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Applying Legal Theory to Racism in American Society

Section 1: Introduction

Racism has shown to be a trying part of American history. From slavery to mass incarceration, race relations has proved to be a dominant force in social, economic, and political aspects of society. The purpose of this paper is to demonstrate how the combination of the theories given by H.L.A. Hart, a British legal philosopher, and Derrick Bell, an American lawyer, professor, and civil rights activist, can be used to gain a more comprehensive view on the American legal system which can be used to show how there is room for reform under the current system. Racism has been prevalent throughout all of American history and so when thinking about the American legal system it is impossible to theorize about the system effectively without taking racism into account. While both Hart and Bell's philosophical inquiries can be used separately, the combination of the two gives a more comprehensive view on how the American system operates. The value of this is that the combination of the two is more applicable to how the system operates in the real world. I will argue that the synthesis of these two thinkers is valuable when theorizing about reform because the combination of their theories provides a way to think about how to change the current legal system that has historically maintained racism within American society. Hart's description of a legal theory provides a theoretical apparatus that can be used to describe how change can occur within the current system. Bell's theory can be used to show the need for reform and gives insight on how to start thinking about what change should look like. I will apply the combination of these thinkers to the contemporary problem of mass incarceration to

demonstrate how the synthesis of their theories can be used to theorize about racist structures that exist under a valid legal system. The purpose of this application is to highlight that the answer to solving racism in America is not to change the legal system, but rather to promote change within the current system. The combination of the theories given by these two thinkers will expose how the legal system has been abused and also how the system leaves room for change.

Section two of this paper is dedicated to reconstructing Hart's legal theory and also showing that while law and morality are closely related, morality is not a necessary condition of legal validity. This section provides a description of a valid legal system that will be used to show how abuse of a legal system occurs. The separation between morality and legal validity will be used to show how legally valid laws are still open to moral scrutiny. Section three presents Bell's theory on how the American legal system has been abused in order to benefit white people at the cost of exploiting people of color. The abuse of the American legal system shows the need for change in order to escape from the racism that has been prevalent throughout America's history. Section four contains a combination of these theories and develops an argument for how this combination gives a more holistic view of the American legal system and also how this combination shows room for change within the system. Finally, section five applies the synthesis of Hart and Bell's theories to the contemporary problem of mass incarceration. The application of these thinkers will expose how racism occurs under a valid legal system and provide a theoretical mechanism for how to think of changing the system. The main argument of this paper is that the theories given by Hart and Bell compliment each other and the combination of these thinkers is valuable when applied to contemporary problems.

Section 2: Connection Between Law and Morality in H.L.A. Hart's Legal Theory

The purpose of this section is to outline the connection between law and morality in Hart's legal philosophy. Hart argues that while law and morality are closely related, morality is not a necessary condition of legal validity.[1] I will first start by outlining Hart's legal theory as presented in his book *The Concept of Law* (2012) and then I will proceed to show how and why he argues morality is not a necessary condition of legal validity. This section is the starting point for combining Hart and Bell. The description Hart provides of a legal system will be later used to describe the legal validity of the American legal system and how change is possible within the current legal system.

2.1: The Union of Primary and Secondary Rules as the Heart of a Legal System

In *The Concept of Law* (2012), Hart argues that there are two distinct but related types of rules and that the unification of these primary and secondary rules is the "essence" of law and should act as the focus of legal jurisprudence. The relationship between these two types of rules is the "centre of a legal system."[2] It is important to note that Hart recognizes that the use of the word 'law' is so heterogenous and that the unification of primary and secondary rules may not be present every time the word 'law' is used. Hart states:

> The main theme of this book is that so many of the distinctive operations of the law, and so many of the ideas which constitute the framework of legal thought, require for their elucidation reference to one or both of these two types of rule, that their union may be justly regarded as the 'essence' of law, though they may not always be found together wherever the word 'law' is correctly used.[3]

[1] H. L. A. Hart, *The Concept of Law*, ed. Paul Craig, 3rd ed. (Oxford: Oxford University Press, 2012), 202. Hart looks in depth at the relationship between law and morality throughout all of chapters 8 and 9
[2] Hart, *The Concept of Law,* 99.
[3] Hart, *The Concept of Law,* 155.

The purpose of Hart's theory is not to define what law is, but instead to give a description which allows for "great explanatory power."[4]

Primary rules are rules that require people to do or to abstain from certain actions regardless of whether they want to or not. These rules are "duty imposing," which serve to direct actions of citizens living within a state by telling people what they can and cannot do under law. Examples of primary rules would be laws that prohibit the use of illicit drugs, setting a minimum age for the consumption of alcohol, laws that regulate labor, etc. Primary rules are laws which make people's behavior non-optional, because failure to follow these laws results in sanctions of punishment.[5] For example, if someone is caught breaking a traffic law, such as exceeding the speed limit, they may be issued a fine or their license may be suspended. Primary rules are distinct but related to secondary rules.

Secondary rules are rules that confer powers publicly or privately. These rules only exist to serve as rules that have to do with primary rules and are therefore "parasitic" upon primary rules. Rules of this type are concerned with the operation of primary rules and act as rules about primary rules.[6] In accordance with the previous speeding example, the power of a police officer to issue a fine when someone is speeding is a kind of secondary rule. Hart argues that secondary rules are necessary in any complex society because they allow for the procedures necessary to recognize, change, and adjudicate primary rules.[7]

Hart categorizes secondary rules into three types: rules of recognition, rules of change, and rules of adjudication. Rules of recognition are rules that serve to identify primary rules. The

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[4] Hart, *The Concept of Law,* 155.
[5] Hart, *The Concept of Law*, 81-82.
[6] Hart, *The Concept of Law,* 81.
[7] Hart, *The Concept of Law*, 91-94. Hart develops this argument by analyzing a society in which only primary rules existed, but it is not necessary to go into depth with this argument for the purpose of this paper.

purpose of these rules are to identify the reference of authority to determine which are legitimate primary rules. In the speeding example, the rule of recognition is seen through speed limit signs which communicate what the maximum speed that one cannot surpass when driving on that road. Rules of recognition take simple or complex forms depending on the society. A simple form of the rule of recognition would be reference to an authoritative text or list of rules that serves the purpose of identifying the primary rules that are established in that society. A more complex form of the rule of recognition is found where there are more complex criteria used to identify primary rules. Hart references identifying criteria as being legislative enactment, customary practice, or judicial decisions.[8] For example, a law that grants people the power to bear arms is identified as such in the Second Amendment of the authoritative power of the U.S. Constitution.[9] Rules of recognition also become more complex due to the arrangement of a hierarchy of authority. This is because complex societies have multiple forms of laws which arise from different authorities and these authorities are ranked within a hierarchy. For example, a city ordinance cannot overpower a state law, which cannot overpower a federal law. Another example is the power of the Supreme Court to overrule laws enacted by Congress. In the U.S. there are a variety of authorities which give us primary rules and because of this secondary rules are used to both identify primary rules and to rank authorities into a hierarchy.

