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From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System

“Slavery in the United States,” wrote Frederick Douglass in 1846, “is the granting of that power by which one man exercises and enforces a right of property in the body and soul of another.” Throughout his career as an abolitionist, his writings and speeches probed the contradictions of the legal definition of the slave as “a piece of property – a marketable commodity.”¹ He used this definition of the slave as property, for example, as the basis for his analysis of theft by slaves as an everyday practice of resistance to slavery. The slave “can own nothing, possess nothing, acquire nothing, but what must belong to another. To eat the fruit of his own toil, to clothe his person with the work of his own hands, is considered stealing.”² Because the slave “was born into a society organized to defraud him of the results of his labor . . . he naturally enough thought it no robbery to obtain by stealth – the only way open to him – a part of what was forced from him under the hard conditions of the lash.”³ When Douglass himself escaped from slavery, he also stole property which belonged, in the eyes of the law, to his master. As a fugitive slave, both state and federal law constructed him as a criminal – a thief who absconded with his own body.

Throughout his life, Douglass periodically referred to the criminalization of the black population as a by-product of slavery. In 1877 President Rutherford Hayes appointed him US Marshall in the District of Columbia (over much criticism by both blacks and whites), which he said brought him into direct contact with black individuals stigmatized as criminals.⁴ While he invariably contested the prevailing presumption of ex-slaves’ natural proclivities toward crime, he nevertheless agreed that “they furnish a larger proportion of petty thieves than any other class,”⁵ attributing this “thieving

propensity” to holdovers from slavery. A central component in Douglass’s philosophy of history was the assumption that over time, as the black population became increasingly removed from the era of slavery, these criminal propensities would recede accordingly.

It is sad to think of the multitude who only dropped out of slavery to drop into prisons and chain-gangs, for the crimes for which they are punished seldom rise higher than the stealing of a pig or a pair of shoes; but it is consoling to think that the fact is not due to liberty, but to slavery, and that the evil will disappear as these people recede from the system in which they were born.⁶

More than a century after Douglass expressed his confidence that over time the black population would be transformed by material progress and spiritual enlightenment and would thus cease to be treated as a criminalized class, blackness is ideologically linked to criminality in ways that are more complicated and pernicious than Douglass ever could have imagined. The overwhelming numbers and percentages of imprisoned black men and women tend to define the black population as one that is subject *a priori* to incarceration and surveillance. In 1997, 1.8 million people were in the country’s jails and prisons, approximately half of whom were black. Almost one-third of all young black males are either incarcerated or directly under criminal justice surveillance.⁷ Although women constitute a statistically small percentage of the overall prison population (7.4 percent), the rate of increase in the incarceration of black women surpasses that of their male counterparts.⁸ Whereas the prison system established its authority as a major institution of discipline and control for black communities during the last two decades of the nineteenth century, at the close of the twentieth century, carceral regulation of black communities has reached crisis proportions.

Considering the central role race has played in the emergence of a contemporary prison industrial complex and the attendant expansion of incarcerated populations, an examination of Douglass’s historical views on the criminalization of black communities and the racialization of crime may yield important insights. In this paper, I am especially interested in Douglass’s silence regarding the post-Civil War southern system of convict lease, which transferred symbolically significant numbers of black people from the prison of slavery to the slavery of prison. Through this transference, ideological and institutional carryovers from slavery began to fortify the equation of blackness and criminality in US society.

When the Thirteenth Amendment was passed in 1865, thus legally abolishing the slave economy, it also contained a provision that was universally celebrated as a declaration of the unconstitutionality of peonage. “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 anyplace subject to their jurisdiction" (emphasis added). That exception would render penal servitude constitutional – from 1865 to the present day. That black human beings might continue to be enslaved under the auspices of southern systems of justice (and that this might set a precedent for imprisonment outside the South) seems not to have occurred to Douglass and other abolitionist leaders. It certainly is understandable that this loophole might be overlooked amid the general jubilation with which emancipation initially was greeted. However, the southern states' rapid passage of Black Codes – which criminalized such behavior as vagrancy, breach of job contracts, absence from work, the possession of firearms, and insulting gestures or acts⁹ – should have stimulated critical reconsideration of the dangerous potential of the amendment's loophole. Replacing the Slave Codes of the previous era, the Black Codes simultaneously acknowledged and nullified black people's new juridical status as US citizens. The racialization of specific crimes meant that, according to state law, there were crimes for which only black people could be "duly convicted." The Mississippi Black Codes, for example, which were adopted soon after the close of the Civil War, declared vagrant "anyone/who was guilty of theft, had run away [from a job, apparently], was drunk, was wanton in conduct or speech, had neglected job or family, handled money carelessly, and . . . all other idle and disorderly persons."¹⁰ Thus vagrancy was coded as a black crime, one punishable by incarceration and forced labor.

Considering the importance Douglass accorded the institution of slavery as an explanatory factor in relation to the vast numbers of "free" black people who were identified as criminal, it is surprising that he did not directly criticize the expansion of the convict lease system and the related system of peonage. As the premier black public intellectual of his time, he seems to have established a pattern of relative silence vis-à-vis convict leasing, peonage, and the penitentiary system, all of which clearly were institutional descendants of slavery. Douglass's most explicit denunciation of peonage did not occur until 1888, after a trip he made to South Carolina during which, according to Phillip Foner, he "realized how little he had known about the true conditions of his people in the South."¹¹ In a speech on the occasion of the twenty-sixth anniversary of Emancipation in the District of Columbia, Douglass said that the landlord and tenant laws in the South sounded like "the grating hinges of a slave prison" and kept black people "firmly bound in a strong, remorseless, and deadly grasp, a grasp from which only death can free [them]."¹² However, by the time he made this observation, tenant farming, peonage, and convict leasing had been in place for over two decades in some states. The Hayes-Tilden Compromise of 1877 led to the expansion and strengthening of these systems throughout the South. Precisely at the time Frederick Douglass's voice was most

needed to trouble the rise of this new form of slavery – experienced directly by thousands of black people and symbolically by millions – his political loyalties to the Republican Party and his absolute faith in principles of Enlightenment seemed to blind him to the role the federal government was playing in the development of convict leasing and peonage. In fact, just as President Rutherford Hayes decided to withdraw federal troops from the South, he also decided to appoint Frederick Douglass as US Marshall of the District of Columbia.

