

**Mass Incarceration Debates**

**Selected Evidence Set**

**Debatable Issue**

**Is mass incarceration of African-Americans in the U.S. the moral equivalent of slavery?**

**These passages can be used as evidence to build arguments and counter-arguments on either side of the debatable issue.**

Mass Incarceration = Slavery

“[Bryan Stevenson, the founder of the Equal Justice Initiative:] When tens of thousands of people showed up in Alabama in 2015 to celebrate the 50th anniversary of the historic march from Selma to Montgomery in support of voting rights, few of them realized that nearly 30 percent of the black male population of Alabama today has permanently lost the right to vote over a criminal conviction. [Law professor Michelle Alexander:] So many aspects of the old Jim Crow are suddenly legal again once you’ve been branded a felon. And so it seems that in America we haven’t so much ended racial caste, but simply redesigned it” (“13th,” Directed by Ava DuVernay, 2016).

“They called the end of slavery ‘Jubilee.’ We thought we were done then, and then you had 100 years of Jim Crow, terror, and lynching. … We get the bills passed to vote, and then they break out the handcuffs, label you a felon, [and] you can’t vote or get a job. So, we don’t know what the next iteration of this will be. But it will be” (13th,” Directed by Ava DuVernay, 2016).

“As President Obama reminds us in an audio clip at the documentary’s start, this country is home to five percent of the world’s population and 25 percent of the world’s prisoners. Around 2.3 million Americans are currently incarcerated. Of that number, [40.2 percent](http://www.theroot.com/articles/culture/2011/03/more_black_men_in_prison_today_than_enslaved_in_1850/) are African-American men. That fact is more shocking when you consider that African-American men make up only about 6.5 percent of the U.S. population. Or, to put a finer point on it, per New Jersey Senator Cory Booker: ‘Right now, we now have more African-Americans [under criminal supervision](http://www.democracynow.org/2016/10/3/from_slavery_to_mass_incarceration_ava) than all the slaves back in 1850s’” (Julia Felsenthal, “Ava DuVernay’s *13th* Is a Shocking, Necessary Look at the Link Between Slavery and Mass Incarceration,” *Vogue*, October 6, 2016)

Enter the ’70s, the beginning of our modern era of mass incarceration, a period when, per activist and scholar Angela Davis, crime began to stand in for race in political discourse. DuVernay quotes a Nixon official who broke down the strategy the Republican president used to appeal to racist southern whites and voters fearful of the lefty unrest of the late ’60s. A war on crime became a war on drugs. ‘We knew we couldn’t make it illegal to be either against the war or black. But by getting the public to associate the hippies with marijuana and blacks with heroin and then criminalizing both heavily, we could disrupt their communities’” (Julia Felsenthal, “Ava DuVernay’s *13th* Is a Shocking, Necessary Look at the Link Between Slavery and Mass Incarceration,” *Vogue*, October 6, 2016).

“None of what’s happened has been an accident, and all of it has depended on the participation of rational people. Those of us who would prefer to think otherwise are forced to see the criminal justice system not as a well-intentioned instrument that has simply become overused, but as a weapon—one that has been aimed and fired with deliberateness and precision” (Leon Nayfakh, “New Slaves,” Slate, October 6, 2016).

“The 13th Amendment to the United States Constitution did not end slavery. In fact, it is the first time the word ‘slavery’ was ever mentioned in the Constitution and it is in this amendment where it is not abolished once and for all as we were taught, but given the constitutional protection that has maintained the practice of American slavery in various forms to this very day” (Shaun King, “How the 13th Amendment Didn’t Really End Slavery,” Daily News, September 21, 2016).

“Just listen to J. Christian, a Virginia Supreme Court Justice in 1871, in [Ruffin v Commonwealth](http://corrections.eku.edu/insidelook/history-prisoners-rights), a case that allowed for the enslavement of prisoners, in which he states that the prisoner has ‘as a consequence of his crime, not only forfeited his liberty, but all his personal rights ….He is for the time being the *slave of the state.* He is *civiliter mortuss* [civilly dead]; and his estate, if he has any, is treated like that of a dead man.’ What this makes apparent is that the statement that ‘the law had long distinguished between slavery and incarceration’ by the end of the Civil War, is categorically wrong. No such clear distinction had even been made for white prisoners (*Ruffin* in this case was actually a white man), but the law definitely had made no such distinction in respect to Africans whom the law had defined as sub- to non-human for hundreds of years before the *Ruffin* decision” (Dennis Childs, Black Perspectives, “Slavery, the 13th Amendment, and Mass Incarceration: A Response to Patrick Rael,”December 12, 2016).

