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Note

FORCED PRISON LABOR: PUNISHMENT FOR A CRIME?

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ABSTRACT—The Thirteenth Amendment's prohibition of involuntary servitude carves out an exception to its protections that allows the use of forced labor as "punishment for a crime" when an individual is "duly convicted." Courts have interpreted this language as placing a categorical bar on Thirteenth Amendment claims alleged by individuals who are incarcerated. Yet, a consistent understanding of the term "punishment" that draws from the term's use in the Eighth Amendment's Cruel and Unusual Punishment Clause supports a narrower interpretation of the Thirteenth Amendment's punishment exception. This Note argues that individuals cannot be denied Thirteenth Amendment protections unless they are explicitly sentenced to labor as part of their sentence.

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INTRODUCTION

At the Louisiana State Penitentiary in Angola, crowds of Black and brown men can be seen moving meticulously through fields of vegetable crops, eerily resembling an image of Southern slave plantations.[1] As of 2021, the Louisiana State Penitentiary houses over 6,000 individuals, who are required to grow crops, raise cattle, and produce supplies as part of their sentences.[2] These incarcerated individuals do not have to be compensated for their work and can be forced to labor under threat of punishment, such as solitary confinement. [3] In some instances, incarcerated people are

[1] Whitney Benns, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/ [https://perma.cc/8V6G-EDZW] ("In a sense, slavery never ended at Angola; it was reinvented."); *see also* Benjamin Fearnow, *Angola Inmates Halt Farmwork, Demand 'Slavery' Investigation of U.S. Prisons*, NEWSWEEK (May 9, 2018), https://www.newsweek.com/louisiana-state-penitentiary-angola-work-stoppage-inmates-prison-guards-fight-917675 [https://perma.cc/FF5J-KFKV] ("We are urging that local, state and federal governments who currently hold hundreds of thousands of African Americans on prison farms across the country be investigated for antebellum criminality, involuntary servitude and slavery.").

[2] *Louisiana State Penitentiary*, PRISON INSIGHT, https://prisoninsight.com/correctional-facilities/state/louisiana/louisiana-state-penitentiary/ [https://perma.cc/GG4T-2W3J].

[3] Benns, *supra* note 1; Bryce Covert, *Louisiana Prisoners Demand an End to 'Modern-Day Slavery,'* APPEAL (June 8, 2018), https://theappeal.org/louisiana-prisoners-demand-an-end-to-modern-day-slavery/ [https://perma.cc/R2GE-KUZH] ("Once cleared by a prison doctor, prisoners at Angola can be legally forced to work under threat of severe punishment, including solitary confinement. Even prisoners with physical impediments may still have to work.").

"compensated" with as little as two cents per hour for their work.[4] These practices should be unconstitutional under the Thirteenth Amendment's prohibition of involuntary servitude, yet courts have upheld these practices based on a textual exception.[5]

The Thirteenth Amendment specifically permits the use of involuntary servitude as a "punishment for crime" when an individual has been "duly convicted."[6] The word "punishment" is not unique to the Thirteenth Amendment—it is also used in the Eighth Amendment, which prohibits "cruel and unusual punishment[]."[7] Courts interpret this term distinctively in the Eighth and Thirteenth Amendments.[8] In the Thirteenth Amendment context, courts consistently view the text as barring incarcerated people from bringing involuntary servitude claims, since labor is understood as part of the "punishment" for their crimes.[9] Here, punishment is basically recognized as all institutional treatment that people experience while incarcerated.[10]

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[4] *See* Covert, *supra* note 3.

[5] *See infra* Part III. This Note focuses on the persistence of involuntary servitude instead of discussing slavery, as it is commonly accepted that the Thirteenth Amendment's exception only applies to involuntary servitude. *See generally* United States v. Kozminski, 487 U.S. 931, 942 (1988) (discussing the provisions of the Thirteenth Amendment and noting that the "express exception" applied to "involuntary servitude . . . as a punishment for crime").

[6] U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). The Thirteenth Amendment's Punishment Clause only applies to individuals who have been "duly convicted," and some courts have interpreted this to mean that pretrial detainees are not subject to its exception. *See, e.g.*, McGarry v. Pallito, 687 F.3d 505, 514 (2d Cir. 2012) ("It is clearly established that requiring hard labor of pretrial detainees—persons not 'duly convicted'—violates the Thirteenth Amendment."). This Note does not address issues involving pretrial detainees.

[7] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[8] *See infra* Part III.

[9] *See, e.g.*, Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963) ("Prison rules may require appellant to work but this is not the sort of involuntary servitude which violates Thirteenth Amendment rights."); Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977) ("Compelling prison inmates to work does not contravene the Thirteenth Amendment."); Omasta v. Wainwright, 696 F.2d 1304, 1305 (11th Cir. 1983) (holding that the Thirteenth Amendment's prohibition against involuntary servitude is not implicated when an inmate is forced to work, even though the conviction may be subsequently reversed); Wendt v. Lynaugh, 841 F.2d 619, 620 (5th Cir. 1988) (holding that the defendant, duly convicted of a crime, fell precisely into the exemption of the Thirteenth Amendment); Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992) ("The Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work."); Tourscher v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999) (holding that pretrial detainees may be required to perform some services without a violation of the Thirteenth Amendment).

[10] Courts generally deny Thirteenth Amendment claims brought by those who are incarcerated, as involuntary servitude is viewed as a valid punishment for a crime. This categorical denial of petitions in case law creates the inference that "punishment" is understood to encompass all treatment individuals experience during their incarceration. *See infra* Part III.

In contrast, "punishment" under Eighth Amendment case law is interpreted very differently.[11] Courts have held that treatment while incarcerated amounts to Eighth Amendment punishment if prison officials intend the treatment as punishment or if the treatment is a term of the sentence imposed by a court.[12] Therefore, while unpaid labor is considered a punishment under the Thirteenth Amendment because it is viewed as institutional treatment, unpaid labor would receive additional scrutiny under the Eighth Amendment based on the intent of prison officials and the terms of the individual's sentence.

This Note calls into question the conflicting interpretations of punishment under the Eighth and Thirteenth Amendments and proposes an intratextual reading of punishment that interprets each use of the term in the Constitution in light of the other.[13] This intratextual analysis presents a uniform constitutional definition of punishment that is more consistent with its original intended meaning under the Thirteenth Amendment.[14] In sum, this Note concludes that incarcerated individuals must be explicitly sentenced to labor in order to be excluded from Thirteenth Amendment protections.

Although some scholars have considered the intersection of the term punishment in both the Eighth and Thirteenth Amendments,[15] no scholar has engaged in an in-depth study of the corresponding case law and applied their findings to create doctrinal support for challenging involuntary servitude in

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[11] *See infra* Section III.A.

[12] Wilson v. Seiter, 501 U.S. 294, 300–02 (1991) (discussing the intent requirement to constitute "punishment" under the Eighth Amendment (citing Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973))). This understanding of punishment involves an examination of the intent of prison officials or the court-imposed sentence in order to determine a constitutional violation. In the Thirteenth Amendment context, by contrast, most courts do not undertake an additional examination of intent and instead reject all challenges to involuntary servitude brought by incarcerated individuals because their labor is regarded as part of the punishment exception. *See infra* Part III.

[13] Intratextualism refers to a method of constitutional interpretation where repetitive constitutional terms are read in light of each other. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

[14] Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 628 (2008) ("[T]he true intent and meaning of [the Thirteenth Amendment] prohibits slavery or involuntary servitude forever in all forms, except in direct execution of a sentence imposing a definite penalty according to law." (quoting CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867))).

[15] *E.g.*, *id.* at 610–11 (applying an intratextual reading of punishment in the Eighth Amendment context to clarify Thirteenth Amendment claims on sexual slavery); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 398 (2009) (examining the Eighth Amendment and Fifth Amendment in order to argue that only incarcerated people who are sentenced to labor are exempted from Thirteenth Amendment protections).

prisons.[16] This Note advances the scholarly conversation by employing a joint reading of the Amendments and resolving the current discrepancy in Eighth and Thirteenth Amendment case law regarding the constitutional understanding of punishment.

Part I outlines the persistence of forced prison labor today. Part II details the history of the Thirteenth Amendment and the socioeconomic and political context against which efforts to abolish slavery and ratify the Thirteenth Amendment occurred. Part II further highlights the significance of the punishment exception as a method to preserve the financial interests vested in systems of unpaid labor and encourage the unchallenged passage of the Amendment. Part III examines the Eighth Amendment's prohibition against cruel and unusual punishment and details the interpretation of punishment in Eighth Amendment case law as compared to Thirteenth Amendment case law.

After examining the contrasting ways in which the Court has interpreted punishment in both Amendments, Part IV applies an intratextual approach to illustrate the doctrinal support for a uniform interpretation of the term punishment. Part V subsequently describes how litigation challenging forced prison labor would be impacted if courts interpreted punishment similarly in both the Eighth and Thirteenth Amendment contexts. In conclusion, this Note argues that the theory of intratextualism necessitates that individuals cannot be exempted from Thirteenth Amendment protections unless they are explicitly sentenced to labor. The current inconsistencies in interpreting punishment in the Constitution call into question the legitimacy of the Thirteenth Amendment's punishment exception to begin with. This Note pushes the needle forward in an effort to extend Thirteenth Amendment protections to all individuals—irrespective of whether they are incarcerated or not.

I. PRISON LABOR TODAY

In many ways, the Thirteenth Amendment's exception for involuntary servitude as a "punishment for crime" is a vehicle for the persistence of forced labor today. At present, approximately 55% of the American prison population works while serving their sentences.[17] Sometimes incarcerated

[16] The closest is Professor Raja Raghunath's article that engages the Eighth Amendment to support a conception of punishment under the Thirteenth Amendment as requiring an individual to be sentenced to labor. This argument does not examine the full range of implications when adopting a uniform definition of punishment under the Eighth and Thirteenth Amendments. Raghunath, *supra* note 15, at 398–99, 430.

[17] Lauren-Brooke Eisen, *COVID-19 Highlights the Need for Prison Labor Reform*, BRENNAN CTR. FOR JUST. (Apr. 17, 2020), https://www.brennancenter.org/our-work/analysis-opinion/covid-19-highlights-need-prison-labor-reform [https://perma.cc/3ZYS-JE2V].

people may "volunteer" to work for barely any payment as they have no other source of income while incarcerated.[18] In many other cases, labor is neither voluntary nor compensated and yet is still deemed acceptable under the punishment exception.[19] Certain states have even codified requirements for participation in work programs and repercussions for anyone refusing to work when jobs are available.[20] In the absence of formal statutes that regulate prison labor, incarcerated individuals who refuse work also face threats from guards that they will be placed in solitary confinement, transferred to dangerous housing units, or lose some of their good-time credits.[21]

Today, prison labor is an integral part of incarceration and a critically unrecognized presence in the lives of nonincarcerated individuals despite the prevalence of goods that are produced in prisons. Incarcerated individuals are coerced into doing jobs ranging from building furniture or farming to acting as call-center representatives.[22] Prison labor even contributed to large

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[18] Christopher Zoukis, *Prison Work Programs: 'Cost-Effective Labor Pool' or 'Slave Labor of Yesterday'?*, PRISON LEGAL NEWS (Jan. 8, 2019), https://www.prisonlegalnews.org/news/2019/jan/8/prison-work-programs-cost-effective-labor-pool-or-slave-labor-yesterday/ [https://perma.cc/YRF5-62J5]; Terry Tang, *Lawmakers Mark Juneteenth by Reviving 'Abolition Amendment,'* AP NEWS (June 18, 2021), https://apnews.com/article/or-state-wire-race-and-ethnicity-lifestyle-juneteenth-963c58a1a19ba501f5677343b9c786e0 [https://perma.cc/BFW3-YKBX] ("Advocates of the bill note that it targets forced labor and not prison work programs, which are voluntary.").