According to Milfred Fierce, who has authored one of the few extended studies of the convict lease system within the field of African-American Studies, little is known about Douglass's views on convict leasing or those of other black leaders of his era.¹³ Later, Booker T. Washington did occasionally speak out against convict leasing, and he integrated into his own project of industrial education some efforts to assist individuals caught up in the system of debt peonage. But he never developed an explicit strategy to abolish convict leasing. W. E. B. Du Bois published an essay in 1901 entitled "The Spawn of Slavery: The Convict Lease System of the South" in a now obscure missionary periodical, and while it proposed a radical analysis, it seems that it was not widely read or discussed.¹⁴ Du Bois argued not only that crime was a "symptom of wrong social conditions," but that the entrenchment of convict leasing "linked crime and slavery indissolubly in [black people's] minds."¹⁵ In 1907, Mary Church Terrell published an essay in *The Nineteenth Century* entitled "Peonage in the United States: The Convict Lease System and the Chain Gangs."¹⁶

Fierce explains the relative silence on the part of leaders like Frederick Douglass in part as a result of their limited knowledge of the atrocities connected with this system. However, it is difficult to believe that Douglass was unaware of the development of the lease system in the aftermath of Emancipation or of its expansion at the close of Radical Reconstruction. While his speeches and writings suggest that he did not consider this an issue important enough to deserve a place on his agenda for black liberation, recurring references to presumptions of black criminality and evocations, albeit abstract, of chain gangs persuade me that Douglass must have been aware of the atrocities committed in the name of justice. I therefore tend to think that Fierce is more accurate when he contends that

in addition, black leaders fell victim to the notion that "criminals" were getting what they deserved and, despite the cruelty of convict leasing, a crusade on behalf of prisoners was not seen as more important than fighting the lynching bee, opposing voting restrictions, or protesting the acts of racial bigotry that abounded. Those who accepted this analysis failed to fully appreciate how many of the convicts were kidnapped, held beyond their sentences, or actually innocent of the crimes for which they were incarcerated, the total number of which will never be known.¹⁷

They also failed to recognize that black boys and girls were not exempt from the convict labor system. David Oshinsky, author of *Worse Than Slavery*, refers to a pardon petition for a six-year-old girl named Mary Gay, who was sentenced to thirty days "plus court costs" on charges of stealing a hat.¹⁸

The general impact of the convict leasing system was even more far-reaching than the horrors it brought to individual black lives. According to Oshinsky:

From its beginnings in Mississippi in the late 1860s until its abolition in Alabama in the late 1920s, convict leasing would serve to undermine legal equality, harden racial stereotypes, spur industrial development, intimidate free workers, and breed open contempt for the law. It would turn a few men into millionaires and crush thousands of ordinary lives.¹⁹

By the time the National Committee on Prison Labor convened in 1911, a number of southern states had already abolished convict labor and the abolitionist campaign had been rendered legitimate by the rising influence of the penal reform movement. The General Secretary of the National Committee on Prison Labor entitled his book on the Committee's findings *Penal Servitude* and introduced it with the following observation:

The State has a property right in the labor of the prisoner. The 13th Amendment of the Constitution of the United States provides that neither slavery nor involuntary servitude shall exist, yet by inference allows its continuance as punishment for crime, after due process of law. This property right the state may lease or retain for its own use, the manner being set forth in state constitutions and acts of legislature.²⁰

Although the loophole in the Thirteenth Amendment was apparently missed by most at the time of its passage, in retrospect it is easy to see how the very limitation of "slavery" and "involuntary servitude" to "criminals" could facilitate the further criminalization of former slaves.

Throughout his post-War writings and speeches Frederick Douglass argued that vast numbers of black people discovered that crimes were imputed to them which carried no prison sentence for whites. Had he decided to examine this attribution of criminality to black people more thoroughly, he might have discovered a link between the leasing system and other institutions for the control of black labor. The Thirteenth Amendment putatively freed black labor from the total control to which it was subject during slavery. In actuality, new forms of quasi-total control developed – sharecropping, tenant farming, the scrip system and the most dramatic evidence of the persistence of slavery, the convict lease system. Although Alabama and Louisiana had begun to use the lease system before

the Civil War, it was only with the emancipation of the slaves that they and the other southern states began to use convict leasing on a relatively large scale. During the post-Civil War period, the percentages of black convicts in relation to white was often higher than 90 percent. In Alabama, the prison population tripled between 1874 and 1877 – and the increase consisted almost entirely of blacks.²¹

Radical Reconstruction did not abruptly end with the withdrawal of federal troops in 1877. However, as the first black recipient of a federal appointment that required senate confirmation, Douglass failed to use his position to forcefully challenge the Republican Party's complicity with the repressive process of re-establishing control over southern black labor. "It was clear by inauguration day," Phillip Foner contends, "that Hayes' agreement to remove the last remaining federal troops from the South had rendered meaningless his pledge to uphold the rights of the colored people. At this crucial moment Douglass voiced no opposition to Hayes' policy."²² Instead, Douglass continued to define freedom as access to political rights, thus prioritizing political progress over economic freedom. His argument that "slavery is not abolished until the black man has the ballot"²³ was transformed into intransigent – although not always uncritical – support for the Republican Party, which was combined with an Enlightenment philosophy of history that emphasized inevitable future progress for the former slaves. Throughout his campaign for the Fifteenth Amendment and for the legislation necessary to enforce it, Douglass represented the ballot as the engine of progress for African Americans – even if these political rights were explicitly gendered as male and proscribed by the criminalization process to which all black people were vulnerable. However, after the fall of Radical Reconstruction and the solidification of the move toward disfranchisement, Douglass developed other arguments which revealed the Hegelian character of his unswerving belief in Enlightenment and historical progress.

In an 1879 paper opposing the Exoduster movement, Douglass contended that black people were the only hope for progress in the South. He argued that "whatever prosperity, beauty, and civilization are now possessed by the South" could be attributed to the labor of black slaves. This dependence of the South on black people was no less the case in the aftermath of slavery. "[The Negro] is the arbiter of her destiny."²⁴

The Exodus has revealed to southern men the humiliating fact that the prosperity and civilization of the South are at the mercy of the despised and hated Negro. That it is for him, more than for any other, to say what shall be the future of the late Confederate States; that within their ample borders, he alone can stand between the contending powers of savage and civilized life; that the giving or withholding of his labor will bless or blast their beautiful country.²⁵

That Douglass could represent black workers as already having achieved the status accorded white workers – that is they were free to sell or withhold their labor to southern employers – revealed his astounding failure to engage with the actual position of black labor in the South.