The second type of secondary rules are rules of change. Rules of change grant power to individuals or groups of individuals to create new or extinguish old primary rules.[10] Rules of this type are best understood as conferring powers to legislatures. For example, speed limits are determined by state legislatures, and rules of change are seen within this legislative power. These

[8] Hart, *The Concept of Law*, 95.
[9] U.S. Const. Amend. II
[10] Hart, *The Concept of Law,* 95.

rules include the identification of legislatures and the limitations and restrictions of legislative power.[11]

The third type of secondary rules are rules of adjudication. These rules serve the purpose of making authoritative determinations on whether or not a primary rule has been broken and to provide sanctions if said primary rule was broken. Secondary rules serve to identify the people who are to adjudicate and also to set procedures in place for the carrying out of sanctions if a primary rule is broken.[12] In the speeding example, the rule of adjudication is seen through the authoritative power given to police officers to pull people over who violate traffic laws and to issue fines as sanctions for these violations. In the U.S., rules of adjudication also confer authoritative power to courts and judges to make determinations on whether a primary rule has been broken and also to provide guidelines for punishment.

Understanding that primary rules and secondary rules are both distinct but related is the key to understanding Hart's legal philosophy. Hart emphasizes the importance of the unification of primary and secondary rules, but also recognizes that this is not the whole story of a legal system. Hart states, "the union of primary and secondary rules is at the centre of a legal system; but it is not the whole, as we move away from the centre we shall find we shall have to accommodate… elements of a different character."[13] These "elements of a different character" refer to the connection between law and morals, which is the focus of the next subsection of this paper.

2.2 Connection Between Law and Morality

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[11] Robert S. Summers, "Professor H.L.A. Hart's Concept of Law," *Cornell Law Faculty Publications,* Paper 1348 (1963): 635.
[12] Hart, *The Concept of Law,* 97.
[13] Hart, *The Concept of Law,* 99.

It is important to understand Hart's argument for the connection between and the separation between law and morality for the purpose of this paper because it will act as a guide for the analysis of how oppression has operated in a society with a valid legal system. This analysis will be addressed in depth later in Section 4. Hart argues that legal rules and moral rules are interrelated, but denies that morality is a necessary condition of legal validity.[14] The purpose of this subsection is to explain the connection between law and morality and understand why Hart maintains some separation between them.

Hart makes a teleological argument that the "proper end of human activity is survival" and this argument is based on the understanding that generally most people desire to live.[15] This is an important component to understanding a legal system because in order to raise questions about how people ought to live, it must be assumed that people have a desire to live. From the assumption that people desire to live, society develops in order to help ensure survival. Hart argues that there are certain rules of conduct that exist within all societies in order to ensure survival. These rules of conduct are based in "elementary truths concerning human beings, their natural environment, and aims." Hart calls these rules of conduct the minimum content of natural law.[16] He argues that there are five aspects of human nature which are prone to work against survival and therefore the legal system must take these conditions into account.[17]

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[14] William C. Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy," *Marquette Law Review* 67, no. 673 (1984): 687.
[15] Hart, *The Concept of Law,* 192. Hart argues for certain truisms of human nature and the desire to live stems from a history of people choosing to live when they could have chosen otherwise.
[16] Hart, *The Concept of Law*, 193. Hart makes an effort to separate his use of natural law from other forms of natural law theory which have been used in different ways by different people. Other natural law philosophers mentioned by Hart include: Aquinas, Hobbes, and Hume. Hart wants to separate his analysis by carefully explaining that the minimum content of natural law he is using is needed based on the argument that humans desire to live and society functions to ensure this survival.
[17] Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy," 684.

Hart refers to these five aspects of human nature as "truisms". It is important to note that these truisms are not natural truths inherent to all humans, but rather are observations about the way most people have behaved throughout most of history. These truisms are not necessary truths about humans because they could have been otherwise and one day may be otherwise. For example, the first truism is the vulnerability of humans based on observations that humans are prone to bodily injury when attacked. This conclusion comes from inductive reasoning, which shows the contingency of the conclusion. Hart maintains that humans may evolve into creatures that are equipped with an exoskeleton that makes them immune from bodily harm when attacked. If this becomes the case, then humans will no longer be vulnerable and there would no longer be a need for a legal system to address this truism.[18] The contingency of these truisms separates Hart's analysis from other thinkers, such as Hobbes or Locke.

The first feature that needs to be addressed by law and morality is human vulnerability. As previously stated, humans are vulnerable and are therefore prone to bodily harm that can come as a result of an attack. Even the physically strongest person can be overpowered by a group or is vulnerable when they are sleeping. This vulnerability creates the legal and moral obligation of a society to protect people by restricting the free use of violence. Hart refers to this condition as "the most characteristic provision of law and morals."[19]

The second truism is that of approximate equality. Even though people differ in their physical and intellectual capabilities, no one is so powerful that they are able to completely overpower the rest. This leads to the necessity of a system that allows people to compromise their impulses and settle disputes peacefully. Necessary compromise is at the base of both legal and moral obligation for Hart. It is important to note the respect Hart gives to the fact that it is equally

[18] Hart, *The Concept of Law,*194-95.
[19] Hart, *The Concept of Law*, 195.

important to recognize that there are always people who wish to exploit these systems that create approximate equality. Exploitation is one of the reasons Hart maintains to argue against the necessary connection between legal and moral rules and will be addressed in depth later in this subsection.

The third truism is that human beings are limited in their altruism.[20] Hart argues that human beings are naturally at a medium between being devils and angels. Humans are not devils that wish to kill everyone else, but neither are they angels because if they were it would be clear that no system would be necessary to create rules against harming each other. The medium between these two extremes is one that shows tendencies towards aggression, which are apparent enough to cause for the need of basic legal and moral rules which control this aggression.

The fourth truism that Hart argues is that limited resources govern human action. Human beings need food, clothes, and shelter. Since these resources are limited, people cannot have everything they want. Society must institute some minimal concept of property and protection of that property.[21] Law is necessary to adjudicate competing claims and allow people to keep what they are legally entitled to.[22]

The fifth and final truism is the limited understanding and strength of the will. There is a necessity for a system that protects people from each other and themselves under law. Due to the fact that humans can fall to temptation of their own personal interest at the cost of the interest of others creates the need of a system of detection and punishment which can act as a guide of

[20] Hart argues that men are not predominantly selfish and are uncaring about the wellbeing of other humans' survival. This argument that humans are naturally self interested is seen in other thinkers' work in political philosophy. Reference Thomas Hobbes' *Leviathan* for an indepth look into this tradition. Thomas Hobbes, *Leviathan,* (Indianapolis: Hackett Publishing Company, 1994).
[21] Hart, *The Concept of Law,* 196. Hart makes a claim that this minimal institution of property need not necessarily mean individual property, but does not elaborate or develop this claim.
[22] Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy," 685.

behavior. The punishment of actions is not required for motivating behavior, but it acts as a guarantee that the people who voluntarily obey should not be sacrificed to those who do not.[23]

