The Badges and Incidents of Capital Punishment

Luca Azzariti Crousillat[*]

In the spirit of Toni Morrison's Sula, this Note calls for reclaiming justice not as a static ideal but as an ongoing commitment to dismantling systemic oppression. Capital punishment remains a stark vestige of slavery in the United States, perpetuating institutionalized discrimination, cultural trauma, and systemic barriers to equality. This Note uses the Thirteenth Amendment to challenge the death penalty, arguing that it is unconstitutional under the Amendment's prohibition against the "badges and incidents" of slavery. The Note explores the history and meaning of the Thirteenth Amendment, examining its purpose at the time of its ratification. Then, drawing from historical and legal analyses, the Note traces the death penalty's roots in slavery, lynching, and racial oppression, emphasizing its disproportionate impact on Black Americans.

Building on the jurisprudence of the Thirteenth Amendment, the Note next introduces a three-pronged test to identify practices that perpetuate slavery's legacy: examining whether they institutionalize discrimination, inflict psychological harm rooted in historical trauma, or impose systemic barriers to equality. Applying this test to Furman v. Georgia, the Note then demonstrates how capital punishment satisfies each of the three prongs by reinforcing racial hierarchies, denying humanity, and perpetuating structural inequities.

Finally, the Note addresses counterarguments, including textualist interpretations of the Thirteenth Amendment and the Amendment's Punishment Clause. It concludes by positioning the abolition of capital punishment as essential to fulfilling the Thirteenth Amendment's transformative promise of justice and equality.

* Associate Editor, Volume 103, *Texas Law Review*; J.D. Candidate, Class of 2025, The University of Texas School of Law. I would like to extend my deepest gratitude to Dean Shavonne Henderson and Professor Jim Marcus for their invaluable support and guidance in shaping the direction of this Note. Special thanks to Kirk von Kreisler for his patience and dedication as a remarkable Notes editor, and to Morgan Bates for her thoughtful final edits and insightful suggestions. I am also grateful to the *Texas Law Review* for the opportunity to bring the Thirteenth Amendment to the center of constitutional discussion.

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Introduction

The Bottom, once a thriving neighborhood with its own unique culture and traditions, becomes a moving symbol of the African American experience.[1] In *Sula*,[2] Toni Morrison imagines how, as the landscape is razed to make way for a golf course,[3] the bulldozing of the Bottom becomes not only the physical displacement of a community but also the systematic erasure of Black lives and narratives—an ongoing legacy of slavery. The

1. *See* Rachel Kaadzi Ghansah, *The Radical Vision of Toni Morrison*, N.Y. TIMES MAG. (Apr. 12, 2015), https://www.nytimes.com/2015/04/12/magazine/the-radical-vision-of-toni-morrison.html [https://perma.cc/MU8G-EZBK] ("What I'm interested in is writing without the gaze, without the white gaze. . . . It was always about African-American culture and people—good, bad, indifferent, whatever—but that was, for me, the universe.").

2. TONI MORRISON, SULA (Signet international ed. 1993) (1973).

3. *Id.* at 11.

footbridge, already gone,[4] serves as a tender metaphor for the disappearance of pathways to justice and equality, reflecting the systemic barriers faced by marginalized communities powerless against a flawed legal system, and the pervasive inequities that hinder access to fundamental rights and protections. But while the laughter of those in the Bottom, masking underlying pain, speaks to the resilience of individuals facing systemic oppression, the reality of adult pain persists—an enduring trauma inflicted upon future generations.[5]

Capital punishment is a stark embodiment of the oppression depicted in Morrison's fictional narrative. It's a discriminatory mechanism applied disproportionately against Black Americans, thereby mirroring the struggle of exploitation and dehumanization that began with slavery. Capital punishment perpetuates a cycle undermining the hard-fought gains of civil rights movements, just as destroying the Bottom would erase history. Reading Morrison's prose, the link between historical legacies and contemporary struggles for justice invites reflection on the enduring significance of the past in shaping present-day realities.

I. The Story Thus Far . . .

Before delving into the nexus of past legacies and modern forms of slavery, it's important to consider how literature has explored the constitutionality of capital punishment. Noteworthy to the discussion, and contrary to the focus of this Note, most legal scholarship examining the constitutionality of capital punishment has centered on the Eighth Amendment's prohibition of cruel and unusual punishment.[6] This Note,

4. *Id*. at 12.

5. *See id.* (describing the Bottom as a place where "it would be easy for the valley man to hear the laughter and not notice the adult pain that rested somewhere under the eyelids" of the Black residents).

6. *See generally, e.g.*, Charles W. Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005 (1977) (examining the role of public opinion in shaping the Supreme Court's decisions on the death penalty and how informed public opinion can influence Eighth Amendment challenges); THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan J. Ryan & William W. Berry III eds., 2020) (addressing new challenges and controversies related to the Eighth Amendment, such as the technological advancements in punishment, the use of solitary confinement, and the impact of racial bias); Phyllis A. Ewer, *Eighth Amendment—The Death Penalty*, 71 J. CRIM. L. & CRIMINOLOGY 538 (1980) (examining specific Supreme Court cases and their impact on the legal framework surrounding the death penalty under the Eighth Amendment); Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 WASH. L. REV. 809 (2020) (investigating whether the Supreme Court's interpretation of the Eighth Amendment's individualized sentencing requirement has, in practice, increased the fairness of capital sentencing or has instead perpetuated racial discrimination); Michał Urbańczyk, *Human Dignity, the Eighth Amendment, and the Death Penalty*, *in* ENLIGHTENMENT TRADITIONS AND THE LEGAL AND POLITICAL SYSTEM OF THE UNITED STATES OF AMERICA 255, 255–85 (Michał Urbańczyk, Kamil Gaweł & Fatma Mejri eds., Szymon Nowak trans., 2024) (demonstrating how human dignity has been central to the ongoing debate and legal decisions surrounding the death penalty in the United States).

however, diverges from that well-trodden path by exploring the potential of the *Thirteenth* Amendment, with its focus on abolishing slavery and its vestiges, to challenge the constitutionality of the death penalty.

Similarly, in recent years, legal scholarship has increasingly explored the intersection of abolitionism and the Thirteenth Amendment. While scholars like Michelle Alexander have highlighted the Amendment's potential to challenge not only chattel slavery but also its enduring vestiges, such as forced labor, racial discrimination, and the criminalization of poverty,[7] much of this scholarship has focused on the Amendment's application to issues like prison labor and criminal statutes, often overlooking its potential implications for capital punishment.[8] And although some scholars have touched upon the connection between the death penalty and the legacy of slavery, a comprehensive analysis of how capital punishment perpetuates the "badges and incidents" of slavery remains largely absent from the literature.

For example, Bailey Barnes briefly discusses the possibility of using the Thirteenth Amendment as a basis for challenging the death penalty.[9] He argues that the death penalty's racially discriminatory application and inherent cruelty *may* violate the Thirteenth Amendment's prohibition against slavery and involuntary servitude.[10] And yet, this Note goes beyond

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7. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 29 (rev. ed. 2012) (describing how the Reconstruction-Era legislation, including the Thirteenth Amendment, brought a period of advancement for Black Americans); *see also id.* at 13 (comparing Jim Crow and mass incarceration, which "operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race").

8. *See generally, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019) (arguing that the Punishment Clause of the Thirteenth Amendment has been exploited to perpetuate systems of racialized forced labor within the prison industrial complex); Fareed Nassor Hayat, *Abolish Gang Statutes with the Power of the Thirteenth Amendment: Reparations for the People*, 70 UCLA L. REV. 1120 (2023) (using the "badges and incidents" framework to argue for a Thirteenth Amendment challenge to gang statutes).

9. *See* Bailey D. Barnes, *The Havoc Death Wreaks: Civil Rights Challenges to Capital Punishment*, 31 B.U. PUB. INT. L.J. 1, 28–31 (2022) (using the "badges and incidents" framework to argue that "relatives of Black capital defendants condemned to die at the hands of the [S]tate" may bring Thirteenth Amendment claims under 42 U.S.C. § 1983).

10. Barnes highlights that Black defendants are disproportionately sentenced to death compared to White defendants and suggests a form of racial targeting. *Id.* at 29–30. He draws a parallel between capital punishment and the historical context of lynching and racial violence, arguing that the death penalty could be seen as a modern-day "badge[] and incident[] of slavery." *Id.* at 31. This connection, he argues, could form the basis for a Thirteenth Amendment challenge to the death penalty as applied to Black defendants. *Id.* However, Barnes's analysis of the Thirteenth Amendment is lacking in historical depth, as he does not extensively delve into the historical context of the Amendment's adoption or its intended scope in relation to capital punishment. He briefly mentions the connection between capital punishment and lynching, but he does not provide a comprehensive historical analysis of this relationship. *Id.* And while he identifies two factors that scholars use to determine what constitutes a "badge and incident of slavery," he does not thoroughly

exploring the potential of the Thirteenth Amendment as a basis for challenging the death penalty. Instead, this Note proposes a structured scrutiny test, framing capital punishment as a perpetuation of slavery's "badges and incidents."[11] This Note argues that the Thirteenth Amendment was intended not only to abolish slavery but also to eradicate all its institutions, making interpretation of "badges and incidents" central to this paper's argument.[12]

Another scholar, Nikayla Johnson, focuses instead on the Supreme Court's jurisprudence on capital punishment, as she highlights the racial bias inherent in the system.[13] She argues that capital punishment, as applied to Black defendants, is a vestige of slavery and should be abolished under the Thirteenth Amendment.[14] Through a historical analysis of the Supreme Court's capital punishment jurisprudence, Johnson highlights the Court's inconsistent reasoning and acceptance of racial bias in the criminal legal system.[15] She also discusses the legislative responses to the Supreme Court's decision in *McCleskey v. Kemp*,[16] lamenting that statistical evidence of racial bias in the death penalty was not enough to prove an Eighth Amendment violation.[17] Johnson concludes by arguing that the death penalty should be abolished under the Thirteenth Amendment because it's a badge and incident of slavery.[18]

But while Johnson's article and this Note both argue the death penalty is unconstitutional under the Thirteenth Amendment, they differ in their approach and scope. Johnson focuses primarily on the historical context and Supreme Court jurisprudence related to capital punishment. This Note delves deeper into the historical context of Thirteenth Amendment jurisprudence

examine the application of these factors to capital punishment, particularly the complexities of proving a causal or functional connection between the legacy of slavery and the death penalty. *Id.* at 28, 30–31. Nonetheless, Barnes's thesis provides an important starting point for further analysis, and this Note seeks to build on his work by offering a deeper historical and analytical exploration of the relationship between capital punishment and the Thirteenth Amendment.

11. *See infra* subpart IV(C).

12. *See infra* subparts IV(A)–(B).

13. *See generally* Nikayla Johnson, *Confronting the Fear of Too Much Justice: Ending the Death Penalty Through the Thirteenth Amendment*, 7 HOW. HUM. & C.R. L. REV. 69 (2022) (arguing for a Thirteenth Amendment challenge to the death penalty while examining Supreme Court decisions that acknowledge racial bias permeating in the death penalty system).

14. *Id.* at 87.

15. *Id.* at 71–79.

16. For a discussion about the impact of *McCleskey*, see *infra* subpart III(B).

17. *See* Johnson, *supra* note 13, at 80–86 ("[B]oth the legislative and judicial responses to *McCleskey* have failed to bring forth any lasting concrete reform addressing the arbitrary and discriminatory manner by which Black defendants are subjected to the imposition of the death penalty.").

18. *See id.* at 91 (arguing that by failing to define the "badges and incidents of slavery," "Congress has rendered the Thirteenth Amendment baseless and allowed Black people to persist in a subservient role in a society deeply rooted in the institution of slavery").

and capital punishment, while also examining the legal interpretation of the "badges and incidents" language, proposing a three-pronged test to identify such vestiges in the context of capital punishment. Further, this Note favors a more intersectional approach to the application of the death penalty, drawing on literary references and social theories to provide a more nuanced understanding of the issue. It thus strives to offer a more comprehensive approach to challenging the constitutionality of the death penalty.

Likewise, the "badges and incidents" language has been explored by scholars like William Carter.[19] Carter contends that the judiciary has the power to define and offer redress for these badges and incidents of slavery, even in the absence of congressional action.[20] He proposes a two-pronged test to identify such vestiges, focusing on the connection between the aggrieved class and the institution of chattel slavery, as well as the connection between the injury and the institution.[21] Carter emphasizes the need for an "evolutionary" interpretation of the Thirteenth Amendment, recognizing its potential to address contemporary forms of racial discrimination and inequality.[22]

This Note builds upon Carter's analysis of the "badges and incidents" language but distinguishes itself by focusing specifically on capital punishment as a contemporary manifestation of these vestiges of slavery. It proposes a more nuanced, three-pronged test tailored to the context of capital punishment.[23] This Note also delves into the historical context of slavery and lynching, while discussing the evolution of capital punishment. In doing so, it emphasizes the need for a comprehensive understanding of how these historical legacies continue to shape contemporary issues of racial injustice in the criminal legal system.

Lastly, a growing body of legal scholarship has examined the concept of mercy within the criminal legal system, particularly in the context of policing and corrections. Scholars such as Rachel Barkow, Jeffrey Bellin, and Avlana Eisenberg have argued for the importance of mercy as a guiding principle in these contexts, emphasizing the need for leniency, compassion, and a recognition of shared humanity between law enforcement officials and

19. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1366 (2007). For discussion of "badges and incidents" within other relevant literature, see *infra* subparts IV(A)–(B).

