

# DEMONIZING PEOPLE OF COLOR AND THE POOR IN THE UNITED STATES BY WAY OF THE THIRTEENTH AMENDMENT HOAX

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

**By: Mujahid Farid**  
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Given the fact that the United States is well-known as the land of opportunity, it is an interesting exercise trying to understand how the country arrived at the place where it contains 25% of the world’s people confined in prison while it only populates 5% of the globe (1). Why, given the United States’ comparative world wealth, do so many people languish behind bars, and for such long periods of time?

To get to the root of any social phenomenon it is always vitally important to do an in-depth historical analysis. It is not possible to fully understand any social condition without going back—sometimes quite a ways back. To get a firm grip on where we stand today—dissecting all factors leading to a particular situation—we need to connect the past—and not miss-out on crucial contributing factors. This short paper in no way purports to offer such a comprehensive overview, but tries to connect significant vignettes so as to provoke a more in-depth study into the degree to which entrenched racist beliefs—reinforced by longstanding United States Constitutional and legal underpinnings—lies at the base of New York State’s broken parole system.

To view mass incarceration clearly and precisely, and then be able to respond appropriately, we first need to recognize that, contrary to past claims, mass incarceration is not a response to crime—at least not in the broader terms. History shows that the carceral spirit is motivated by economic and racial concerns. Michelle Alexander eloquently explained the dynamics of mass incarceration and debunked the myth that it was impelled by street crime when she illustrated that President Ronald Reagan actually declared his administration’s War on Drugs before the so-called crack epidemic had taken root, and the U.S. Justice Department had announced the cutting in half of the personnel assigned to the prosecution of white-collar crimes. (2). If mass incarceration was due to crime, then we would have witnessed myriad prosecutions and imprisonments of white collar criminals during the rise of the carceral system. One researcher noted: “On the larger canvas, what exactly separates Madoff’s operation from those of the banks rewarded for their shady follies by a \$700 billion bailout?...unlike Madoff who looted his clients of a mere \$50 billion, they were ‘too big to fail’” (3).

Likewise, Alan Mobley of San Diego State University , while explaining the public abandonment of social programs targeting crime-generative factors, argues that “Mass incarceration is targeted not at crime, violence, or victimization, or costs to society, for that matter, but at those deemed ‘street’ criminals” (4). It should not be difficult interpreting the code.

Moreover, the facts and figures belie that the crime rate and mass incarceration are directly related. In New York State, where over the past twenty years there has been a substantial downsizing of the prison population along with a reduction in crime rates, the state budget for the carceral system has still steadily grown (5).

Not only is the United States the world's leader in incarcerating people, but the United States, in the course of pursuing its carceral agenda, targets some of the most infirm of the population with severe treatments and punishments. Some jurisdictions in the United States prosecute 16 and 17-year-olds as adult criminals. In New York over 40,000 young people ages 16 and 17 are being arrested annually and prosecuted, mostly for minor offenses (6). Moreover, Children as young as 13 have been sentenced to life without any possibility of parole—given up as non-redeemable (7). And the United States perpetually punishes the elderly beyond the point where they present any public safety threat. A relatively recent report shows that between 1995 and 2010, the number of state and federal prisoners aged 55 and over nearly quadrupled to 124,400, while the overall prison population only grew 42%. The report finds that by 2030 there will be more than 400,000 older people behind bars, a 4,400 percent increase from 1981 when only 8,853 state and federal prisoners was elderly (8). While international embarrassment may be the cause of some states' recent efforts to downsize ever-swelling prison populations, the evidence of a sustained punishment paradigm remains evident in the ever-growing segment of the elderly population.

Whence comes the propensity to perpetually punish?

Undoubtedly the entrenchment of prisons in the United States, with their primary focus on punishment, can to some degree be attributed to class and economic conflict. Yet, race plays a significant role in this interaction and is sometimes wittingly, or not, downplayed and overlooked. What this writer has found is that when we analyze mass incarceration and its associated problems, no matter from where we begin our research we find the intersection of race. Race seems to be an ever-present insidious ingredient with crime and punishment in America.