These five truisms about the human condition are the core of both morality and legal systems in Hart's argument. These truisms show the close relationship between morality and law that Hart argues for. Putting laws in place to protect minimum forms of persons, property, and promises are undoubtedly important for a legal system, but Hart still maintains that there is some separation between law and morality. Hart's reasoning for the separation of morality and law takes two different forms. The first has to do with Hart taking an empiricist approach to studying legal jurisprudence, and the second takes the form of a moral argument.[24]

Hart is concerned with how legal systems operate in the real world, not with theorizing abstractly about how law ought to operate. In this sense, Hart is concerned with *describing* law not *prescribing* law.[25] He recognizes that the only way to effectively study legal philosophy, is to think about the way legal systems operate in the real world. The separation between law and morality stems from the question of whether immoral rules are legally valid. There are two different views in the study of law which seek to answer this. The wider view of law is one where inquiries "consider together as 'law' all rules which are valid by the formal tests of a system of primary and secondary rules, even though some of them offend against a society's own morality or against what we may hold to be an enlightened or true morality."[26] The wider view of law includes all

[23] Hart has continuously argued against John Austin's view that law is a system of orders backed by threats and so he wishes to maintain the distinction between punishment being used for guaranteeing obedience but not as the normal motive for obedience. For more information on Austin's argument reference: John Austin, *The Province of Jurisprudence,* (Indianapolis: Hackett Publishing Company, 1998). For more information on Hart's criticism of Austin reference chapters 2, 3, and 4 of *The Concept of Law*.
[24] Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy," 687.
[25] Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy," 688.
[26] Hart, *The Concept of Law,* 209.

laws that are recognized under the rule of recognition in a society, regardless of whether or not these rules are moral. On the other hand, the narrow view of law excludes immoral rules from "law". The separation between law and morality allows for Hart to theorize under a wider view of law as opposed to the narrower view because legal validity is different from morality. Hart argues for this view because it allows philosophers to accurately describe how legal systems work instead of excluding immoral rules that show all other characteristics of legal rules. This argument is important because by taking a wider view on studying legal systems, one can study how legal systems are abused. Hart states, "if we adopt the wider concept of law, we can accommodate within it the study of whatever special features morally iniquitous laws have, and the reaction of society to them."[27] The separation between law and morality is needed because it allows for a wider view of legal systems, which also includes how these systems have been abused throughout history.

The second reason Hart wants to maintain separation between morality and law takes the form of a moral argument because the separation allows for laws to be morally criticized.[28] Recognizing laws as law because they have all the characteristics of laws is distinct from the issue of whether or not laws are moral. Hart wants to distinguish between laws being related to morality and laws being morally conclusive. The idea that laws are morally conclusive would invalidate laws that exist which are not moral, even though in reality immoral laws have and still do exist under legal systems. By distinguishing between legal validity and moral relevance, laws that exist are subject to moral scrutiny and can raise questions on whether or not immoral laws should be obeyed without invalidating their existence as laws.

Hart's insistence on the separation between law and morality gives a basis for using his legal theory to account for how oppression has operated within the American legal system. The

[27] Hart, *The Concept of Law*, 210.
[28] Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy," 688.

two different reasonings for why Hart maintains this separation that were described above will be used in the fourth section of this paper to create the argument that Hart's legal theory is aware of the realities of the way oppression operates in the world and that his theory is able to account for them. The next section will go into how Derrick Bell theorized about the oppression people of color have endured and will provide the next piece needed to make the argument presented in section four.

Section 3: Derrick Bell and Racism in America

The purpose of this section is to give a brief overview of Derrick Bell's inquiries into how racism in the U.S. has operated and functioned to serve to benefit one group (white people) at the expense of another (black people). This overview will provide the second piece needed to create an argument for how Hart and Bell can be used in combination to provide a more complete view of the way legal systems operate. In his book *And We Are Not Saved* (1987), Bell serves as the narrator in conjunction with the fictional character of Geneva Crenshaw to show the complex workings of race relations in the U.S.[29] Geneva embarks on ten "Chronicles", fictional stories that focus on different aspects of society's treatment of race, and then discusses these adventures with the Narrator. Throughout these "Chronicles", the reader is presented with Bell's theories on how racism operates and offers hope on how one can begin to remedy these wrongs.

Bell theorizes about how the American legal system is focused on assuring that society maintains racism, not ending it. Bell shows this argument through how civil rights laws have acted to both push black people ahead, while making sure their status is still lower than white people. The "goldilocks" approach of not having too much nor too little is used to keep just the right

[29] Derrick Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice,* (New York: Basic Books, 1987).

amount of racism prevalent in society. Civil rights laws can not give too much equality to people of color because it would cede the financial benefits gained from their exploitation. On the other hand these laws can not give too little equality to people of color because then there would be continuous disruption due to the constant attention being given to the unequal distribution of rights.[30] Occasional civil rights "victories" serve as distractions to the fact that while these laws seem to promote the social, economic, and political position of people of color, they work simultaneously to limit that position and continue to promote the inferior status of black people. The main theme of Bell's work is to show how racism functions for the economic gains of white people at the expense of the exploitation of people of color. The "Chronicles" provide dramatized examples throughout American history on how this process occurs.

In the first "Chronicle", the "Chronicle of the Constitutional Contradiction", Geneva is transported back in time to the Constitutional Convention and debates with the Framers about the issue of slavery. Geneva, a black woman, warns the delegates that allowing slavery to continue after signing the Constitution would have a "disasterous effect on the nation's people, both white and black."[31] No matter what Geneva told the delegates about how their decisions would result in a Civil War and a long history of racial violence and hatred, the delegates insisted that the slavery compromises included in the Constitution were necessary for the nation's unity. The purpose of this "Chronicle" is to show that nothing could have been done to change the decisions of the delegates. What this "Chronicle" reveals is the contradiction that the American government was founded on. While preaching the equality of all people and the unalienable rights of life, liberty, and the pursuit of happiness, the underlying truth of the formation of American government is that

[30] Richard Delgado, "Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?" *Yale Law Journal* 97, (1988): 923.
[31] Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice*, 26.

it was built on the exploitation of black bodies who were not given any of these considerations.[32] Exploitation of black bodies for economic gain was the cost of freedom for white people. Geneva and the Narrator discuss how this contradiction is still true in politics today. Geneva asks:

> And what makes you think that the Constitution's Framers who saw us as slaves, and used that lowly status to convince themselves that we are an inferior race, would have been more likely to recognize our humanity than are the country's contemporary leaders who, having every reason to know that we are not inferior, seem determined to maintain racial dominance even if that aim destroys us and the country?[33]

The truth of the constitutional contradiction is seen throughout all of America's legal history. The economic gain of the exploitation of black bodies has always been chosen over granting people of color the freedom and equality that the government and society profess as the American way.

The "Chronicle of the Sacrificed Black School Children" presents an eerie story where all the black school children disappear on the first day of the implementation of new desegregation plans. The purpose of this "Chronicle" is to show the failures of court-mandated desegregation to improve the position of black school children. While black school children were supposedly the main beneficiaries of desegregation efforts, "the figures put beyond dispute that the fact that virtually every white person in the city would benefit directly or indirectly from the desegregation plan that most had opposed."[34] The disappearance of the black school children brings to light the totality of the economic benefits white people were receiving from desegregation plans. Had the black school children not gone missing, financial benefits from multiple areas of the desegregation plans were to be received. The desegregation plans caused black schools to be closed, while white schools that were at risk of closing were now able to remain open due to an increase in enrollment.

