[20] An original author of ACA 3 and formerly-incarcerated individual, Samuel Nathaniel Brown, experienced forced labor throughout the pandemic, under the threat of his early release being jeopardized.[21] Over 90,000 Californians are incarcerated in state prison,[22] many subjected to comparable coercion. Perhaps this constitutional amendment will enliven Californians’s resolve to decarcerate the state, reverse draconian law and order policies, and center rehabilitation and humanity in response to social and economic issues.[23]

On the federal level, the “Abolition Amendment,” first introduced by Oregon U.S. Senator Jeff Merkley and Representative William Lacy Clay in 2020, would eradicate the Thirteenth Amendment’s Punishment Clause. [24] Constitutional amendments require two-thirds approval of the House and Senate and ratification by three-quarters of state legislatures.[25] While amendments to the United States Constitution are rare, the United States must strip out its constitutional homage to systematic racism to become an international agent for human rights.

The United States’s hypocrisy in demanding other countries’ compliance with international human rights law while committing violations and declining to ratify human rights treaties is not novel.[26] Incarceration (especially coupled with surveillance and policing) is an egregious form of state-sanctioned violence and typifies the United States’ pervasive international human rights violations. The extent to which incarceration constitutes slavery under the 1926 Slavery Convention’s definition—“the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”—is arguable and beyond the scope of this post.[27] Regardless, the United States must remedy its constitutional endorsement of slavery by eliminating the Punishment Clause.

Language matters: just as people must forsake dehumanizing terms such as “prisoner” or “criminal,”[28] laws must decry racist language and practices. Coupled with decarceration and abolition struggles, eliminating the Thirteenth Amendment’s allowances for slavery and servitude may help position the United States to dismantle its white-supremacist institutions, combat carceral capitalism, satisfy international human rights standards, and pursue a more radically imagined future.

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[1] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[2] *Universal Declaration of Human Rights*, Amnesty Int’l, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights>[<https://perma.cc/A3QB-P2LX>] (last visited Feb. 15, 2022).

[3] U.S. Const. amend. XIII, § 1.

[4] Never Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 Va. J. Soc. Pol’y & L. 65, 66 (2019).

- [5] Press Release, Jeff Merkley, U.S. Senator for Oregon, Merkley, Clay Propose Constitutional Amendment to Close Slavery Loophole in 13th Amendment (Dec. 2, 2020), <https://www.merkley.senate.gov/news/press-releases/merkley-clay-propose-constitutional-amendment-to-close-slavery-loophole-in-13th-amendment-2020> [https://perma.cc/5UWH-ENH8].
- [6] *Id.*; see also Maurice Chammah, *Prison Plantations*, Marshall Proj., (May 1, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/05/01/prison-plantations> [https://perma.cc/U6SC-UWKX].
- [7] See Hammad, *supra* note 4; Cecil J. Hunt, II, *Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration*, 49 U. Balt. L. Rev. 313 (2020); Bharat Malkani, *Voices of the Condemned: A Comparative Study of the Testimonies of Death Row Exonerees and Slave Narratives*, Law, Culture, & Humanities 1–21 (2014), <https://doi.org/10.1177/1743872114556435>; Angela Davis, *Are Prisons Obsolete?* (2003).
- [8] Olivia Wynkoop, *SF Supervisors Support Move to End Involuntary Prison Labor in California*, S.F. Exam’r (Feb. 25, 2021, 5:30 PM), <https://www.sfexaminer.com/news/sf-supervisors-support-move-to-end-involuntary-prison-labor-california> [https://perma.cc/8YWX-GKNN].
- [9] See Roy Walmsley, *World Prison Population List (12th ed.)*, Int’l. Ctr. Prison Stud.(2013), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf [https://perma.cc/V9UB-Q8PX]
- [10] Tryon P. Woods, *Slavery and the U.S. Prison System*, Glob. Pol’y J. (May 6, 2021), <https://www.globalpolicyjournal.com/blog/06/05/2021/slavery-and-us-prison-system> [https://perma.cc/G3NS-AM9K].
- [11] See William L. Twisdale, *The Thirteenth Amendment and Unconstitutional Servitude: The Punishment Exception Clause as a Legal Gateway to Involuntary Servitude*, Montclair State U. (2016).
- [12] Candice Bernd, Maureen Nandini Mitra, & Zoe Loftus-Farren, *America’s Toxic Prisons: The Environmental Injustices of Mass Incarceration*, Truthout (June 1, 2017), <https://truthout.org/articles/america-s-toxic-prisons-the-environmental-injustices-of-mass-incarceration>[https://perma.cc/EG3K-NZHJ].
- [13] James C. Thomas, & Lynne A. Sampson, *High Rates of Incarceration as a Social Force Associated with Community Rates of Sexually Transmitted Infection*, 191 J. Infectious Diseases 55–60 (Feb. 1, 2005); see also Elizabeth J. Glifford, *How Incarceration Affects the Health of Communities and Families*, 80 N.C. Medical J. 372–75 (Nov. 2019).
- [14] Jeremy Travis et al., *The Growth of Incarceration in the United States* (2014); Bruce Western, Jeffrey R. Kling, & David F. Weiman, *Labor Market Consequences of Incarceration*, 47 Crime & Delinquency 410, 415 (July 2001); Donna Willmott & Juliana van Olphen, *Challenging the Health Impacts of Incarceration: The Role for Community Health Workers*, 3 Cal. J. Health Promotion 38–48 (June 2005).
- [15] See Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. of Just. (July 2017); Todd R. Clear, *Impacts of Incarceration on Public Safety*, 74 Johns Hopkins U. Press 613–30 (2007); Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, Brennan Ctr. (Aug. 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe> [https://perma.cc/9RR2-U2U9].
- [16] See Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Pol’y Initiative (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [https://perma.cc/9ZRL-UA64].