In the United States Black people and people of Color have never, by and large, been accorded full citizenship status by the power elite. It is well-known that the United States Constitution designated such people to be counted only as three-fifths of a person (9). Some people today believe this assignation was abrogated with passage of the 13<sup>th</sup> Amendment to the Constitution. The facts and persisting conditions contradicts any such conclusion

It has been established that mass incarceration functions to devastate certain communities—mainly communities of color. The Children's Defense Fund issued a comprehensive report in 2006 which found that the "United States of America is not a level playing field for all children, and our nation does not value and protect all children's lives equally". The report found that the "school-to-prison-pipeline" is not an act of God or inevitable; it is a series of human choices at each stage of our children's development" (10).

According to the Sentencing Project, blacks are almost six times as likely as whites to be imprisoned, and Hispanics are nearly twice as likely. African-Americans comprise less than 14 percent of the population but nearly 40 percent of those imprisoned ( *id at fn 6*).

In New York State, during a period of research, people confined at the Green Haven Prison looked at the anecdotal disproportionate incarceration of people of Color and discovered that 85 percent of the total prison system was African American or Hispanic, and 75 percent of those groups came from only seven neighborhoods in New York City, to which 95 percent of them return upon release. Most of the other 25 percent of people confined at that time came from five other major urban communities throughout the state (11).

The fastest growing segment in the prisons are those 55 and older, a trend that is contributing to increasing trepidation by the federal and state governments since the cost of maintain these elderly people can cost 2 to 4 times more than the average. A recent study by Human Rights Watch pointed out that the number of federal and state prisoners 55 and older nearly quadrupled to 124,000 between 1995 and 2010, while the prison population as a whole grew by only 42%. (12) The explanations for this aging of the prison population are usually traced to the punitive sentencing policies adopted during the past twenty-five years. The obvious follow-up questions should be: what are the motivating factors for this punitive spirit and why do they prevail even when carrying them out devastate state and government budgets?

Not too long ago I listened to a conversation amongst people, some of whom claimed advance knowledge of the U.S. criminal justice system, while others appeared novice. The conversation centered around how there is a widespread misunderstanding about even basic things of the criminal justice system such as the difference between a jail and a prison; a detainee and a prisoner; and the difference between a prison and a penitentiary. The knowledgeable person went on to explain these things, and pointed out that the basic difference between a prison and penitentiary was that the prison was a state facility, while the penitentiary was a federal one. As I thought about this, I realized that the explanation was not totally correct. It is true that the label hold true to some degree today, but the history of the distinction reveals a lot more, and even enlightens us on what might be hidden motivations.

Let's consider that the early establishment of penal facilities in the United States happened sometime before the so-called emancipation of blacks and people of color. These early "state" facilities used for housing people who had committed crimes were referred to as "penitentiaries." One of the very earliest, the Eastern State Penitentiary in Philadelphia was operated by the state of Pennsylvania. During this period, which goes back to the very early 1800's, these facilities designated penitentiaries irrespective of jurisdiction. The fundamental reason was that they were designed (though severely harsh) with the intent to cause people to repent, become penitent, and rehabilitate from sin and deviance. The system operated on the theory that people could change, become penitent, and rehabilitate under proper conditions. This was predicated on the fact that the people who housed these institutions were mainly white and redeemable. This wouldn't apply to blacks because blacks were already slaves and didn't need to be imprisoned. If a black committed a crime or perceived offense, he or she could legally be subjected to corporal punishment, for even the miniscule, to the extent of

death. Rehabilitation, penitence and restoration becomes a non-issue when you are dealing with those who are not fully human—those part beast. In such cases there is no sin, deviance, or crime to repent from, because these are natural instincts coming into play. Thus, punishment becomes the dominant and prevailing paradigm.

Later in time, with the passage of the 13<sup>th</sup> Amendment, supposedly liberating people of color, we find that cryptic section, which made slavery contingent on being duly convicted of a crime, which altered the whole purpose of incarceration. Now, there was no concern about penitence; the issue became punishment and the perpetuation of slavery—that Peculiar Institution. There was no reason to be concerned with penitence and rehabilitation when those likely to be confined were only three-fifths of a human being. Then the notion of “Penitentiaries” became obsolete. Notably, the 13<sup>th</sup> Amendment contains no constraints as to time, race, or severity of offense. Accordingly, in the final analysis, slavery in the United States was never really abolished; it was actually expanded. The irony is that today whites may find themselves suffering from the collateral consequences of racist policy—themselves classified and forever branded as slaves.