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[32] Thomas Jefferson, "The Declaration of Independence," (1776), retrieved from https://www.archives.gov/founding-docs/declaration-transcript.
[33] Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice*, 49-50.
[34] Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice*, 107.

Black teachers and administrators were reassigned or fired, while an increase in white teacher's aides were hired to assist with the school integration plans. The missing black school children were never found and this serves to show how the ones who were supposed to benefit from integrating schools were forgotten.

Geneva and the Narrator discuss the "Chronicle of the Sacrificed Black School Children" and how the decision from *Brown v. Board of Education* (1955) has impacted the education of black children. The discussion reveals a constant theme throughout the book that while black people were happy with the victory of the Supreme Court decision, they were distracted from how this victory benefited white people. The narrator states:

> while we spoke and thought in an atmosphere of 'rights and justice' our opponents had their eyes on the economic benefits and power relationships all the time. And that difference in priorities meant that the price of black progress was benefits to the other side, benefits that tokenized our gains and sometimes strengthened the relative advantages whites held over us.[35]

While the decision from *Brown v. Board of Education* (1955) rendered major social and political changes for the status of black people, it lacked educational benefits for black school children who were intended to be helped the most.[36] The discussion between Geneva and the Narrator comes to show that racial integration does not equate to effective education for black children, a conclusion that they credited to W. E. B. DuBois, who had reached this conclusion in 1935.[37] The "Chronicle" shows how desegregating schools proved to be one step forward and one step back for people of color.

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[35] Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice*, 108.
[36] For more evidence of this refer to: Ray Rist, *The Invisible Schoolchildren: School and Integration in American Society,* (Cambridge, MA: Harvard University Press, 1978).
[37] For more information on this reference W. E. B. DuBois "Does the Negro need Separate Schools?" *The Journal of Negro Education* 4, no 3, (July 1935): 328-335.

I will not go in depth discussing each individual "Chronicle", but I have given the "Chronicle of the Constitutional Contradiction" and the "Chronicle of the Sacrificed Black School Children" special consideration because they are important to the arguments presented in this paper. The "Chronicle of the Constitutional Contradiction" is important to this paper because it provides the argument that the freedom and equality that white people have came at the cost of the exploitation of black bodies for economic gain. This contradiction was fundamental to the start of American government and is still prevalent in society today. I will use this contradiction in section five of this paper when applying the synthesis of Hart and Bell's theories to the contemporary problem of mass incarceration. The "Chronicle of the Sacrificed Black School Children" is important because it provides Bell's argument that the civil rights "victories" both pushed black people ahead while still maintaining them as inferior to white people. This "Chronicle" also provides the argument that I will present more in depth in section four that Bell believes that in order to live in a truly free and equal society, the idea of freedom and equality must be re-evaluated.

The other eight "Chronicles" continue to address the subordination of black people for the benefit of white people.[38] Every "Chronicle" has a similar ending to the first one, American racism is a constant and unwavering force in the legal system. Bell argues that even though the oppression of black people has changed forms throughout American history, it still remains a part of society. The "Chronicles" run through different forms of remedies to this oppression like integrated education, separatism, self-help, and armed resistance, but each one of these fail because of the unsettling impacts of racial equality felt by whites. Bell ultimately argues that the legal system in the U.S. has the flexibility to include reforms that work towards curing the prevalence of racism in American society, but does not give specifics to what these reforms would look like. The book

[38] While each Chronicle deserves it's own recognition, there is not enough room in this paper for a thorough analysis of each one.

ends with a significantly more optimistic Geneva than it began with, but the source of her optimism is not completely clear.[39]

With a look into Bell's theory on how racism functions in the American legal system to benefit white people with the cost of exploiting black bodies for economic gain, all the pieces are in place to move on to the next section. In the next section, I will argue how Hart's legal theory and Bell's theory compliment each other and work together to provide a comprehensive view on how the American legal system operates. The combination of these two theories will then be applied to the contemporary problem of mass incarceration in America in section five.

Section 4: Combining Hart and Bell

The purpose of this paper is to show how Hart and Bell's theories are able to complement each other and can be used in combination to give a more holistic approach to thinking about the American legal system. Both of these thinkers offer something the other one does not. Hart provides an in-depth description of legal systems and creates an argument that separation between legal validity and morality is necessary in order to theorize about how these systems have been abused. What Hart does not provide is a way to think about the abuse of legal systems. Bell provides a theory about how racism has played a fundamental role in U.S. history, but does not provide a description of a legal system. Hart complements Bell's theory because he gives a theoretical apparatus for theorizing about law. Bell complements Hart's theory because he provides evidence of how legal systems have been abused.

Hart's theory is distinct from other prevalent legal theories because he recognizes the reality of how legal systems have been abused in order to benefit certain groups at the cost of other

[39] Delgado, "Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?" 927.

groups. The purpose of Hart's theory is to give thinkers a description of what a legal system is while also acknowledging how these systems have operated in the real world. Hart's argument for separation between legal validity and morality is important because this is where he leaves room to theorize about how legal systems have been abused. Hart argues that adopting a wider view of law allows thinkers to study how legal systems have been abused. He takes this argument further and claims that the only way to theorize about legal systems is to understand how they have operated in the real world, which includes their abuse. He states, "study of its use involves study of its abuse."[40] Hart emphasizes the importance of understanding how legal systems have been abused in order to correctly theorize about legal systems, but does not give an extensive account on how legal systems have been abused throughout history.

Bell's theory offers an account of how the legal system in the U.S. has been abused. Bell demonstrates how the legal system has been used to simultaneously work in favor of and against the elevation of people of color in society. The American legal system maintains the proper amount of racism in society. Everytime it seems the system is making strides to improve the status of black people, it is seen that these strides move black people one step forward and one step back at the same time. Bell's theory works as a compliment to Hart because he focuses on how the legal system is involved in limiting the status of people of color and this approach is exactly the abuse Hart leaves room for in his description of a legal system.

4.1: Hart's Analysis of the Unequal Distribution of Rights

It remains without question that legal validity and morality are closely related, but Hart argues for some separation to be made between the two. Hart's theory does not stop after he

[40] Hart, *The Concept of Law*, 210.

presents the five truisms about the human condition which are needed to be answered by society in order to ensure survival, because Hart recognizes that this is an unrealistic view on how legal systems have operated in history. Hart states:

> The protections and benefits provided by the system of mutual forbearances which underlies both law and morals may, in different societies, be extended to very different ranges of persons. It is true that the denial of these elementary protections to any class of human beings, willing to accept the corresponding restrictions, would offend the principles of morality and justice to which all modern states pay, at any rate, lip service.[41]

This unequal distribution of the benefits received from a legal system is seen explicitly in the constitutional contradiction offered by Bell. The contradiction of American government being built on a platform of freedom for white people at the cost of denying freedom to black slaves is a perfect example of how a legal system has provided benefits to some at the cost of denying these benefits from others. In Hart's legal theory, the legal system established by the Framers and implemented in American society presents a valid legal system because it shows the characteristics present in a legal system, meaning the combination of primary and secondary rules. The separation between legal validity and morality is needed to demonstrate how legal validity does not show conclusive morality. A valid legal system can be used to violate moral rules by suppressing certain groups within the society the system is implemented in. This is made visible by Bell's argument that the freedoms promised by the implementation of the American legal system were reserved to white people and denied to people of color.