20. Carter, *supra* note 19, at 1344 n.124.

21. *Id.* at 1366–67.

22. *Id.* at 1375.

23. Carter's approach casts a wide net in scope yet applies a narrowly confined set of criteria, grounded predominantly in historical context. By contrast, this Note narrows its lens to capital punishment while advancing a more expansive and multifaceted test: It invites courts to consider not only the historical underpinnings of institutionalized discrimination but also the enduring psychological harms and structural inequities that perpetuate systemic injustice.

the community.[24] However, this scholarship has focused primarily on mercy as a tool for judges, prosecutors, and law enforcement officials to use within the system,[25] with limited attention given to its potential role in bringing direct challenges to the institution of capital punishment.[26] This Note seeks to bridge this gap by proposing that capital punishment is unconstitutional under the Thirteenth Amendment. And, by integrating insights from both the abolitionist and historical approaches to criminal justice reform, it offers a novel and comprehensive framework for challenging the constitutionality of capital punishment.

This Note will explore the relationship between capital punishment and the Thirteenth Amendment, focusing on racially motivated sentencing practices and the enduring legacy of slavery in America's criminal legal system. Part II begins by examining the legislative history and interpretations of the Thirteenth Amendment, exploring its original purpose—to abolish slavery and all forms of racial oppression—to the subsequent narrowing of its scope, which has, in turn, limited its ability to address racially discriminatory practices. Part III addresses the historical roots of capital punishment, tracing its application from the colonial period through its use as a mechanism for controlling Black people post-emancipation. Part III also examines how practices such as lynching and racially motivated sentencing were transformed into the modern death penalty, which has disproportionately impacted Black people.

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24. *See generally* Rachel E. Barkow, *When Mercy Discriminates*, 102 TEXAS L. REV. 1365 (2024) (arguing that while discretion in the criminal justice system often leads to racial disparities, it is possible to have leniency without discrimination by focusing on broad, racially inclusive categories for relief and continuously tracking decisions for bias); Avlana K. Eisenberg, *The Case for Mercy in Policing and Corrections*, 102 TEXAS L. REV. 1409 (2024) (arguing that the criminal justice system should be reformed to encourage mercy as a cultural value among police and corrections officers, rather than focusing solely on individual acts of mercy); Jeffrey Bellin, *Principles of Prosecutor Lenience*, 102 TEXAS L. REV. 1541 (2024) (arguing that prosecutorial leniency should be guided by three principles—non-arbitrariness, equality, and abundance—while acknowledging the potential conflicts between these principles in practice).

25. *See generally* Barkow, *supra* note 24 (discussing mercy from judges and juries); Bellin, *supra* note 24 (discussing prosecutorial leniency); Eisenberg, *supra* note 24 (discussing mercy in policing and corrections).

26. While this Note and the scholarship of Barkow, Bellin, and Eisenberg share a common goal of promoting a more just and equitable legal system, the arguments approach the issue of mercy from different angles. The essays focus primarily on the practical application of mercy within existing legal frameworks, advocating for reforms in policing, corrections, and prosecutorial practices. This Note, on the other hand, takes a more radical stance as a response to a racially driven institution. That is not to say that mercy is not implicitly advocated for in this Note. This Note's central argument—that capital punishment is unconstitutional under the Thirteenth Amendment because it perpetuates the "badges and incidents" of slavery—inherently calls for a more merciful approach to criminal justice. In doing so, it champions a system that prioritizes rehabilitation, restorative justice, and a recognition of the shared humanity of all individuals, regardless of their crimes.

Part IV aims to clarify the meaning of "badges and incidents" of slavery by following its origins in both legal and social contexts. Here, the Note establishes a comprehensive understanding of how "badges" represent the enduring stigma of inferiority attached to Black people, while "incidents" include practices and laws tied to slavery.

Part V applies the "badges and incidents" test to capital punishment, arguing that it functions as an institution rooted in racial subjugation. Reframing *Furman v. Georgia*, this Part shows how capital punishment perpetuates racial hierarchy and serves as both a "badge" and "incident" of slavery. Finally, Part VI discusses the specific counterarguments detractors may use against the Thirteenth Amendment's application in this context, including the potential impact on the criminal legal system as a whole; the limitations posed by recent textualist interpretations of the Constitution; and the Punishment Clause and its implications for modern incarceration practices.

II. The Thirteenth Amendment

The Thirteenth Amendment, a beacon of hope for the abolition of slavery, faced a challenging journey through legislative battles and judicial interpretations. As the military defeat of the Confederate states during the Civil War became imminent, the Thirty-Eighth Congress aimed to abolish slavery through a constitutional amendment.[27] Initially, the Amendment's proponents envisioned a societal transformation that would eradicate not only the "shackle[s]" of slavery but also its deeply ingrained laws, institutions, and ideologies.[28] The Amendment's passage was met with recalcitrance, particularly from those who feared the empowerment of Black people.[29] But at its core, the Thirteenth Amendment aimed to promote justice and equality before the law:[30] "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

27. *See* S. JOURNAL, 38th Cong., 2d Sess. 13 (1864) (statement of President Abraham Lincoln) ("In a great national crisis, like ours, unanimity of action among those seeking a common end [(the abolition of slavery)] is very desirable—almost indispensable.").

28. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Lyman Trumbull, Chair, Senate Judiciary Committee) (arguing that the Thirteenth Amendment would "obliterate the last lingering vestiges of the slave system").

29. *See id.* at 2940–41 (statement of Rep. Fernando Wood) (arguing that the Thirteenth Amendment would involve "the extermination of the white men of the southern States, and the forfeiture of all the land and other property belonging to them").

30. *See id.* at 1203 (statement of Sen. Henry Wilson) (explaining that slavery "has trampled upon the most sacred rights of the citizen"); *see also id.* at 2980 (statement of Rep. Martin Russell Thayer) ("[N]ow is the time to uproot and destroy forever this prolific cause of all our sufferings."); *id*. at 1370 (statement of Sen. Daniel Clark) ("But I am free and bold to confess that I am for a Union without slavery, and an amended Constitution for making it forever impossible.").

jurisdiction."[31] And landmark cases like *United States v. Rhodes*[32] and *In re Turner*[33] affirmed the Amendment's power to dismantle the vestiges of slavery,[34] leading to successful prosecutions of White supremacists who sought to perpetuate slavery's remnants.[35]

Alas, the promise of the Thirteenth Amendment began to wane as judicial interpretations narrowed its scope in the subsequent years. *Blyew v. United States*[36] and the *Slaughter-House Cases*[37] restricted the Amendment's application to chattel slavery alone, excluding other forms of servitude and oppression.[38] This shift in interpretation limited the federal government's ability to intervene in cases of racial violence and discrimination, effectively returning the enforcement of civil rights to the very states that had once upheld slavery.[39] Still, the final spark of recognition of the Thirteenth Amendment's power in addressing racially motivated violence came in *United States v. Cruikshank*,[40] where the Court, through Justice Bradley's majority opinion, acknowledged the conceptual basis for federal prosecution

31. U.S. CONST. amend. XIII, § 1.

32. 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

33. 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

34. *See Rhodes*, 27 F. Cas. at 787 (reasoning that Congress's primary aim in safeguarding a Black person's right to testify was to prevent the perpetuation of injustice against Black victims and defendants in civil and criminal proceedings); *In re Turner*, 24 F. Cas. at 339 (holding that compelling the Black petitioner to work until she reached the age of eighteen constituted "involuntary servitude" and thus directly contravened the protections enshrined in the Thirteenth Amendment).

35. Notably, amid organized White violence against Black citizens in the late 1860s, the United States Attorney for Kentucky, Benjamin H. Bristow, vigorously pursued prosecutions against White offenders. *See* Robert D. Goldstein, Blyew*: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 525 (1989) (describing Bristow as "one of the leading prosecutors defending freedpersons"). Out of the crisis emerged the Department of Justice, tasked with prosecuting cases where the civil and political rights of citizens had been infringed upon. RON CHERNOW, GRANT 700 (2017); *see also* Act of June 22, 1870, ch. 150, 16 Stat. 162 (establishing the United States Department of Justice); Enforcement Act of 1870, ch. 114, 16 Stat. 140 (prohibiting discrimination in voter registration based on "race, color, or previous condition of servitude"); Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (imposing liability for persons who act under color of state law while violating another's constitutional rights).

36. 80 U.S. (13 Wall.) 581 (1871).

37. 83 U.S. (16 Wall.) 36 (1872).

38. *See Blyew*, 80 U.S. (13 Wall.) at 592–93 (upholding federal removal of cases only in circumstances against white persons despite Thirteenth Amendment protections); *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 69 (stating it "requires an effort" and "a microscopic search . . . to find in [the Thirteenth Amendment] a reference to servitudes, which may have been attached to property"). The *Blyew* dissent regarded the denial of a Black person's access to the courtroom as reinstating a "badge of slavery" that the Civil Rights Act had aimed to eradicate. *Blyew*, 80 U.S. (13 Wall.) at 599 (Bradley, J., dissenting).

39. *See, e.g.*, Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 332–33 (2004) (stating that *Blyew* limited federal jurisdiction over civil rights cases, which allowed violent supremacist groups like the Ku Klux Klan to avoid federal prosecution when state laws barred Black testimony against Whites).

40. 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897), *aff'd* 92 U.S. 542 (1875).

of White on Black violence, citing the "affirmative operation" of the Thirteenth Amendment.[41] The Court contended that the Amendment's assurance of liberty empowered Congress to uphold equality among races—to eradicate the "badge of servitude" symbolized by violence against Black citizens.[42] The Court drew a distinction between crimes targeting a victim's race or past enslavement and "ordinary" crimes, asserting that the former fell under federal protection because they sought to deprive Black citizens of their rights and equal protection under the law.[43]

While Justice Bradley's opinion upheld the Thirteenth Amendment as the constitutional basis for federal prosecutions of racially motivated violence against Black citizens, the Court's decision to release the White defendants was perceived as a setback for national civil rights enforcement. The ruling's publication in the summer of 1874 was met with widespread violence, terrorism, and intimidation against Black citizens, a trend that persisted despite Congress's passing of a new Civil Rights Act in 1875—challenges that, over time, contributed to the erosion of the Thirteenth Amendment's protections and its corresponding inability to effectively combat systemic racism and discrimination.[44]

But the Supreme Court's decisions in *The Civil Rights Cases*[45] and *Plessy v. Ferguson*[46] further weakened the Thirteenth Amendment's potential to combat racial injustice.[47] By narrowly construing the Amendment's reach

41. *Id.* at 711. It must also be noted, however, that *Cruikshank* narrowly limited state action on due process and equal protection; it particularly narrowed Congress's power granted by all Reconstruction Amendments. *See id.* at 711–13 ("But [the Thirteenth Amendment] does not authorize congress to pass laws for the punishment of ordinary crimes and offenses against [Black people] or any other race. That belongs to the state government alone."). The Court denied and obscured the transformative potential of the Constitution in combating racial injustice, thus diluting the Framers' pledge of reparations. *See id.* at 712 ("But whilst the [Thirteenth] [A]mendment has the effect adverted to, it must be remembered that the right conferred and guarantied [sic] is not an absolute, but a relative one.").

42. *See id.* at 711 ("As disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude, it was supposed that congress [sic] had the power . . . [to] place the other races on the same plane of privilege as that occupied by the white race.").

43. *Id.* at 712.

44. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 155 (Fordham Univ. Press 2005) (1985) (describing the violence that "exploded in the wake of Bradley's decisions"); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 559 (Henry Steele Commager & Richard B. Harris eds., Perennial updated ed. 2014) (1988) (recounting the "violent crusade" of racially motivated crimes in 1875 that were "committed in broad daylight"); *see also* United States v. Butler, 25 F. Cas. 213, 217–18 (C.C.D.S.C. 1877) (No. 14,700) (describing violence against Black citizens in South Carolina in 1876).

45. 109 U.S. 3 (1883).

46. 163 U.S. 537 (1896).

47. The Supreme Court's decision in *The Civil Rights Cases* significantly cabined the reach of the Thirteenth Amendment, limiting its scope to only "slavery and its incidents." *The Civil Rights Cases*, 109 U.S. at 23. In light of this limitation, by the time of the *Plessy* decision, the Thirteenth

and dismissing Congress's efforts to address racial discrimination, the Court effectively sanctioned segregation and other discriminatory practices, perpetuating the "badges and incidents" of slavery that the Amendment sought to eradicate.[48] The Court's narrow interpretation of the Thirteenth Amendment in *Plessy* and *The Civil Rights Cases* led to a reliance on the Equal Protection Clause of the Fourteenth Amendment as the primary tool for advancing civil rights,[49] leaving the Thirteenth Amendment largely dormant for almost a century.[50]

It wasn't until *Jones v. Alfred H. Mayer Co.*[51] in 1968 that the Court revived the Thirteenth Amendment's promise of freedom by recognizing its power to address racial discrimination in housing.[52] In doing so, *Jones* heralded a pivotal change in constitutional jurisprudence and reshaped perceptions of other race-related issues. It established a powerful legal foundation for confronting systemic inequalities stemming from the legacy of slavery, while emphasizing the federal government's *affirmative duty* in safeguarding civil rights and advancing equitable treatment under the law.[53]

Amendment was so narrowly construed that even the Court could not understand why the plaintiff relied on it for his argument. *Plessy*, 163 U.S. at 543. Even still, the Court further restricted the Thirteenth Amendment in two ways. First, the Court limited the Amendment to cases involving compulsory exploitation of labor and peonage. *Id.* at 542. Second, the Court alleged that the drafters of the Thirteenth Amendment never intended that racially discriminatory state laws should be affected by the abolition of slavery. *See id.* (holding, for example, that refusing accommodations to Black people "cannot be justly regarded as imposing any badge of slavery or servitude"). The Court concluded by saying that a legal distinction "founded in the color of two races . . . *must* always exist." *Id.* at 543 (emphasis added).