The Negro . . . has labor, the South wants it, and must have it or perish. Since he is free he can now give it, or withhold it; use it where he is, or take it elsewhere, as he pleases. His labor made him a slave, and his labor can, if he will, make him free, comfortable and independent. It is more to him than either fire, sword, ballot-boxes, or bayonet. It touches the heart of the South through its pocket.²⁶

Ironically, Douglass's argument here foreshadows in starkly literal terms Booker T. Washington's admonition to "cast down your bucket where you are." If black labor was free at all, it was only in the formal sense that the economic system of slavery had been declared unconstitutional. Tenant farming, sharecropping, peonage, the practice of paying wages in scrip – and, for a vastly disproportionate number of black people, convict labor – militated against any assertion of economic freedom on the part of the masses of former slaves. Although a relatively small number of people were directly affected by the convict labor system, its symbolic importance resided in its demonstration to all black workers that incarceration and penal servitude were their possible fate. Convict leasing was a totalitarian effort to control black labor in the post-Emancipation era and it served as a symbolic reminder to black people that slavery had not been fully disestablished.²⁷ That black women could be housed, worked and physically and sexually abused by inmates and guards in camps that were largely male constituted a message that there was a fate even worse than slavery awaiting them. D. E. Tobias, one of the few black intellectuals at the turn of the century to prioritize the campaign against convict leasing, referred to the "immorality" abounding in the convict camps because of the co-correctional housing policies and because women were whipped nude in the presence of male convicts.²⁸ As long as it was possible to arrest and imprison black people (not only on serious charges, but also on petty charges that would never land a white person in jail) and lease out their labor under oppressive conditions that often surpassed those of slavery, black labor could not be said to be free.

In *Black Reconstruction*, W. E. B. Du Bois would later argue that because there was no historical precedent for a black presence in southern prisons and because white convicts were released during the war to join the Confederate armies, the role of southern penitentiary systems was reconceptualized after the outbreak of the Civil War. "The whole criminal system," wrote Du Bois, "came to be used as a method of keeping Negroes

at work and intimidating them. Consequently there began to be a demand for jails and penitentiaries beyond the natural demand due to the rise of crime."²⁹ After the initiation of the convict lease system, one black member of the legislature presented a bill for the abolition of the penitentiary system.³⁰

Douglass's argument against the Exoduster movement was thus based on a highly abstract construction of "free labor" that bore no relationship to black economic realities in the South and, in this context, served as a surrogate for the failed notion that the ballot promised full freedom and equality for the former slaves. However, to do Douglass's argument justice, it should be pointed out that he did not deploy it against emigration per se, but rather he focused his opposition on the organized Exoduster movement and its demands for federal financing. In light of the horrendous situation in the South, he suggested that "voluntary, spontaneous, self-sustained emigration on the part of the freedmen may or may not be commendable. It is a matter with which they alone have to do."³¹ As long as emigration remained a private and individual matter, Douglass had no objections. However, when it was raised publicly and politically as a strategy for liberation, he strongly opposed it.

In summarizing the arguments in favor of emigration, he refers to Senate testimony by the emigrants themselves. He points to their contention "that for a crime for which a white man goes free, a black man is severely punished" and "that the law is the refuge of crime rather than of innocence; that even the old slave driver's whip has reappeared, and the inhuman and disgusting spectacle of the chain-gang is beginning to be seen."³² Douglass did not contest the truth of this testimony – in fact, he had relied and would continue to rely on the fact that the criminal justice system had become a sanctuary for racism of the cruelest sort – but he nonetheless chose to respond to it by maintaining that black labor was "free" and held a far greater promise than emigration.

But even though the violent racism that was at the core of restructured criminal justice systems in the South did not, in Douglass's opinion, furnish compelling arguments for a political strategy of exodus from the South, his speeches and writings for the rest of his life powerfully evoked ways in which crime was racialized and race criminalized. In an essay for *North American Review* in 1881, challenging essentialist constructions of race prejudice, he wrote that "the colored man is the Jean Valjean of American society. He has escaped from the galleys, and hence all presumptions are against him."³³ Although Douglass's contentions that the social conditions of slavery and the persistence of racism during the post-slavery era were entirely responsible for the criminalization of black people led him to challenge these presumptions of criminality, they also steered him toward an analytical impasse. If slavery produced criminals, then black people had

to be acknowledged as criminals. On the other hand, he argued against the imputation of guilt where none was present.

If a crime is committed, and the criminal is not positively known, a suspicious-looking colored man is sure to have been seen in the neighborhood. If an unarmed colored man is shot down and dies in his tracks, a jury, under the influence of this spirit, does not hesitate to find the murdered man the real criminal, and the murderer innocent.³⁴

As indicated above, Douglass often alluded to the fact that black people were punished for minor offenses as if they were hardened criminals, that "the crimes for which they are punished seldom rise higher than the stealing of a pig or a pair of shoes." In fact, the Mississippi Legislature passed its notorious "Pig Law" in 1876, classifying the theft of any cattle or swine as grand larceny and carrying up to five years in the penitentiary. This law was in part responsible for a vast increase in the penitentiary population in that state.³⁵ In 1875, the Democratic legislature in Arkansas passed a similar law classifying the theft of property worth two dollars as a felony punishable by one to five years.³⁶ Several weeks after the Mississippi Pig Law was passed, the legislature legalized the leasing of convict labor to private companies. Prisoners, according to this act, would be permitted to "work outside the penitentiary in building railroads, levees or in any private labor or employment."³⁷ As David Oshinsky observes, "throughout the South, thousands of ex-slaves were being arrested, tried, and convicted for acts that in the past had been dealt with by the master alone. . . . An offense against [the master] had become an offense against the state."³⁸ In 1875 Governor John Brown of Tennessee expressed his opinion that to imprison a black man who had stolen a pig with a white murderer was a gross injustice -- to the white man.³⁹

Because black people were more likely to be imprisoned for minor offenses than white people, in states like Florida, large numbers of black people convicted on charges of stealing were incarcerated alongside white men who had often committed appalling crimes. The author of an account on forced labor in the Florida turpentine camps pointed out that it was possible to send a negro to prison on almost any pretext but difficult to get a white there, unless he committed a very heinous crime.⁴⁰

Douglass was certainly conscious of the degree to which crime itself was racialized, of the South's tendency to "impute crime to color."⁴¹ With his usual eloquence, he said that "justice is often painted with bandaged eyes . . . but a mask of iron, however thick, could never blind American justice, when a black man happens to be on trial."⁴² Not only was guilt assigned to black communities, regardless of the race of the perpetrator of a crime; white men, Douglass claimed, sometimes sought to escape punishment by disguising themselves as black.