This may explain why very recently a NYS Appellate Division court could issue a decision on parole policy and practice (13) which has all the elements, and is reminiscent of, the infamous United States Supreme Court decision Dred Scott v. Sanford, in which the court found that a black person has no rights in which a white person is bound to respect (14). Of the Supreme Court’s decision here, Frederick Douglass is reported to have said: “This very attempt to blot out forever the hopes of an enslaved people may be one necessary link in the chain of events preparatory to the downfall and complete overthrow of the whole slave system.” (Speech on Dred Scott Decision (1857). (<http://teachingamericanhistory.org/library/index.Asp?document=772>).

Today, there is a major effort to reform parole policy and practice in New York State. Release Aging People in Prison (RAPP) has engaged in this process by focusing on the elderly. We want criminal justice officials to adopt reasoned and evidence-based policies and practices to release the elderly from prison after they have served long periods of incarceration, have shown themselves to be rehabilitated, and are proven to no longer present a threat to public safety. Yet, even here, there is much push-back and refusal to adopt scientific processes. We have found ourselves engaged in a formidable battle. Those of us who insist that these policies and practices be implemented need to understand fully what we are up against. RAPP is confronting a parole system where there are no constraints on parole board discretion. In deciding to deny release to even an elderly person who has already served considerable years confined and pose no public risk, the parole board is accountable to no one. And that is how many in power would have it.

The difficulties we face changing course with New York State’s parole system can be largely attributed to race. Even though the prevailing idea may be that whites may be capable of reforming, even after committing murder and other serious offenses, it remains that the fear of a violent Black living in society can be truly overwhelming and terrifying. Thus, using scientific methods to make release determinations can contradict the instincts of corrections officials, by classifying violent offenders as a lower recidivism risk than someone convicted of a nonviolent

robbery or drug offense. Criminologists agree that all people convicted of crimes like murder, and who have served long sentences, when considered for release are often older and less likely to reoffend (15). Thus, some policymakers may fight tooth and nail to avoid the scientific process when it is counterintuitive to racist instincts. It just becomes much too difficult to let go of the propensity to perpetually punish in the case of a serious offense.

Taking into account this analysis, if there is a real desire to change current conditions the question then becomes, “what must be done?” The first order of business is to recognize the hoax. **Webster** defines a hoax as: “To trick into believing or accepting as genuine something false and often preposterous.”

Falling for the hoax means accepting the belief that the power elite in the United States operates on egalitarian principles. There is amongst them an overwhelming and prevailing belief that large segments of the American population are deemed unable to change and rehabilitate. When we reject the hoax, we no longer approach those in authority with milquetoast pleas for reasoned social applications and evidence-based systems. It was Frederick Douglass who noted that “Power concedes nothing without a demand!” Acknowledging this will help us modify all our strategic plans.

If we are to develop strategies of disruption, we need a more finely textured description of the ideological structures that produce the political acquiescence necessary to carry out a program of hyper-incarceration. It would be folly for us to keep employing strategies that ignore underlying causes and which address, instead, the micro-processes that support mass incarceration.

In the United States race seems to always trump rational decision-making. Nevertheless, the choice between money for prisons and money for re-building the social structure should be an easy one. If the masses of people really want to be tough on crime, they should be investing in, and struggling for, a system that releases people who are not a threat to public safety—and with the elderly this is an extraordinarily easy choice. And where does this struggle start?

“Who would be free, themselves must strike the blow...

“This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. **Power concedes nothing without a demand. It never did and it never will.** Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress. In the light of these ideas, Negroes will be hunted at the North and held and flogged at the South so long as they submit to those devilish outrages and make no resistance, either moral or physical. Men may not get all they pay for in this world, but they must certainly pay for all they get. If we ever get free from the oppressions and wrongs heaped upon us, we must pay for their removal. We must do this by labor, by suffering, and if needs be, by our lives and the lives of others.”

(From the August 3, 1857 speech delivered by Frederick Douglass at Canandaigua, NY)

I conclude this analysis by noting something once said to me: “The person who is right is a majority. We, who have God and conscience on our side, have a majority against the whole universe.”

So help us God.

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