48. *See The Civil Right Cases*, 109 U.S. at 25 ("Mere discriminations on account of race or color were not regarded as badges of slavery.").

49. For examples of civil rights cases brought under the Fourteenth Amendment Equal Protection Clause rather than the Thirteenth Amendment, see Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 342 (1938) (describing a Black plaintiff bringing a claim under the Equal Protection Clause for discriminatory admissions practices in higher education); Smith v. Allwright, 321 U.S. 649, 650–51 (1944) (describing a Black plaintiff bringing a claim under the Equal Protection Clause for discrimination at a polling location in Texas); Shelley v. Kraemer, 334 U.S. 1, 7 (1948) (describing a Black plaintiff bringing a claim under the Equal Protection Clause for discriminatory restrictive property agreements); and Brown v. Bd. of Educ., 347 U.S. 483, 487–88 (1954) (describing Black plaintiffs bringing a claim under the Equal Protection Clause for the discrimination caused by segregated public schools).

50. *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.–C.L. L. REV. 1, 22 (1995) (stating that after *The Civil Rights Cases* in 1883, "the Thirteenth Amendment lay dormant until 1968").

51. 392 U.S. 409 (1968).

52. *See id*. at 440–41 (holding that the "badges and incidents of slavery" included restrictions on the right to use property).

53. *See id.* at 432 (describing the "great fundamental rights" that the Thirteenth Amendment must protect (quoting CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Lyman Trumbull))). The Court's decision to expand the statute's reach beyond state action to include private discrimination suggests a proactive role for the federal government in ensuring equal access to housing, regardless of race. It can be inferred that the government's duty extends beyond merely preventing discriminatory state laws to actively combating discriminatory practices by private

Jones involved a Black family in St. Louis, Missouri that was denied the opportunity to purchase a home solely because of their race.[54] The family sued the housing developer under the Civil Rights Act of 1866, which, *inter alia*, prohibited discrimination based on race in the making and enforcement of contracts, including property transactions.[55] *Jones* reaffirmed Congress's authority under the Thirteenth Amendment to pass legislation aimed at eliminating the "badges and incidents" of slavery. The opinion, authored by Justice Stewart, relied heavily on the century-old legislative debates that led to the passage of the Thirteenth Amendment and the Civil Rights Act of 1866.[56] The Court held that the denial of the opportunity to purchase a home based on race constituted a "badge" of slavery and was therefore prohibited by the Thirteenth Amendment.[57] The Court explained that when racial discrimination confines individuals to "ghettos" and "makes their ability to buy property turn on the color of their skin," it becomes yet another vestige of slavery.[58] The Thirteenth Amendment, the Court stated,

> [a]t the very least . . . includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[59]

Some eight decades had passed since the Supreme Court had significantly cabined Congress's power to define "the badges and the incidents of slavery."[60] And yet, in *Jones*, the Court reinstated the original interpretation of the Thirteenth Amendment's Enabling Clause as precedent,[61] echoing Congress's original articulation of its meaning. In doing so, the Court overturned nearly a century of prior Supreme Court jurisprudence that had significantly limited congressional authority under the Amendment's Enabling Clause.[62]

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individuals. *See id.* at 423 ("To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by 'State or local law' but also by 'custom, or prejudice.'" (quoting CONG. GLOBE, 39th Cong., 1st Sess. 209 (1866) (statement of Sen. Reverdy Johnson))).

54. *Id.* at 412.

55. *Id.*

56. *Id.* at 436.

57. *Id.* at 441.

58. *Id.* at 442–43.

59. *Id.* at 443.

60. *See id.* at 440 ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery . . . ."). *But see supra* note 46 (discussing the Court's limitation of that power in the late nineteenth century).

61. *See* U.S. CONST. amend XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *see also Jones*, 392 U.S. at 440 (holding that Congress has the power to enforce the Thirteenth Amendment).

62. *See supra* notes 47–48and accompanying text.

Further, the *Jones* Court not only affirmed the constitutionality of civil rights legislation grounded in the Thirteenth Amendment but also revitalized a conception of freedom that extended beyond merely emancipating Black people from the bonds of slavery. The Court reminded detractors that the Thirteenth Amendment "'abolished slavery[] and established universal freedom.'"[63] However, the Court refrained from delving deeper into the full scope of the Amendment because it was "a question not involved in [*Jones*]."[64]

III. Capital Punishment and the Legacy of Slavery

That the reality of 250 years of race-based chattel slavery endured by Black people in America is connected to the roots of capital punishment is undeniable. As then-Senator Barack Obama said, the United States is forever "stained by . . . [the] original sin of slavery."[65] And the original sin of slavery was the precursor for the death penalty as it's employed in the modern American South. Capital punishment has its origins in racial oppression and the perpetuation of White supremacy.[66]

Contemporary capital punishment in the United States is heavily influenced by a historical legacy of racial violence and control. Literature has examined how both lynching and slavery, as historical practices, continue to shape the modern application of the death penalty. Research by David Rigby and Charles Seguin underscores this connection, demonstrating how the legacy of slavery and its legal status at the state level remain significant predictors of contemporary executions, surpassing even the influence of lynching.[67] The enduring effects of slavery on state-level political institutions and culture play a crucial role in shaping contemporary capital punishment practices. This Part views capital punishment through a comprehensive sociohistorical lens to understand how slavery, White supremacy, and capital punishment are deeply intertwined.

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63. *Jones*, 392 U.S. at 439 (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)).

64. *Id.*

65. Barack Obama, United States Senator, A More Perfect Union (Mar. 18, 2008) (transcript available at https://web.archive.org/web/20100405084319/http://my.barackobama.com/page/content/hisownwords [https://perma.cc/C7YW-GFH7]).

66. *See* Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 675–76 (2015) (arguing that capital punishment endured in the South, even as many northern states abolished it in the mid-1800s, because southern Whites regarded "[t]he death penalty . . . as essential to maintaining control over the slaves"); Ta-Nehisi Coates, *The Inhumanity of the Death Penalty*, ATLANTIC (May 12, 2014), https://www.theatlantic.com/politics/archive/2014/05/the-inhumanity-of-the-death-penalty/361991/ [https://perma.cc/4JXE-VZU9] ("In America, the history of the criminal justice [system]—and the death penalty—is utterly inseparable from white supremacy.").

67. David Rigby & Charles Seguin, *Capital Punishment and the Legacies of Slavery and Lynching in the United States*, 694 ANNALS AM. ACAD. POL. & SOC. SCI. 205, 216 (2021).

A. From Slavery to Lynchings to Capital Punishment

After the slave system became firmly entrenched in America, there arose a need to implement a system to govern the enslaved and facilitate the extraction of their valuable commodity: free labor. But the result wasn't merely that Black slaves were apprehended and sentenced more frequently than White colonists; rather, a distinct system of laws and justice was established *specifically* for the enslaved.

During the colonial and antebellum periods, Black individuals were subjected to harsh laws known as slave codes, which governed all aspects of their lives from the mid-17th century—beginning with Virginia's slave laws in the 1660s—until the abolition of slavery in 1865.[68] Virginia's 1639 legislation, referred to as "Act X," explicitly excluded Black citizens from a subsidy of arms and ammunition and subjected them to "be fined at the pleasure of the Governor and Council," reflecting a fear for the enslaved to possess weapons.[69] Another Virginian law, passed in the 1657–1658 legislative session, further illustrated the devaluation of Black lives, authorizing the establishment of a colonial militia to apprehend runaway slaves.[70] The formalization of slave codes in the late 1600s aimed to consolidate disparate laws related to slavery, leading some to question why similar restrictions were not imposed on White servants.[71] The differential treatment between Black people and Whites during this period was rooted in perceptions of Black inferiority and alleged propensity of Black people for crime and violence, despite much of this behavior being a response to their brutal treatment during slavery.[72]

But even further, the race-based criminal codes of this era imposed the death penalty on enslaved individuals for many more offenses than they did

68. The year 1619 marks the arrival of the first Africans in Virginia, but their status was initially ambiguous. KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 18, 21 (1956) (noting that in 1619, a "Dutch man of warre" brought twenty Africans to Virginia, marking the introduction of slavery into the American colonies and that their status was "vague and amorphous"). It was not until later in the 17th century that slavery became codified in law. *Id*. at 22; *see* A. Leon Higginbotham, Jr., *Racism and the Early American Legal Process 1619–1896*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 1 (1973) ("From 1619 to 1860 the American legal process was one which expanded and protected the liberties of white Americans—while at the same time the legal process became increasingly more harsh as to the *masses* of [slaves] . . . .").

69. 1 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 226 (1823).

70. *Id.* at 483.

71. *See* KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME 35–36 (2d ed. 2009) (discussing the "racial hierarchy as a pure race category" and the tendency of slaveowners to "monitor[] the boundaries of Whiteness").

72. *See id.* at 36, 50 (describing the ranges of slave punishment based on "Blackness" and that "the mainstream sentiment was that Blacks were separated from Whites for their own good and because they were dumb, dirty, and deviant").

for Whites.[73] While White offenders generally faced execution only for murder, Black individuals faced hanging as a common form of punishment for offenses such as rape, slave revolt, attempted murder, burglary, and arson.[74] More, some condemned slaves endured additional brutality: being burned alive at the stake.[75] Executed slaves were further demeaned by the public display of their severed heads on poles outside the courthouse or by permitting their corpses to decay in full view of the public.[76]

The brutality of slave codes and the dehumanization of Black individuals under slavery laid the groundwork for the racial terror of lynching that followed in the post-Emancipation era. After Emancipation, White southerners resorted to ritualistic kidnappings and killings of Black individuals to assert and reinforce White supremacy.[77] Lynching was a means to publicly assert dominance, strip Black individuals of their citizenship status, and assert control over their bodies, treating them as commodities for White entertainment and economic gain.[78] Lynching was justified under the guise of preserving racial boundaries, especially when concerning alleged breaches of sexual conduct between Black men and White women.[79] But a significant number of these acts were motivated by the desire to seize Black people's property—part of a broader pattern of theft and exploitation.[80]

Even beyond accusations of sexual conduct, Frederick Douglass, in 1893, highlighted how accusations of insolence or disrespect toward Whites were enough to justify lethal violence against Black individuals, echoing the logic of punishment during slavery to enforce White supremacy, regardless

73. ANGELA Y. DAVIS & EDUARDO MENDIETA, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 34 (2005).

74. Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 96, 99–100 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

75. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 71 (2002) (noting that "slaves convicted either of murdering their owners or of plotting a revolt" were burned at the stake—"a form of super-capital punishment, worse than death itself").

76. *Id.* at 72, 75. It's noteworthy that these practices persist in various forms today: For instance, after Michael Brown was killed by a White police officer, the City of Ferguson left his body on the street in public view for hours. *Timeline of Events in Shooting of Michael Brown in Ferguson*, ASSOCIATED PRESS (Aug. 8, 2019, 12:28 PM), https://apnews.com/article/shootings-police-us-news-st-louis-michael-brown-9aa32033692547699a3b61da8fd1fc62 [https://perma.cc/285K-HQ9P].

77. Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 273 (2007).

78. *See* DAVIS & MENDIETA, *supra* note 73, at 49 (describing lynching as "one of the ways in which the impossibility of equal citizenship was reinforced").

79. *See* David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 825 (2005) (discussing the use of lynchings as punishment for alleged rapes and as a mechanism for preserving racial purity).

80. Lizzie Presser, *Kicked Off the Land*, NEW YORKER (July 22, 2019), https://www.newyorker.com/magazine/2019/07/22/kicked-off-the-land [https://perma.cc/X9MH-RQ8Q] ("Most black men were lynched between 1890 and 1920 because whites wanted their land.").

of actual guilt.[81] The enduring presence of public torture lynchings in the South until the mid-twentieth century not only stalled progress towards more humane forms of punishment, but also solidified the demand for retribution against Black insubordination.[82] Lynching, alongside other forms of White domination like debt peonage, convict leasing, and segregation,[83] was integral to maintaining an institutionalized system of racial control.[84]

As public lynchings became less socially acceptable in the mid-twentieth century, the State turned to the death penalty to continue racial control. Executions deliberately echoed the brutality of lynching, making Black bodies into spectacles of suffering designed to maintain White dominance.[85] And despite efforts to sanitize capital punishment, its underlying purpose remains to reinforce the subordinate status of Black people, disproportionately targeting them and upholding White supremacy.[86] The persistence of the death penalty today underscores its nature as an uncivilized form of punishment, perpetuating White dominance over Black individuals and continuing the historical legacy of racial violence and

81. *See* Frederick Douglass, *Introduction* to THE REASON WHY 2, 7 (1893) ("It is enough to accuse, to condemn and punish the accused with death.").

82. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 6 (Russell Sage Found. 2006) (1964) (explaining that retribution against young Black men "significantly rolls back the gains to citizenship hard won by the civil rights movement"); Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 809 (2002) (claiming that to seek retribution for perceived injustices, the Ku Klux Klan emerged to reassert White supremacy and restore Whites to their "proper place" in the southern racial order).

83. Peonage is "a condition of enforced servitude, by which the servitor is restrained of his liberty and compelled to labor in liquidation of some debt or obligation, real or pretended, against his will." *Peonage*, BLACK'S LAW DICTIONARY (2d ed. 1910), https://thelawdictionary.org/peonage/ [https://perma.cc/A7FB-Y3RB]. Convict leasing was a practice of leasing prisoners to private companies or individuals to work, often in harsh and dangerous conditions, with little regard for their rights or well-being. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 3–4 (Anchor Books 2009) (2008) (discussing the practice of convict leasing). Segregation was "the act of separating such as in races in a school or other public place." *Segregation*, BLACK'S LAW DICTIONARY (2d ed. 1910), https://thelawdictionary.org/segregation/ [https://perma.cc/F3R5-AR8H].

84. *See* Roberts, *supra* note 77, at 274 (describing lynchings as "extensions of the inequitable formal administration of justice and part of a broader system of racial control").

85. *See* BANNER, *supra* note 75, at 230 (arguing that "the racial pattern of capital punishment in the South closely resembled that of lynching" and that the "death penalty was a means of racial control"); PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 403 (Mod. Libr. paperback ed. 2003) (2002) (describing the crowd watching a capital execution as "burst[ing] into cheers, then crush[ing] forward in an effort to glimpse the corpse as it was removed from the building").

86. *See* Bryan Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, *in* DEBATING THE DEATH PENALTY 76, 92 (Hugo Adam Bedau & Paul G. Cassell eds. 2004) (concluding that the tolerance of racial bias in the modern era of the death penalty poses a "serious threat to anti-discrimination reforms and equal justice in America").

oppression. For even though methods like lethal injection are considered "more humane," their symbolic attempt to reduce pain does not diminish the unconstitutionality of the death penalty.[87]

B. Contemporary Capital Punishment: A Vestige of Slavery

The first critical step in highlighting the illegitimacy of the capital punishment system is to trace its origins back to the institution of slavery. Second, it's crucial to acknowledge that capital punishment plays a role in subjugating Black individuals and perpetuating a racial capitalist regime. Mere attempts at reforming the system for fairness or inclusivity fall short, as they may worsen harm given that the system's repressive outcomes stem from inherent features, not isolated malfunctions. This subpart will show that capital punishment, as it stands today, is a mechanism that effectively sustains racial oppression.

Racial disparities in death penalty application and enforcement highlight systemic injustices in the criminal legal system. Since the reinstatement of the death penalty in 1976, statistics reveal that a disproportionate number of Black citizens have been executed compared to their representation in the population.[88] Moreover, the race of the victim plays a significant role in application of the death penalty, as a higher percentage of executions involve White victims even though White victims constitute only half of murder victims.[89] Similarly, the composition of current death row inmates reflects racial disparities, with a significant overrepresentation of Black citizens compared to their share of the population.[90] These disparities extend to the broader prison population, where, despite a recent decline in overall imprisonment rates,[91] Black and Hispanic citizens continue to be incarcerated at disproportionately high rates compared to Whites.[92]

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87. Bucklew v. Precythe, 139 S. Ct. 1112, 1124–25 (2019) ("[T]he Eighth Amendment does not guarantee a prisoner a painless death . . . .").

88. *See Black Population by State 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/black-population-by-state [https://perma.cc/R3FR-XPRR] ("According to the 2018 United States Census estimates, the United States population is approximately 14.6% Black . . . ."); *see Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 8, 2024), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf [https://perma.cc/93WW-TA2B] (stating that Black defendants account for 33.9% of defendants executed since 1976).

89. *Id.*

90. *Id.*

91. *U.S. Correctional Population Continued to Decline in 2021*, U.S. DEP'T JUST. (Feb. 23, 2023), https://www.ojp.gov/files/archives/pressreleases/2023/us-correctional-population-continued-decline-2021 [https://perma.cc/4U33-99PX].

92. *Racial Disparities Persist in Many U.S. Jails*, PEW CHARITABLE TRS. (May 16, 2023), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/05/racial-disparities-persist-in-many-us-jails [https://perma.cc/5HY3-JZ3W]. As of October 2, 2024, the Texas death row

The case law recognizes this inconsistency across racial lines. In *McCleskey v. Kemp*,[93] the issue of racial bias in the application of the death penalty took center stage. The case revolved around Warren McCleskey, a Black man sentenced to death in Georgia for the murder of a White police officer.[94] McCleskey's legal team presented the Baldus study, a comprehensive statistical analysis that revealed a stark racial disparity in Georgia's capital sentencing practices.[95] The study showed that defendants charged with killing White victims were significantly more likely to receive the death penalty than those charged with killing Black victims.[96]

And yet despite the compelling evidence of racial bias presented in the Baldus study, the Supreme Court, in a controversial 5–4 decision, upheld McCleskey's death sentence.[97] The Court acknowledged the existence of racial disparities in capital punishment but argued that McCleskey had failed to prove that intentional discrimination had influenced his specific case.[98] The Court's ruling placed a high burden of proof on defendants seeking to challenge racial bias in the death penalty, effectively requiring them to demonstrate explicit discriminatory *intent* rather than offer statistical evidence of systemic disparities.[99] Further, this decision reinforced the deeply entrenched nature of racial bias in the capital punishment system, highlighting the challenges faced in addressing systemic injustices and the

population totals 173 people. Of those 173 people, 44 prisoners are White, 46 are Hispanic, and 81 people are Black. *Death Row Information*, TEX. DEP'T OF CRIM. JUST. (Oct. 2, 2024), https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html [https://perma.cc/9VME-GKY5].

93. 481 U.S. 279 (1987).

94. *Id.* at 283.

95. *Id.* at 286. Conducting a study on racial bias in capital punishment was challenging yet feasible before David Baldus's work. Researchers used data from government sources like the Uniform Crime Reporting section of the FBI. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 591 (1980). After the Baldus study, a federal district court published a supplemental opinion in *Ross v. Hopper* that discussed the sufficiency of the study. 538 F. Supp. 105, 107 (S.D. Ga. 1982). The *Ross* opinion disregarded the Baldus-type evidence and dismissed the claim due to the Baldus study's supposed neglect of "countless racially neutral variables." *Id.* (quoting Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir. 1982)). But many defendants have argued that the Baldus study does address racially neutral variables. *Cf.* Spencer v. Zant, 715 F.2d 1562, 1582 (11th Cir. 1983) ("In his brief to this Court, [the defendant] alleges that Dr. Baldus's study addressed the very defects identified in the evidence . . . .").

96. *McCleskey*, 481 U.S. at 286.

97. *Id.* at 320.

98. *See id.* at 291 n.7 ("[W]e assume the [Baldus] study is valid statistically without reviewing the factual findings of the District Court."); *id.* at 292–93 (concluding that McCleskey offered "no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence").

99. *See id.* at 292 ("Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose.").

Court's reluctance to confront the legacy of slavery and its impact on contemporary legal practices.[100]

So yes, the historical pattern of controlling slave labor through both brutality and legislative measures is unmistakable, extending from the post-colonial era into the present. Moreover, the post-colonial era marked the emergence of stereotypical images portraying Black people as criminals,[101] fueling the denial of their civil rights both within and outside the criminal legal system. Racial disparities in the legal system were thus cemented. Today, Black Americans still grapple with the perception of being more inclined toward criminality, leading to a lack of basic protections; and despite efforts to seek justice through the courts, Black individuals have often encountered unsympathetic treatment.

Thus, history, case law, and statistics reveal that capital punishment is more than just a retributive mechanism; it's a tool deeply embedded in racial hierarchy—an endemic remnant of the legacy of slavery.

IV. The "Badges and Incidents" of Slavery

For much of its contentious history, the Thirteenth Amendment's promise of liberation remained largely unfulfilled, stymied by narrow judicial rulings and legislative inaction. It wasn't until 1954, with the landmark case *Brown v. Board of Education*,[102] that the Supreme Court started to revitalize the Amendment's original promise of universal freedom. True, *Brown* drew heavily on the Fourteenth Amendment;[103] but one may argue that the Court's decision in *Brown* galvanized the burgeoning Civil Rights Movement to push for the liberation of Black people under the broad terms of the Thirteenth Amendment. White supremacists—shielded by local

100. *See* Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 731–32 (2003) (noting Justice Powell's concern that "if the Court eliminated the death penalty because of discriminatory enforcement, it would create precedent that would require the elimination of other kinds of punishment also found to be administered in a discriminatory manner"). In response to *McCleskey*, the Congressional Black Caucus introduced the Racial Justice Act. *Id.* at 732. This Act aimed to prevent executions resulting from racially biased sentencing and allowed courts to infer discrimination from statistical data. *Id.* The Act was passed by a United States House of Representatives committee in 1990 and 1994 but removed from the legislation each time in conference with the United States Senate. Daniel E. Lungren & Mark L. Krotoski, *The Racial Justice Act of 1994—Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 U. DAYTON L. REV. 655, 658–61 (1995). Critics primarily claimed the Racial Justice Act would effectively lead to the abolition of the death penalty. Butler, *supra*, at 732–33.

101. *See* Sheri Lynn Johnson, *Explaining the Invidious: How Race Influences Capital Punishment in America*, 107 CORNELL L. REV. 1513, 1530 (2022) (discussing the history of "stereotypes [about Black people] regarding violence and criminality").

102. 347 U.S. 483 (1954).

103. *See id.* at 495 ("[W]e hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

customs of immunity—reacted to *Brown* by escalating anti-Black and anti-civil rights violence.[104] The Civil Rights Movement rekindled the national conscience, prompting the federal government to reclaim its interventionist role as a guardian of civil rights by the mid-1960s.[105]

But a question still remains: What, exactly, does "badges and incidents" mean? Does this concept exclusively address public laws discriminating against Black people or, more broadly, those based on race? Does it encompass any public or private practice perpetuating racial inferiority? Or does its scope extend further, covering any act driven by arbitrary class prejudice? Today, there's no universally accepted understanding of this frequently invoked yet under-theorized concept.

The phrase "badges and incidents of slavery" originated in *The Civil Rights Cases*. While the specific phrase doesn't appear in text of the Thirteenth Amendment itself, the Court used the language to reflect the Amendment's scope and Congress's enforcement power.[106] The ambiguity of the "badges and incidents" language represented a significant departure from the true intent and spirit of the Thirteenth Amendment. Since the language's inception, it has served as the authoritative characterization of subjects falling under Congress' prophylactic enforcement power. While many have identified certain behaviors as constituting a "badge and incident of slavery," only a few have endeavored to define the terms.[107] This Part aims to establish, to the best of its ability, the original meaning of "badges of slavery" and "incidents of slavery," as well as to decipher the *true* meaning behind the Court's use of the phrase "badges and incidents" in relation to the Thirteenth Amendment in *The Civil Rights Cases*.

A. Incidents of Slavery

Black's Law Dictionary defines incident as "anything which inseparably belongsto [sic], or is connected with, or inherent [to], another

104. *See* JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954–1965, at 38–39, 48–49 (1987) (describing different examples of immunized white violence).

105. *See generally* KENNETH O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA, 1960–1972 (1989) (illustrating how the movement's activism and demands for justice created a sense of urgency and moral imperative that forced the government towards a more interventionist stance by the mid-1960s).

106. The Civil Rights Cases, 109 U.S. 3, 21 (1883) ("Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents . . . .").

107. *E.g.*, Carter, *supra* note 19, at 1313–14; Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 564 (2012); George Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment* 1 (Univ. Va. L. Sch., Paper No. 68, 2007).

thing, called the 'principal.'"[108] In the context of slavery, this definition suggests that an "incident" refers to any practice, aspect, or component that is connected to or inherently associated with the institution of slavery itself. Essentially, it implies that certain practices are integral to or inseparable from the system of slavery. Forced labor, exploitation, abuse, and deprivation of rights, for instance, could be categorized as "incidents" of slavery because of their connection to institutionalized oppression—the legal restrictions imposed on slaves or the legal rights granted to slaveowners.

In *Prigg v. Pennsylvania*,[109] the U.S. Supreme Court asserted that since the Constitution's Fugitive Slave Clause "contains a positive and unqualified recognition of the right of the owner in the slave," all the "incidents" associated with that right are also recognized.[110] The Court emphasized "the right of seizure and recaption" as a fundamental incident of the property right of slaveowners, observing that this right "is universally acknowledged in all the slaveholding states."[111]

Although the Court in *Prigg* did not explicitly define "incident," it used the term in a manner that reveals its meaning within the context of slavery. The Court's recognition that the right to recapture and seize a fugitive slave was an inseparable part of the property rights inherent in slave ownership underscores the insidious ways in which the legal system at the time upheld the institution of slavery. *Prigg* thus suggests that an "incident" refers to a legal entitlement or practice that is inseparably connected to or inherent in the right of ownership over a slave.