In certain parts of our country, when any white man wishes to commit a heinous offence, he wisely resorts to burnt cork and blackens his face and goes forth under the similitude of a Negro. When the deed is done, a little soap and water destroys his identity, and he goes unwhipt of justice. Some Negro is at once suspected and brought before the victim of wrong for identification, and there is never much trouble here, for as in the eyes of many white people, all Negroes look alike, and as the man arrested and who sits in the dock in irons is black, he is undoubtedly the criminal.⁴³

Douglass made these comments during an 1883 speech in celebration of the twenty-first anniversary of Emancipation in the District of Columbia. Three years later on the same occasion, he referred to his previous remarks and produced a recent example of a white man in Tennessee who had been killed while committing a crime in blackface:

Only a few days ago a Mr J. H. Justice, an eminent citizen of Granger county, Tennessee, attempted under this disguise to commit a cunningly devised robbery and have his offense fixed upon a Negro. All worked well till a bullet brought him to the ground and a little soap and water was applied to his face, when he was found to be no Negro at all, but a very respectable white citizen.⁴⁴

Cheryl Harris argues that a property interest in whiteness emerged from the conditions of slavery and that "owning white identity as property affirmed the self-identity and liberty of whites and, conversely, denied the self-identity of blacks."⁴⁵ Douglass's comments indicate how this property interest in whiteness was easily reversed in schemes to deny black people their rights to due process. Interestingly, cases similar to the ones Douglass discussed have emerged during the 1990s -- the case of Charles Stuart, who killed his wife in Boston and attempted to place the blame on an anonymous black murderer, and Susan Smith who killed her children in Union, South Carolina, and claimed they had been abducted by a black carjacker.

The last period of Frederick Douglass's life coincided with the consolidation of Jim Crow segregation in the South. Within the penitentiaries and convict labor camps, the criminality imputed to blackness gave rise to ideologies of separation that, in comparison to those of the "free" world, were magnified and exaggerated. In the "free" world, school systems, transportation systems, hospitals and neighborhoods were being subjected to strict laws of segregation. In some states there was the practice of incarcerating white convicts in penitentiaries and sending black convicts to labor camps.⁴⁶ While the prisons and labor camps were establishing lines of racial demarcation, black convicts who were incarcerated on charges of petty larceny were often treated as a danger to white convicts, even those in

prison for murder. During the 1880s meetings of the National Prison Association (NPA) were replete with racist defenses of convict leasing, including arguments that the camps were a notch above black people's living conditions in freedom and that prison simply denied them "liberty, liquor and lust." White convicts, on the other hand, endured a much more trying ordeal, largely because they were compelled to live among black people.⁴⁷ It was claimed that the law "lays on the Caucasian a dreadful grief, which the African does not feel. . . . The fact remains, and will remain, that there is a psychological repulsion between races, horrible to one but not the other."⁴⁸ Southerners speaking before the NPA meetings called up such exaggerated comparisons as that between incarcerated whites with blacks and "the 'ancient torture' of tying up murderers with 'decaying corpses,' resulting in death to the living murderer."⁴⁹

In light of Frederick Douglass's reticence regarding penal servitude, an analysis of his response to the prevailing discourses on race – which rendered criminality an obligatory ideological companion of blackness – might yield insights into the relative silence regarding penal servitude in black intellectual circles today. Douglass was quite outspoken on the issue of lynching and, in his many speeches and essays devoted to this subject, he was certainly required to address the criminalizing ideology of racism. But why speak out against lynching and remain silent on leasing? Lynching was outside the pale of the law. It could be opposed on the basis of its unlawfulness, of its seemingly chaotic and aberrant quality. The issue, as Douglass formulated it, was not so much the guilt or innocence of lynch victims, but rather that they were divested of their right to confront their accusers in an arena structured by law. To take on convict leasing would have required Douglass to relinquish some of his major Enlightenment principles – and his vision of black liberation was too solidly anchored in the promise of legislated justice to permit him to ponder the possibility of the profound complicity of legal institutions in the continuation of this micro-cosmic slave system.

Consider this description of lynching from his well-known essay, "Why is the Negro Lynched?":

It [mob-law] laughs at legal processes, courts and juries, and its red-handed murderers range abroad unchecked and unchallenged by law or by public opinion. If the mob is in pursuit of Negroes who happen to be accused of crime, innocent or guilty, prison walls and iron bars afford no protection. Jail doors are battered down in the presence of unresisting jailors, and the accused, awaiting trial in the courts of law, are dragged out and hanged, shot, stabbed or burned to death, as the blind and irresponsible mob may elect.⁵⁰

What Douglass fails to recognize is that the very iron bars that he looked to for security were as much a weapon of terror as the mob itself. "In a perverse way," according to Oshinsky, "emancipation had made the black population more vulnerable than before. It now faced threats from two directions: white mobs and white courts. Like the Ku Klux Klan, the criminal justice system would become a dragnet for the Negro."⁵¹

Perhaps Douglass's confidence in the law blinded him to ways in which black people were constructed, precisely through law, as only fit for slavery. This was the symbolic meaning of the convict lease system. By 1911, the National Prison Association openly acknowledged the links between the prison system and slavery:

The *status of the convict* is that of one in *penal servitude* – the last surviving vestige of the old slave system. With its sanction in the common law, its regulation in the acts of legislatures, and its implied recognition in the Constitution of the United States, it continues unchallenged and without question, as a basic institution, supposedly necessary to the continued stability of our social structure.⁵²

When Douglass wrote in 1894 about "the determination of slavery to perpetuate itself, if not under one form, then under another,"⁵³ he referred to the landlord tenant system as well as the practice of paying black laborers with store orders (instead of with money) as ways of perpetuating slavery. "The landowners of the South want the labor of the Negro on the hardest terms possible. They once had it for nothing. They now want it for next to nothing."⁵⁴ Interestingly, he suggests that landowners employ three strategies, yet he only mentions two (tenant farming and payment in scrip). Perhaps he originally meant to include convict leasing and/or peonage, but, on second thought, decided to remove references to these systems because they involved direct intervention or implicit sanction by the state.

