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PRISONERS FOR SALE: MAKING THE THIRTEENTH AMENDMENT CASE AGAINST STATE PRIVATE PRISON CONTRACTS

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INTRODUCTION

Prison overcrowding has evolved into a critical social problem. Per capita, the United States incarcerates more individuals than any industrialized nation in the world.[1] In 2006, for example, the number of people "under supervision" in the nation's criminal justice systems topped 7.2 million.[2] As a result, states spend billions of dollars to house, supervise, and counsel inmates.[3] Adding to this problem, criminal law reform is slow and often nonexistent, and states have been forced to find other ways to remedy the burden that incarceration places on taxpayers and treasuries.

Starting in the 1980s, one such remedy has been for states and localities to enter into contracts with private corrections construction and management firms.[4] These companies are publicly traded and exist solely for the purpose of making profits from prison contracts with local, state, and federal authorities.[5] In fact, Corrections Corporation of America (CCA), the oldest and most well-known private prison company, is listed on the New York Stock Exchange and recently reported nearly $1.5 billion in total revenue.[6] CCA's success led to the creation of similar entities across the United States, taking the private prison industry from a one-man show to a billion dollar market in just two decades.[7]

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* J.D., William & Mary School of Law, 2010; B.A., *summa cum laude*, with Honors, The College of William & Mary, 2007. I dedicate this Note to my parents for helping me with every step of the journey, and to my friends for all their support and inspiration.

[1] Chris Weaver & Will Purcell, Comment, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 349 (1998).

[2] Darryl Fears, *New Criminal Record: 7.2 Million: Nation's Justice System Strains to Keep Pace With Convictions*, WASH. POST, June 12, 2008, at A9.

[3] *Id.*

[4] *See* Judith Greene, *Banking on the Prison Boom*, *in* PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 3, 13–16 (Tara Herivel & Paul Wright eds., 2007).

[5] Tara Herivel, *Introduction in* PRISON PROFITEERS, *supra* note 4, at ix, x ("While there are many industries that make money from prisons, the private prison industry is unique in that it is the only such industry *founded solely in order to profit from prisons*.") (emphasis added).

[6] CORRECTIONS CORPORATION OF AMERICA, 2007 ANNUAL REPORT 2 (2008), *available at* http://investor.shareholder.com/cxw/annuals.cfm (follow "2007 Annual Report" hyperlink) [hereinafter CCA 2007 ANNUAL REPORT].

[7] *See* Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112 (2001).

To grasp the constitutional concerns presented by the private prison industry, one must first understand how it makes a profit. First, a state or locality, either by statute or decree, approves a new prison and solicits bids from private prison companies. Once a prison company secures a contract, it builds the type of correctional facility requested and operates it for the government. The latter task requires the prison company to hire personnel (e.g., prison guards, wardens, and psychologists) and provide the same services as a state-owned prison.[8] Criminal justice scholars and legal professionals have generally commented on the *benefits* of privatization, stating that competition among firms results in better facilities for the inmates as well as lower costs to taxpayers.[9]

Private prisons also mimic their public counterparts in one interesting aspect: prison labor. As in state jail, prisoners confined by the state to a privately owned facility must perform menial tasks for little to no pay.[10] The point of such work, consequently, is reformation and rehabilitation. By doing such work in the private context, however, prisoners directly contribute to the profit-making function of the corporation.[11] At the very least, therefore, inmate labor in private prisons constitutes "involuntary servitude."[12] If the state is characterized as "contracting out" inmates to these corporations who subsequently aid the prison in earning corporate revenue, the system begins to resemble a modern day form of slavery.

The Thirteenth Amendment states, "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[13] Since its passage, the "Punishment Clause" has been a bane for prisoners who argue that they are being subjected to conditions resembling slavery or involuntary servitude. Finding support from the *Slaughter-House Cases*,[14] federal courts have held that the main purpose of the amendment was specific—to abolish African-American chattel slavery and its incidents. As such, the Punishment Clause renders any current prisoner's argument that they are slaves or involuntary servants void and frivolous.[15] In these cases, the

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[8] See the discussion of a current California contract with CCA in Marc Lifsher, *Increase in Inmates Opens Door to Private Prisons*, L.A. TIMES, Aug. 24, 2007, at A1, for an illustration of the private prison contract process.