[19] Eisen, *supra* note 17 ("For decades, prisoners in American correctional facilities have worked for no wages or mere pennies an hour. . . . Under this system, the captive labor market worked long hours in unsafe conditions, often treated as poorly as they had been as slaves."); Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/CD44-2S22] ("With a few rare exceptions, regular prison jobs are still unpaid in Alabama, Arkansas, Florida, Georgia, and Texas.").

[20] *E.g.*, TENN. CODE ANN. § 41-2-123 (2021) ("All prisoners sentenced to the county workhouse . . . shall be worked on the county roads . . . ."); *id.* § 41-2-146 ("When any prisoner has been sentenced to imprisonment in a county workhouse or jail . . . the sheriff . . . shall be authorized to permit the prisoner to participate in work programs."); *id.* § 41-2-120 ("Any prisoner refusing to work or becoming disorderly may be confined in solitary confinement, or subjected to such other punishment, not inconsistent with humanity, as may be deemed necessary by the sheriff or superintendent for the control of the prisoners, including reducing sentence credits pursuant to the procedure established in § 41-2-111."); S.D. CODIFIED LAWS § 24-11-28 (2021) ("Every able-bodied prisoner over eighteen and not more than fifty years of age confined in any jail [in this state] . . . may be required to labor during the whole or some part of each day of his sentence . . . ."); MONT. CODE ANN. § 53-30-132 (2021) ("Able-bodied persons committed to a state prison as adult offenders may be required to perform work as provided for by the department of corrections . . . ."); IOWA CODE § 904.701 (2021) ("An inmate of an institution shall be required to perform hard labor which is suited to the inmate's age, gender, physical and mental condition, [and] strength . . . .").

[21] The Indicator from Planet Money, *The Uncounted Workforce*, NPR, at 04:33 (June 29, 2020, 5:01 PM), https://www.npr.org/2020/06/29/884989263/the-uncounted-workforce [https://perma.cc/83T8-MJN9].

[22] Alexia Fernández Campbell, *The Federal Government Markets Prison Labor to Businesses as the "Best-Kept Secret,"* VOX (Aug. 24, 2018, 10:00 AM), https://www.vox.com/2018/8/24/17768438/national-prison-strike-factory-labor [https://perma.cc/XAM8-3RDD].

productions of personal protective equipment and sanitizers during the COVID-19 pandemic.[23] In 2020 alone, a report revealed that over 4,100 corporations profited from the use of prison labor.[24] Private prisons are also particularly reliant on forced labor to reduce maintenance costs, and incarcerated individuals are often required to cook their own meals and clean the facilities.[25]

Public entities are no exception—state-run facilities have programs through which incarcerated individuals produce goods that are later sold at a profit to other governmental agencies.[26] The Federal Prison Industries program, a government-owned entity that seeks to provide marketable skills to incarcerated people, earns $500 million yearly in net sales using prison labor.[27] At the same time, the incarcerated individuals whose labor these entities reap are only paid $0.23–$1.15 per hour, and portions of these wages are often garnished to cover court fees or other incarceration-related expenses.[28] For comparison, the federal minimum wage is currently $7.25 per hour, and many states impose higher minimum-wage requirements.[29]

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[23] Katie Nixdorf & Kaitlyn Wang, *More than 20 States Are Using Prison Labor to Make Hand Sanitizer and Masks While the Coronavirus Spreads Through the Prison System*, BUS. INSIDER (Apr. 14, 2020, 11:15 AM), https://www.businessinsider.com/coronavirus-prison-labor-hand-sanitizer-masks-2020-4 [https://perma.cc/YMM9-LD9Y].

[24] *The Prison Industry: Mapping Private Sector Players*, WORTH RISES (May 2020), https://worthrises.org/theprisonindustry2020 [https://perma.cc/VYU7-4ZB7] (finding that the list of corporations that profited from prison labor includes Bank of America, Barnes & Noble, Canon, Dell, Ernst & Young, Fidelity, LexisNexis, Time Warner Cable, Timberland, Verizon, and Zoom).

[25] Sytonia Reid, *On Sale Now: Prison Labor*, GREEN AM., https://www.greenamerica.org/hidden-workers-fighting-change/sale-now-prison-labor [https://perma.cc/PV8F-S4FQ] (noting that private prisons "lean on inmate labor as a cost-saving measure" and that "the bulk of the work inmates do . . . is in maintaining the prison itself, working as janitors and cooks, or doing laundry"); Jonathon Booth, *How Private Prisons Profit from Forced Labor*, CURRENT AFFS. (Oct. 26, 2020), https://www.currentaffairs.org/2020/10/how-private-prisons-profit-from-forced-labor [https://perma.cc/T5S9-X54K] (discussing forced labor in immigration detention centers).

[26] Daniel Moritz-Rabson, *'Prison Slavery': Inmates Are Paid Cents While Manufacturing Products Sold to Government*, NEWSWEEK (Aug. 28, 2018, 5:12 PM), https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729 [https://perma.cc/P8W4-F66B].

[27] *Prison Labor Is a Billion-Dollar Industry, with Uncertain Returns for Inmates*, ECONOMIST (Mar. 18, 2017), https://www.economist.com/united-states/2017/03/16/prison-labour-is-a-billion-dollar-industry-with-uncertain-returns-for-inmates [https://perma.cc/F2B8-SYU8].

[28] Katherine Stevenson, *Profiting Off of Prison Labor*, BUS. REV. BERKELEY (July 6, 2020), https://businessreview.berkeley.edu/profiting-off-of-prison-labor/ [https://perma.cc/ABK5-KNCK]; *UNICOR: Program Details*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp [https://perma.cc/6FZ4-DFAM]. Examples of fees incarcerated individuals are subjected to include court-appointed attorney fees, court-clerk fees, filing-clerk fees, DNA-database fees, jury fees, crime-lab-analysis fees, and late fees.

[29] *Minimum Wage*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/minimum-wage [https://perma.cc/3PA9-B732]; *State Minimum Wage Laws*, U.S. DEP'T OF LAB. (Sept. 30, 2021), https://www.dol.gov/agencies/whd/minimum-wage/state [https://perma.cc/AY3G-C2C7].

Reliance on prison labor has become so commonplace that it can significantly impact state resources and public service capabilities. For example, in states such as California, incarcerated individuals represent a large portion of the state's firefighters.[30] In the wake of coronavirus outbreaks in prisons in 2020, many incarcerated people in California were offered an increasing number of release options from prison. As a result, the state faced a shortage of firefighters to battle the unprecedented number of wildfires in California.[31] Proponents of these forced-work programs have criticized the release of incarcerated people during a time when their labor was needed.[32]

This example demonstrates how incarcerated individuals are not only tasked with life-threatening jobs and are minimally compensated, but are also viewed as an important source of low-cost services.[33] In fact, until 2020, those who worked as firefighters while incarcerated were unable to get those exact jobs after their release.[34] Firefighting is just one example of the many settings in which these disparities exist.[35] The prevalence of forced labor today demonstrates the continuing impact of the Thirteenth Amendment's punishment exception more than a century after the abolition of slavery.

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[30] Thomas Fuller, *Coronavirus Limits California's Efforts to Fight Fires with Prison Labor*, N.Y. TIMES (Aug. 24, 2020), https://www.nytimes.com/2020/08/22/us/california-wildfires-prisoners.html [https://perma.cc/GZ37-5GQD]; Abigail Johnson Hess, *California Is Paying Inmates $1 an Hour to Fight Wildfires*, CNBC (Nov. 12, 2018, 11:54 AM), https://www.cnbc.com/2018/08/14/california-is-paying-inmates-1-an-hour-to-fight-wildfires.html [https://perma.cc/W4VE-RDVG].

[31] Alisha Ebrahimji & Sarah Moon, *California Faces an Inmate Firefighter Shortage Because the State Released Them Early Due to the Pandemic*, CNN (Aug. 24, 2020, 12:23 PM), https://www.cnn.com/2020/08/24/us/california-inmate-firefighters-trnd/index.html [https://perma.cc/F6JC-6858].

[32] Fuller, *supra* note 30.

[33] *See id.* Firefighters face serious risks as a result of their jobs, such as smoke inhalation, carbon monoxide poisoning, burns, and heat exhaustion. An estimated 60,825 firefighters were injured in the line of duty in 2019. *Firefighter Injuries in the United States*, NAT'L FIRE PROT. ASS'N (Nov. 2020), https://www.nfpa.org/News-and-Research/Data-research-and-tools/Emergency-Responders/Firefighter-injuries-in-the-United-States [https://perma.cc/MM6Y-Q8P4].

[34] Eliyahu Kamisher, *Prison Labor Is on the Frontlines of the COVID-19 Pandemic*, APPEAL (Oct. 5, 2020), https://theappeal.org/prison-labor-is-on-the-frontlines-of-the-covid-19-pandemic [https://perma.cc/67TW-6HPG]; Cyrus Farivar, *New California Law to Make It Easier for Former Inmate Firefighters to Turn Pro*, NBC NEWS (Sept. 11, 2020, 3:35 PM), https://www.nbcnews.com/news/us-news/proposed-california-law-would-make-it-easier-former-inmate-firefighters-n1239833 [https://perma.cc/BY8E-GMXC].

[35] Justin Stabley, *People Leaving Prison Have a Hard Time Getting Jobs. The Pandemic Has Made Things Worse*, PBS (Mar. 31, 2021, 5:55 PM), https://www.pbs.org/newshour/economy/people-leaving-prison-have-a-hard-time-getting-jobs-the-pandemic-has-made-things-worse [https://perma.cc/XLJ8-NTKK]; *Employment of Young Men After Arrest or Incarceration*, U.S. BUREAU OF LAB. STATS. (May 20, 2019), https://www.bls.gov/opub/ted/2019/employment-of-young-men-after-arrest-or-incarceration.htm [https://perma.cc/C9SD-H3F4] (finding that, seventy-eight weeks after release, the employment rate of individuals who were incarcerated for more than six months was just 55%).

II. THE HISTORY OF THE THIRTEENTH AMENDMENT

No discussion about the provisions of the Thirteenth Amendment can begin without acknowledging the economic and political incentives present at the time of ratification and that continue to exist in different forms today. This Part traces the events surrounding the ratification of the Thirteenth Amendment and the influences that contributed to a limited prohibition of slavery. This Part illustrates the economic and political interests that were served by the inclusion of a punishment exception that would ensure the continuation of a source of free or cheap labor. Understanding these economic and political interests sheds light on the intended meaning of the Thirteenth Amendment.

A. The Punishment Exception: A Solution to Authorize Unpaid Labor

In 1863, President Abraham Lincoln issued the Emancipation Proclamation, announcing that the United States would recognize as free any enslaved people in areas not then under Union control.[36] Toward the end of the Civil War, it was evident that the Union would emerge victorious, which meant that slavery would be abolished nationwide.[37] The abolition of slavery would have a profound impact on the U.S. economy.[38] In the years leading up to the Civil War, the United States increasingly relied on labor-intensive crops in international trade and used these profits to become one of the world's leading economies.[39] Between 1801 and 1862 alone, the amount of cotton picked by enslaved persons increased by 400%.[40] The South was responsible for producing 75% of the world's cotton by the start of the Civil War.[41]

In addition to cotton, the United States traded crops such as tobacco, rice, and sugar cane, which also required large amounts of physical capital

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[36] Abraham Lincoln, President of the United States, Emancipation Proclamation (Jan. 1, 1863), *reprinted in Transcript of the Proclamation*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html [https://perma.cc/E7PQ-P6AP].

[37] Paul Finkelman, *Lincoln and Emancipation: Constitutional Theory, Practical Politics, and the Basic Practice of Law*, 35 J. SUP. CT. HIST. 243, 250–51 (2010).