Convict leasing and the accompanying laws permitting the criminal prosecution of people who did not fulfill their job contract were even more closely linked to slavery than the systems explicitly mentioned by Douglass. At the same time, all these legal and economic systems – leasing, peonage, tenant farming, sharecropping, and payment in scrip – mutually informed each other, all overdetermined by slavery in their techniques of controlling black labor. With respect to the fact that most people subject to these systems were black, Milfred Fierce points out that "for them, the distinction between antebellum *de jure* slavery and postbellum *de facto* slavery was close to being much ado about nothing."⁵⁵

Southern blacks were trapped in [a] penal quagmire in excessive numbers and percentages of the total prison population of each southern state. For the victims, many of whom were ex-slaves, this predicament represented nothing

short of a revisit to slavery. Those blacks who were former slaves, and became victims of the convict lease system – especially those convicted and incarcerated on trumped up charges, or otherwise innocent of crimes for which they were imprisoned – must have imagined themselves in a time warp.⁵⁶

Fierce argues – as indicated by the title of his study, *Slavery Revisited* – that the lease system established conditions that were tantamount to slavery, permitting plantation owners and industrialists to rent crews of mostly black convicts, using the same methods of coercion to guarantee their labor that had been practiced during slavery.

While Douglass may not have addressed the convict lease system because of its legal status and its affiliation with the criminal justice system, had he examined this system more closely, he might have discovered that the authority of the state was not directly exercised through the lease system. Rather the state served to mediate the privatization of convict labor. Alabama had already set a precedent for the privatization of convict labor before the abolition of slavery, which further affirms the historical link between slavery and leasing. The first penitentiary was constructed in Alabama in 1840 and by 1845 it was so much in debt that the entire prison was leased for a period of six years to a J. G. Graham. Graham simply became warden and took the profits from the convicts' labor.⁵⁷

When all the southern states established the system of convict leasing, it made overwhelmingly black convict labor forces available to planters and capitalists under conditions modeled along the lines of slavery, conditions that, in many ways, proved worse than the slave system. Matthew Mancini, author of *One Dies, Get Another*, proposes an analysis of the lease system that complicates the obvious connection with slavery. He persuasively argues that given the indisputable similarities and continuities, it is the differences and discontinuities that provide the most interesting perspective on convict leasing. He points out that the rate of economic exploitation – defined in Marxian terms as the value of unpaid labor (and thus also the rate of profit) – was actually greater with the lease system than with slavery. Slaveholders were not only responsible for the maintenance of the laboring subjects, but were expected to guarantee the maintenance of the entire slave community – including children and elders who were not able to work.⁵⁸ Lessees, on the other hand, were only responsible for individual convicts, each of which represented a labor unit. Moreover, lessees purchased the labor of entire crews of convicts, not of individuals. According to Mancini:

The individual convict as such did not represent a significant investment, and his death or release, therefore, not a loss. When considered as a source of labor, then, slaves received a “wage” best thought of as aggregated, convicts one that was individual; as a form of capital, by contrast, slaves were individu-

ally significant, convicts collectively so. This does turn out to be a relevant distinction rather than a metaphysical exercise, for the consequence was an economic incentive to abuse prisoners. These two economic factors – the subsistence or lower-than-subsistence “wage” the convicts received and their status as aggregated capital – served to reinforce one another and to make leasing, from the point of view of the economic definition, “worse” than slavery.⁵⁹

A small but significant number of black men and women were condemned to live out the worst nightmares of what slavery might have been had the cost of purchasing slaves been low enough to justify conditions of genocide, i.e. no man, woman or child unable to work would be supported by the slave owners. Under these conditions (which were not entirely unheard of during slavery), it also would have been profitable to literally work slaves to death, because the cost of purchasing new ones would not have interfered with profits. Precisely because of this, Mancini decided to entitle his study of convict leasing *One Dies, Get Another*. We can only speculate as to how Frederick Douglass might have responded to the convict lease system had he extricated himself from his faith in formal legalities and examined more closely this symbolic and malignant reincarceration of slavery. We can also only speculate about the impact his engagement with the lease system might have had on future agendas for black liberation and on the future relationship between black intellectuals and social movements against the US prison system.

Although Frederick Douglass did not enlist his communicative powers in an examination of convict leasing, three of his intellectual descendants did see fit to write about this issue.⁶⁰ D. E. Tobias, a self-taught researcher and organic intellectual in the Gramscian sense, published an essay in 1899, a significant portion of which was devoted to leasing. In 1901, W. E. B. Du Bois published a relatively obscure article on convict leasing, and in 1907, Mary Church Terrell wrote about the subject in the same journal that had published Tobias's piece.

In his article “A Negro on the Position of the Negro in America,” D. E. Tobias described himself as a twenty-nine-year-old black man, son of slaves, who was studying the prison system in the US.⁶¹ Unfortunately, this seems to be Tobias's only published writing. Interestingly, he positioned the campaign against convict leasing at the very top of his agenda for black liberation. In this sense, he directly contested the philosophical tradition initiated by Frederick Douglass – and later taken up by Du Bois in his debate with Washington – according to which black political rights were the sine qua non of black liberation. Tobias did not deny the importance of the ballot. But he argued, in effect, that as long as convict leasing continued to

exist, black people could never fully enjoy the franchise. Moreover, he suggested that the imprisonment of such large numbers of black people was tantamount to robbing them forever of their rights as citizens. "Once a Negro voter is sent to prison, he is forever thereafter disfranchised, and for this reason alone the whites have made thousands of negro convicts for the purpose of depriving them of their votes."⁶² The use of incarceration as an explicit scheme to erode the potential political power of the black population reflected, in Tobias's view, what Frederick Douglass had referred to as "the determination of slavery to perpetuate itself." "The sole purpose of the South in going to war with the Nation," Tobias wrote,

was to keep the black race as chattels, and having been defeated in that, ex-slaveholders were determined that the negroes should be held in bondage to serve them. Accordingly the remarkable ingenious scheme of making the negroes prisoners was soon devised, and at once scores and thousands of ex-slaves were arrested and convicted on any sort of flimsy charges, and farmed out to the highest bidders for human flesh. By reason of this new form of slavery, hundreds and thousands of black men and women have never known that they were emancipated.⁶³

Tobias points out that southern authorities justified the institution of the convict lease system by evoking the Civil War destruction of most of the South's prison structures and thus by representing the lease plan as a "makeshift and an experiment until other means of caring for the large negro criminal population could be found."⁶⁴ However, after more than three decades, the lease system had become a critical component of southern criminal justice.