Similarly, the term "incident" was also employed by antebellum courts to denote legal restrictions and conditions directly imposed on slaves. In *Neal v. Farmer*,[112] the Supreme Court of Georgia enumerated among the "many . . . incidents of slavery" requirements such as a slave's obligation to obey the master's commands or face "beating, imprisonment, and every species of chastisement"; the prohibition on a slave "acquiring property for his own benefit"; and the recognition of a slave as "the subject of property—saleable and transmissible."[113]

But while this list recognizes that many significant legal restraints applied to both free Black individuals and enslaved people, the existence of restrictions not exclusively tied to slavery does not diminish the fact that these restraints were inherently imposed upon those who were enslaved. Their roots were deeply tied to maintaining the system of slavery itself. The

108. *Incident*, BLACK'S LAW DICTIONARY (2d ed. 1910), https://thelawdictionary.org/incident/ [https://perma.cc/SYY6-X2W6].

109. 41 U.S. (16 Pet.) 539 (1842).

110. *Id.* at 613.

111. *Id.*

112. 9 Ga. 555 (1851).

113. *Id.* at 567.

legal restrictions proffered in *Farmer*, then, were essential incidents of slavery.

And the literature provides clues as well. Scholars have frequently used the term "incident" to denote the legal dimensions of the slave system.[114] Parsons, for instance, delves into the legal aspects governing the power dynamics between master and slave, which he calls the "nature and incidents of slavery."[115] The law clearly demarcates the boundaries of this institution without acknowledging any intermediary status between freedom and slavery.[116] A key incident of slavery is that the relationship between master and slave is legally unchangeable.[117] Courts do not allow modifications that might grant partial freedom or impose any "new and incongruous" features on the relationship.[118] Marriages between slaves are not legally recognized, and any related contractual rights are denied.[119] More, slaves are barred from legal recourse related to personal relations, such as testifying in certain cases or being liable for adultery or polygamy.[120] And even when a slave is entitled to future freedom, courts will not necessarily prevent "the master . . . from removing [the slave] out of the [s]tate"—an ongoing limitation on the slave's autonomy.[121] In the same vein, Thomas Morris affirms that "the concept of property, the notion of a person as a 'thing,' was obviously the central 'incident' in slavery."[122] These additional legal burdens are thus inextricably tied to, and inherently flow from, the condition of being enslaved.

Despite considerable debate surrounding the precise implications of the proposed Thirteenth Amendment, some supporters, such as Senator James Harlan of Iowa, contended that the Amendment abolished not only slavery but also its "necessary incidents."[123] The incidents of slavery were regarded

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114. *E.g.*, 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 326, 341, 346 (4th ed. 1860); George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 163, 164–65 (Alexander Tsesis ed., 2010); GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 31 (2d ed. 1856).

115. PARSONS, *supra* note 114, at 326.

116. *See id.* at 327 ("A slave cannot become partially free. The law recognizes only freedom on the one side and slavery on the other . . . .").

117. *See id.* ("[W]hen the fact of slavery is clear, the nature of the relation of master and slave admits of no modification . . . .").

118. *Id.*

119. *Id*. at 341.

120. *Id.*

121. *Id.* at 346.

122. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 80 (1996).

123. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1439–40 (1864) (statement of Sen. James Harlan) ("If, then, none of these necessary incidents of slavery are desirable, how can an American Senator cast a vote to justify its continuance for a single hour, or withhold a vote necessary for its prohibition?").

as inherent rights, entirely contingent upon the right to own and trade slaves. And thus, with the abolition of slavery, these rights ceased to exist as a component of it. What's crucial in this debate isn't the exact validity of contracts but rather the shared assumption among both sides: The Thirteenth Amendment nullified both slavery and its associated rights, and it defined the incidents of slavery as the legal entitlements inherently linked to slave ownership. An incident of slavery, as understood in its historical context, encompassed any legal entitlement or restriction that inherently accompanied the institution of slavery.

B. Badges of Slavery

Used both in its literal and figurative senses, "badge" serves as a tangible or metaphorical representation of the subordinate status endured by Black people during the era of slavery. *Black's Law Dictionary* defines badge as "[a] mark or cognizance worn to show the relation of the wearer to any person or thing; the token of anything."[124] For example, Adam Smith, in *The Wealth of Nations*, used the phrase "badges of slavery" to refer to trade and manufacture restrictions placed by the British on the colonies.[125]

But it wasn't until the Revolutionary and Civil Wars that the term acquired a more specific range of meanings. During that period, the term "badge of slavery" was predominantly used in both legal and political discourse to refer to the skin color of Black people. In certain states, and within some courts, dark skin was automatically presumed to indicate slave status.[126] As elucidated by a Delaware state court in 1840, the condition, or status, of slavery could be discerned because "their color became the badge of that status."[127] Certain legal restrictions applicable to slaves, such as the prohibition on providing testimony in cases involving White individuals, also extended to free Black people because they too bore the "badge of slavery."[128]

Following the Civil War, the use of the term "badge of slavery" diminished in popular discourse but gained increased legal prominence. With this shift, the term acquired a broader range of connotations that reflected reality post-emancipation. Skin color ceased to be perceived as a badge of slavery.[129] Instead, in post-Civil War America, the term "badge of slavery"

124. *Badge*, BLACK'S LAW DICTIONARY (2d ed. 1910), https://thelawdictionary.org/badge/ [https://perma.cc/CG8H-JS59].

125. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 387 (10th ed. 1802).

126. MORRIS, *supra* note 122, at 21.

127. State v. Whitaker, 3 Del. (3 Harr.) 549, 550 (1840).

128. *See id.* at 551 (denying any Black person of the opportunity to testify).

129. Lorenzo Clay, Letter from Governor Cony, *in* BANGOR DAILY WHIG & COURIER, July 13, 1865, at 2 ("Color is no longer a badge of servitude . . . .").

began to denote the methods employed by southern governments and White citizens to reintroduce the aspects of slavery onto freed slaves or, more broadly, to curtail their rights in a manner that identified them as a lesser class of citizens.[130]

Accordingly, before the Thirteenth Amendment, the term "badge of slavery" had a relatively narrow scope, referring primarily to indicators such as the color of a Black person's skin or other manifestations of inferiority associated with slavery. However, in the immediate aftermath of the Thirteenth Amendment, the concept evolved into a more legal term, denoting the restrictions imposed by states on the civil rights of freed slaves. This shift in terminology is logical; prior to emancipation, slaves were inherently bound by the legal constraints of their status. The only individuals subject to badges of slavery were free Black people, who, due to their skin color, were often regarded as inferior and subjected to state laws imposing similar restrictions as those on slaves. However, after emancipation, skin color alone no longer signaled servitude. All individuals of African descent were now free, and no one was subject to the trappings of slavery. So, different legal restrictions, or "badges," emerged to fill the void.

But the meaning of "badge of slavery" had not yet reached its zenith by 1883, the year the Court decided *The Civil Rights Cases*. Instead, the term's fluidity mirrored the relentless evolution of tactics employed to perpetuate racial subjugation. While skin color served as the stark badge of slavery before the Civil War, the post-war era witnessed the emergence of new, insidious badges. The Black Codes, with their blatant attempts to reinstate the legal and social shackles of slavery,[131] were but one manifestation. And then, as these codes crumbled under the weight of progress, Southern society—ever-resourceful in its pursuit of white racial dominance—devised subtler yet equally potent methods to maintain the subjugation of freed slaves. Violence, the sting of discrimination, the selective enforcement of ostensibly race-neutral laws, and the eventual entrenchment of Jim Crow—these became the new badges of slavery, each a testament to the adaptability of systemic racism.[132]

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130. *See, e.g.*, United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151) (finding that "free blacks" had "few civil and no political rights" and that "[m]any of the badges of the bondman's degradation were fastened upon them"); Blyew v. United States, 80 U.S. (13 Wall.) 581, 599 (1871) (explaining that to "deprive a whole class of the community" of a particular right "is to brand them with a badge of slavery"); United States v. Cruikshank, 25 F. Cas. 707, 711 (C.C.D. La. 1874) (No. 14,987), *aff'd* 92 U.S. 542 (1875) (explaining that the "disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude"); *see also supra* Part II.

131. *See* FONER, *supra* note 44, at 199–201 (describing Black Codes prohibiting former slaves from exercising rights including the rights to bear arms and serve on juries).

132. *See* George Lipsitz, *The Sounds of Silence: How Race Neutrality Preserves White Supremacy*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 28 (2019) (arguing that "selective enforcement of [colorblind] laws" to force Blacks to labor for

As demonstrated by the historical evolution of what constitutes a "badge of slavery," the fight against racial injustice requires a more dynamic understanding of the term's ever-shifting manifestations.

C. The Proposed Test

Given the evolving and expanding nature of what is a "badge and incident" of slavery, this Note offers a comprehensive test to determine whether a practice or policy violates the Thirteenth Amendment. A test in this space should consider not only the historical context but also the contemporary manifestations of racial subjugation. Indeed, *Jones v. Mayer Co.* provides insight into whether badges and incidents of slavery have evolved as society has developed. In *Jones*, the Court linked "the exclusion of [Black people] from White communities" to "the Black Codes" to "the slave system,"[133] demonstrating the enduring impact of historical practices on contemporary societal structures.

Further, *Jones* authorized the State to eradicate any form of racial discrimination reminiscent of slavery.[134] Judge A. Leon Higginbotham, Jr. adopted a similar analysis in *Pennsylvania v. Local Union No. 542*,[135] a case involving allegations of harassment and intimidation against Black people who had filed a race discrimination lawsuit against the local union.[136] After determining that several statutes empowered the court to enjoin such harassment, Judge Higginbotham concluded that these statutes were valid under the Thirteenth Amendment.[137]

On the other hand, a narrow interpretation of "badges and incidents" fails to acknowledge the systemic nature of racial oppression and would only facilitate the perpetuation of discriminatory practices and policies that effectively marginalize Black people into second-class citizens. By neglecting to recognize the comprehensive scope of the "badges and incidents" of slavery, courts would undercut the transformative power of the Thirteenth Amendment in confronting racial injustice and inequality. A narrow interpretation would reinforce the myth of colorblindness, obscuring the persistent legacy of slavery and its lasting repercussions on Black communities.

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whites under oppressive conditions resembling slavery perpetuated systemic inequality and entrenched Jim Crow policies).

133. Jones v. Mayer Co., 392 U.S. 409, 441–42 (1968).

134. *See id.* at 439 (holding that Congress may enforce the Thirteenth Amendment by appropriate legislation "to eliminate all racial barriers to the acquisition of real and personal property").

135. 347 F. Supp. 268 (E.D. Pa. 1972).

136. *Id*. at 272.

137. *Id*. at 298–301.

The analysis established in subparts IV(A)–(B) reveals the evolving meanings of "badges and incidents" of slavery. The concept of "badges and incidents" encompasses not just the tangible symbols of slavery—like chains and physical bondage—but also the intangible indicators of racial subjugation deeply ingrained in American culture. This Note proposes the following three-pronged test that courts might use to determine whether a violation of the Thirteenth Amendment has transpired. Specifically, any act being scrutinized must not:

i. perpetuate institutionalized discrimination, marginalization, or dehumanization;
ii. trigger psychological and emotional wounds inflicted by centuries of racial oppression; or
iii. manifest a systemic barrier to the opportunity, dignity, and full citizenship enjoyed by Black people across various facets of life.

Together, these three prongs hope to capture the full breadth of the "badges" and "incidents" of slavery that persist in modern-day America. The first prong targets structural inequities, those entrenched systems and practices that sustain racial hierarchies and deprive individuals of equal treatment under the law. The second prong seeks to redress the enduring psychological and emotional harm that slavery and its aftermath have wrought, recognizing the generational impact of such injuries on human dignity and self-worth. The third prong focuses on systemic barriers, those obstacles that inhibit access to the full rights and opportunities of citizenship, perpetuating inequality in education, employment, housing, and beyond.

The choice of "or" rather than "and" is deliberate, as each prong represents an independent affront to the principles of equality and justice. Any single manifestation of these harms is sufficient to violate the proposed standard, for each perpetuates the legacy of slavery in ways both tangible and intangible. This structure ensures that the test is neither unduly restrictive nor blind to the multifaceted nature of oppression. Instead, it acknowledges that slavery's legacy operates along multiple axes, each of which demands vigilant scrutiny and meaningful redress.

1. Institutionalized discrimination.—"Badges and incidents" refers to how power systems institutionalize forms of discrimination, marginalization, and dehumanization that persist even in the absence of explicit bondage. While Michel Foucault doesn't directly address slavery in *Discipline and Punish*,[138] he explores similar themes through disciplinary power and

138. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (exploring the evolution of the modern penal system).

surveillance. Foucault traces the development of disciplinary power in institutions like prisons—mechanisms that serve to regulate and control individuals' behavior, thus shaping their subjectivities and identities.[139]

Institutions of slavery shifted to disciplinary power.[140] Power, in the context of sentencing, manifests through prosecutorial discretion. At each stage of the criminal process, there's ample evidence indicating that Black people receive disparate treatment compared to Whites—both as victims of crime and as defendants in criminal cases.[141] While police officers determine whether to apprehend a suspect, it's the prosecutor who determines whether formal charges should be pressed and what those charges should be.[142] It's all discretionary,[143] and this broad, unchecked discretion positions prosecutors as main actors in advancing racial inequality in the criminal process.[144] As stated, the criminal legal system in the United States has been criticized for disproportionately targeting and incarcerating Black individuals; courts have consistently affirmed and endorsed prosecutorial discretion, thereby raising barriers to mounting legal challenges against discretionary decisions that disproportionately impact Black criminal defendants and crime victims.[145] Professor Davis, a prominent criminal law scholar, has argued that the discriminatory treatment experienced by defendants and victims may stem from "unconscious racism and institutional bias" rather than explicit discriminatory intent.[146]

Therefore, under prong one of this Note's test, prosecutorial discretion and capital sentencing might reflect a "badge" or "incident" of slavery.