[38] *Cf.* P.R. Lockhart, *How Slavery Became America's First Big Business*, VOX (Aug. 16, 2019, 9:00 AM), https://www.vox.com/identities/2019/8/16/20806069/slavery-economy-capitalism-violence-cotton-edward-baptist [https://perma.cc/S3P2-6Z9T] ("The bodies of the enslaved served as America's largest financial asset . . . .").

[39] *Id.*

[40] *Id.*

[41] *Id.*; Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY (Sept. 2, 2020), https://www.history.com/news/slavery-profitable-southern-economy [https://perma.cc/FC9S-QEPS]; *see also* Sven Beckert, *Empire of Cotton*, ATLANTIC (Dec. 12, 2014), https://www.theatlantic.com/business/archive/2014/12/empire-of-cotton/383660/ [https://perma.cc/WMB3-ES2N] (discussing international reliance on American cotton).

to produce.[42] Investors were able to derive significant profits from the trade of these "cash crops," which were exponentially increased by using free labor during production.[43] Southern states in particular prospered from the export of these crops and became the wealthiest region in the country—the Mississippi River Valley had more millionaires per capita than the rest of the United States.[44] At the time, enslaved people consisted of about 40% of the South's population.[45] As a result, there were intense concerns in the South about the impact that the loss of free labor would have on the region's economy.[46]

These concerns underlay significant opposition to the possibility of amending the Constitution to abolish slavery, which still required congressional approval despite President Lincoln's Emancipation Proclamation and the end of the Civil War.[47] In fact, early proposals of the Amendment included far more expansive language. Senator Charles Sumner, for example, proposed the language "[a]ll persons are equal before the law, so that no person can hold another as a slave,"[48] based on the French Declaration of the Rights of Man and of the Citizen, but his proposal was not adopted.[49]

The eventual text of the Thirteenth Amendment was taken from the Northwest Ordinance of 1787, a document that outlined the process for admitting new states to the Union.[50] Although some scholars suggest that the initial proposal by Senator Sumner was overlooked due to its foreign origins

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[42] Timmons, *supra* note 41.

[43] *Id.*

[44] Lockhart, *supra* note 38.

[45] MARK V. SIEGLER, AN ECONOMIC HISTORY OF THE UNITED STATES: CONNECTING THE PRESENT WITH THE PAST 133 (2017).

[46] Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 771 (2011) ("[S]ome of the southern states . . . were less willing to question the institution of slavery and defended it as the indispensable foundation of not just their own but the nation's economy.").

[47] Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 448–49 (1989); Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL'Y 73, 83–84 (2017).

[48] CONG. GLOBE, 38th Cong., 1st Sess. 1482 (1864) (statement of Rep. Smith); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1466, 1474–75 (2019); Eric Foner, *Abraham Lincoln, the Thirteenth Amendment, and the Problem of Freedom*, 15 GEO. J.L. & PUB. POL'Y 59, 65 (2017); James Oakes, *"The Only Effectual Way": The Congressional Origins of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 115, 124 (2017).

[49] Foner, *supra* note 48, at 65.

[50] *Id.*; Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1470 (2012); Ghali, *supra* note 14, at 625–26; *See* Ordinance of 1787: The Northwest Territorial Government, art. 6, *reprinted in The Organic Laws of the United States of America*, 1 U.S.C. XLV, LVII, LIX (2018) [hereinafter Ordinance of 1787] ("There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted . . . .").

and not its broad view of equality, it cannot be disregarded that Congress chose to adopt a more narrow abolition of slavery.[51] In fact, President Lincoln's successor even openly assured Southern states that the proposed Amendment would have a restrictive scope in promoting civil rights.[52] Another public figure—and former Confederate general—even explicitly encouraged states to use the criminal justice system to create a supply of free labor.[53] Ratified in 1865, the Thirteenth Amendment did not just formally end slavery: it provided a solution to the economic problem the South faced and presented a vision of the Amendment that Southern states would be more likely to support.[54]

B. Slavery Reimagined: Convict Leasing, Black Codes, and Mass Incarceration

The Thirteenth Amendment's punishment exception allowed states to continue to benefit from free labor as long as the laborers were "duly convicted."[55] What followed was a rise in practices designed to incarcerate and exploit Black people and recently freed enslaved people.[56] One such practice was convict leasing. After the passage of the Thirteenth Amendment, the system of convict leasing proliferated as prisons increasingly began hiring out or "leasing" incarcerated individuals as laborers to private parties, such as railways, mines, or plantations, in

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[51] Balkin & Levinson, *supra* note 50, at 1478; Ghali, *supra* note 14, at 626. The eventual language of the Thirteenth Amendment creates exceptions to its protection and in doing so, it diverged from Senator Sumner's view of equality for all.

[52] Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 991–92 (2009).

[53] ALAN CONWAY, THE RECONSTRUCTION OF GEORGIA 62 (1966) ("General John T. Morgan, a white supremacist from Alabama . . . urged that . . . the Constitution of the United States gave the power to inflict involuntary servitude as a punishment for crime . . . .").

[54] Howe, *supra* note 52, at 991–92; Ghali, *supra* note 14 at 609, 627 (describing how Southern states were resistant to the prohibition of slavery and how the proposed Amendment maintained the power of states to punish criminals); *see also* Pope, *supra* note 48, at 1467 (quoting General John T. Morgan as saying, "as the Constitution of the United States [gives] the power to inflict involuntary servitude as a punishment for crime, a suitable law should be framed by the state jurists [to] enable them to sell into bondage once more those Negroes found guilty of certain crimes").

[55] Raghunath, *supra* note 15, at 421–22.

[56] Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 933–35, 945 (2019).

exchange for a fee paid to the prisons.[57] Incarcerated individuals were not paid in this arrangement.[58]

Convict leasing was not a new phenomenon and had existed for decades at this point. However, when the practice reemerged in the 1860s after the Thirteenth Amendment was passed, it involved an unprecedented number of incarcerated individuals, an overwhelming proportion of whom were Black.[59] Prison authorities leased out incarcerated individuals to companies, often for years on end,[60] and gave leasing parties unlimited discretion regarding incarcerated individuals' living and working conditions.[61] The status of the laborers as "prisoners" and not formal employees meant that the state did nothing to ensure that individuals who were leased out were not exploited or subjected to abuse.[62] Further, because these practices were deemed constitutional, incarcerated individuals could not challenge them in court or refuse to participate.[63]

The growth of convict leasing did not occur in isolation. To function, the practice necessitated an added "supply" of incarcerated individuals to meet the rising demand for free labor behind bars.[64] This need was filled by a second practice targeted at vulnerable members of the population: the Black Codes. The Black Codes contributed to an increase in the number of people in prison who could serve as unpaid laborers.[65] These racist regulations emerged in 1865 as white-dominated Southern legislatures passed a series of laws that restricted the rights of newly freed Black citizens and allowed the state to maintain control over them.[66] These policies were especially nefarious as they criminalized ordinary behavior such as vagrancy

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[57] *Id.* at 941–45; Howe, *supra* note 52, at 1009–11.

[58] Ashley Mott, *Fact Check: Southern States Used Convict Leasing to Force Black People into Unpaid Labor*, USA TODAY (July 7, 2020, 11:12 AM), https://www.usatoday.com/story/news/factcheck/2020/07/07/fact-check-convict-leasing-forced-black-people-into-unpaid-labor/5368307002/ [https://perma.cc/GN8S-DFRP]; *cf.* Howe, *supra* note 52, at 1010–11.

[59] Raghunath, *supra* note 15, at 422 (detailing the sharp increase in the practice of convict leasing following the passage of the Thirteenth Amendment).

[60] *See e.g.*, Howe, *supra* note 52, at 1009 (reporting the Alabama Governor in 1866 as leasing 374 prisoners for six years to a railroad company).

[61] *Id.* at 1010.

[62] *Id.*

[63] Raghunath, *supra* note 15, at 399, 421.

[64] Goodwin, *supra* note 56, at 936 ("Black Codes provided an urgent legal solution to the demand for low- or no-wage labor after the ratification of the Thirteenth Amendment.").

[65] *Id.* at 935–37.

[66] *Id.*

and imposed penalties of incarceration for nonemployment.[67] The codes also limited Black people's ability to quit a job by criminalizing and imprisoning those who left a job for which they had a contract with the employer (which was often a requirement for employment).[68] Under the Black Codes and later the Jim Crow laws,[69] prison populations expanded, providing a large pool of unprotected and unpaid laborers for individuals or companies that wanted to profit off nonexistent labor costs.[70]

The modern-day iteration of these same practices is the U.S. government's "War on Drugs," which has resulted in increased enforcement for low-level drug crimes and overly punitive sentencing schemes for drug offenses.[71] These practices are disproportionately enforced against communities of color and directly contribute to the drastic rise in prison populations, which has tripled since 1980.[72] Subsequently, mass incarceration drives the financial goals of public and private entities who

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[67] *See e.g.*, *id.* at 938 ("The Mississippi codes also established a series of vagrancy laws . . . ."). Vagrancy laws criminalize a range of acts including loitering, panhandling, and sleeping outdoors in public places, in essence prohibiting homelessness and unemployment. These laws allowed law enforcement authorities to arrest a wide range of individuals whom they considered undesirable. *See* ALLISON FRANKEL, SCOUT KATOVICH & HILLARY VEDVIG, ALLARD K. LOWENSTEIN INT'L HUM. RTS. CLINIC, "FORCED INTO BREAKING THE LAW": THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 30 (2016).

[68] Goodwin, *supra* note 56, at 938 ("Failure to comply with such laws authorized 'every civil officer' and white person to 'arrest and carry back to his or her legal employer any freedman, free Negro, or mulatto who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause.'" (quoting *Mississippi Black Codes*, HIST. IS A WEAPON, http://www.historyisaweapon.com/defcon1/mississippiblackcode.html [https://perma.cc/6MCQ-8ZFX])).

[69] Jim Crow laws operated similarly to the Black Codes as a way to enforce racial segregation and curtail the rights of Black voters. This included laws forbidding Black populations from using the same restrooms, water fountains, and building entrances as white individuals and designating specific sections for Black patrons at restaurants or theaters. *See* Erin Blakemore, *Jim Crow Laws Created 'Slavery by Another Name,'* NAT'L GEOGRAPHIC (Feb. 5, 2020), https://www.nationalgeographic.com/history/article/jim-crow-laws-created-slavery-another-name [https://perma.cc/28H4-A8H7].

[70] Nadra Kareem Nittle, *How the Black Codes Limited African American Progress After the Civil War*, HISTORY (Jan. 28, 2021), https://www.history.com/news/black-codes-reconstruction-slavery [https://perma.cc/EJN7-EJQX] ("[L]ife after bondage didn't differ much from life during bondage for the African Americans subjected to the black codes. This was by design, as slavery had been a multi-billion dollar enterprise, and the former Confederate states sought a way to continue this system of subjugation."); Anita Sinha, *Slavery by Another Name: "Voluntary" Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J.C.R. & C.L. 1, 23 (2015).

[71] Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs [https://perma.cc/HEC6-Z67G].

[72] Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018, 9:00 AM), https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/ [https://perma.cc/A9AP-TAN7].

continue to benefit from access to involuntary free labor.[73] In sum, at every stage since the abolition of slavery, there have been policies and practices put in place that contribute to mass incarceration and the subjugation of Black people. Understanding the emergence and persistence of these practices may illuminate why the Thirteenth Amendment's punishment exception has hardly been the subject of extensive examination or debate by courts.