W. E. B. Du Bois's 1901 article "The Spawn of Slavery: The Convict-Lease System in the South" examines the lease system as a structural inheritance of slavery wherein black people accused of committing crimes were disciplined by the private imposition of labor, using "the slave theory of punishment – pain and intimidation."⁶⁵ He defined this system as "the slavery in private hands of persons convicted of crimes and misdemeanors in the courts."⁶⁶ This method of controlling black labor, Du Bois argued, emerged alongside a juridical construction of black criminality in the chaos that followed Emancipation when punishment was no longer the private purview of slavemasters, when black slaves were no longer legally recognized as the property of their masters. "Consequently, so far as the state was concerned, there was no crime of any consequence among Negroes. The system of criminal jurisprudence had to do, therefore, with whites almost exclusively. . . ."⁶⁷ Although the Freedman's Bureau attempted to create innovative methods of mediating legal relationships, these new strategies failed and the state courts re-established their authority.

As the regular state courts gradually regained power, it was necessary for them to fix by their decisions the new status of the freedmen. It was perhaps as natural as it was unfortunate that amid this chaos the courts sought to do by judicial decisions what the legislatures had formerly sought to do by specific law – namely, reduce the freedmen to serfdom. As a result, the small peccadillos of a careless, untrained class were made the excuse for severe sentences. The courts and jails became filled with the careless and ignorant, with those who sought to emphasize their new-found freedom, and too often with innocent victims of oppression. The testimony of a Negro counted for little or nothing in court, while the accusation of white witnesses was usually decisive. The result of this was a sudden large increase in the apparent criminal population of the Southern states – an increase so large that there was no way for the state to house it or watch it even had the state wished to. And the state did not wish to. Throughout the South laws were immediately passed authorizing public officials to lease the labor of convicts to the highest bidder. The lessee then took charge of the convicts – worked them as he wished under the nominal control of the state. Thus a new slavery and slave-trade was established.⁶⁸

I quote this long passage because it is such an insightful summary of the way the convict lease system served as a decisive lever for the transition from a bifurcated system of criminal justice – privatized punishment for blacks and public punishment for whites – to a system in which the state concentrated on the punishment of blacks and functioned as a mediator for punishment through privatized labor. In other words, "the state became a dealer in crime, profited by it so as to derive a net annual income for her prisoners."⁶⁹ Du Bois would later write in *Black Reconstruction* that "[i]n no part of the modern world has there been so open and conscious a traffic in crime for deliberate social degradation and private profit as in the South since slavery."⁷⁰

Du Bois's analysis of the convict lease system implicitly contested Douglass's construction of black labor as "free." Du Bois made the astute observation that so-called "free" black labor was, in a very concrete sense, chained to black convict labor, for in many industries in which black people sought employment – such as brick-making, mining, roadbuilding – wages were severely depressed by the fact that convicts could be leased from the state at costs as low as \$3 a month.⁷¹ Moreover, Du Bois pointed out that the very theory of work embodied in convict leasing would have to be radically transformed in order to establish a criminal justice system free of racial bias. Instead of convict labor serving as a scheme for both private and state profit, it would have to be reconstructed as a means of correction and reformation of the convict him/herself. With the abolition of the profit motive, Du Bois seemed to imply, a powerful incentive for the racism at the core of the system would cease to exist.

Unfortunately, this insightful and radical analysis of the convict lease system was not taken up by Du Bois's contemporaries. The relative obscurity to which it was relegated may be attributed to the fact that the essay appeared in a Protestant periodical devoted to writings on missionary projects, *The Missionary Review of the World*. As a result, its audience probably consisted largely of theologians and missionaries. Today, it is probably only read by students of religious studies and scholars researching convict leasing. However, Du Bois did refer to convict leasing and peonage in his monumental study *Black Reconstruction*.

Twelve years after Douglass's death, Mary Church Terrell remarked that "it is surprising how few there are among even intelligent people in this country who seem to have anything but a hazy idea of what the convict lease system means."⁷² Her essay on convict leasing was published in the prestigious review *The Nineteenth Century*, and although it is difficult to document how the essay was received, Milfred Fierce asserts that it "influenced many others, both black and White."⁷³ Terrell, like Douglass in the preceding generation, was one of the major figures in the anti-lynching crusade. However, she wrote as passionately against the convict lease system as she had against lynching, meticulously documenting her allegations of untold cruelty with references to comments by southern legal authorities and official reports. "It is no exaggeration," Terrell wrote,

to say that in some respects the convict lease system, as it is operated in certain southern States, is less humane than was the bondage endured by slaves fifty years ago. For, under the old régime, it was to the master's interest to clothe and shelter and feed his slaves properly, even if he were not moved to do so by considerations of mercy and humanity, because the death of a slave meant an actual loss in dollars and cents, whereas the death of a convict to-day involves no loss whatsoever either to the lessee or to the State.⁷⁴

There are several references in the article to the way women were integrated into the convict lease system with little regard to their gender – they worked and were housed together with men. Focusing her examination on the state of Georgia, she quotes extensively from a report issued several years before by Colonel Alton Byrd, who had been appointed a special investigator into the conditions of Georgia's convict camps. In one passage he described a young black woman,