Hart argues how a valid legal system can be used to work in favor for some at the cost of other people living within that legal system. Hart states:

> On the other hand, it [a legal system] may be used to subdue and maintain, in a position of permanent inferiority, a subject group whose size, relative to the master group, may be small or large, depending on the the means of coercion, solidarity, and discipline available to the latter, and the helplessness or inability to organize of

[41] Hart, *The Concept of Law*, 200.

> the former. For those thus oppressed there may be nothing in the system to command their loyalty but only things to fear. They are its *victims*, not its *beneficiaries*.[42]

Again Bell's constitutional contradiction exemplifies how the American legal system was employed to maintain white power and continue black inferiority. The gloomy reality that Geneva brings attention to is that no matter what was said or done, there was no convincing the delegates in attendance of the Constitutional Convention to change the decisions they made to unify the country at the cost of the exploitation of black bodies. It is seen that the American legal system from its foundation was set up to only benefit certain members of society by the victimization of others. Not only is this contradiction seen at the foundation of the American legal system, the sad reality is that this contradiction still exists. While racism has changed forms since slavery, it is still a prominant feature of society.

4.2: How to Change

Bell theorizes about how to remedy racism in America. The purpose of the "Chronicles" is to reveal the misguided sense of freedom that civil rights advocates have aimed for. He argues that people of color have been looking at white privilege as the representation of freedom and equality, but this is the wrong way to approach gaining freedom and equality. The aim for freedom should not be aiming for the inverse of the current position of black people because "the stark truth is that whites as well as blacks are being exploited, deceived, and betrayed by those in power."[43] Bell argues that the ideas of equality and equal distributions of rights need to be re-evaluated in order to reconstruct a society where everyone is truly equal. To put this idea differently, bell hooks states

[42] Hart, *The Concept of Law*, 201. Emphasis mine.
[43] Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice*, 254.

"and to the slave, the master's way of life represents the ideal free lifestyle."[44] In order to create a society where everyone is equal, it is necessary to have a different idea of what equality means. Freedom and equality need to be seen outside of the structure that white supremacy has created. Whiteness is not the token of equality, equality needs to be rethought of as separated from what white supremacy has made it out to be. Bell argues that the misguidance of civil rights advocates is of their "efforts to achieve what whites possess rather than what we, and they, might become."[45] If an equal society is ever going to be made possible, the idea of what equality means needs to be changed.

Bell continues to argue that the path to change is available under the Constitution. He argues that the Constitution is fluid and this fluidity can be taken advantage of "to make the laws reflect the needs of both whites and blacks."[46] For Bell, the Constitution and the law (as flawed as it may be) has room for restructuring and reinterpretation and can "be vehicles of reform". Hart's legal theory can be used to demonstrate how this restructuring and reinterpretation occurs. Secondary rules of change are used as a mechanism to create new or extinguish old laws, and secondary rules of adjudication give power to courts to reinterpret what laws mean. By understanding Hart's description of how legal systems work as the combination of primary and secondary rules, one can begin to see what Bell means when he argues that the Constitution is fluid.

Hart's legal theory shows how a legal system works and his argument that morality is not a necessary condition of legal validity allows one to think about how a valid system of laws has been abused to benefit one group at the cost of another. Bell's theorization of how the American

[44] bell hooks, *ain't i a woman: black women and feminism* (New York: Routledge, 2015), 156.
[45] Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice*, 253.
[46] Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice*, 255.

legal system has been abused to benefit white people at the expense of people of color can complement Hart's argument of the separation between legal validity and morality. Hart's description of the union between primary and secondary rules can be used as the theoretical mechanism for which Bell refers to when thinking about the fluidity of the American legal system and its ability to act as a vehicle of reform. Both these thinkers offer something the other does not, and combining these two theories gives a more holistic view on how the American legal system has been abused and also shows the room for the system to change.

The synthesis of Hart and Bell provided in this section can be used to think differently about race problems in American society. I will put this theory into practice in the next section by looking into the contemporary problem of mass incarceration. The combination of Bell and Hart will be applied to the problem of mass incarceration to demonstrate how to think about the problem and what change should look like.

Section 5: Application of Bell and Hart

The purpose of this section is to demonstrate how the synthesis of Bell and Hart's theories can be applied to the real world through the concrete example of the problem of mass incarceration in America. The first subsection will lay out the problem of mass incarceration by defining mass incarceration and giving a brief history of the problem in America. The second part of this section focuses on applying Hart and Bell to the problem of mass incarceration and showing how the combination of their theories allows for a new approach to thinking about this problem.

5.1 Mass Incarceration

The United States makes up around 5% of the world's population, but has about 25% of the world's prison population.[47] The problem of mass incarceration has been developing since the 1970s, which is highlighted by the 700% increase in the American incarcerated population since then. For the purposes of this paper, mass incarceration refers to the extreme rate of the imprisonment of people.[48] Mass incarceration has not simply been a result of an exponential increase in crime since the 1970s, but an increase in policies enacted to implement more punishment for crimes. The increase in punishment has also resulted in the differential treatment of people of color by the criminal justice system. The American Civil Liberties Union (ALCU) reports that one out of every three black boys can expect to go to prison in their lifetime in comparison to one out of every seventeen white boys. In 2017, African American adults represented 12% of the American population but 33% of the sentenced prison population in comparison to the 64% of white adults represented in the American population but only 30% of the prison population.[49] The unproportional rate of black people being incarcerated is due to politicians, on both sides of the political spectrum, adopting fear and underlying racial rhetoric to push increasingly punitive policies.[50] Policies that resulted from the "war on drugs" and "tough on crime" movements, resulted in people of color being incarcerated at a disproportionate rate.