C. Moving Beyond Context: The Drafters' Intent

While there are obvious political and economic motivations underlying the Thirteenth Amendment's exception to its forced-labor protections, it is not clear whether the punishment exception to the Thirteenth Amendment applies to all incarcerated individuals uniformly. Even in the wake of its passage, members of the Republican Party argued that the blanket application of the exception to all incarcerated individuals was an erroneous reading of the Amendment.[74] In fact, in 1867, John Kasson, a Republican congressman, proposed legislation that sought to clarify the scope of the Thirteenth Amendment to demonstrate that the drafters could not have intended for a system of convict leasing to develop in its wake.[75]

Congressman Kasson's resolution stated that the Thirteenth Amendment prohibited involuntary servitude in all forms "except in direct execution of a sentence imposing a definite penalty according to law."[76] An overwhelming majority of bipartisan representatives supported this view—the resolution passed in the House and was referred to the Senate Judiciary Committee for next steps.[77] Other public officials also recognized that the punishment exception was being interpreted in a way that permitted "the re-enslavement of black labor through the criminal law."[78] In particular,

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[73] Kica Matos & Jamila Hodge, *The Chains of Slavery Still Exist in Mass Incarceration*, VERA INST. OF JUST.: THINK JUST. BLOG (June 17, 2021), https://www.vera.org/blog/the-chains-of-slavery-still-exist-in-mass-incarceration [https://perma.cc/436D-2GX2].

[74] Pope, *supra* note 48, at 1468–69 ("It would appear, then, that convicted offenders retain protection against slavery or involuntary servitude unless it has been imposed as a punishment for the specific crime whereof they have been duly convicted. . . . The Amendment's Republican framers overwhelmingly embraced [this] alternative reading."); Ghali, *supra* note 14, at 626–29 ("[I]t is clear that a majority of the drafters, at least in the House of Representatives of the Thirty-Ninth Congress, urged an interpretation of the punishment clause that secured the rights of prisoners.").

[75] CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867).

[76] *Id.* ("[T]he true intent and meaning of [the Thirteenth Amendment] prohibits slavery or involuntary servitude forever in all forms, except in direct execution of a sentence imposing a definite penalty according to law, which penalty cannot, without violation of the Constitution, impose any other servitude than that of imprisonment or other restraint of freedom . . . .").

[77] *Id.*

[78] Pope, *supra* note 48, at 1478.

Congressman Thaddeus Stevens observed that "[u]nder the pretense of [the Punishment Clause] they are taking men . . . for assault and battery and selling them into bondage for ninety-nine years."[79] Similarly, Representative Henry C. Deming also noted that the Thirteenth Amendment formally "abolishes the infamy of buying, selling, and owning human beings . . . [but under its exception] North Carolina is now selling black men into slavery for petty larceny."[80]

Despite the existence of opposition to the Thirteenth Amendment's interpretation from many members of Congress, the fight to alter its language faded into the background as industrialists, landowners, and businessmen relied on the continued use of free labor.[81] Congressman Kasson's bill was never voted on in the Senate, and the Senate Judiciary Committee postponed it indefinitely.[82] Due to the limited surviving documentation surrounding the ratification of the Thirteenth Amendment and the debates regarding its passage, it is difficult to definitively resolve questions of intent and original meaning.[83] However, with respect to the Punishment Clause in particular, one method of understanding its meaning is to examine the use of the same terminology in earlier passages of the Constitution.

III. UNDERSTANDING CONSTITUTIONAL "PUNISHMENT"

This Part focuses its inquiry into "punishment" in the Thirteenth Amendment by examining the significance of this term within the Constitution. The word "punishment" appears in numerous articles of historical and constitutional importance,[84] most notably in the Eighth and Thirteenth Amendments, yet the Supreme Court has done little to advance a uniform definition of this term. In addition to the Thirteenth Amendment's

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[79] CONG. GLOBE, 39th Cong., 1st Sess. 655 (1866) (statement of Sen. Stevens).

[80] *Id.* at 332 (statement of Rep. Deming).

[81] Raghunath, *supra* note 15, at 423–25; Pope, *supra* note 48, at 1485–89.

[82] The Senate Judiciary Committee recommended "indefinite postponement" of the bill, as its contents were described as being covered by the 1866 Civil Rights Act, which prohibited individuals from being subjected to penalties or pains on account of color, race, or previous condition of servitude. The Civil Rights Act does not limit involuntary servitude under the Thirteenth Amendment only to individuals who are explicitly sentenced to labor, which would have been articulated under Congressman Kasson's bill, so it is unclear what really motivated the Committee's postponement. *See* Pope, *supra* note 48, at 1488–89.

[83] *See* Howe, *supra* note 52, at 992–94 (inferring from a dearth of evidence that there was an implied common knowledge within Congress about the meaning of the Thirteenth Amendment).

[84] *See e.g.*, U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . . [and] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ."); *id.* art. III, § 3 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

exception of punishment imposed for a crime, the Eighth Amendment prohibits "cruel and unusual punishment[]."[85] This Part examines the case law of both Amendments and illustrates the disparate approach taken by courts in each scenario.

The Eighth Amendment was ratified in 1791 as part of the Bill of Rights.[86] Like the Thirteenth Amendment, the language of the Eighth Amendment is nearly identical to provisions in the Northwest Ordinance of 1787.[87] The Ordinance includes two references to punishment: first as an exception to the prohibition against forced labor and second as a general prohibition against cruel and unusual punishment.[88] The common origin of the two Amendments illustrates that the constitutional idea of punishment in the Eighth and Thirteenth Amendments was derived from the same principles.[89] Additionally, just as the Punishment Clause in the Thirteenth Amendment focuses on individuals who have been duly convicted, the Eighth Amendment's provisions are also almost uniformly applied to incarcerated individuals when determining whether their treatment is constitutional.[90] The similarities between the two constitutional texts suggest their meanings may inform each other.[91] But Supreme Court case law has not yet recognized this.

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[85] Although many of the Court's discussions on the Eighth Amendment have centered on deducing which methods of punishment are "cruel and unusual," the Court has also extensively debated the meaning of "punishment" when determining constitutional violations. This Note's treatment of the Eighth Amendment will focus on the Eighth Amendment's meaning of "punishment."

[86] John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 464 (2017).

[87] Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817, 833 (2016). Article 2 of the Northwest Ordinance notes that "[a]ll fines shall be moderate; and no cruel or unusual punishments shall be inflicted," resembling the text of the Eighth Amendment, which notes that "excessive fines shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Ordinance of 1787, *supra* note 50, art. 2; U.S. CONST. amend. VIII; *see also supra* note 50 and accompanying text (noting the similarities between the two).

[88] Similarly, Article 6 notes that "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted," which is reiterated almost verbatim in the Thirteenth Amendment's prohibition of involuntary servitude "except as punishment for crime whereof the party shall have been duly convicted." Ordinance of 1787, *supra* note 50, art. 6; U.S. CONST. amend. XIII, § 1.

[89] *See* Raghunath, *supra* note 15, at 427 (discussing the similarities between the Amendments).

[90] Eighth Amendment jurisprudence is primarily focused on claims brought by people who are incarcerated. The Amendment's reference to "bail" also further indicates its relevance to incarcerated individuals. Daniel Yves Hall, Note, *The Eighth Amendment, Prison Conditions and Social Context*, 58 MO. L. REV 207, 207 (1993) ("Application of the Eighth Amendment to 'cruel and unusual' prison conditions is one area where such an approach proves to be a useful tool.").

[91] In contrast to the Eighth Amendment's "cruel and unusual" component, the Thirteenth Amendment's Punishment Clause has not been subject to extensive analysis by courts, as will be demonstrated in Section III.B. Thus, the Court's examination of the Eighth Amendment can inform how punishment is understood in the Thirteenth Amendment context.

Eighth Amendment jurisprudence reveals a complicated history, but the Court most recently adopted an intent-based formula under which prison conditions amount to punishment only if they are imposed as part of a sentence or are intended to inflict punishment. In Thirteenth Amendment jurisprudence, by contrast, lower courts view punishment as including all treatment by prison authorities after an individual is convicted. A consistent constitutional understanding of punishment requires a reconciliation of these diverging lines of case law. Consequently, this Note engages in a comparative analysis of case law stemming from the two Amendments in order to identify a constitutional definition of punishment. In doing so, this Note argues that punishment in the Thirteenth Amendment should only apply to individuals who are explicitly sentenced to labor.

A. The Eighth Amendment's Prohibition on Cruel and Unusual "Punishment"

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

—U.S. CONST. amend. VIII

Society's understanding of "punishment" is different today than at the time of the ratification of the Eighth Amendment in 1791. Nonetheless, the Court continues to employ both an originalist and a subjective or "evolving standards of decency" approach in determining the protections afforded by the Constitution.[92]

Punishment has previously been viewed by the Court as purely a deprivation inflicted as part of a prison sentence and meted out by a sentencing judge.[93] In fact, for almost 185 years after the passage of the Bill of Rights, the Eighth Amendment did not apply to treatment outside of the specifications of an individual's prison sentence, nor did it address deprivations suffered as a result of conditions in prison.[94] When petitioners complained about such treatment, courts rejected their grievances, claiming

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[92] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion); Atkins v. Virginia, 536 U.S. 304, 312 (2002); Roper v. Simmons, 543 U.S. 551, 563 (2005). Although the Court attempts to employ objective factors to the evolving standards of decency, the Court's own judgement will ultimately decide the matter. *Atkins*, 536 U.S. at 312.

[93] *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that the paddling of schoolchildren did not come within the scope of the Eighth Amendment because "[a]n examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes"); *see also* Hudson v. McMillian, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) (recounting the Court's history of applying the Eight Amendment only to punishments assessed by statutes or sentencing judges).

[94] *See* Estelle v. Gamble, 429 U.S. 97, 102, 104 (1976) (signifying the first time the Supreme Court recognized Eighth Amendment violations to include prison conditions).

the judiciary did not have a role in regulating prison life.[95] Thus, the first point of examination in earlier Eighth Amendment cases was whether the punishments were a part of the petitioner's sentence or were proscribed as part of a statute or governmental regulation.

For example, in *Weems v. United States*, the Supreme Court for the first time explained in depth the role of the Eighth Amendment and the intent of its drafters and, in doing so, introduced a proportionality standard to determine what punishments violated the Constitution.[96] The Court looked exclusively at the defendant's sentence, commenting that the legislature maintained its power to define crimes and their respective modes of punishment unless the punishment was constitutionally prohibited.[97] This notion that punishment under the Eighth Amendment derived mainly from statutes or sentences persisted long after *Weems*.

In *Helling v. McKinney*, Justice Clarence Thomas and Justice Antonin Scalia, two of the Court's most unwavering originalists, dissented from the Court's holding that the Eighth Amendment could be applied to an individual's risk of injury when incarcerated.[98] These Justices expressed concern over the proposition that deprivations as a result of conditions of confinement could equal punishment for Eighth Amendment purposes, even in cases where the deprivations are not inflicted as part of a criminal sentence.[99] The Justices examined the meaning of punishment at the time of the Eighth Amendment's ratification, arguing that "punishment has always meant a fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him."[100] They emphasized that the "understanding of the word [punishment], of course, does not encompass a prisoner's injuries that bear no relation to his sentence" and concluded that "judges or juries—but not jailers—impose punishment."[101] As demonstrated in *Helling*, an

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[95] Stroud v. Swope, 187 F.2d 850, 851–52 (9th Cir. 1951); *see also* Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962) (per curiam) (holding that courts have no power to supervise the management of prison institutions); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 954–56 (7th Cir. 1956) (finding that pleading the prison's tortious conduct was a failure to state a claim under the federal Civil Rights Act); Banning v. Looney, 213 F.2d 771, 771 (10th Cir. 1954) (per curiam) (stating that courts lack the power to interfere with prison rules and regulations); Sarshik v. Sanford, 142 F.2d 676, 676 (5th Cir. 1944) (per curiam) (holding that courts do not function to supervise the treatment of prisoners).