[17] Colo. Const. art. 2, § 26.

[18] Ruta Ulcinaite, *Nebraska Votes to Remove Slavery Language From State Constitution*, 3 News Now (Nov. 4, 2020, 8:08 PM), <https://www.3newsnow.com/news/election-2020/nebraska-votes-to-remove-slavery-language-from-state-constitution>; Josh Rose, *Utahns Vote to Remove Slavery as a Punishment for a Crime From Constitution*, ABC (Nov. 3, 2020, 11:12 PM), <https://www.abc4.com/news/politics/election/utahns-vote-to-remove-slavery-as-a-punishment-for-a-crime-from-constitution> [<https://perma.cc/49WE-VG5R>].

[19] Maria L. La Ganga, *He Wants to Kick Jim Crow Out of the California Constitution*, L.A. Times (Feb. 24, 2021, 6:00 AM), <https://www.latimes.com/california/story/2021-02-24/ridding-the-california-constitution-of-americas-original-sin> [<https://perma.cc/6BTA-YDH8>].

[20] *Asm. Kamlager Announces ACA 3: The California Abolition Act to Abolish Involuntary Servitude*, Cal. State Assembly Democratic Caucus (Mar. 4, 2021), <https://asmdc.org/press-releases/asm-kamlager-announces-aca-3-california-abolition-act-abolish-involuntary-servitude> [<https://perma.cc/7JRW-32R7>].

[21] *Id.*

[22] *Id.*

[23] *See also* Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (2007).

[24] Press Release, *supra* note 5.

[25] Aaron Morrison, *US Lawmakers Unveil Anti-slavery Constitutional Amendment*, AP News (Dec. 2, 2020), <https://apnews.com/article/lawmakers-anti-slavery-amendment-6e13df5702725fc18c889eb6762771c3>; *see* Terry Tang, *Lawmakers Mark Juneteenth by Reviving ‘Abolition Amendment’*, AP News (June 18, 2021), <https://apnews.com/article/or-state-wire-race-and-ethnicity-lifestyle-juneteenth-963c58a1a19ba501f5677343b9c786e0>.

[26] Marie Wilken, *U.S. Aversion to International Human Rights Treaties*, Glob. Just. Ctr. Blog (June 22, 2017), <https://globaljusticecenter.net/blog/773-u-s-aversion-to-international-human-rights-treaties> [<https://perma.cc/6M4B-KQEU>].

[27] 1926 Slavery Convention, art. 1(1).

[28] *See* Erica Bryant, *Words Matter: Don’t Call People Felons, Convicts, or Inmates*, Vera Inst. of Just. (Mar. 31, 2021), <https://www.vera.org/blog/words-matter-dont-call-people-felons-convicts-or-inmates> [<https://perma.cc/MJA4-2KRJ>]; *see also* Blair Hickman, *Inmate. Prisoner. Other. Discussed.*, Marshall Proj. (Apr. 3, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed> [<https://perma.cc/W8SB-495C>].