2. Psychological and emotional wounds.—"Badges and incidents" also refers to the historical psychological and emotional scars that are triggered by centuries of inhumane treatment.[147] And most times, the clearest

139. *See id.* at 130–31 (describing different theories of punishment and how those theories developed the prison system throughout the eighteenth century).

140. *See* discussion *supra* subpart III(B).

141. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16 (1998).

142. Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 476–77 (1976).

143. *See id.* at 477–78 (explaining that "[i]n a loose sense, every decision of a prosecutor . . . is discretionary").

144. *See* Davis, *supra* note 141, at 16–17 (arguing that the role of prosecutors "in the complexities of racial inequality in the criminal process is inextricable and profound").

145. *Id*. at 18.

146. *Id*.

147. This section is inspired by the philosophy of "Afrofuturism." I. Bennett Capers coined the concept, asserting that literature and media serve as a testament to the need to insist that people of color have a future. *See* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 11–12 (2019) (referencing popular media that excludes people of color while arguing that we must insist that "people of color *have* a future"). Like Capers, this Note

expressions of these enduring scars are captured in literature. In *The Bluest Eye*,[148] for example, Toni Morrison depicts the desire of Black Americans to escape the dehumanizing effects of racism and internalized self-hatred through Pecola's longing for blue eyes.[149] Pecola's yearning reflects a devastating cultural trauma, enforced by a racist system, such that she believes her worthiness is tied to external markers.

Moreover, cultural trauma is triggered not by its frequency but by its ability to overwhelm ordinary coping mechanisms, often involving threats to life or bodily integrity, eliciting feelings of helplessness and terror.[150] Cultural trauma is a profound loss of identity and significance—a rupture in the social cohesion of a group that has previously attained a certain level of unity.[151] Emotional emancipation prioritizes the attainment of power and identity, echoing Dr. King's final address to the Southern Christian Leadership Conference, which emphasized cultivating a "firm sense of self-esteem" in the Black community.[152] It means granting Black citizens the ability to embrace a positive self-image without the need for explanation or validation. But institutions that perpetuate the belief of Black inferiority undermine Black individuals' self-esteem, harm Black families' well-being, and stifle the potential of Black children; the belief disregards the historical trauma experienced by Black communities, leading to tensions and violence, constraining hope, and limiting progress.[153]

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believes that literature holds philosophical significance and presents legal and ethical questions more purely than real-world current events. By eliminating contingencies, literature helps clarify the fundamental principles of adjudication. It allows us to analyze policy issues without binding the literature to specific ideologies or causes. Fiction becomes a tool for exploring one's own moral judgment. Engaging with authors like Toni Morrison, for instance, leads to an empathetic understanding of the trauma caused by slavery. Literature, therefore, transcends mere storytelling; it becomes an educational journey that draws from real-life experiences and transforms them into art.

148. TONI MORRISON, THE BLUEST EYE (RosettaBooks 2004) (1970).

149. *See generally id.* (depicting the effects of racism on a young Black girl's sense of self-worth).

150. *See* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 33 (1997) (asserting that "[t]raumatic events are extraordinary because they overwhelm the ordinary human adaptations to life" and evoke helplessness and terror); Cheryl N. Grills, Enola G. Aird & Daryl Rowe, *Breathe, Baby, Breathe: Clearing the Way for the Emotional Emancipation of Black People*, 16 CULTURAL STUD. ↔ CRITICAL METHODOLOGIES 333, 336 (2016) ("Traumatic events are extraordinary, not because of their rarity, but because they are outside the normal range of human experience, they overwhelm ordinary coping mechanisms, and they are the sources of exceptional mental and physical stress." (citation omitted)).

151. RON EYERMAN, CULTURAL TRAUMA: SLAVERY AND THE FORMATION OF AFRICAN AMERICAN IDENTITY 2 (2001).

152. *See* Martin Luther King, Jr., Final Address to the Southern Christian Leadership Conference, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 245–46 (James Melvin Washington ed., 1986) ("As long as the mind is enslaved, the body can never be free.").

153. Grills et al., *supra* note 150, at 335.

Therefore, under prong two of this Note's test, the perpetuation of cultural trauma—whether through systemic racism, the reinforcement of negative stereotypes, or institutions that deny Black citizens the opportunity to heal and reclaim their identity—constitutes a "badge" or "incident" of slavery.

3. Systemic barriers.—Finally, "badges and incidents" may manifest as cultural barriers to opportunity, dignity, and the full citizenship of Black people. Isabel Wilkerson, in *Caste*,[154] draws parallels between America's racial hierarchy to a hidden caste system, where Black people are systematically marginalized and oppressed due to perceived notions of inferiority.[155] Caste systems operate not only through overt acts of discrimination, but through unconscious biases and norms that perpetuate inequality.[156] These norms are cultural practices. This caste system is a remnant of slavery, functioning as a pervasive social structure that determines individuals' opportunities, status, and treatment based on their perceived place within the hierarchy.

And what better serves as a proxy for assessing cultural norms and practices than the jury system? In criminal trials, the jury presents a particularly concerning opportunity for implicit biases to significantly disadvantage defendants.[157] Critics have highlighted that "implicit biases translate most readily into discriminatory behavior . . . when people have wide discretion in making quick decisions with little accountability."[158] Indeed, implicit biases have been shown to increase assumptions of the criminality, violence, and overall dangerousness of Black individuals due to an obvious historical precedent.[159] White Americans are driven to justify and uphold the existing racial social order as the established norm.[160] While this aspect undoubtedly demonstrates a significant risk of discretionary powers, it only offers a partial explanation of the perilous nature of implicit bias. Its other manifestation stems from the extensive history of disproportionate

154. ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS (2020).

155. *Id*. at 70 ("Any action or institution that mocks, harms, assumes, or attaches inferiority or stereotype on the basis of the social construct of race can be considered racism.").

156. *See id*. at 187 (describing the contribution of implicit racial prejudices to the development of "the caste system").

157. *See* Eli Jones, *The Inherent Implicit Racism in Capital Crime Jury Deliberation*, 9 VA. J. CRIM. L., 2020, at 109, 119 ("Implicit biases have been shown to increase assumptions of the criminality, violence, and overall dangerousness of Black individuals.").

158. Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012).

159. For further discussion of the implications of slavery, White supremacy, and capital punishment on the American legal system, see *supra* Part III.

160. *See* WILKERSON, *supra* note 154, at 19 (describing the caste system as "fixed and rigid" while supporting "whoever fit the definition of white" as "the dominant caste").

brutality directed at Black offenders, which influences attitudes of anger and retribution in racial contexts, particularly in administering capital punishment.

Accordingly, the persistence of systemic barriers—including implicit biases in jury decision-making, the maintenance of racial hierarchies akin to caste systems, or cultural norms that perpetuate marginalization—constitutes a "badge" or "incident" of slavery under the third prong.

V. Applying the Test: The Thirteenth Amendment and Capital Punishment

A. The Unconstitutionality of Capital Punishment

The death penalty, as an institution of criminal punishment, represents a contemporary badge and incident of slavery, and is therefore unconstitutional under the Thirteenth Amendment. Yet, the United States questioned the mechanics of capital punishment on only one occasion—*Furman v. Georgia*.[161] In *Furman*, the Supreme Court invalidated the death penalty statutes of thirty-nine states and the federal government.[162] And as Justice Brennan recognized, it was a decision that was up to the Court alone, as the issue was not one to be submitted to the normal electoral processes.[163] Furthermore, concerned that the death penalty was being applied unevenly and potentially discriminating against those most vulnerable in American society, Justice Douglas chose to challenge the states' position rather than simply defer to it.[164]

And yet the lessons gleaned from *Furman* may not be as straightforward as they appear at first blush. Rather than showcasing the Supreme Court's capacity to resist reactionary pressures surrounding capital punishment, *Furman* suggests the opposite—that even during the Court's ostensibly radical moments, it remained closely aligned with prevailing public opinion, reflecting the social and political currents. At the time *Furman* was decided, public support for the death penalty stood at around fifty percent,[165] while resistance to the practice steadily increased over the course of a decade.[166]

161. 408 U.S. 238 (1972) (per curiam).

162. *Id.* at 411 (Blackmun, J., dissenting) (explaining that because of the Court's decision, "the capital punishment laws of 39 States and the District of Columbia [were] struck down").

163. *Id.* at 268 (Brennan, J., concurring) (recognizing that unlike the other guarantees of the Bill of Rights, there would be no election to determine the fate of the death penalty).

164. *See id.* at 240, 242 (Douglas, J., concurring) (arguing that "the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class . . . .").

165. 1 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1972–1977, at 20 (1978).

166. ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 368 (4th ed. 2008).

Many believed that abolishing the death penalty was inevitable.[167] Against this backdrop, it becomes challenging to see *Furman* as a decisively radical decision; rather, the Court chose to adopt a stance that was already gaining steam in the court of public opinion. *Furman* addressed an issue that divided the nation approximately in half, opting for the position that was slightly in the minority but backed by growing momentum.

But more importantly, *Furman* lacked a coherent vision. Because the decision failed to ground its decision in racial oppression, its focus on what would constitute cruel and unusual punishment left the Court's ruling vulnerable to being overturned. And without a solid framework rooted in both moral and constitutional principles, *Furman*'s impact was weakened, and subsequent legal challenges ultimately resulted in the reinstatement of the death penalty.[168]

Furman was the perfect opportunity to effectively link a violation of the Thirteenth Amendment with capital punishment; and doing so would have strongly cemented its unconstitutionality. This Note thus contends that its constitutional test would have provided the clear framework necessary for evaluating the legality of capital punishment, establishing the practice as a badge and incident of slavery, and thus demonstrating that the death penalty is unconstitutional. Yes, under our "badges and incidents" test, it becomes clear that capital punishment is unconstitutional.

B. Applying the "Badges and Incidents" Test to Furman

The factual basis for the claim that capital punishment violates Black people's fundamental rights is a critical issue to explore before reaching any conclusions. Historical evidence, lived experiences, and the inherent limitations of capital punishment all point to the undeniable conclusion: Racial motives and biases stemming from slavery continue to taint the application of the death penalty. In an illustration of this Note's proposed "badges and incidents" test, *Furman* exposes the inherent unconstitutionality of capital punishment. By dissecting the facts of *Furman* through the lens of each of the test's three prongs, this subpart shows how the death penalty disproportionately targets marginalized groups (prong one), replicates the psychological terror of slavery (prong two), and undermines the promise of equal citizenship under the law (prong three). Before applying the test, however, the facts of *Furman* must be fleshed out in detail.

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167. *See, e.g.*, HUGO ADAM BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 98–99 (1977) (describing expert opinions that capital punishment is a "dying and indefensible penal institution").

168. *See* Gregg v. Georgia, 428 U.S. 153, 168–69 (1976) (overturning *Furman* and explaining that the Court there did not resolve the fundamental issue of the constitutionality of the death penalty).

In *Furman*, the Court consolidated three cases, each with significantly different factual contexts but sharing in common the sentencing of Black people.[169] One defendant, Jackson, was convicted of raping a young White woman.[170] A psychiatrist assessed Jackson as having average intelligence and being fit to stand trial, attributing his criminal behavior to environmental factors.[171] While Jackson's victim suffered bruises, she did not appear to suffer any "long-term traumatic impact."[172] Another one of the three defendants, Furman, killed a homeowner during a burglary attempt.[173] Furman pleaded insanity and the superintendent's report indicated that Furman had a diagnosis of mental deficiency with psychotic episodes associated with a convulsive disorder; nevertheless, he too was deemed competent to stand trial.[174] Furman testified that the fatal shot allegedly occurred as he stumbled over a wire while fleeing the burglary scene, causing him to fire his weapon through a closed door.[175] The third defendant, Branch, raped an elderly White woman, coercing her silence by threatening to return and inflict further harm if she reported the assault.[176] Branch, who possessed cognitive abilities bordering on mental deficiency, had received only approximately five and a half years' worth of elementary education.[177]

The first prong of this Note's proposed "badges and incidents" test examines whether an act perpetuates institutionalized discrimination, marginalization, and dehumanization. And in *Furman*, Justice Douglas recognized that, while the death penalty is not itself inherently cruel, it may be if its application discriminates based on race, wealth, or social status.[178] Indeed, the Court's decision in *Furman* shows how prosecutorial discretion, when disproportionately applied to minority groups, serves as a mechanism of social control and surveillance. Jackson and Branch, for instance, were sentenced to death for a crime that did not cause death to the victim.[179] The prosecutor's unusual pursuit of capital punishment seemed influenced by the

169. *Furman*, 408 U.S. at 240, 252–53 (Douglas, J., concurring).

170. *Id.* at 252.

171. *Id.*

172. *Id*.

173. *Id.*

174. *Id.* at 252–53.

175. *Id*. at 294 n.48 (Brennan, J., concurring).