[96] 217 U.S. 349, 366–67, 382 (1910) (holding that the penalty imposed was disproportionate to the severity of the crime and that it was "repugnant to the bill of rights").

[97] *Id.* at 387 (White, J., dissenting).

[98] 509 U.S. 25, 37–38 (Thomas, J., dissenting).

[99] *Id.*

[100] *Id.* at 38 (internal quotation marks omitted) (quoting *Punishment*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

[101] *Id.* at 38, 40 (internal quotation marks omitted).

originalist understanding of punishment is centered on treatment imposed as part of a court-ordered sentence.

Over time, the Court began to shift away from a strict perception of punishment as deriving meaning solely from courts or the legislature; however, the Court continued to employ more objective approaches in its Eighth Amendment jurisprudence. In *Kennedy v. Mendoza-Martinez*, the Court set out a multifactor test to distinguish between punishments and nonpunishments under the Constitution.[102] The Court stated that the following questions had to be addressed to evaluate the Eighth Amendment claim: (1) "whether the sanction involves an affirmative disability or restraint," (2) "whether it has historically been regarded as a punishment," (3) "whether it comes into play only on a finding of *scienter*," (4) "whether its operation will promote the traditional aims of punishment," (5) "whether the behavior to which [the sanction] applies is already a crime," (6) "whether an alternative purpose to which [the sanction] may rationally be connected is assignable for it," and (7) "whether [the sanction] appears excessive in relation to the alternative purpose assigned."[103]

It may seem that the Court proposed a definitive way to determine what punishments are under the Constitution. But even in articulating this test, the Court notes that the factors could "point in differing directions."[104] In other words, the *Mendoza-Martinez* decision simply restates many of the tests the Court has employed in evaluating the Eighth Amendment without providing further clarification as to which of these tests is the most probative.[105] The *Mendoza-Martinez* decision did not result in the uniform application of the multifactor test in subsequent Eighth Amendment decisions or promote more objective determinations of Eighth Amendment violations.[106] However, this test may have foreshadowed that an actor's purpose in inflicting a sanction

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[102] 372 U.S. 144, 168–69 (1963); *see also* John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 NW. U. L. REV. 9, 17 (2020) (recounting the multifactor test).

[103] *Mendoza-Martinez*, 372 U.S. at 168–69.

[104] *Id.* at 169.

[105] The Court cites to a number of previous decisions when creating their test. This includes the proportionality test from *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion), which was first articulated in *Weems v. United States*, 217 U.S. 349, 402 (1910) (White J., dissenting).

[106] The current prevailing standard in Eighth Amendment jurisprudence requires petitioners to show that prison officials exhibit "deliberate indifference" in creating or contributing to the violation. This standard was introduced in *Estelle v. Gamble* and *Wilson v. Seiter*, and it was solidified in *Farmer v. Brennan.* Although *Mendoza-Martinez* remains good law, the multifactor test has not been applied by the Court in these more recent decisions. *See Farmer v. Brennan*, 511 U.S. 825, 835–39 (1994).

or deprivation is at least somewhat relevant in determining if a sanction is a punishment under the Eighth Amendment.[107]

Although cases such as *Mendoza-Martinez* reiterated the Court's emphasis on fixed tests rooted in common law or an original meaning of the text, the Court soon started to recognize that the changing needs of society warranted a more flexible approach to determining constitutional violations. Thus, the concept of "evolving standards of decency" emerged when interpreting the Eighth Amendment.[108] In *Estelle v. Gamble*, the Court ended its practice of limiting Eighth Amendment violations to actions that were part of a petitioner's sentence or meted out by a statute or regulation and recognized that prison conditions could constitute "punishment" under the Constitution.[109] Although prison conditions are not explicitly enumerated as a formal punishment when sentencing someone who is convicted, the *Estelle* Court found that prison conditions such as inadequate medical care inevitably do become part of the punishment an individual experiences along with their sentence; therefore, prison conditions must be covered by the Eighth Amendment.[110] The Court in *Estelle* addressed the medical needs of the petitioner and found that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[111]

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[107] Professor John Stinneford describes the *Mendoza-Martinez* test as involving two main components: first, determining whether an action has traditionally been used as a punishment or is equivalent to such a traditional form of punishment and, second, if the answer is no, then identifying the government's purpose in imposing sanctions or penalties. Stinneford, *supra* note 102, at 17–18. Although this inquiry focuses on the historical role of certain forms of deprivation as opposed to the specific intent of the prison official involved in carrying out the treatment, it may foreshadow the later intent-based test discussed below.

[108] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("[W]e have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting *Trop*, 356 U.S. at 101 (plurality opinion))). Much of the case law that followed the Court's evolving standards of decency decision focuses on the cruel and unusual component of the Eighth Amendment instead of the punishment aspect. Even so, the shift in the Court's interpretation away from objective tests found in common law and from the original meaning of the text is still instructive as it highlights that Eighth Amendment protections against punishment are not entrenched in a static notion of common law.

[109] *Id.* at 102–03 ("[T]he Amendment proscribes more than physically barbarous punishments. . . . The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' against which we must evaluate penal measures." (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968))).

[110] *Id.* at 103 (describing the government's obligation to provide medical care for those whom it is punishing by incarceration and noting that "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met [and] . . . may actually produce physical 'torture or a lingering death'" (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890))).

[111] *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion)).

Though the *Estelle* decision appeared to widen the scope of punishment under the Eighth Amendment to include prison conditions, the holding was significantly narrowed in later decisions through the Court's focus on punitive intent. In *Whitley v. Albers*, the Court held that shooting a nonrioting inmate during a prison riot did not violate the Eighth Amendment because the prison official was seen as engaging in a "good faith effort to maintain or restore discipline," instead of seeking to inflict harm.[112] Similarly, in *Wilson v. Seiter*, the Court found that prison conditions could only be considered a punishment under the Eighth Amendment if the prison official responsible for the conditions exhibited a "wanton" or "culpable" state of mind.[113] These cases demonstrate that the state of mind of the prison official responsible for an alleged violation became a central question in determining what treatment amounted to punishment.

The *Seiter* Court's discussion of *Duckworth v. Franzen* is especially enlightening to understand how the Court conceptualized punishment.[114] The *Seiter* Court noted:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century. . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.[115]

The Court in *Seiter* built on this view by reintroducing the notion that punishment is "pain inflicted . . . by the statute or the sentencing judge" and additionally holding that in cases where there is no formal punishment, "some mental element must be attributed to the inflicting officer before it can qualify."[116] This language identifies that punishment, at its base line, involves some intentionality in treatment either by a court-imposed sentence or through the motivations of a perpetrator. Only after assessing whether

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[112] 475 U.S. 312, 320–21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1003 (2d Cir. 1973)). It is worth noting that this decision occurred on the coattails of Justice Potter Stewart and Chief Justice Warren Burger's resignations and during the appointments of Justices Sandra Day O'Connor and Scalia, which paved the way for an increase in more conservative ideologies within the Court, particularly when it came to prisoners' rights. *See* Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 875 (2011).

[113] 501 U.S. 294, 299 (1991) (holding that the Eighth Amendment "mandate[s] inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment").

[114] *See id.* at 300 (citing Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *abrogated on other grounds as noted in* Burton v. Downey, 805 F.3d 776, 785 (7th Cir. 2015)). In *Duckworth*, Judge Richard Posner, sitting on a panel for the Seventh Circuit, undertook an extensive analysis of the term "punishment" when determining whether it was an Eighth Amendment violation for prisoners to be handcuffed when a fire broke out during their transport between prisons. 780 F.2d at 653–56.

[115] *Seiter*, 501 U.S. at 300 (quoting *Duckworth*, 780 F.2d at 652).

[116] *Id.*

treatment qualifies as punishment under the Eighth Amendment can a court engage in the additional inquiry of whether the treatment at issue was cruel and unusual.

Although these cases recognized an intent component in the Eighth Amendment punishment analysis, it was not until *Farmer v. Brennan* that the Court became clear about how exactly the intent requirement would be satisfied.[117] In *Farmer*, the majority states that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"[118] Here, the examination of punishment was the central inquiry, not the cruel and unusual component, and the Court held that "an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment."[119] Thus, the Court found awareness to be a necessary requirement for intent and held that punishment under the Eighth Amendment occurs when prison officials act with subjectively culpable intent by being aware of a risk and disregarding it.[120] This standard imposes significant burdens for petitioners bringing Eighth Amendment claims to show that officials possessed a specific mental state. Moreover, *Farmer*'s subjective-culpability standard also incentivizes officials to remain unaware of prison conditions, despite the fact that it is their job to be informed of those conditions.

In sum, the intent-based view of punishment is consistent across many of the Court's seminal decisions involving incarcerated individuals and is the relevant standard today that incarcerated individuals must meet when alleging Eighth Amendment violations.[121] As demonstrated by the development of Eighth Amendment jurisprudence, the Court has debated the meaning of punishment for decades, and its meaning continues to evolve.[122] This development of Eighth Amendment case law is not only instrumental

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[117] *See* 511 U.S. 825, 839–40 (1994).

[118] *Id.* at 837.

[119] *Id.* at 838.

[120] *Id.* at 837 ("We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety . . . .").

[121] Under *Farmer*, punishment is understood to encompass treatment that derives from subjectively culpable intent. *Id.* at 834. Similarly, the notion that punishment also encompasses acts resulting from court-imposed sentences and statutes has never been overturned and continues to be employed as well. *See* Helling v. McKinney, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting).

[122] Most recently the Court redefined how punishment was understood with respect to pretrial detainees and held that "proof of intent (or motive) to punish is [not] required . . . [and] a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015).

in understanding the nuances of a constitutional definition of punishment but is also necessary to compare the Court's treatment of the Punishment Clause in the Thirteenth Amendment context. Legal interpretations of punishment under the Thirteenth Amendment will be illustrated in the next Section.

B. A Forgotten Analysis: The Thirteenth Amendment's "Punishment" Exception

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

—U.S. CONST. amend. XIII, § 1

Thirteenth Amendment case law stands in stark contrast to the long evolution of Eighth Amendment case law and the complex and convoluted ways in which the word "punishment" has been interpreted under the Eighth Amendment. Unlike the Eighth Amendment, the Thirteenth Amendment's Punishment Clause has been left out of interpretive battles and is presumed to hold a one-dimensional and straightforward meaning.

Early case law on the Thirteenth Amendment was situated in the era of Jim Crow laws and often focused on questions of whether racial discrimination in private inns, public transportation, and even private schools were prohibited under the Amendment.[123] In the *Civil Rights Cases*, the Supreme Court interpreted the Thirteenth Amendment's protections to not only include a prohibition of slavery and involuntary servitude but to also include the "badges and incidents of slavery."[124] Although such terminology is not found in the text of the Constitution itself, the Court's badges and incidents interpretation was viewed as a foregone conclusion and an obvious reflection of the drafters' intent.[125] This broad approach to the Thirteenth Amendment has not been applied with respect to the punishment exception.

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[123] *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (examining whether racial discrimination by private housing developers and private schools were among the "badges and incidents of slavery" that Congress is empowered to prohibit under the Thirteenth Amendment). Given that this case involved private acts of discrimination, the Fourteenth Amendment was not applicable. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968) (holding that Congress can regulate the sale of private property to prevent racial discrimination as the Thirteenth Amendment empowers them to prohibit "the badges and incidents of slavery").

[124] 109 U.S. at 20 ("[I]t is assumed, that the power vested in Congress to enforce the [Thirteenth Amendment] by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . ."); *see also* U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."). Thus, the *Civil Rights Cases* interpreted Section 2 as including badges and incidents of slavery.

[125] The Civil Rights Cases, 109 U.S. at 20–21.