“Indeed, members of the former confederacy were not ‘confused’ at all about the way in which the exception clause offered cover for Black re-enslavement. This is indicated in parts of the congressional record you must be unaware of such as that offered in regard to the [Black Codes](http://www.history.com/topics/black-history/black-codes) in which a southern clergyman [said in his testimony](https://archive.org/details/jointreconstruct00congrich) that ‘we must now make a code that will subject as many crimes to the penalty of involuntary servitude, and so reduce the Negroes under such penalty again to practical slavery.’ [Carl Schurz](http://bioguide.congress.gov/scripts/biodisplay.pl?index=s000151) also expounded upon this at length after his tour of the southern states” (Dennis Childs, Black Perspectives*,* “Slavery, the 13th Amendment, and Mass Incarceration: A Response to Patrick Rael,”December 12, 2016).

“During Reconstruction, Southern states quickly took advantage of the 13th Amendment’s slavery loophole by arresting Black people for minor crimes such as unemployment, loitering or gambling, and selling them to private employers through the convict lease system. Today, the majority of Black people enslaved in prisons were arrested for drug crimes. Even though Black people use drugs at the same rate as White people, they are incarcerated for drug crimes at 20 to 50 times the rate of White people in some states” (Angela Chan, “America Never Abolished Slavery,” Huffington Post, May 2, 2015).

“In the past decade, several influential studies of this period have revealed the relationship between emancipation, the 13th Amendment, and the convict lease program (Lichtenstein, 1996a; Mancini, 1996; Davis, 1999). Built into the 13th Amendment was state authorization to use prison labor as a bridge between slavery and paid work. Slavery was abolished ‘except as a punishment for crime.’ This stipulation provided the intellectual and legal mechanisms to enable the state to use ‘unfree’ labor by leasing prisoners to local businesses and corporations desperate to rebuild the South's infrastructure. During this period, white ‘Redeemers’ -- white planters, small farmers, and political leaders -- set out to rebuild the pre-emancipation racial order by enacting laws that restricted black access to political representation and by creating Black Codes that, among other things, increased the penalties for crimes such as vagrancy, loitering, and public drunkenness” (Kim Gilmore, “Slavery and Prison – Understanding the Connections,” History Is a Weapon, 2004).

Racial bias remains a very serious problem in the United States, and is a direct legacy of the history of racial oppression and the enslavement of African-Americans. That history is manifest today in a racially biased criminal justice system that disproportionately locks up black men, in police brutality inflicted on minority communities, and in grossly inadequate economic opportunities for urban low-income adults (Equal Justice Initiative, Slavery to Mass Incarceration, 2015).

The War on Drugs initiated in the 1980s led to the establishment of mandatory minimum sentences for low-level drug offenses, minimums that were racially biased in the extreme. For instance, possessions of 500 grams of powder cocaine could still lead to probation, whereas possession of 5 grams of crack cocaine would lead to a mandatory minimum sentence of 5 years in a federal penitentiary. Mandatory sentencing laws have led to a “grotesque injustices” and an explosion in the number of incarcerated black and brown men (Vox, “How Mandatory Minimums Helped Drive Mass Incarceration,” 2015).

“This is part of the story that many people are unaware of, the ways in which poor people, particularly poor folks of color, are targeted by our criminal justice system, arrested for extremely minor offenses [e.g., accumulated parking tickets, or unpaid vehicle registration fees], the very sorts of crimes that occur with equal frequency in middle-class communities or on college campuses but go largely ignored—targeted, arrested or cited, and then saddled with fines and fees that are nearly impossible for them to pay back. Then warrants are issued for their arrest, for failure to appear in court or to pay back their fees or fines in a timely manner, leading them into a system from which they have little hope of ever truly escaping. We can look back in history and see this is not the first time we’ve done something like this. Following the end of slavery, a new system of racial and social control was born, known as ‘convict leasing.’ After the end of slavery, African-American men were arrested in mass, and they were arrested for extremely minor crimes like loitering, standing around, vagrancy or the equivalent of jaywalking—arrested and then sent to prison and then leased to plantations. And the idea was they were supposed to earn their freedom, but they could never pay back the plantation owners or the corporations the costs of their clothing and shelter, and so they were effectively re-enslaved, you know, sometimes for the rest of their lives. And today we see millions of poor people and folks of color who are trapped yet again in a criminal justice system, you know, which are treating them like commodities and like people who are easily disposable” (Michelle Alexander, “Roots of Today’s Mass Incarceration Crisis Date to Slavery, Jim Crow,” Democracy Now, March 4, 2015).