[9] *See generally* JAMES AUSTIN & GARRY COVENTRY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, NCJ 181249, EMERGING ISSUES ON PRIVATIZED PRISONS 15–18 (2001).

[10] *See* MICHAEL A. HALLETT, PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE 65 (2006) (describing use of private, for-profit convict labor not only within the prison itself, but also to provide goods through contracts with companies such as IBM, Motorola, Victoria's Secret, and Compaq).

[11] Weaver & Purcell, *supra* note 1, at 349.

[12] HALLETT, *supra* note 10, at 1–3 (linking the concept of "involuntary servitude" in the Thirteenth Amendment to modern day for-profit imprisonment).

[13] U.S. CONST. amend. XIII, § 1 (emphasis added).

[14] 83 U.S. 36 (1872).

[15] *See infra* Part II.B.

Court either implicitly assumes or directly states that private prison inmates have no Thirteenth Amendment claim without further elaboration.

This Note argues that, given the history of the Thirteenth Amendment and the current state of private prison contracts, inmates working in these privately owned and operated facilities do indeed have a constitutional claim. The Punishment Clause does not, in fact, justify the current relationship between government entities and private prison companies. In its current form, the state is handing over control of prisoners to private companies who, in turn, use the prisoners to improve their facilities and increase profits, thus indirectly benefiting these companies' shareholders. Such a system of private, unpaid use of labor too closely resembles the slave system that the Thirteenth Amendment sought to abolish, and was not the punishment scheme envisioned by its drafters when they carved out an exemption for convict servitude.

The argument will proceed in several parts. Part I will outline the development of the penitentiary system in the United States by focusing on how the private sector has been used to aid the state in its responsibility to rehabilitate and punish criminals. The Thirteenth Amendment's contributions to prison organization, the Southern "convict leasing" system that resulted, and the modern private prison industry's emergence will also be discussed, along with the Supreme Court's early Thirteenth Amendment jurisprudence, which simultaneously killed and partially revived the amendment as a protector of civil rights.

Part II, discussing current judicial treatment of the Thirteenth Amendment, will outline the private prisoner's possible constitutional claim. Utilizing this discussion, this Note will contend that the Supreme Court would be justified in rendering the current private prison industry unconstitutional under the Thirteenth Amendment's prohibition against "slavery [and] involuntary servitude."[16]

Finally, Part III will propose a legislative solution, modeled on Virginia's administrative code, that will allow the private prison industry to exist and make profits while avoiding any suggestion that its existence violates prisoners' civil rights against slave-like, compulsory labor.

I. PRIVATE CORRECTIONS AND THE "PUNISHMENT CLAUSE": A HISTORY

A. Early American History to the Civil War

During the early colonial period, imprisonment itself was not even considered a form of criminal punishment.[17] Instead, jails were simply holding areas where the accused awaited trial and the condemned awaited actual punishment, which could be

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[16] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 360 (2005) ("Whenever one person improperly held another in bondage, the amendment applied: 'slavery [and] involuntary servitude . . . shall [not] exist.'") (quoting U.S. CONST. amend. XIII, §1).

[17] Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450 (2005).

the stockade, banishment, the gallows, or other such punitive measures.[18] British colonial governments employed private citizens to build and subsequently run these jails.[19] To supplement their usually meager fee, these jailers often took bribes, charged prisoners for meals, and provided cheap accommodations.[20]

Nevertheless, these private jailer contracts, and the often undesirable outcomes that resulted from them, were accepted by the authorities due to the overarching need to cut housing costs.[21] That same desired goal also paved the way for the primitive version of the modern corrections system. As early as 1555, England sought to decrease the cost of housing their debtors by assigning them to privately owned "workhouses."[22] Prisoners, during their brief period of confinement, would work to offset the costs of holding them as well as to supplement the jailer's small government salary.[23]