The Supreme Court has not recently examined cases involving the punishment exception to the Thirteenth Amendment. However, in cases in which circuit courts have addressed the Clause, the vast majority have adopted a very broad reading of the phrase "punishment for crime" and held that the Thirteenth Amendment's language clearly excludes people convicted of a crime. Essentially, these circuit courts reason that because incarcerated individuals are incarcerated as punishment for a crime, forced labor imposed by a prison official is automatically a component of the punishment—regardless of whether the prison official intends the work to inflict punishment.

In *Draper v. Rhay*, the Ninth Circuit held that the "Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute."[126] This reasoning is reflected in case law in the Third, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits, where the presence of forced labor is viewed as a reality of imprisonment and not an unconstitutional punishment.[127] These cases do not examine what "punishment for crime" entails or what the drafters intended by referring to a party as being "duly convicted." For example, does being duly convicted include pretrial detention? Does punishment have to be meted out by a sentence? Does involuntary servitude only include forced unpaid labor or does it also encompass situations in which incarcerated individuals are given minimal compensation? Courts seemingly fail to acknowledge these important distinctions when determining the applicability of the Thirteenth Amendment to cases.

In *Holt v. Givens*, the Eleventh Circuit addressed Holt's claim that his Thirteenth Amendment rights were violated when he was required to work for the Department of Corrections without pay during his incarceration in an Alabama state prison.[128] The court held that when "a prisoner is incarcerated pursuant to a presumptively valid judgment . . . and is forced to work pursuant to prison regulations or state statutes, the thirteenth amendment's

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[126] 315 F.2d 193, 197 (9th Cir. 1963).

[127] *See, e.g.*, Omasta v. Wainwright, 696 F.2d 1304, 1305 (11th Cir. 1983) (holding that the Thirteenth Amendment does not prohibit forced labor pursuant to prison regulations or state statutes); United States v. Drefke, 707 F.2d 978, 983 (8th Cir. 1983) ("The Thirteenth Amendment, however, is inapplicable where involuntary servitude is imposed as punishment for a crime."); Piatt v. MacDougall, 773 F.2d 1032, 1035 (9th Cir. 1985) (denying the due process claim of a prisoner forced to work without pay because that is not a protected liberty interest under the Thirteenth Amendment); Tracy v. Keating, 42 F. App'x 113, 116 (10th Cir. 2002) (recounting that the Thirteenth Amendment's prohibition against slavery expressly does not apply to prisoners); O'Connell v. Johnson, 245 F. App'x 193, 194 (3d Cir. 2007) (holding that, while on appeal, a prisoner is still duly convicted and therefore does not fall within the Thirteenth Amendment's prohibition); Bowen v. Quarterman, 339 F. App'x 479, 481 (5th Cir. 2009) (deciding that, despite inmate's hand injury, his forced labor did not violate the Thirteenth Amendment).

[128] 757 F. App'x 915, 922 (11th Cir. 2018).

prohibition against involuntary servitude is not implicated."[129] The court held that Holt's claim failed "as a matter of law."[130] Similarly, in *Berry v. Bunnell*, the Ninth Circuit examined a case in which the petitioner was compelled by prison officials to work and faced rules-violation reports and disciplinary charges when he refused to participate.[131] Here, the court held that the "Thirteenth Amendment does not apply where prisoners are required to work in accordance with prison rules."[132]

This language is reiterated across numerous decisions and given such deference that even in cases where petitioners are appealing their convictions, the Thirteenth Amendment is still held to justify forced labor.[133] In *Plaisance v. Phelps*, the court repeated that "[t]here is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though that conviction is being appealed."[134] This discussion did not question the Thirteenth Amendment's language or whether the requirement that individuals be duly convicted should include incarcerated people who are appealing their convictions.

The unwillingness of courts to deviate from set precedent in Thirteenth Amendment jurisprudence is further illustrated in *Omasta v. Wainwright*, where a petitioner whose conviction was reversed challenged the constitutionality of the involuntary servitude he was subjected to during his incarceration.[135] In this case, the Eleventh Circuit issued a very brief opinion that cited other circuit decisions and held that there was "no merit" in the appellant's claim as "[t]he Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute."[136] Nowhere in this decision did the court address the fact that the petitioner was wrongly

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[129] *Id.* (quoting *Omasta*, 696 F.2d at 1305).

[130] *Id.*

[131] 39 F.3d 1056, 1057 (9th Cir. 1994) (per curiam).

[132] *Id.* (citing Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963)).

[133] *See* Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988) (holding that the Thirteenth Amendment's exception was appropriately applied to the petitioner because "[t]he fact that appellant is appealing his conviction does not require the district court to assume his conviction was other than duly obtained").

[134] *Id.* (first quoting Stiltner v. Rhay, 322 F.2d 314, 315 (9th Cir. 1963); and then quoting *Draper*, 315 F.2d at 197).

[135] 696 F.2d 1304, 1305 (11th Cir. 1983) ("Appellant contends that because his conviction was reversed his incarceration was unconstitutional from its inception. . . . [H]e argues[] he was subjected to involuntary servitude in contravention of the thirteenth amendment . . . .").

[136] *Id.* (quoting *Draper*, 315 F.2d at 197); *see also* Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (describing forced-labor claims made by incarcerated individuals as "thoroughly frivolous" given the Thirteenth Amendment's "express exception for persons imprisoned pursuant to conviction for crime").

imprisoned and forced into work that may not have been a valid punishment for a crime.[137]

As discussed, the vast majority of forced-labor cases follow the approach that prisoners are not entitled to Thirteenth Amendment protections. However, there are a few Fifth Circuit cases that diverge from this view. An examination of these cases may provide a useful framework to understand how a Thirteenth Amendment view of punishment can still limit forced labor in prisons. The Fifth Circuit stands alone in taking a closer look at the meaning of punishment under the Thirteenth Amendment. In *Watson v. Graves*, the court found that a "prisoner who is not sentenced to hard labor retains his thirteenth amendment rights."[138] This language paves the way for the interpretation that the Thirteenth Amendment does not categorically ban all incarcerated individuals from its protection. Moreover, this language also provides courts with precedent to examine the plain language of the Thirteenth Amendment and find that "punishment for a crime" only involves situations in which prisoners are explicitly sentenced to hard labor. The Fifth Circuit's interpretation in *Watson* would outlaw most current forms of forced labor in prisons, since being sentenced to labor is no longer commonplace in most states.

However, the *Watson* court failed to create Thirteenth Amendment protections for future claimants as the petitioner ultimately lost the case due to the fact that they were "paid" for their labor.[139] The court viewed this payment in exchange for labor as amounting to voluntary servitude and consequently not a violation of the prisoners' rights.[140] Thus, petitioners to date have been unable to successfully cite the language in *Watson* to support their claims because its holding is viewed as an anomaly in federal jurisprudence.

There are some Fifth Circuit cases, such as *Lang v. Quinlan* and *Gill v. Texas Department of Criminal Justice*, in which the court has not explicitly disregarded the language of *Watson* and has reiterated that incarcerated individuals not sentenced to labor may retain their Thirteenth Amendment

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[137] *See generally Omasta*, 696 F.2d at 1305 (acknowledging that the case was of "first impression" yet relying solely on persuasive authority with no particularized analysis).

[138] 909 F.2d 1549, 1552 (5th Cir. 1990).

[139] *Id.* at 1552–53 ("When the employee has a choice, even though it is a painful one, there is no involuntary servitude. . . . None of the 'facts' presented by Watson and Thrash show such intimidation. . . . The choice of whether to work outside of the jail for twenty dollars a day or remain inside the jail and earn nothing may have indeed been 'painful' and quite possibly illegal under state law, but the evidence shows that . . . neither Watson nor Thrash were subjected to involuntary servitude.").

[140] *Id.*

rights.[141] However, even in these scenarios, the Fifth Circuit continued to hold that those petitioners did not state a viable claim because they did not allege facts showing they were compelled to labor and had no way to avoid continued service.[142] *Watson* simultaneously opens the door for incarcerated individuals to state viable Thirteenth Amendment claims and slams the same door with an ultimate holding that creates a barrier for them to overcome.

Despite the existence of Thirteenth Amendment cases that touch on low wages and poor working conditions, courts have not addressed in depth what voluntariness means in the context of prison labor. These courts assume that working for even a dollar per hour qualifies as a "choice" and is therefore outside the realm of Thirteenth Amendment protections.[143] In *Ali v. Johnson*, the Fifth Circuit further relegated *Watson* to the background, finding that "[e]ven if *Watson* correctly implied that a prisoner not sentenced to hard labor may make a Thirteenth Amendment claim, Ali conveniently overlooks the fact that this statement was *dicta*."[144] However, the *Ali* court did not acknowledge the distinction that, unlike in *Watson* where the petitioner was compensated for his labor (albeit poorly), the petitioner in *Ali* was not.[145] This discrepancy should have prompted a different analysis.

In sum, we are left with a line of case law that places a categorical bar on incarcerated individuals making Thirteenth Amendment claims despite the fact that the language of the Thirteenth Amendment does not explicitly exclude all incarcerated people from its protections. In fact, the Amendment's language specifically limits the exception to situations in which involuntary servitude is imposed as a punishment—yet courts have

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[141] Lang v. Quinlan, No. 92-1435, 1993 WL 129675, at *5 (5th Cir. Apr. 9, 1993) (per curiam) ("It may be true, as Lang argues, that a prisoner who has not been sentenced to hard labor retains a Thirteenth Amendment right to be free of involuntary servitude." (citing *Watson*, 909 F.2d at 1552)); Gill v. Tex. Dep't of Crim. Just., No. 95-20723, 1996 WL 60544, at *2 (5th Cir. Jan. 23, 1996) (per curiam) ("Although 'a prisoner who is not sentenced to hard labor retains his thirteenth amendment rights,' the prisoner must allege facts showing compulsion." (quoting *Watson*, 909 F.2d at 1552)).

[142] *Lang*, 1993 WL 129675, at *5 ("'A showing of compulsion is thus a prerequisite to proof of involuntary servitude.' . . . Lang has not even alleged that prison administrators have compelled him to work . . . ." (quoting *Watson*, 909 F.2d at 1552)); *Gill*, 1996 WL 60544, at *1 ("Even the most liberal reading of Gill's complaint would only establish that Gill faced a difficult choice whether to participate in prison work programs.").

[143] *Watson*, 909 F.2d at 1554–55 (noting that the petitioners were paid twenty dollars a day and were often made to work in excess of twelve hours).

[144] 259 F.3d 317, 318 (5th Cir. 2001).

[145] *Id.* (describing how Ali was required to work even though he was not sentenced to labor); *Texas Slavery Upheld Again*, PRISON LEGAL NEWS (July 15, 2002) https://www.prisonlegalnews.org/news/2002/jul/15/texas-slavery-upheld-again/ [https://perma.cc/N386-SBDV] ("Texas, like a few other states, pays prisoners in its custody absolutely nothing for their labor, making Texas prisoners state slaves in the most literal sense of the term.").

seldom, if ever, engaged in analyses of what punishment involves with respect to the Thirteenth Amendment.

This lack of analysis stands in stark contrast to debates over the meaning of punishment in Eighth Amendment jurisprudence. The disconnect between how courts have examined punishment in the Eighth Amendment context as compared to the Thirteenth Amendment is illustrated in *Ray v. Mabry*, where the Eighth Circuit examined an involuntary servitude claim and unsurprisingly held that "[c]ompelling prison inmates to work does not contravene the Thirteenth Amendment."[146] At the same time that the court denied the petitioner's forced-labor claims under the Thirteenth Amendment, it noted that "there are circumstances in which prison work requirements can constitute cruel and unusual punishment" under the Eighth Amendment.[147] The court's acknowledgement that forced labor could form a constitutional violation under the Eighth Amendment and not the Thirteenth Amendment further highlights the tension between the evolution of these two bodies of law.