In 1971, President Richard Nixon declared that the U.S. was in a "war on drugs" which has resulted in the mass incarceration problem that has demonstrated the racial disparities in the

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[47] "Mass Incarceration," American Civil Liberties Union, accessed April 13, 2020, https://www.aclu.org/issues/smart-justice/mass-incarceration.
[48] Ronnie B. Tucker Sr., "The Color of Mass Incarceration," *Ethnic Studies Review* 37-38, no. 1 (2014-2015): 135-149.
[49] John Gramlich, "The Gap Between Number of Blacks and Whites in Prison is Shrinking," *Pew Research Center*, April 30, 2019, https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/.
[50] James Cullen, "The History of Mass Incarceration," *Brennan Center For Justice,* July 20, 2018, https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration.

treatment of people of color by the criminal justice system. The underlying motive behind Nixon's "war on drugs" was given by John Ehrlichman, Nixon's aide on domestic affairs, when he stated:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[51]

Nixon's "war on drugs" rhetoric was the continued effort to be "tough on crime" which was really a ploy to criminalize minorities in the U.S. President Ronald Reagan turned Nixon's anti-drug rhetoric into policy when he implemented the Anti-Drug Abuse Act of 1986, which allocated funds to new prisons, drug education, and treatment.[52] The main consequence of this act was the creation of mandatory minimum sentences which included harsh sentences on crack cocaine use that disproportionately impacted the African American population. The sentence for crack cocaine in comparison to powder cocaine was 100:1. The sentence given for the possession of one hundred grams of powder cocaine would equate to the mandatory minimum sentence given for the possession of one gram of crack cocaine.[53] There is no chemical difference between the two forms of the drug, the only difference is that crack cocaine is predominantly used by people of color and

[51] Alex Lockie, "Top Nixon Advisor Reveals the Racist Reason He Started the 'War on Drugs' Decades Ago," *Business Insider,* July 31, 2019, https://www.businessinsider.com/nixon-adviser-ehrlichman-anti-left-anti-black-war-on-drugs-2019-7.
[52] Arit John, "A Timeline of the Rise and Fall of 'Tough on Crime' Drug Sentencing," *The Atlantic,* April 22, 2014, https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/.
[53] Deborah J. Vagins and Jesselyn McCurdy, "Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law," *The American Civil Liberties Union,* October 2006, https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law.

powdered cocaine is used more often by white people. The disparity in the sentencing of the two different forms of the same drug highlights the racist implications of this law.

During the election after President Reagan's term, George Bush used the "tough on crime" strategy to win the 1988 presidency. The Bush campaign aired an ad that accused Democratic presidential candidate Michael Dukakis of being soft on crime. The ad featured Willie Horton who had been convicted of murder after stabbing a gas attendant nineteen times.[54] Horton was released from prison on a furlough program and during this release he raped a woman and stabbed her boyfriend.[55] The ad was used to attack Dukakis, who had supported furlough, or "weekend pass" programs by making him appear soft on crime and advocated for Bush as the "tough on crime" candidate. The racist undertones of this campaign ad was the fact that Willie Horton was an African American male who raped a white woman. The impact of the Willie Horton ad is seen because Dukakis had a significant lead on Bush prior to its airing and lost this lead and eventually the presidency after the airing of the ad. Not only did the racist ad misrepresent the furlough process, but it also taught Democrats in order to win elections, they had to adopt a "tough on crime" strategy.[56]

Democratic President Bill Clinton proceeded to adopt the "tough on crime" approach and passed the Violent Crime Control and Law Enforcement Act in 1994 which increased drug treatment programs and gun safety laws, and also allocated more money for prisons and issued harsher sentences.[57] The main part of this act was the creation of federal three-strikes laws which

[54] John, "A Timeline of the Rise and Fall of 'Tough on Crime' Drug Sentencing."
[55] Peter Baker, "Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh," *The New York Times,* December 3, 2018, https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html.
[56] Baker, "Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh."
[57] U.S. Congress, House, *Violent Crime Control and Law Enforcement Act of 1994*, HR 3355, 103rd Cong., 2nd sess., introduced in House October 26, 1993, https://www.congress.gov/bill/103rd-congress/house-bill/3355/text.

imposed life sentences for almost any crime, no matter how minor, if the defendant has two prior convictions. The result of the "three strikes and you're out" mentality was the disproportionate impact on minority offenders because drug offenses are included as prior "strikes" and so drug laws that disproportionately impact black people result in an increase in black offenders "striking out".[58] In summary, political actions enacted by politicians have led to a disproportionate number of black people being incarcerated and has resulted in the creation of the mass incarceration problem in America. These policies designed as "tough on crime" approaches have shown underlying racist conseqences and resulted in a disproportionate number of people of color being incarcerated.

The implications of policies that came out of "tough on crime" strategies and the "war on drugs" are still being seen today. The disparity of black people versus white people who were impacted by harsher drug policies is seen in the statistics given by the National Association for the Advancement of Colored People (NAACP). While black people and white people report to use drugs at similar rates, the imprisonment rate of black people in 2017 was six times that of white people. Black people account for 12.5% of illicit drug users in America, but 29% of those arrested for drug offenses and 33% of those incarcerated in state facilities for drug offenses.[59] Policies enacted decades ago are still having real consequences in American society today.

I want to clarify that I am not trying to argue that the policies enacted in recent decades have intentionally been aimed to disproportionately impact people of color, but rather have included this history to show how these policies have had real implications and real consequences on minority groups. Intentionality of these policies is not a point I seek to debate, my argument

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[58] "10 Reasons to Oppose '3 Strikes, You're Out'," *The American Civil Liberties Union,* accessed April 12, 2020, https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out.
[59] "Criminal Justice Fact Sheet," *National Association for the Advancement of Colored People,* accessed April 14, 2020, https://www.naacp.org/criminal-justice-fact-sheet/.

rests on the reality that these policies have resulted in racism within the criminal justice system regardless of what their original intentions or purposes may have been.

The purpose of this brief history of the politics that led to the extreme increase in the number of incarcerated people from around 500,000 in 1980 to over 2.2 million in 2015, is to present mass incarceration as a contemporary problem in which racism is prevalent.[60] The rest of this section will be used to apply the combination of Hart's legal theory and Bell's theory to present a new way to look at the problem of mass incarceration in order to show how the synthesis of these two thinkers can show the way to approach solving this problem.

5.2: Applying Hart and Bell to Mass Incarceration

The combination of Hart and Bell has demonstrated the capacity to show the abuse of a valid legal system. The application these two thinkers to the problem of mass incarceration will first entail showing how the policies enacted that created the problem of mass incarceration are valid laws under Hart's description of a legal system. Next, Hart's argument that morality is not a necessary condition of legal validity will be used to highlight that while the laws enacted by President Reagan and President Clinton are valid, that does not mean they are morally conclusive and are therefore open to moral scrutiny. After that, Bell's constitutional contradiction will be applied to show how mass incarceration has shown abuse of a valid legal system due to the disproportionate impact it has had on people of color. Finally, after obtaining a comprehensive analysis of the problem of mass incarceration, I will use Hart and Bell to present a way to think about solving this problem.

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[60] "Criminal Justice Fact Sheet," *National Association for the Advancement of Colored People,* accessed April 14, 2020, https://www.naacp.org/criminal-justice-fact-sheet/.