176. *Id.* at 253 (Douglas, J., concurring).

177. *Id*.

178. *See id*. at 241–42 (arguing that the death penalty is certainly "unusual" if the penalty discriminates by "race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices").

179. *Id*. at 239 (per curiam).

fact that Jackson and Branch were Black while their victims were White.[180] Indeed, with historical redolence, the application of the death penalty for rape has primarily occurred in the Southern United States—disproportionately targeting Black defendants in cases involving allegations of raping a White woman or child.[181] Thus, under the first prong of the test, *Furman* illustrates how capital punishment entrenches institutionalized discrimination against Black defendants, standing as a modern embodiment of a "badge" or "incident" of slavery.

The second prong of the "badges and incidents" test analyzes whether an act triggers psychological and emotional wounds inflicted by centuries of inhumane treatment. Justice Brennan based his opinion, *inter alia*, on human dignity, evoking this prong: "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."[182] Although the prohibition on degrading punishment includes torture, Justice Brennan relied on previous cases such as *Weems v. United States*[183] and *Trop v. Dulles*[184] to claim that physical suffering alone is not required to deem a punishment unconstitutional, rather, mental suffering is enough.[185] Thus, the death

180. *See id.* at 249 (Douglas, J., concurring) ("There is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual punishments.' 'A penalty . . . should be considered "unusually" imposed if it is administered arbitrarily or discriminatorily.'" (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970))); *id.* at 309–10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").

181. Brief for the ACLU et al. as Amicus Curiae Supporting Petitioner, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343), at 7.

182. *Furman*, 408 U.S. at 290 (Brennan, J., concurring).

183. 217 U.S. 349 (1910). Recognizing that legislation is not set in stone but instead evolves with society's changing standards, the *Weems* Court observed:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions.

Id. at 373.

184. 356 U.S. 86 (1958). *Trop* also explicitly stated that the Eighth Amendment's prohibition against cruel and unusual punishment must be interpreted in light of the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. This dynamic interpretation of the Constitution allows for the recognition that certain punishments, while once considered acceptable, may no longer be deemed so as society's moral and ethical standards evolve. Thus, the death penalty, despite its historical acceptance, may now be considered a badge and incident of slavery in light of the growing understanding of the punishment's historical legacy and contemporary values.

185. *See Furman*, 408 U.S. at 273–74 (Brennan, J., concurring) (describing the "denial by society of the individual's existence as a member of the community" as a punishment).

penalty, according to Justice Brennan, is inherently a "denial of the executed person's humanity."[186]

Jackson, Furman, and Branch were all sentenced to death, despite varying levels of cognitive ability, mental health issues, and mitigating factors.[187] And furthermore, the contrast in capital punishment sentencing for White and Black defendants highlights systemic biases and underscores the historical narrative that Black people face arbitrary, harsher punishment.[188] Brennan's analysis in *Furman* suggests how capital punishment elicits feelings of helplessness and inaptness; his assertion that the death penalty inherently denies the humanity of the condemned aligns with the broader societal "othering" of Black slaves. Brennan's opinion also lends support to the argument that capital punishment perpetuates cultural trauma.[189] This mental suffering disempowers Black Americans, eroding their sense of self and identity, and perpetuating an image of Black inferiority. As such, capital punishment also satisfies the test's second prong.

Finally, the test's third prong examines whether the act under scrutiny manifests as a cultural barrier to opportunity, dignity, and full citizenship.[190] In the conclusion of his *Furman* concurrence, Justice Stewart states: "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[191] There is no rational justification, Justice Stewart continues, for why certain juries imposed the death penalty on these individuals while others who committed equally egregious crimes received only imprisonment; the men in *Furman* represented a "capriciously selected random handful" upon whom the death sentence had been arbitrarily imposed.[192]

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186. *Id*. at 290.

187. *Id.* at 239 (per curiam); *see id.* at 252–53 (Douglas, J., concurring) (describing the mental states of each of the three petitioners).

188. *See* Brief for the ACLU et al. as Amicus Curiae Supporting Petitioner, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343), at 7 ("Historically, the use of death as a penalty for rape, far more than any other crime, has been driven by obvious racial discrimination.").

189. *See Furman*, 408 U.S. at 273 (Brennan, J., concurring) (mentioning that such punishment is "degrading to human dignity" and arguing that "[t]o inflict punishment for having a disease is to treat the individual as a diseased thing rather than a sick human being"). As discussed throughout this Note, this attack on human dignity perpetuates cultural trauma, especially among marginalized groups who have historically faced discriminatory application of capital punishment. *See supra* Part III.

190. The third prong is reflected in Justice Douglas's concurrence in *Furman*. *See id.* at 257 (Douglas, J., concurring) ("Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment," such that "equal or lesser sentences [are] imposed on the elite [and] . . . harsher one[s] on the minorities or members of the lower castes").

191. *Id.* at 310 (Stewart, J., concurring).

192. *Id*. at 309–10.

Justice Stewart's observation brings attention to the issue of jury discretion, acknowledging the danger of arbitrariness in imposing the death penalty. His observation that certain juries imposed the death penalty on individuals while others received only imprisonment showcases the capricious nature of the death penalty's application—especially when the legal system does not account for juror's implicit biases. Justice Stewart's conclusion echoes the sentiments of how juries may implicitly root racial social order. One is thus left to question the ethical implications of a legal system that permits the arbitrary realization of a caste.[193]

In this way, then, juror discretion of when and when not to impose capital punishment manifests as a barrier to the opportunity, dignity, and full citizenship of Black Americans—satisfying the third prong of the test.

And so, the analysis of *Furman* under the proposed "badges and incidents" test demonstrates the pervasive connection between capital punishment and the enduring legacy of slavery. Justice Douglas highlighted how the discretionary application of the death penalty disproportionately targets Black defendants, perpetuating institutionalized discrimination and cementing racial hierarchies as mechanisms of social control. Justice Brennan underscored the psychological and emotional toll exacted by capital punishment, describing it as a denial of humanity that mirrors the cultural trauma inflicted upon Black communities for generations. And Justice Stewart, in turn, exposed the arbitrary and capricious nature of the death penalty's imposition, linking it to systemic barriers that undermine Black Americans' dignity and access to full citizenship.

Each prong of the test finds clear application in *Furman*: the inequitable pursuit of capital punishment against Jackson and Branch, two Black men accused of non-lethal crimes; the cultural trauma inflicted by a punishment system historically rooted in the devaluation of Black lives; and the jury discretion that implicitly reinforces racial hierarchies in determining who lives and who dies.

VI. Special Considerations and Lingering Questions

This final Part is vital to understanding the scope of the Thirteenth Amendment and the arguments put forth in this Note. Each of the next three

193. *See id.* at 255 (Douglas, J., concurring). Musing on the consequences of enabling the arbitrary imposition of the death penalty, Justice Douglas noted:

> In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of . . . juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Id. (citation omitted).

subparts—dealing with the criminal legal system writ large, textualism, and the Punishment Clause—confront distinct facets of how this constitutional provision can be interpreted and applied in today's legal landscape. These facets are deemed "special considerations" because they highlight the boundaries of the Thirteenth Amendment, probing its capacity to challenge modern practices rooted in historical injustices and addressing lingering questions about this Note's argument.

The first subpart evaluates whether the test proposed in this Note can be extended to the entire criminal legal system, beyond just the death penalty. It considers whether the Thirteenth Amendment's prohibition against slavery and its "badges and incidents" can be applied broadly to challenge systemic racial biases and discriminatory practices throughout the criminal legal framework. This inquiry is crucial for understanding the extent to which the Amendment can function as a comprehensive tool for confronting and dismantling structural inequalities that persist in modern legal institutions.

The second subpart focuses on the implications of a resurgence in textualist jurisprudence, examining whether strict adherence to the original text and understanding of the Thirteenth Amendment might limit its scope. As recent Supreme Court decisions have leaned towards a more textualist approach, this subpart analyzes the potential impact of such a shift on the Amendment's capacity to address contemporary forms of racial subjugation.

The final subpart delves into the complexities surrounding the Punishment Clause of the Thirteenth Amendment, which allows for "involuntary servitude" as a punishment for crime. This analysis raises fundamental questions about whether the Clause inadvertently permits practices that resemble slavery, such as forced prison labor. The subpart evaluates whether this Clause can be reconciled with the Amendment's broader intent to eradicate all forms of slavery and its vestiges or whether it stands as a contradiction within the Amendment.

Addressing these questions is essential to comprehending the full reach and limitations of the Thirteenth Amendment in the context of ongoing debates over racial justice and criminal punishment.

A. The Unconstitutionality of the Criminal Legal System

While a full-throated analysis lies outside of the scope of this Note, it's worth briefly discussing the effects of its proposed test on the broader criminal legal system. Specifically, the second prong of the "badges and incidents" test—analyzing whether an act triggers psychological and emotional wounds inflicted by centuries of inhumane treatment—might not universally apply to the entire system. For while the historical context of slavery and its enduring psychological impact on Black communities is undeniable, extending this prong to encompass all aspects of the criminal legal system could face challenges.

The history of the Thirteenth Amendment, as discussed in Part II of this Note, might not provide a direct basis for declaring the entire criminal legal system unconstitutional under this prong because the Framers of the Thirteenth Amendment were concerned primarily with eradicating the specific institution of slavery and its direct consequences, rather than addressing the broader complexities of the criminal legal system that would evolve later.[194] But even excluding this "originalist" perspective, the historical and social distinctions between capital punishment and other forms of punishment within the criminal legal system further complicate the application of this prong for a few reasons.

First, and to reiterate, the death penalty has a long and intertwined history with slavery and racial oppression in the United States.[195] It was used as a tool of control and subjugation during slavery and continued to be disproportionately applied to Black individuals even after its abolition.[196] This historical legacy of racial bias and discrimination makes the death penalty particularly susceptible to triggering psychological and emotional wounds linked to slavery. Other forms of punishment, while still problematic and potentially discriminatory, may not carry the same historical weight and direct connection to the trauma of slavery.

Second, the death penalty carries a unique social and moral weight compared to other forms of punishment. It's often seen as the ultimate expression of state power[197] and is associated with strong emotions and debates about justice.[198] The finality and irrevocability of the death penalty can have a profound impact on individuals, families, and communities, exacerbating the psychological and emotional trauma experienced by those affected.[199]

But most importantly, the irreversibility of the death penalty distinguishes it from other forms of punishment. While imprisonment, fines, or probation can be overturned or modified if new evidence emerges or if concerns about wrongful conviction arise, the death penalty offers no such possibility. This finality creates a unique sense of fear, anxiety, and helplessness for those facing execution and for their loved ones, potentially intensifying the psychological and emotional toll.[200] The knowledge that the

194. *See supra* notes 28–30 and accompanying text.

195. *See supra* Part III.

196. *See supra* notes 73–75.

197. *See supra* note 182 and accompanying text.

198. *See supra* notes 10 and 18.

199. *See Report Addresses Death-Row Family Members' Barriers to Mental Health Care*, DEATH PENALTY INFO. CTR. (Sept. 25, 2024), https://deathpenaltyinfo.org/report-addresses-death-row-family-members-barriers-to-mental-health-care [https://perma.cc/3J5F-F7XJ] ("Families who have a loved one on death row, or who have experienced the execution of a loved one, suffer a variety of adverse mental health effects . . . .").

200. *Id.*

State has the power to end one's life can trigger deep-seated fears and anxieties related to historical experiences of dehumanization and violence.[201]

Yes, the second prong of this Note's test hopes to heal the deep wounds etched on the soul by centuries of unconstitutional cruelty. And yes, the psychological and emotional scars left by slavery might remain throughout the criminal legal system. Nevertheless, it would be difficult to broadly apply the test's second prong to all aspects of that system, where its relevance may be less direct and more nuanced. There is thus the need for a tailored and context-specific approach in evaluating the constitutionality of each aspect of the criminal legal system under the Thirteenth Amendment.

B. The Potential Return to Textualist Jurisprudence

Another potential conflict to application of this Note's "badges and incidents" test lies in recent Supreme Court jurisprudence—*Bucklew v. Precythe*.[202] In *Bucklew*, the Court delved into the original meaning and historical understanding of the Eighth Amendment's prohibition of cruel and unusual punishment.[203] This emphasis on originalism and textualism could be seen as a harbinger of a broader shift in the Court's interpretive approach,[204] potentially impacting the way the Thirteenth Amendment is construed. But while the resurgence of textualism may appear to narrow the scope of the Thirteenth Amendment's "badges and incidents," a closer reading reveals that this method, when applied faithfully, need not undermine the Amendment's capacity to address enduring forms of subjugation.

It's crucial to underscore that *Bucklew* primarily addressed the narrow issue of the method of execution under the Eighth Amendment. While the Court, in dicta, engaged in a discussion about original meaning, the discussion was explicitly confined to the specific context of evaluating the constitutionality of a particular execution method, not the broader question of whether capital punishment itself is constitutional.[205] Thus, to extrapolate from this limited discussion a sweeping endorsement of textualism across all facets of capital punishment jurisprudence is to overreach and potentially misconstrue the Court's intent.

But even if we acknowledge, *arguendo*, a potential shift towards a more textualist approach in the Court's philosophy, textualism does not inherently negate the expansive understanding of "badges and incidents" argued for in

201. *See supra* notes 85, 182–89 and accompanying text.

202. 139 S. Ct. 1112 (2019).