Mass Incarceration ≠ Slavery

“On its face, the language of the Thirteenth Amendment’s “exception clause” offers no mechanism to actively promote incarceration. Instead, its obvious purpose is to ensure that none mistake the prohibition on racial slavery for a prohibition on criminal incarceration. Given the novelty of emancipation at the phrase’s origin, that was not pointless: surely the abolition of slavery should not mean that no one (black or white) could ever be incarcerated for crimes they committed, right? The exception clause alone did nothing to promote racial oppression. Search in vain for legal cases in which the clause was used to argue for the legality of any form of punishment. Instead, we see the opposite, as in in *U.S. v. Ah Sou*, C.C.A.9 (1905), wherein the court used the clause to argue against deporting a Chinese woman because it would have returned her to a state slavery in China. To justify their oppression, white supremacists used [much more powerful](http://www.aaihs.org/black-protest-white-backlash-and-the-history-of-scientific-racism/) and [overt legal devices](http://www.aaihs.org/emancipation-and-the-birth-of-the-professional-police-force/) than slippery language in the Thirteenth Amendment. [Jim Crow and mass incarceration](http://www.aaihs.org/americans-have-carried-american-hatred-black-intellectuals-imperialism-and-policing/) would’ve happened with or without the exception clause” (Patrick Rael, Black Perspectives, “Demystifying the 13th Amendment and Its Impact on Mass Incarceration,” December 9, 2016).

“When the country expanded into the Northwest Territory in 1787, the very year delegates met to devise a new constitution, Congress decided that slavery would be prohibited in the new lands. Compare the slavery prohibition of the language of the Northwest Ordinance with that of the Thirteenth Amendment:

1787: ‘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.’

1865: ‘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.’

Everyone in 1865 openly acknowledged and discussed this debt to the Ordinance of 1787.  They were not the first. The language of the Ordinance echoed in the constitutions of every state carved out of it, as well as many far western states. The exception clause had long served the purpose it served in 1865 and 1787—to *distinguish*, not merge, slavery and criminal incarceration. By 1865, the exception clause had become boilerplate” (Patrick Rael, Black Perspectives, “Demystifying the 13th Amendment and Its Impact on Mass Incarceration,” December 9, 2016).

“In fact, Pfaff argues, drug convictions are a distinctly secondary factor in prison growth. During the great wave of incarceration—generally thought to have begun around 1980, and cresting about three decades later—state prisons added something like a million inmates, with about ‘half that growth coming from locking up more people convicted of violence,’ Pfaff calculates. Nonviolent drug offenses accounted for only around a fifth of the new incarcerations. What’s more, many of the drug convictions were meant to be what [Fordham University law professor John] Pfaff calls ‘pretextual attacks on violence.’ Violent crimes that are associated with drug dealing are more difficult to prosecute than drug offenses themselves, which usually involve hard evidence rather than the testimony of witnesses. . . . And so the war on drugs, however misguided as social policy, was not, Pfaff insists, a prime mover of the epidemic of incarceration—the numbers just aren’t there” (Adam Gopnik, “How We Misunderstand Mass Incarceration,” *New Yorker*, April 10, 2017).

“And so the war on drugs, however misguided as social policy, was not, [Fordham University law professor John] Pfaff insists, a prime mover of the epidemic of incarceration—the numbers just aren’t there. Even in New York State, famous for its Draconian ‘Rockefeller laws,’ the decline in the number of inmates imprisoned for drug offenses in the past fifteen years has been dramatic—without changing the face, or the fact, of mass incarceration. Pfaff calls this his core claim: ‘If we define the people in prison as a result of the war on drugs to be those serving time for a drug conviction, then that war simply hasn’t sent enough people to state prisons for it to be a major engine of state prison growth.’ What about mandatory sentences? Pfaff notes that these outsized punishments are given to a very small part of the actual prison population. Most new inmates are serving relatively short sentences. This, Pfaff observes, is essentially good news. ‘Prison admissions are a flow, not a stock,’ he writes. ‘They depend far more on choices made today than on the lingering effects of thousands of past decisions.’ Pfaff deals with the issue of for-profit prisons with similar statistical efficiency: even if private prisons were banned tomorrow and all their inmates released, the prison population would drop by, at most, eight per cent. The numbers just aren’t there” (Adam Gopnik, “How We Misunderstand Mass Incarceration,” *New Yorker*, April 10, 2017).