Hart describes a legal system as the unification of primary and secondary rules. This description will now be applied to two of the laws that led to the problem of mass incarceration. The Anti-Drug Abuse Act of 1986 and the Violent Crime Control and Law Enforcement Act of 1994, enacted by President Reagan and President Clinton respectively, are both primary rules under Hart's theory. These laws are "duty imposing" rules which serve to direct the behavior of people living in American society. Both of these laws abstain people from the use of illicit drugs and make people's behavior non-optional because failure to follow these rules results in sanctions of punishment. The Anti-Drug Abuse Act created mandatory minimums on the possession of cocaine and the possession of five grams of crack cocaine resulted in a mandatory minimum sentence of five years without parole.[61] The behavior of possessing cocaine is non-optional under The Anti-Drug Abuse Act because failure to abstain from the possession of cocaine is punishable by sanctions. The Violent Crime Control and Law Enforcement Act imposes a mandatory life sentence without the possibility of parole for Federal Offenders with three or more convictions for serious violent felonies or drug trafficking crimes.[62] This law is a primary rule because it imposes sanctions of punishment on those people who commit felonies. This law makes behavior non-optional because if an offender is involved in three or more felonies they are punished by a mandatory life sentence without the possibility of parole. These primary rules are distinct but related to the secondary rules of recognition, change, and adjudication.

The Anti-Drug Abuse Act of 1986 and the Violent Crime Control and Law Enforcement Act of 1994 are primary rules which can be identified through secondary rules of recognition. Both

[61] Vagins and McCurdy, "Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law."
[62] U.S. Congress, House, *Violent Crime Control and Law Enforcement Act of 1994*, HR 3355, 103rd Cong., 2nd sess., introduced in House October 26, 1993, https://www.congress.gov/bill/103rd-congress/house-bill/3355/text.

of these laws can be identified as written acts in the United States Code.[63] Through rules of recognition, both of these federal laws are identified in their written form and are accessible to the public. Since this is the age of the Internet, both of these laws are easily found and can be accessed in their full form online. Rules of recognition confers power to the authoritative source of codified statutes under the United States Code. These rules are recognized as legitimate primary rules because the passing of these laws followed the process laid out in Article 1, Section 7 of the U.S. Constitution, which is the supreme authoritative power in the U.S.[64] The process of creating a law involves secondary rules of change.

Secondary rules of change are responsible for granting power to legislatures to create new laws. Article 1 of the Constitution outlines the powers of congress and the description of its makeup. For example, Article 1, Section 1 of the Constitution states: "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[65] The powers conferred to Congress are explained in the Constitution and these powers and restrictions on Congress are examples of secondary rules of change. The Anti-Drug Abuse Act and the Violent Crime Control and Law Enforcement Act both adhere to the law making process outlined in the Constitution. The adjudication of these primary rules is seen through secondary rules of adjudication.

Secondary rules of adjudication serve to confer power to the authoritative sources to determine whether or not a primary rule has been broken and procedures for how to carry out sanctions if a primary rule was broken. In the U.S., the authoritative power to make determinations

[63] The United States Code is a consolidation and codification by subject matter of the general and permanent laws of the United States. It is prepared by the Office of the Law Revision Counsel of the United States House of Representatives. The website for the United States Code is: https://uscode.house.gov/.
[64] U.S. Const. art. 1, § 7.
[65] U.S. Const. art. 1, § 1.

on whether or not a primary rule has been broken falls onto courts and judges. Article 3 of the Constitution confers judicial power onto the court system. Article 3, Section 1 states: "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[66] Power is given to the federal court system in the U.S. to make determinations on whether or not The Anti-Drug Abuse Act or the Violent Crime Control and Law Enforcement Act have been violated and has the power to impose punishment on those who violate these laws.

The Anti-Drug Abuse Act and the Violent Crime Control and Law Enforcement Act both fit into Hart's description of a valid legal legal system because they show the unification of primary and secondary rules in the U.S. legal system. Under Hart's legal theory, these valid laws are not morally conclusive due to the separation of morality and legal validity. Bell's theory on the abuse of the American legal system can now be applied to show how these valid laws are abused because of the disproportionate impact they have on people of color. Bell's constitutional contradiction will be used to expose how these two laws have led to economic benefits from mass incarceration to be reaped by the private prison industry.[67]

Bell's constitutional contradiction exposes how the American government was founded on the exploitation of black bodies for economic gain. His contradiction showed how unifying the country under one authoritative government came at the cost of denying basic freedoms promised by this establihsed government to black people through the continuation of slavery. The reality of the constitutional contradiction is that the economic gain of the exploitation of black bodies has

[66] U.S. Const. art. 3, § 1.

[67] There are various industries that profit off mass incarceration, but I have chosen to focus on the private prison industry as the example used in this paper because only focusing on one industry gives more attention to the philosophical inquiry of Bell instead of trying to go into depth with each individual industry that profits off of punishment.

always been chosen over granting people of color the freedom and equality that is promised by the American government in the Constitution. This contradiction can be seen explicitly in the problem of mass incarceration because of how the private prison industry profits off of the deprivation of freedom of the incarcerated population. Since mass incarceration disproportionately impacts people of color, the racist structuralization of the criminal justice system in place is primarily exploiting black bodies and economically benefiting private industries, such as the private prison industry.

The business model of private prison companies depends upon high rates of incarceration.[68] The private prison industry has developed out of the problem of mass incarceration. Prior to the 1980s, the private prison industry was virtually nonexistent. The leading private prison company, Corrections Corporation of America (CCA), was founded in 1983.[69] The exponential increase in the number of incarcerated prisoners created the need for more facilities to hold these new convicts. CCA is responsible for "managing more than 40 percent of all adult-secure beds under contract with such providers in the United States." The introduction of private prisons allowed for the need of more prison facilities to be met along with a new profitable business market. CCA is so lucrative that it "joined the New York Stock Exchange in 1994". [70] The institution of private prisons into the American prison system has had major impacts, including a

[68] "Banking on Bondage: Private Prisons and Mass Incarceration," *American Civil Liberties Union,* accessed on April 14, 2020, https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration.
[69] "Who are We," *Corrections Corporation of America,* accessed April 13, 2020, http://www.correctionscorp.com/who-we-are.
[70] All the quotations in this paragraph were obtained from CCA's website under their description of their company.

1600% increase in the number of prisoners held in private prisons from 1990 to 2009.[71] The revenue private prisons bring in is estimated by the ACLU:

> In 2010, the two largest private prison companies alone received nearly $3 billion dollars in revenue, and their top executives, according to one source, each received annual compensation packages worth well over $3 million.[72]

While private prisons serve to lower the cost of incarceration, there has not been substantial empirical evidence to prove that they offer a cost saving advantage over publicly run prisons.[73] The private prison industry is also concentrated to only a few firms and this market concentration results in huge payouts to the few firms in the industry. A study conducted by The Hamilton Project reports that the private prison industry is concentrated to a few firms where the three largest private prison companies account for 96% of the total number of private prison beds.[74] The Hamilton Project reports that the severe concentration of the private prison industry means that there are larger incentives for each company to lobby for favorable legislation, including legislation that increases mandatory minimums, because this legislation offers huge economic benefits to the few firms in the industry. The basic point of the private prison industry is that it profits financially off of punishment.

Bell's constitutional contradiction can be seen in the problem of mass incarceration because the imprisonment and deprivation of freedom and equality of people is directly profited

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[71] "Banking on Bondage: Private Prisons and Mass Incarceration," *American Civil Liberties Union,* accessed on April 14, 2020, https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration.

[72] "Banking on Bondage: Private Prisons and Mass Incarceration," *American Civil Liberties Union,* accessed on April 14, 2020, https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration.