As we know from Eighth Amendment case law, the term punishment has been analyzed with contention and has fueled decades of debate by the Supreme Court.[148] But conversely, the same exact term has never even been addressed by the Supreme Court with respect to the Thirteenth Amendment and has been viewed as an unnecessary inquiry by lower courts. Is it possible to reconcile these disparities?

As will be discussed in the next Part, this Note proposes a novel solution resolving the disconnect between the Eighth and Thirteenth Amendments, shaping future prisoner rights litigation through the theory of intratextualism.

IV. THE DOCTRINAL BASIS FOR A UNIFORM DEFINITION OF "PUNISHMENT"

The differing interpretations of "punishment" in the Eighth and Thirteenth Amendment contexts leave us questioning why courts have adopted such conflicting approaches to examining the same word and whether the use of repetitive terminology actually merits a uniform meaning. Many courts regard repeated terms in different parts of the Constitution as carrying the same meaning.[149] But despite the similarities between the Eighth

[146] 556 F.2d 881, 882 (8th Cir. 1977).

[147] *Id.*

[148] *Supra* Section III.A.

[149] *E.g.*, Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (examining the

and Thirteenth Amendments and the common origin of their text, courts have declined to read them consistently with one another. This Part draws on theories of intratextualism and statutory interpretation, and examples of other repetitive terms in the Constitution to support a definition of punishment that is uniform across Eighth and Thirteenth Amendment jurisprudence.

Intratextualism is a form of constitutional interpretation in which words and phrases that recur in different parts of the Constitution are read in light of each other.[150] This methodology is most notably associated with Professor Akhil Reed Amar,[151] but it has also been employed in Supreme Court decisions over the years[152] and is recognized by various scholars of constitutional interpretation.[153]

In particular, intratextualism guides constitutional interpretation by suggesting that words in one part of the Constitution may be understood by looking at their usage in another passage of the Constitution.[154] This process involves "using the Constitution as its own dictionary."[155] Analyzing repetitive constitutional terms by examining passages of the Constitution itself and the terms' development in case law—as opposed to consulting external sources such as dictionaries[156]—may actually provide a clearer picture of words' full legal meanings.[157] Moreover, consulting the

repetition of the term "the people" in the First, Second, Fourth, Ninth, and Tenth Amendments to identify its shared meaning).

[150] Amar, *supra* note 13, at 748.

[151] *Id.*

[152] NLRB v. Noel Canning, 573 U.S. 513, 527–28 (2014); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–15 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328–30 (1816); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2680 (2015) (Roberts, C.J., dissenting).

[153] *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1021–22 (2007) (applying intratextualism to interpret the words "inferior" and "supreme" with regard to courts); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1172–73 (2003) (applying an intratextual comparison of the Interstate, Foreign, and Indian Commerce Clauses); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1331 (2001) (applying intratextualism to the requisite procedures for federal law, treaties, and the Constitution); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO L.J. 1113, 1199 (2003) (describing Chief Justice John Marshall's intratextual approach to the Necessary and Proper Clause).

[154] Amar, *supra* note 13, at 748.

[155] *Id.* at 756.

[156] Using external sources such as ordinary English dictionaries is known as a plain-meaning approach, which judges use to gain added clarity about the meaning of a term and its applicability to the case at hand. *See id.* at 788–89 (contrasting the application of plain-meaning textualism with intratextualism).

[157] *See Ariz. State Legislature*, 135 S. Ct. at 2680 (Roberts, C.J., dissenting) (describing the Constitution as the best source of the meaning of a word in the Constitution).

Constitution as opposed to dictionaries from varying publishers provides a common reference point, which results in a more uniform application of constitutional law.

Scholars have also suggested that nonconsecutive clauses of the Constitution should be read together in order to analyze larger patterns at work.[158] In Professor John Hart Ely's *Democracy and Distrust*, he describes the Constitution as containing a number of broadly worded clauses that cannot be read in isolation and instead should be understood in light of themes present in the Constitution as a whole.[159] While this approach does not focus on the repetitive use of certain terms in the Constitution, it does recognize that the meaning of constitutional concepts is derived collectively.[160]

Professor Amar furthers Professor Ely's approach by focusing specifically on how words and phrases can inform each other.[161] According to Professor Amar, the Constitution was meticulously crafted as a declaration of rights for all members of society; intratextualism posits that the repetition of the words within this deliberate document cannot be written off as pure coincidence—the meanings of these repeated words must inform each other.[162] Intratextualism suggests that absent a good reason for doing otherwise, similar constitutional commands should be treated similarly for reasons analogous to the doctrinal principle that like cases should be treated alike.[163]

The idea that similar terminology be understood with respect to one another or in a uniform manner is not unique to intratextualism, or even constitutional interpretation. In statutory interpretation, a common canon is the concept of *in pari materia*, which means that statutes on the same subject or involving the same terminology can be construed together or as one in order to resolve any ambiguities in the language of the statute.[164] This principle has largely been applied to statutes passed at the same time or close

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[158] Gerald S. Dickinson, *Intratextual and Intradoctrinal Dimensions of the Constitutional Home*, 15 DUKE J. CONST. L. & PUB. POL'Y 291, 295 (2020); Amar, *supra* note 13, at 792–93.

[159] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 12 (1980).

[160] *See id.* at 12–13.

[161] *See* Amar, *supra* note 13, at 779.

[162] *Id.* at 793.

[163] *See e.g.*, Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."); Hurtado v. California, 110 U.S. 516, 534 (1884) ("We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment.").

[164] E. FITCH SMITH, COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION 751, 759 (New York, Banks, Gould & Co. 1848).

in time to each other.[165] While the Eighth Amendment and the Thirteenth Amendment were passed about seventy-four years apart, the Supreme Court has acknowledged that in some scenarios, when different statutes are "made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system."[166] Following this logic, the primary test is whether the statutes discuss the same subject area or use the same terminology.

According to the Supreme Court, the concept of *in pari materia* rests on the notion that Congress is aware of all previous statutes on the same subject when they pass a new statute.[167] Therefore, it makes sense to infer that if terminology is repeated in different statutes Congress has intended the words to hold the same meaning unless it has been explicitly indicated otherwise. Congress has passed thousands of statutes to date, and *in pari materia* still holds that members are knowledgeable of all statutes on a subject matter when passing new legislation.[168] The application of *in pari materia* in the legislative context lends even stronger support for applying intratextualism to terms and topics repeated in different constitutional documents. After all, there are many fewer documents to work with, which suggests that the drafters must have been aware of the previously ratified amendments when proposing the Reconstruction Amendments. The common origin of both the Eighth and Thirteenth Amendments in the Northwest Ordinance further bolsters this assumption.[169]

The Supreme Court practices something similar to intratextualism for common constitutional phrases and terms. For example, the Supreme Court has repeatedly compared constitutional commandments such as "due process" and found that the terminology holds the same meaning in the Fifth Amendment as in the Fourteenth Amendment.[170] The Fifth Amendment was ratified in 1791 as part of the Bill of Rights, and the Fourteenth Amendment was not passed until 1868, around seventy-seven years after the ratification of the Fifth Amendment.[171] Despite this gap in time, courts consistently view

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[165] *Id.* at 755.

[166] Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 546 (1852) (quoting Lord Mansfield's opinion in *Rex v. Loxdale* (1758) 1 Burr 445, 447 (KB)).

[167] Erlenbaugh v. United States, 409 U.S. 239, 243–44 (1972); Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 541–52 (1954).

[168] *Erlenbaugh*, 409 U.S. at 244.

[169] *Supra* note 88 and accompanying text.

[170] Hallinger v. Davis, 146 U.S. 314, 319–20 (1892); Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring); Paul v. Davis, 424 U.S. 693, 702, 702 n.3 (1976); Dusenbery v. United States, 534 U.S. 161, 167 (2002).

[171] CHESTER JAMES ANTIEAU, INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 345 (1997); CONG. GLOBE, 40th Cong., 2d Sess. 4266, 4295–96 (1868).

the Fourteenth Amendment's Due Process Clause as reflective of the Fifth Amendment's due process requirement and as extending this principle to state governments.[172] Similarly, the Eighth Amendment was ratified in 1791 while the Thirteenth Amendment passed in 1865—seventy-four years later—and, as noted, both texts share terminology and a common source.[173] Nonetheless, a comparison that was so logical in the context of the Due Process Clauses has not yet been extended to the Punishment Clauses in the Eighth and Thirteenth Amendments.

It may be argued that the Eighth Amendment's inclusion of the term "cruel and unusual" modifies the Punishment Clause and distinguishes it from the use of "punishment" in the Thirteenth Amendment. However, the line of Eighth Amendment case law clearly demonstrates that the word "punishment" has been given independent meaning with which the Supreme Court has continuously grappled. Thus, the notion that the cruel and unusual component differentiates the two Amendments is inconsistent with the fact that in many cases, the meaning of punishment is what has been the determining feature for Eighth Amendment protections, not the cruel and unusual component. Consequently, an intratextual approach to the use of punishment is appropriate.

This Note proposes that intratextualism should be applied to the interpretation of the Punishment Clauses in the Eighth and Thirteenth Amendments as well. Both the Eighth and the Thirteenth Amendments not only share a common term, but each text also has clear roots in the Northwest Ordinance.[174] Moreover, the Punishment Clause in each Amendment has been applied to the same groups of individuals: those who are incarcerated. Thus, given the contextual and historical similarities of these Amendments, it is well suited to an intratextual analysis.

V. WHERE DOES THIS LEAVE US? AN INTRATEXTUAL VIEW OF PUNISHMENT

This final Part outlines the doctrinal consequences of reading the Thirteenth Amendment in line with the current intent-based interpretation of the Eighth Amendment. Under a uniform constitutional definition of "punishment," involuntary servitude is only exempted from Thirteenth Amendment protections if an individual is explicitly sentenced to labor.[175]

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[172] *See supra* note 170 and accompanying text.

[173] ANTIEAU, *supra* note 171, at 178; *see supra* note 88 and accompanying text.

[174] *See supra* notes 87–88.

[175] The Eighth Amendment's standard for punishment requires that the treatment at issue (1) be meted out by a statute or (2) satisfy the intentionality requirement. *See supra* note 120 and accompanying

The historical context of the Thirteenth Amendment and the need for consistency in constitutional interpretation support this definition.

As demonstrated in Part III, the vast majority of cases on the Thirteenth Amendment treat the entire experience of incarceration as an obvious interpretation of the "punishment for a crime" exception, which is at odds with the Eighth Amendment's more nuanced approach to determining what constitutes punishment. In Eighth Amendment jurisprudence, the current prevailing standard for determining a constitutional violation is an intent-based approach.[176] As illustrated in *Farmer*, the Court underscored that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"[177] Thus, the Eighth Amendment's intent-based approach serves as a useful starting point for applying intratextualism to devise a uniform definition of punishment.

If an intent-based meaning of punishment is applied to the Thirteenth Amendment, there are two immediate implications[178]: involuntary servitude can only be imposed on incarcerated individuals if they are (1) explicitly sentenced to labor or (2) required to labor as a penalty by a prison official. The first implication reiterates the language in Eighth Amendment case law that punishment can be meted out by a sentence[179] and is also reflective of debates that emerged during the ratification of the Thirteenth Amendment as to the drafters' intent.[180] Formally sentencing individuals convicted of crimes to labor as part of their punishment is a historic practice that dates back to the ratification of the Reconstruction Amendments and continues in limited settings to this day.[181] The lack of acknowledgement of the existence of sentenced labor in Thirteenth Amendment case law, despite its persistence in reality, is puzzling—especially because punishment under the Eighth Amendment was at times understood to require a formal sentence.[182]

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text. This Part explains why forced labor does not involve an intentional or culpable mindset, and therefore a uniform definition of punishment using Eighth Amendment case law in the context of the Thirteenth Amendment would rely on the sentences of individuals alone.