“[The war on drugs] rhetoric resonated in part because of violence. To frame it as the war on drugs suggests a very top down approach—framing this as a war on drugs. We could change our framing, redeploy our police officers, and we can shift things. I think the lessons of the war on drugs and punitive [sentencing] in general was more bottom up. The example I always point to is New York state. We passed and ratified drug laws in 1973. That was when New York state sort of declared its war on drugs. And the number of people in the New York state prison goes up slightly in the years after '73 and then it goes down. In 1984 there were actually fewer people in New York state prison for drugs than '73, so you have this huge rhetorical war on drugs being declared and local prosecutors just don't do anything with it. Then in the mid-1980s, there's this giant explosion of violence, and you see this huge rise in drug-related incarcerations which suggests to me that there is a substantial contextual component to this” (John Pfaff, “Why Ending Mass Incarceration Means Locking Up Fewer Violent Criminals,” Reason, February 25, 2017).

“The Harlem NAACP’s push for tougher crime laws raises an important question: If many black citizens supported the policies that produced mass imprisonment, how can it be regarded as the New Jim Crow? The Old Jim Crow, after all, was a series of legal restrictions, backed by state and private violence, imposed on black people by the white majority. When given the opportunity, blacks rejected it. Three states— Mississippi, Louisiana, and South Carolina —had black voting majorities during Reconstruction, and all three banned racial segregation in public schools and accommodations. The Jim Crow analogy encourages us to understand mass incarceration as another policy enacted by whites and helplessly suffered by blacks. But today, blacks are much more than subjects; they are actors in determining the policies that sustain mass incarceration in ways simply unimaginable to past generations” (James Forman, “Beyond the New Jim Crow,” New York University Law Review, February 26, 2012).

“While rates of drug offenses are roughly the same throughout the population, blacks are overrepresented among the population for violent offenses. For example, the African American arrest rate for murder is seven to eight times higher than the white arrest rate; the black arrest rate for robbery is ten times higher than the white arrest rate. Murder and robbery are the two offenses for which the arrest data are considered most reliable as an indicator of offending. . . . I make the point to highlight the problem with framing mass incarceration as a new form of Jim Crow. Because the analogy leads proponents to search for disparities in the criminal justice system that resemble those of the Old Jim Crow, they confine their attention to cases where blacks are like whites in all relevant respects, yet are treated worse by law. Such a search usefully exposes the abuses associated with racial profiling and the drug war. But it does not lead to a comprehensive understanding of mass incarceration” (James Forman, “Beyond the New Jim Crow,” New York University Law Review, February 26, 2012).

“African-Americans have always viewed the protection of black lives as a civil rights issue, whether the threat comes from the police or street criminals. Far from ignoring black-on-black crime, Forman implores, African-American officials and citizens alike have been ‘consumed by it.’ . . . Forman’s compassionate narrative interweaves the complexities of racial and class dynamics, especially in how African-American political officials, police chiefs, judges and prosecutors came to support the punitive policies that now ravage poor communities of color more than anyone else” (Alex Mikulich, “The Problem of Mass Incarceration Is More Complicated than We Thought,” American Magazine, February, 2017).