[73] Megan Mumford, Diane Whitmore Schanzenbach, and Ryan Nunn,"The Economics of Private Prisons," *The Hamilton Project*, October 2006, https://www.hamiltonproject.org/assets/files/economics_of_private_prisons.pdf.

[74] The Hamilton Project is a combination of academics, business leaders, and former public policy makers who offer proposals for policy that are rooted in evidence and experience.

on by the private prison industry. People of color are disproportionately impacted by mass incarceration and so they are the primary group profited off of by the private prison industry. The constitutional contradiction that was exposed by Geneva's encounter with the Framers is still relevant today. Although slavery is no longer legal, the racist foundation of American government has not disappeared, but has simply taken on different forms, including mass incarceration. Michelle Alexander, a civil rights activist, lawyer, and author of the book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) writes in the introduction of her book:

> In each generation, new tactics have been used for achieving the same goals—goals shared by the Founding Fathers. Denying African Americans citizenship was deemed essential to the formation of the original union. Hundreds of years later, America is still not an egalitarian democracy. The arguments and rationalizations that have been trotted out in support of racial exclusion and discrimination in its various forms have changed and evolved, but the outcome has remained largely the same. An extraordinary percentage of black men in the United States are legally barred from voting today, just as they have been throughout most of American history. They are also subject to legalized discrimination in employment, housing, education, public benefits, and jury service, just as their parents, grandparents, and great-grandparents once were.[75]

Alexander's book gives a comprehensive view on the history of mass incarceration that perfectly demonstrates Bell's argument that the constitutional contradiction still exists within the racist structures in place in American government and society today.

Now that the synthesis of Bell and Hart's theories have been applied to the contemporary problem of mass incarceration, their theories can be used to carve a way for thinking about the solution to this problem. The next subsection will show how the combination of Hart and Bell can give new insights on how to solve the problem of mass incarceration.

5.3: Hart and Bell Used to Think About Reform

[75] Michelle Alexander, *The New Jim Crow: Mass Incarceration During the Age of Colorblindness* (New York: The New York Press, 2010), 1-2.

The purpose of this subsection is to demonstrate how the application of Hart and Bell to the problem of mass incarceration can provide a framework to think about a solution to the problem of mass incarceration. While this presents one way to think about finding a solution for mass incarceration and the consequences it has had on people of color, I am not trying to argue that this is the only way to think of a solution. Hart has provided a theoretical apparatus that has been used to show the legal validity of the laws enacted that led to and continued the problem of mass incarceration. Hart's theory showed the framework for thinking about a legal system and has shown that while the laws enacted that led to mass incarceration are valid, they are not morally conclusive. Bell has provided the constitutional contradiction that was used to expose how the policies that were put in place were abused because they disproportionately impacted people of color. The problem of mass incarceration demonstrates how the contradiction between denying certain groups of people freedom in order to benefit other groups is still present today. This was shown because of the economic benefits provided to the private prison industry at the cost of denying other people freedom. The policies put in place that led to mass incarceration have shown to be racist structures because they impact minority groups at a disproportionate rate in comparison to white people.

The combination of Hart and Bell allows for theorizing to be done about the fluidity of the American legal system. Bell argues that the way to create a society where everyone is truly equal is to redefine what equality means outside of the racist structures that have defined American society. He argues that it is necessary to re-evaluate the idea of what equal distribution of rights means so that society may be restructured to reflect the interests of everyone living within a society, not just one group of people. In order to move beyond the racism that has been a part of all of American history, Bell argues that people need to think outside of the idea of equality that

has been rested on white supremacy. He believes that the restructuring of society can be achieved under the current legal system in place. By combining this argument to Hart's description of a legal system one can see how the system can be changed to promote the interests of everyone.

When thinking about how to think about a solution for mass incarceration Bell's argumentation can be used to show how the problem is not a result of an invalid legal system, but rather through the abuse of a valid legal system. Abuse within a valid legal system leaves room for change because then secondary rules can be used as mechanisms of change. If Bell's argument for a new mode of thinking about freedom and equal distribution of rights is applied to Hart's secondary rules then it is obvious how there can be hope for change under the current legal system in place in America. It is not necessary to change the American legal system in order to eliminate racism, because it is possible to promote change within the current legal system. Secondary rules of change can be used to alter the policies enacted that feed into the problem of mass incarceration so that they do not have a disproportionate impact on people of color. Secondary rules of change can also be used to extinguish contracts with private prison industries that profit off of punishment. Secondary rules of adjudication can be used to give sentencing discretion back to judges instead of limiting their discretion with mandatory minimums. The legal system in place can undo the harm that causes mass incarceration, all that is needed is a new evaluation of freedom and equality.

The American legal system has historically been abused to benefit some groups at the cost of disadvantaging others. Applying Hart's description of a legal system shows how the system can be reformed and changed just as it has been abused. Bell's thinking that it is necessary to reinterpret the ideas of freedom and equality in order to restructure society gives the first step to solving contemporary problems, like mass incarceration. Once the idea of equal distribution of rights has been separated out from the ideals that white supremacy has set, then secondary rules may be used

to reshape and reform the American government to reflect them. The hard part of the solution is what these new ideas of freedom and equality look like. The synthesis of Hart and Bell gives a new way to think about the American legal system and can guide a pathway to reform. The combination of these two thinkers has exposed that change is both necessary and possible under the current legal system.

Section 6: Conclusion

The main purpose of this paper was to demonstrate how the theories given by Hart and Bell compliment each other and that the combination of their theories is valuable when thinking about contemporary problems. Since racism has been an integral part of American history, it is impossible to effectively theorize about the American legal system without taking racism into account. The combination of Hart and Bell provides a more holistic view of the way the American legal system actually operates in the real world. A more comprehensive analysis of how the legal system operates is valuable because it can be applied to contemporary problems and gives a theoretical mechanism to think about reforming the system. The synthesis of Hart and Bell has demonstrated that the way to end racism in America can be done within the legal system that is currently in place. This can be done by re-evaluating how to think about freedom and equality and then restructuring society by using secondary rules to make the legal system reflect these new ideas.

I want to recognize that this paper falls victim to the critique that it does not give proper attention to all minority groups and is primarily focused on black men. The argument I have developed can, in part, be applicable to most forms of oppression besides just the oppression of black men. Further research would need to be done to express how different oppressed groups

need different things under a legal system, but the argument that there is room for reform under the current American legal system and that this reform starts with a re-evaluation of the idea of freedom and equality can be applied to other oppressed groups. When applying the combination of Hart and Bell to the problem of mass incarceration I have failed to distinguish between the different implications that mass incarceration has had on different minority groups such as hispanics and native americans. I also talked about the consequences mass incarceration has had on black people generally but it is worth noting that black women have been victimized in their own unique way by the criminal justice system. While I recognize that I have not paid the full attention deserved to different minority groups who are victimized by racist structures that exist within the American legal system, I believe that the theoretical mechanism I have provided can be applied to thinking about solving racism that is felt in different ways by a variety of different oppressed groups.