176 *See* Farmer v. Brennan, 511 U.S. 825, 840 (1994).

177 *Id.* at 837.

178 These implications follow from Eighth Amendment case law which suggests that punishment either derives from (1) a court-imposed sentence and the legislature or (2) the intent and state of mind of the actor alleged to have caused the violation.

179 *See* Wilson v. Seiter, 501 U.S. 294, 300 (1991) (noting that punishment is "pain inflicted . . . [and] formally meted out . . . by the statute or the sentencing judge").

180 *See supra* notes 74–83 and accompanying text.

181 See *infra* note 190 and accompanying text, which details Louisiana's practice of imposing a sentence of hard labor for all individuals convicted of felonies.

182 *See* Weems v. United States, 217 U.S. 349, 381 (1910); Ingraham v. Wright, 430 U.S. 651, 664 (1977); Helling v. McKinney, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting).

When examining the practical considerations of an intratextual approach to punishment, it may be argued that limiting the Thirteenth Amendment's involuntary servitude exception to only formal sentences meted out by judges does not accurately capture the Eighth Amendment's intent-based approach to punishment. After all, the Eighth Amendment also recognizes punishment as deriving from the intent of prison officials.[183] With respect to the Thirteenth Amendment's punishment exception, this Note's proposed definition could result in the perverse outcome in which prison labor is also viewed as permissible—that is, punishment—if it is intended to inflict pain on incarcerated individuals and serve as a penalty. Such a system may allow prison labor to become more unregulated and punitive than it currently is.

While this outcome represents a possible counterargument to the Note's proposed definition for punishment, the economic rationale behind forced labor makes the described scenario an unlikely result. The historical emergence of prison labor and practices such as convict leasing were directly tied to financial and political interests.[184] Although these practices had harmful effects on incarcerated individuals, they were not primarily intended to punish those incarcerated but rather were intended for businessowners, lobbyists, and politicians to profit from free labor.[185] This is even more the case today, where many of the outwardly cruel methods employed in the 1900s, such as chaining incarcerated individuals together or leasing them out like property, are no longer deemed acceptable. Incarcerated individuals today are often even compensated for their work—although their pay is abysmal, with many working for a dollar or less an hour.[186] This is not to say prison labor today is not abhorrent in its own way—it most certainly is—but the ultimate goal of these practices is not and has never been a tool to discipline incarcerated individuals.[187]

The lack of punitive intent behind modern prison labor is further demonstrated by the fact that prison officials routinely place incarcerated individuals in solitary confinement for refusing to work. This raises the question: why would punishment need to be enforced with additional

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[183] *See Seiter*, 501 U.S. at 302 (determining that Eighth Amendment claims based on official conduct of prison officials that does not purport to be a penalty imposed for a crime requires that the offending conduct must be wanton).

[184] Goodwin, *supra* note 56, at 944–48 (discussing the origin of convict leasing, focusing on the incentives that drove the proliferation of it and other forced-labor practices).

[185] *Id.* at 941–42.

[186] *See supra* note 28 and accompanying text.

[187] *See supra* Part II (discussing the economically motivated origin of the Thirteenth Amendment's punishment exception).

punishment?[188] Reframing the Thirteenth Amendment will expose many problematic incentives that are driving mass incarceration and will create a uniform understanding of punishment in the Constitution.

Similarly, even if jurists accept this Note's proposition that an intratextual view of punishment would limit the Thirteenth Amendment's exception to sentences of labor, there may still be concerns that courts will begin to increasingly sentence people explicitly to labor as a way to continue to benefit from free labor.[189] This could potentially result in the same number of incarcerated individuals being exempted from Thirteenth Amendment protections, as is the case today. But this is an unlikely scenario given the rise in voluntary prison work programs and the unwillingness of courts to impose sentences of labor in recent years—which is likely a byproduct of how prevalent forced prison labor already is. Even in states such as Louisiana, where a large proportion of incarcerated individuals are statutorily assigned to hard labor, the legislature still limits the possibility of sentencing individuals to labor for felony convictions.[190] Louisiana's system serves as an extreme example of the repercussions of this Note's proposed approach to Thirteenth Amendment interpretation. However, even Louisiana's system would be preferable to having a constitutional stamp of approval for the involuntary servitude of all incarcerated individuals. In other words, even under a stricter definition of punishment that allows for sentences to labor, courts would still be more intentional about when and to whom they do assign labor as a punishment.

Thus, borrowing from the Eighth Amendment's analysis of punishment does not solve all legal issues related to the Thirteenth Amendment's Punishment Clause. But an intratextual analysis resolves the issue of deeming an entire category of individuals as unworthy of making voluntary decisions on how to use their bodies simply because of their status as incarcerated. An intratexual approach may even be more in line with the

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[188] *See* Kevin Rashid Johnson, *Prison Labor Is Modern Slavery. I've Been Sent to Solitary for Speaking Out*, GUARDIAN (Aug. 23, 2018, 6:00 AM), https://www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike [https://perma.cc/2QB5-QM4D].

[189] Currently, sentencing individuals to labor is not a prevalent practice. *See* Raghunath, *supra* note 15, at 395 ("Although in some states inmates may still be sentenced to hard labor, in most systems today, they labor under a more general requirement that, if they are able-bodied, they must work.").

[190] LA. STAT. ANN. § 15:529.1 (2021). Although there are no statistics available that detail the proportion of incarcerated individuals who are convicted of felonies versus misdemeanors in Louisiana, a number of sources note that the majority of incarcerated individuals in the state are nonviolent offenders. *See, e.g.*, Terry Schuster, *Louisiana's 2017 Criminal Justice Reforms*, PEW (Mar. 1, 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/louisianas-2017-criminal-justice-reforms [https://perma.cc/8HY6-C6EF] ("Although Louisiana's crime rates were nearly identical to South Carolina's and Florida's, the state was sending people to prison for nonviolent crimes at twice and nearly three times the rates of those states, respectively.").

original meaning of the Thirteenth Amendment, as the legislative and executive push to prohibit slavery was arguably not intended to create a vacuum for other forms of oppression to replace it.[191] After all, debates surrounding the Reconstruction Amendments demonstrate a desire to advance the principles of truly voluntary labor and the conditions of all working people.[192] Such a sentiment is expressly contrary to the categorical imposition of involuntary servitude under the punishment exception. Ultimately, an intratextual approach to punishment not only bridges historical and legal discrepancies in how the Thirteenth Amendment and the Punishment Clause has been interpreted, but it also represents a step forward in prisoner rights advocacy. This Note's proposed definition of punishment will enable incarcerated individuals to bring Thirteenth Amendment claims for involuntary servitude, which current interpretations of the text essentially foreclose as a possibility. In doing so, incarcerated individuals can finally address the deep physical and psychological harms they have endured by being compelled and threatened to labor in prison.

CONCLUSION

In contrast to the Thirteenth Amendment's current treatment in case law, a number of states are starting to acknowledge the abusive and archaic nature of permitting forced labor in prisons. Voters in Nebraska, Utah, and Colorado have passed amendments to their state constitutions to remove language permitting involuntary servitude as a criminal punishment.[193] In April 2021, Vermont's senate almost unanimously approved an amendment to the state constitution that explicitly banned slavery and indentured servitude "in any form."[194] Similarly, in May 2021, Tennessee passed a

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[191] *See* VanderVelde, *supra* note 47, at 439–40; Raghunath, *supra* note 15, at 421.

[192] *See* VanderVelde, *supra* note 47, at 439–40.

[193] Elana Lyn Gross, *Alabama, Utah, Nebraska Remove Racist Language from State Constitutions*, FORBES (Nov. 4, 2020, 4:44 PM), https://www.forbes.com/sites/elanagross/2020/11/04/alabama-utah-nebraska-remove-racist-language-from-state-constitutions/?sh=726515461301 [https://perma.cc/8T39-UXM5]; Bill Chappell, *Colorado Votes to Abolish Slavery, 2 Years After Similar Amendment Failed*, NPR (Nov. 7, 2018, 3:12 PM), https://www.npr.org/2018/11/07/665295736/colorado-votes-to-abolish-slavery-2-years-after-similar-amendment-failed [https://perma.cc/2EFJ-BL8K]; *see* NEB. CONST. art. I, § 2 (amended 2020); UTAH CONST. art. I, § 21 (amended 2020); COLO. CONST. art. II, § 26 (amended 2018).

[194] Greg Sukiennik, *Senate Passes Amendments on Abortion Rights, Slavery Ban*, BENNINGTON BANNER (Apr. 9, 2021), https://www.benningtonbanner.com/local-news/senate-passes-amendments-on-abortion-rights-slavery-ban/article_ef8c3278-996b-11eb-bbc8-dfd5c3a85d1f.html [https://perma.cc/GA6R-5DHR]; *see* Parker Richards, *The Push to Remove Any Mention of Slavery from Vermont's Constitution*, ATLANTIC (June 1, 2019), https://www.theatlantic.com/politics/archive/2019/06/slavery-vermonts-constitution/588853/ [https://perma.cc/EQ7S-JA6Z] (discussing the dynamics animating Vermont's recent constitutional amendments).

resolution banning all forms of slavery that will be placed on the 2022 ballot for voters to make the final decision.[195]

As this momentum has been building at the state level, there has even been a push to directly amend the Thirteenth Amendment.[196] In December 2020, Democrats introduced a joint resolution in the House and Senate named the "Abolition Amendment" that would remove the punishment exception from the Thirteenth Amendment—thereby prohibiting the imposition of involuntary servitude on incarcerated individuals.[197] While these measures have not been approved yet and realistically may not be approved in the coming year or even years, these incremental changes signal a vision of a future in which members of society finally recognize forced prison labor as a brutalizing and unacceptable punishment.

For decades, the punishment exception has justified the inhumane treatment of people who are incarcerated. They were chained together while farming, leased out like property to industrialists, and continue today to be exposed to dangerous conditions to produce goods for others' profit. Forced labor deprives individuals of their right to bodily autonomy and violates the most fundamental principles of dignity. The entire Civil War is a testament to this. Yet, the persistence of an indiscriminate application of the Thirteenth Amendment's exception to all incarcerated individuals represents a disconnect with the intended meaning of punishment in the Constitution. An intratextual reading of punishment posits that an individual cannot be exempted from Thirteenth Amendment protections against involuntary servitude unless he or she is explicitly sentenced to labor. This argument represents a step forward in larger efforts to challenge the punishment exception and guarantee Thirteenth Amendment protections to all people. Such an abhorrent denial of liberty requires at least that.

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[195] *Tennessee Senate Oks Bid to Remove 'Slavery' as Punishment*, AP NEWS (Mar. 15, 2021), https://apnews.com/article/tennessee-us-news-slavery-bbfc5729dac6dd769c9110c284993371 [https://perma.cc/4LVE-MJJ4].

[196] Brakkton Booker, *Democrats Push 'Abolition Amendment' to Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020, 6:43 PM), https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution [https://perma.cc/KD82-3K5H].

[197] *Id.* More recently, a federal jury actually determined that immigration detainees who perform tasks such as cooking and cleaning must be paid minimum wage. Gene Johnson, *Federal Jury: Immigrant Detainees Are Owed Minimum Wage*, AP NEWS (Oct. 27, 2021), https://apnews.com/article/immigration-business-washington-minimum-wage-tacoma-c0eecdc7faf3436089a01e16cb9ead58 [https://perma.cc/F8EK-SE64]. Although this decision is not applicable to incarcerated individuals, it does represent a step in the right direction of prohibiting forced labor.