... Lizzie Boatwright, a nineteen-year-old negress sent up from Thomas, Georgia, for larceny. She was clad in women's clothing, was working side by side with male convicts under a guard, cutting a ditch through a meadow. This girl was small of stature and pleasant of address, and her life in this camp must have been one of long drawn out agony, horror, and suffering. She told me she had been whipped twice, each time by the brutal white guard who had

beaten McRay (an elderly black convict at the camp) to death, and who prostituted his legal rights to whip into a most revolting and disgusting outrage. This girl and another woman were stripped and beaten unmercifully in plain view of the men convicts, because they stopped on the side of the road to bind a rag about their sore feet.⁷⁵

It is probably the case that Terrell devoted her most extensive discussion of women in the labor camps to white women because she assumed that the brutal treatment of white women would provoke more widespread expressions of outrage than would that of black women. Although she did not indicate the source of her information, she wrote that in the preceding year, news was released about "one thousand white girls . . . [who] wear men's clothing and work side by side with coloured men who are held in slavery as well as the girls. . . . In the black depths of [Florida] pinewoods, living in huts never seen by civilised white men other than the bosses of the turpentine camps, girls are said to have grown old in servitude."⁷⁶ Terrell concluded this section with the observation that "not only does peonage still rage violently in the Southern states and in a variety of forms, but that while it formerly affected only coloured people, it now attacks white men and women as well."⁷⁷ In this sense Terrell was probably influenced by the discourse of prison reform, which tended to equate the cruelty of peonage and convict leasing with its allegedly increasing impact on white people. For example, Richard Barry's 1907 article in *Cosmopolitan Magazine* emphasized the fact that employers in Florida had come under investigation because of the "monumental error" they made "in going beyond the black man with their slavery. Had they stuck to the racial division they might have escaped castigation, as they have for a decade. But, insatiate, and not finding enough blacks to satisfy their ambitious wants, they reached out and took in white men."⁷⁸

Consequently, the movement to abolish convict leasing tended to reinforce notions of black criminality even as it emphasized the brutality of the leasing system. This abolitionist movement coincided with the increasing influence of discourses on eugenics and scientific racism. Although black leaders attempted to refute essentialist theories of innate criminality by emphasizing the historical conditions under which black criminality emerged, they did not openly examine the structural role of the expanding network of penitentiaries and convict labor camps in constructing and affirming these ideologies. Philosophically, this represented an engagement with the presumption of criminality, but not with the institutions that concretely structured this ideology of criminality.

If Douglass was consistently silent on the issue of convict leasing, then Terrell did not integrate her insights on leasing into her anti-lynching work and thus could not effectively challenge a criminal justice system that

perpetuated notions of black criminality that still persist during the contemporary era. The same observation may be made of Du Bois. This is particularly important in light of the popular historical memory of lynching that remains a critical component of African-American identity. If convict leasing and the accompanying disproportionality with which black people were made to inhabit jails and prisons during the post-Emancipation period had been taken up with the same intensity and seriousness as – and in connection with – the campaign against lynching, then the contemporary radical call for prison abolition might not sound so implausible today.

Of course it is not fair to blame Douglass for over a century of failure to take on the pivotal role of the prison system in constructing and preserving ideological equations of blackness and criminality. And it certainly is not fair to hold him responsible for the “common sense” acceptance of the inevitability of prisons. However – and this is the conclusion of my examination of Douglass’s silence vis-à-vis the convict lease system – scholars who rightfully criticize Douglass for the tenacity with which he embraced Enlightenment principles and a philosophy of history that accorded the bourgeois state a foundational role in guaranteeing racial progress, also should acknowledge how this philosophy militated against an understanding of the prison system, and its specific role in preserving and deepening structures of racism. Moreover, by understanding Douglass’s reluctance to directly oppose the penitentiary system of his era, we may acquire much needed insight into the difficulties activists encounter today in organizing movements against the contemporary prison industrial complex.

NOTES

- 1 Frederick Douglass, “An Appeal to the British People,” reception speech at Finsbury Chapel, Moorfields, England, May 12, 1846, in Phillip Foner, *The Life and Writings of Frederick Douglass*, vol. 1 (New York: International Publishers, 1950), 155.
- 2 “Frederick Douglass Discusses Slavery,” in Herbert Aptheker, *Documentary History of the Negro People* (New York: Citadel Press, 1969), 310.
- 3 Frederick Douglass, “The Condition of the Freedman,” *Harper’s Weekly*, Dec. 8, 1883, in Phillip Foner, *The Life and Writings of Frederick Douglass*, vol. 4 (New York: International Publishers, 1955), 406.
- 4 In his speech on the occasion of the Twenty-Fourth Anniversary of Emancipation in the District of Columbia, he said: “Look at these black criminals, as they are brought into your police courts; view and study their faces, their forms, and their features, as I have done for years as Marshal of this District, and you will see that their antecedents are written all over them.” Foner, *Life and Writings*, vol. 4, 435.
- 5 *Ibid.*, 434.

- 6 Foner, *Life and Writings*, vol. 4, 406.
- 7 Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later* (Washington, DC: The Sentencing Project, 1995).
- 8 *Ibid.*
- 9 E. Franklin Frazier, *From Slavery to Freedom* (New York: Vintage, 1969), 303.
- 10 Milfred Fierce, *Slavery Revisited: Blacks and the Southern Convict Lease System, 1865–1933* (New York: Brooklyn College, CUNY, Africana Studies Research Center, 1994), 85–6.
- 11 Foner, *Life and Writings*, vol. 4, 109.
- 12 *Ibid.*, 110.
- 13 Fierce, *Slavery Revisited*, 230.
- 14 W. E. B. Du Bois, “The Spawn of Slavery: The Convict Lease System of the South,” *Missionary Review of the World*, October 1901.
- 15 Fierce, *Slavery Revisited*, 240.
- 16 Mary Church Terrell, “Peonage in the United States: The Convict Lease System and the Chain Gangs,” *The Nineteenth Century and After*, vol. 42 (August 1907).
- 17 Fierce, *Slavery Revisited*, 229.
- 18 David Oshinsky, “Worse than Slavery”: *Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1996), 47.
- 19 *Ibid.*, 56.
- 20 E. Stagg Whitin, *Penal Servitude* (New York: National Committee on Prison Labor, 1912), i.
- 21 Fierce, *Slavery Revisited*, 88.
- 22 Foner, *Life and Writings*, vol. 4, 101.
- 23 Douglass, “The Need for Continuing Anti-Slavery Work,” speech at 32nd Annual Meeting of the American Anti-Slavery Society, May 9, 1865, in Foner, *Life and Writings*, vol. 4, 166.
- 24 Douglass was invited to present this paper along with Richard T. Greener, the first black graduate of Harvard. Because he did not wish to engage in open debate around this controversial issue, he decided not to appear in person at the meeting but to send his paper to be read by someone else. Greener, who had taught at the University of South Carolina during Reconstruction, now taught at Howard and was a prominent organizer of support for the emigrants. See William S. McFeely, *Frederick Douglass* (New York: W. W. Norton, 1991), 301; Douglass, “The Negro Exodus from the Gulf States,” address before Convention of the American Social Science Association, Saratoga Springs, September 12, 1879, published in *Journal of Social Science*, vol. XI (May 1880), 1–21, reprinted in Foner, *Life and Writings*, vol. 4, 327.
- 25 *Ibid.*, 325.
- 26 *Ibid.*, 327.
- 27 “Certainly the control of black labor was a leading motivation behind every significant effort to establish and maintain convict leasing for fifty years. Just as plain is the similarity between the brutal hardships of convict life and the oppression of slavery times. Finally, the racial character of convict leasing reinforced connections with the slavery regime.” Matthew J. Mancini, *One*