“The experience of African-Americans under mass incarceration is certainly a valid subject for a documentary, but ‘13th’ keeps talking about the whole prison population. Correct statistics and representative examples would still show inequality, but they would probably underline the weakness of the central metaphor: Slavery and Jim Crow were not simply racially *disparate,* they were more like racially ***absolute****.* The ‘slavery rate’ of 1860 wasn’t just much higher for African-Americans than for Whites;[89% of African-Americans were slaves](http://www2.census.gov/prod2/decennial/documents/1860a-02.pdf) compared to *0%* of Whites. Incarcerated populations as a whole are indeed majority non-White, but that’s not true everywhere. As of 2015 or 2016, Arkansas state prisons are [54% White](http://adc.arkansas.gov/images/uploads/Statistical_Information_2015_rev1.pdf), Oklahoma state prisons are [54.5% White](https://www.ok.gov/doc/documents/annual%20report%202015.pdf), Tennessee state prisons are [55.3% White](https://tn.gov/assets/entities/correction/attachments/StatisticalAbstract2016.pdf), Kentucky state prisons are [76% White](http://corrections.ky.gov/about/Documents/Research%20and%20Statistics/Monthly%20Reports/Inmate%20Profile/2016/Inmate%20Profile%2009-2016.pdf). That’s disproportionate to population in every case, but to say the very least, there was never a Southern state where a majority of the slaves were White, or where a majority of those facing Jim Crow laws were White” (Xenocrypt, “Documentary as Advocacy: Some Factual Issues in Ava DuVernay’s ‘13th’ ,”Medium, October 11, 2015).

“By 1998 — just a few years after the crime bill — there were fewer arrests than in 1994 when it was signed, and arrests have dropped further over time. These estimates have almost 2.5 million fewer arrests for 2012 than for 1994. Far from “notching up” in the aftermath of the crime bill, the arrest rate has been falling and is now much lower than it was in 1980, before much of “mass incarceration”. . . . That means there have been millions and millions fewer arrests every year than if the rate had stayed where it was before the Crime Bill” (Xenocrypt, “Documentary as Advocacy: Some Factual Issues in Ava DuVernay’s ‘13th’ ,”Medium, October 11, 2015).

“A product of disastrously confused times, ‘13th’ shows DuVernay’s trendy infatuation with the black civil-rights past. Her argument doesn’t aim toward the kind of enlightenment DuBois envisioned, according to which our moral and political understanding would allow us to overcome America’s slavery-based heritage. Instead, DuVernay demonstrates a perverse nostalgia for the torment and anguish that accompanied mid-century civil-rights activism. She rolls through history, drawing quick, superficial parallels between recent racial events (Ferguson, Baltimore) and past civil-rights milestones. Her implicit message: Nothing has changed. But this insults history and misrepresents black Americans’ spiritual, ethical, and economic drive” (Armond White, “The ‘13th’ Via the Un-Talented Tenth,” *National Review,* October 5, 2016).

“If everyone in America currently held for a drug-related offense in state and federal prison were released, that would reduce those prison populations by approximately 20 percent. That would be significant in its own right, but it still wouldn’t be sufficient to end mass incarceration. It’s easier to win popular support for the release of nonviolent offenders as opposed to violent criminals. But if the nation wants to end mass incarceration, Americans are going to have to consider ways to cut down on the violent offender prison population as well. In 2013, roughly half of all state prisoners [were incarcerated for violent crime](http://www.bjs.gov/content/pub/pdf/p14.pdf)” (Clare Foran, “What Can the U.S. Do About Mass Incarceration,” *The Atlantic*, April 28, 2016).

“And by the time you [James Forman] were representing drug offenders, there were lots of black cops and soon black police chiefs around the country. As you describe it, those men had broken color lines. They'd fought to be treated equally, and they're a part of the story of black empowerment that we often forget about. . . . One reading of this story is that black cops turn out to be not that different from white cops in their attitude towards crime, in their attitude towards whom they're protecting, the middle-class households that are victimized by crime, not young [black] people who get involved with drugs and commit crimes” (Robert Siegel, “’Locking Up Our Own’ Details the Mass Incarceration of Black Men,” NPR, April 18, 2017).

In the first half of the 19th century, 500,000 slaves were sold in the south. It was a multi-billion dollar industry. Slaves at auction were treated like horses, fattened up beforehand and inspected by potential buyers. More than half the sales at auction tore apart black families. Little children were routinely sold to different owners than their parents. Ninety percent of all African-Americans were slaves. There were four million slaves in the mid-19th century. (History.com, The Slave Auction, 2011).

The life of a plantation slave was unhappy, even tragic. Field slaves were grossly overworked and underfed. They were whipped routinely. Many were killed capriciously. They were often exploited sexually. They were intentionally left uneducated and ignorant for their full lives. They were stripped of all that makes someone human. They had very little clothing, utterly inadequate shelter, and could by law own nothing. “They lived lives of unending misery, hardship, and poverty” (Education Videos, “The Life of a Plantation Slave,” 2014).