203. *Id.* at 1123.

204. *Cf.* Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 FLA. L. REV. 59, 60 (2024) ("The Supreme Court's approach to statutory interpretation has moved in a textualist direction over the last several decades . . . .").

205. *See id.* at 1123 (stating that the Eighth Amendment raises the question of what "cruel and unusual" means, even though "the Eighth Amendment doesn't forbid capital punishment").

this Note. Indeed, a textualist reading of the Thirteenth Amendment can still recognize the historical context and legislative intent behind it.[206] As discussed, the Framers' intent to eradicate not just the literal chains of slavery but also the systemic inequalities and dehumanizing practices intrinsic to the institution can be gleaned from a careful textual analysis, informed by historical understanding.[207] As such, the text itself, when viewed in light of its historical context, can support a broad interpretation that encompasses the enduring legacy of slavery.

True, the phrase "badges and incident" is not explicitly present in the text of the Thirteenth Amendment. This concept, however, has been deeply ingrained in Thirteenth Amendment jurisprudence since *The Civil Rights Cases*. There, while the Court narrowly interpreted the Amendment's scope, it nonetheless acknowledged the existence of "badges and incidents of slavery" as a category of practices against which Congress could legislate. Subsequent Supreme Court decisions, such as *Jones*, have further solidified the "badges and incidents" framework as a crucial tool for identifying and addressing the lingering effects of slavery in contemporary society.

Accordingly, although *Bucklew* might signal a renewed emphasis on original meaning in certain Eighth Amendment contexts, it does not necessarily pose a substantial threat to the arguments presented in this Note. *Bucklew*'s limited scope, the compatibility of textualism with a broad interpretation of the Thirteenth Amendment, and the Amendment's unique historical context all support scrutiny of capital punishment as a "badge" and "incident" of slavery. The legal foundation for challenging capital

206. *See, e.g.*, Dewey v. United States, 178 U.S. 510, 521 (1900) ("Our duty is to give effect to the will of Congress, as thus plainly expressed."); Lau Ow Bew v. United States, 144 U.S. 47, 59 (1892) ("Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."); Platt v. Union Pac. R.R. Co., 99 U.S. 48, 64 (1878) ("[I]n endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."); Mo., Kan., & Tex. Ry. Co. v. Kan. Pac. Ry. Co., 97 U.S. 491, 497 (1878) ("It is always to be borne in mind, in construing a congressional grant, . . . that such effect must be given to it as will carry out the intent of Congress."); *see also* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943) (describing the *expressio unius* principle as one of the maxims used "to aid in deciphering legislative intent"); United States v. Barnes, 222 U.S. 513, 519 (1912) ("The maxim . . . expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest."); *cf.* Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980) ("Where Congress explicitly enumerates exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent."); Tilikum v. Sea World Parks & Ent., Inc., 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012) ("As 'slavery' and 'involuntary servitude' are uniquely human activities, as those terms have been historically and contemporaneously applied, there is simply no basis to construe the Thirteenth Amendment as applying to non-humans.").

207. *See supra* notes 31–35.

punishment under the Thirteenth Amendment remains robust and compelling, even in the face of evolving judicial philosophies.

C. The Punishment Clause Question

It is time to address the elephant in the room: the Punishment Clause. At bottom, it's worth grounding the history of established jurisprudence to spur reflection, to have a concrete framework to discuss an Amendment that has been stripped of value and authority, and to avoid circular arguments. But what's perhaps undeniable is that the Thirteenth Amendment *does* authorize a "form of slavery":

> 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.[208]

The text of the Thirteenth Amendment prohibits slavery and forced labor, *except* for those cases in which someone is serving a sentence for a crime. But the debates surrounding the drafting of the Thirteenth Amendment provide little insight on the meaning of the Punishment Clause.[209] The primary concerns during the initial discussions surrounding the Thirteenth Amendment were centered on its core objective of prohibiting slavery and involuntary servitude, and on its second section granting Congress the authority to enforce this prohibition.[210]

Conversely, the exception for punishment for crimes received less attention at the time. The version of the Thirteenth Amendment that was eventually adopted was drafted from the Senate Judiciary Committee, under the leadership of the senator from Illinois, Lyman Trumbull.[211] Interestingly, the Punishment Clause of the Thirteenth Amendment emerged from the language of the Northwest Ordinance.[212] And while Senator Charles Sumner protested the retention of the Ordinance's language, Senator Jacob Howard pointed out that the phrasing is "peculiarly near and dear to the people of the northwestern territory, from whose soil slavery was excluded by it."[213] And

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208. U.S. CONST. amend XIII, § 1 (emphasis added).

209. *See* United States v. Shackney, 333 F.2d 475, 484 (2d Cir. 1964) (reviewing the history of the Amendment's drafting, none of which clarifies the meaning of the Punishment Clause).

210. *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 437 (4th ed. 2008) (noting that "the framers were not at all clear about the extent to which the amendment would prohibit legal discriminations that were the result of the slavery experience").

211. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 449 (1989).

212. HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 224 (1913). The draft of the Northwest Ordinance, written by Thomas Jefferson, contained a provision stating that slavery should be eradicated in all states except for the punishment of crimes. WAGER SWAYNE, THE ORDINANCE OF 1787 AND THE WAR OF 1861, at 31, 32 & n.* (1892).

213. SWAYNE, *supra* note 212, at 73.

thus the Punishment Clause was kept with no discussion or clear implications of its proper meaning. Even when Representative John Kasson, years after the ratification of the Amendment, presented a resolution to clarify the scope of the clause, it was postponed "indefinitely" in the Senate.[214] Kasson's joint resolution clarified that the Punishment Clause meant that the "servitude" is the restraint of freedom, rather than a denial of guarantees under the Thirteenth Amendment.[215]

While originalists might focus on the public's understanding of the Punishment Clause at the time of its enactment, rather than the intent of its proponents, the fact that a related Senate resolution was abandoned[216] casts doubt on whether the Framers of the Thirteenth Amendment themselves fully supported that resolution. This raises questions about the extent to which the resolution accurately reflects the intended meaning of the Punishment Clause.

And the case law provides little concrete guidance as well. Some courts have only addressed the scope of a prisoner's Thirteenth Amendment rights for challenges to a sentence of hard labor, finding that the Amendment allows prison work programs as punishment for crimes.[217] On the other hand, several courts have adopted a broader view of the Punishment Clause, treating it as an exception that specifically bars prisoners from making Thirteenth Amendment claims.[218] And a few courts have suggested, in dicta, that prisoners might still retain some Thirteenth Amendment rights.[219] Still, in

214. CONG. GLOBE, 39th Cong., 2d Sess. 324, 1600 (1867).

215. Kasson urged passage of a resolution, stating that the purpose of the Amendment was to:

> [P]rohibit[] 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 . . . .

Id. at 324.

216. *Id.* at 1600.

217. This sentence ought not to be misconstrued as the Note agreeing on the morality of this interpretation, but rather as the Note agreeing with what the Amendment's plain language could imply. To argue against this premise, while interesting, would be out of the scope of this Note. *See, e.g.*, Smith v. Dretke, 157 F. App'x 747, 748 (5th Cir. 2005) (explaining that hard labor without pay is permitted as punishment); Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992) ("The Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work.").

218. *See, e.g.*, Van Hoorelbeke v. Hawk, No. 95-2291, 1995 WL 676041, at *4 (7th Cir. Nov. 9, 1995) ("[P]risoners are explicitly excepted from th[e] [Thirteenth] [A]mendment's protection."); Jobson v. Henne, 355 F.2d 129, 131 (2d Cir. 1966) ("[Prisoners] are explicitly excepted from the [Thirteenth] Amendment's coverage.").

219. *See* Watson v. Graves, 909 F.2d 1549, 1552 (5th Cir. 1990) (acknowledging that a "prisoner who is not sentenced to hard labor retains his thirteenth amendment rights"); *see also* Davis v. Hudson, No. 00-6115, 2000 WL 1089510, at *3 (10th Cir. Aug. 4, 2000) (recognizing that "there might be circumstances in which the opportunity for private exploitation and/or lack of

District of Columbia v. Heller,[220] the Court stated that provisions in the Constitution should be interpreted according to their "normal and ordinary" meaning, as they would have been understood by the average person when they were written.[221]

And thus, proponents of a broad interpretation of the Punishment Clause argue that the Thirteenth Amendment authorizes the continued existence of slavery as a form of punishment, implying that convicted criminals forfeit certain constitutional rights. But this argument relies on a strained reading of the Amendment. As shown, the legislative history offers little insight into the Clause's intended scope, and the Supreme Court has yet to provide definitive guidance on this issue, leaving its interpretation contested.[222]

Yet, as shown, the historical context surrounding the Thirteenth Amendment's ratification makes it highly improbable that it would tolerate a system resembling chattel slavery, even as punishment.[223] And even further, an argument for capital punishment grounded in the Punishment Clause rests on a reading of the Clause that is irreconcilable with the Thirteenth Amendment's core purpose. Instead, such a construction is unsupported by the Amendment's text, history, or guiding principles.

First, the Punishment Clause, in its plain language, merely carves out an exception to the prohibition against involuntary servitude. It doesn't grant a carte blanche to resurrect slavery under the guise of punishment. The original intent of the clause, or whatever intent can be gleaned from the scant legislative history,[224] was to address concerns about convict labor. There is no evidence the clause sanctioned the state-inflicted death of its citizens. And to say otherwise would be to turn a blind eye to the historical context in which the Thirteenth Amendment was born: a context steeped in the struggle to eradicate the vestiges of slavery, not to enshrine them in the Constitution.

Second, the argument that the Punishment Clause sanctions capital punishment misunderstands the Clause's fundamental scope and purpose. The Clause, even if interpreted broadly, pertains solely to the status of the individual convict. It doesn't extend to the broader institution of punishment itself. The Clause cannot be used to legitimize an entire capital punishment system that is rife with racial bias and perpetuates the very dehumanization the Thirteenth Amendment sought to eradicate.

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adequate state safeguards could take a case outside the ambit of the Thirteenth Amendment's state imprisonment exception").

220. 554 U.S. 570 (2008).

221. *Id*. at 576–77 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

222. The Virginia Supreme Court in 1871, however, referred to prisoners as "slaves of the State." Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

223. *See supra* subpart III(A).

224. *See supra* notes 28–30 and accompanying text.

And third, the Clause's focus on the convicted individual's punishment obscures the systemic issues at play. The death penalty, as it currently exists, is not simply a matter of individual sentences; it's an institution deeply embedded in a history of racial injustice, reflecting and perpetuating the dehumanization and discrimination that were hallmarks of slavery. Even in its broadest interpretation, the Punishment Clause cannot be construed to sanction such a system. The Clause is about the *individual's* sentence, not the societal structures that enable and perpetuate that sentence.

To argue that the Punishment Clause sanctions capital punishment is to conflate an individual's sentence with the institutional machinery that metes it out. The machinery of capital punishment, with its documented racial bias and its echoes of slavery, cannot find shelter in a clause meant to address the conditions of individual convicts. The Thirteenth Amendment, in its totality, is a bulwark against the re-emergence of slavery in any form, whether at the individual or institutional level. Therefore, the Punishment Clause, properly understood, cannot be used to subvert this fundamental principle.

Conclusion

So ends *Sula*, a novel that compels readers to look beneath the surface and challenge societal structures that marginalize identities, to dismantle false dichotomies and reveal how language can be wielded as a tool of oppression. In doing so, Morrison upends traditional hierarchies, suggesting that "when God looks down, it's the bottom. . . . [T]he bottom of heaven—best land there is."[225] Morrison's portrayal of the Bottom as the "best land," despite its imposed inferiority, serves as a profound call to recognize and elevate lives and narratives too often marginalized.

In the same spirit, this Note reclaims the Thirteenth Amendment as an enduring and active force, not merely a historical milestone of emancipation; it's instead a dynamic tool for dismantling entrenched systems of oppression, such as capital punishment.

Thus, let this Note serve as a reflection both on the profound influence of legal institutions over the lives they govern and our responsibility to ensure that influence is wielded with care. Like literature, it bears witness to the ruin wrought by hate, the salvation found in compassion, and people's solemn duty to heed the voices of the past. In this way, both *Sula* and this Note reject complacency in the presence of systemic inequities, insisting instead on a more expansive and courageous vision of justice.

The Thirteenth Amendment has the capacity to address the "badges and incidents" of slavery in capital punishment. Applying this Note's three-pronged framework to *Furman* revealed how capital punishment

225. MORRISON, *supra* note 2, at 14.

(1) entrenches institutionalized discrimination, (2) perpetuates cultural trauma, and (3) erects systemic barriers to the full realization of equal citizenship. Taken together, the prongs illuminate the death penalty's role as a modern manifestation of exploitation and dehumanization—precisely the kind of injustice the Thirteenth Amendment was intended to eradicate.

Opposition to the death penalty doesn't stem from an idealized view of human nature; rather, the practice's abolition is crucial in the quest to mend a society that has long been fractured. The death penalty, rooted in the foundation of the Thirteenth Amendment, is based on the belief that continuously making excuses eventually leads to the normalization of a flawed moral conscience. And as we grapple with a tumultuous world, we cannot seek institutions that treat some with the care of a convalescent and not others. The chains that tie capital punishment to slavery are iron-forged; any attempt at reform or reenactment fails to grant true liberation from either.