- Dies, *Get Another: Convict Leasing in the American South, 1866–1928* (Columbia, SC: University of South Carolina Press, 1996), 20.
- 28 D. E. Tobias, "A Negro on the Position of the Negro in America," in *The Nineteenth Century*, no. 274 (Dec. 1899), 960–1.
- 29 W. E. B. Du Bois, *Black Reconstruction* (New York: Russell and Russell, 1963), 506.
- 30 Ibid.
- 31 Foner, *Life and Writings*, vol. 4, 332.
- 32 Ibid., 330.
- 33 Frederick Douglass, "The Color Line," *North American Review*, vol. CXXXII (June 1881), reprinted in Foner, *Life and Writings*, vol. 4, 344.
- 34 Ibid., 345.
- 35 Fierce, *Slavery Revisited*, 128–9, n. 16. Matthew Mancini argues that while the "Pig Law" may have been in part responsible for an immediate increase in the number of convicts, in 1877, the penitentiary population began to drop – and in fact began to soar immediately after the repeal of this law in 1888. Mancini, *One Dies, Get Another*, 135–6.
- 36 Mancini, *One Dies, Get Another*, 120.
- 37 Mississippi Laws, 1876, c. 110, sec. 1.3, 194–5. Quoted by Oshinsky, *Worse than Slavery*, 41.
- 38 Oshinsky, *Worse than Slavery*, 28.
- 39 Fierce, *Slavery Revisited*, 89.
- 40 "Captain" J. C. Powell's *American Siberia* is quoted by Oshinsky, *Worse than Slavery*, 71.
- 41 Frederick Douglass, "Address to the People of the United States," delivered at a Convention of Colored Men, Louisville, Kentucky, September 24, 1883, in Foner, *Life and Writings*, vol. 4, 379.
- 42 Frederick Douglass, "The United States Cannot Remain Half-Slave and Half-Free," speech on the occasion of the Twenty-First Anniversary of Emancipation in the District of Columbia, April 1883, in Foner, *Life and Writings*, vol. 4, 357. Several months later at a Convention of Colored Men, he said, "Taking advantage of the general disposition in this country to impute crime to color, white men color their faces to commit crime and wash off the hated color to escape punishment," "Address to the People of the United States," Louisville, Kentucky, September 24, 1883, 379.
- 43 Ibid., 359.
- 44 "Southern Barbarism," speech on the occasion of the Twenty-Fourth Anniversary of Emancipation in the District of Columbia, Washington, DC, 1886, in Foner, *Life and Writings*, vol. 4, 434.
- 45 Cheryl Harris, "Whiteness as Property," in Kimberle Crenshaw et al. (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (New York: New Press, 1995), 285.
- 46 Oshinsky, *Worse than Slavery*, 41.
- 47 Mancini, *One Dies, Get Another*, 92.
- 48 Ibid., 93. Mancini quotes the 1886 NPA proceedings.
- 49 Fierce, *Slavery Revisited*, 89.
- 50 "Why is the Negro Lynched," in Foner, *Life and Writings*, vol. 4, 492.

- 51 Oshinsky, *Worse than Slavery*, 29.
- 52 Whitin, *Penal Servitude*, 1–2.
- 53 Douglass, "Why is the Negro Lynched," in Foner, *Life and Writings*, vol. 4, 516.
- 54 Ibid.
- 55 Fierce, *Slavery Revisited*, 43.
- 56 Ibid., 78.
- 57 Mancini, *One Dies, Get Another*, 99–100.
- 58 Ibid., 22.
- 59 Ibid., 23.
- 60 I obtained references for these three essays from Milfred Fierce's *Slavery Revisited*.
- 61 Fierce indicates that "[n]ot much is known about Tobias except that his parents were illiterate former slaves and that he was born in South Carolina around 1870. He described himself as 'a member of the effete African race' and indicated that he was educated in the South and North, an education he financed by working with his hands," *Slavery Revisited*, 243.
- 62 D. E. Tobias, "A Negro on the Position of the Negro in America," *The Nineteenth Century and After*, 960.
- 63 Ibid., 959.
- 64 Ibid., 960.
- 65 W. E. B. Du Bois, "The Spawn of Slavery: The Convict-Lease System in the South," *The Missionary Review of the World*, vol. XXIV, no. 10 (New Series, vol. XIV, no. 10) (October 1901), 743.
- 66 Ibid., 738.
- 67 Ibid.
- 68 Ibid., 740.
- 69 Ibid., 741.
- 70 Du Bois, *Black Reconstruction*, 698.
- 71 Ibid., 744–5.
- 72 Terrell, "Peonage in the United States."
- 73 Fierce, *Slavery Revisited*, 231.
- 74 Terrell, "Peonage in the United States," 306.
- 75 Ibid., 317.
- 76 Ibid., 311.
- 77 Ibid., 313.
- 78 Richard Barry, "Slavery in the South To-Day," *Cosmopolitan Magazine*, March 1907, reproduced in Donald P. DeNevi and Doris A. Holmes (eds), *Racism at the Turn of the Century: Documentary Perspectives, 1870–1910* (San Rafael, CA: Leswing Press, 1973), 131.