Those in favor of such establishments, however, offered another, more powerful justification—that "confinement at productive labor [is] a means of checking vagrancy and other evils."[24] Indentured servitude as a method of criminal punishment and social improvement thus began its evolution and became so popular that it eventually established itself in the American colonies as well.[25] The British Crown transported several thousand criminals to work off their debts to society on cotton and tobacco plantations, a practice that proved to be economically advantageous for the Empire while theoretically reducing crime in the mother country by removing its criminal elements.[26] The colony of Georgia, in fact, was established as just such a penal colony for England's prisoners and poor debtors.[27]

Finding merit in this vision of the prison as a redeeming institution, William Penn created a distinctively American philosophy on criminal punishment.[28] Penn, Quaker

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[18] *Id.*; MARTIN P. SELLERS, THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS 49 (1993) ("Until the early seventeenth century, the main punishment choices continued to be corporal, capital, or banishment.").

[19] Dolovich, *supra* note 17, at 450; SELLERS, *supra* note 18, at 48–49.

[20] Dolovich, *supra* note 17, at 450 ("The less money spent on upkeep, the more money the jailor made . . . .").

[21] SELLERS, *supra* note 18, at 49 ("Countries could not afford to operate [prisons and workhouses] or build them.").

[22] *Id.* at 48–49.

[23] *Id.* at 49.

[24] *Id.* at 48.

[25] Dolovich, *supra* note 17, at 450.

[26] HALLETT, *supra* note 10, at 41–43.

[27] *See* PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 89 (1997) ("[Georgia colony founder James Oglethorpe] was a rich English philanthropist . . . who came to America as a result of his passionate interest in prison reform. He was particularly interested in helpless men imprisoned for debt and believed they ought to be freed and allowed to work their way to solvency on American land.").

[28] SELLERS, *supra* note 18, at 49; White, *supra* note 7, at 124–25 ("America generally is regarded as the birthplace of the modern prison—the prison, that is, as a place for large-scale, long-term, and punitive incarceration.").

leader and founder of the Pennsylvania colony, abhorred the traditional European view that only corporal and capital punishment were effective.[29] Believing that the criminal could be redeemed if he were taken out of society and trained in good morals, Penn advocated for the use of the prison *as punishment itself*.[30] In 1682, he pushed for the creation of "houses of correction as a major instrument of deterrence and justice."[31] This effort resulted in the Great Law of 1682, which required "'every county within the Province of Pennsylvania and territories there unto belonging [to] build or cause to be built a house of restraint, *labor* and punishment' for persons convicted by law."[32] Under this scheme, recouping the costs of housing prisoners became a secondary motive compared to the greater desire for the state to use work for rehabilitative purposes.[33]

Following the American Revolution, the new Commonwealth of Pennsylvania expanded upon its founder's vision by building the first "penitentiary" in 1790.[34] Considered a major reform in punishment at the time, the Walnut Street Prison required its inmates to work "in order to attack idleness, thought to be a major cause of crime."[35] The major difference between Penn's new rehabilitative penitentiary system and the punitive system that had previously existed, therefore, was that under Penn's system work was imposed to further the *state's* police power objective of enforcing public morals rather than create a private profit motive.[36] As such, punishment and its accoutrements became state functions.

The "Pennsylvania" system of punishment, as it was called, became greatly accepted in the post-revolutionary period.[37] The Pennsylvania system was more humane, uniquely American, and more in line with the Enlightenment ideals that informed the United States' founding.[38] Penitentiaries were praised and readily

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[29] SELLERS, *supra* note 18, at 49.

[30] *Id.* ("[Houses of correction] engendered a major change in punishment from traditional methods such as torture and death, to detainment, work, and penance in order to rehabilitate convicts.").

[31] *Id.*

[32] *Id.* (quoting Pennsylvania's Great Law of 1682) (emphasis added).

[33] *See* Dolovich, *supra* note 17, at 450–51; William P. Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even For Prisoners*, 44 SANTA CLARA L. REV. 1159, 1161–62 (2004).

[34] Quigley, *supra* note 33, at 1161.

[35] *Id.*

[36] Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 348 (1998) ("With the endorsement of the indefatigable Dr. Benjamin Rush, . . . silence and labor would be the twin engines of moral reform inside this latest innovation[: the Walnut Street prison]. Silence enlisted the prisoner's own conscience to provide his punishment."); Quigley, *supra* note 33, at 1161–62 ("The focus was primarily on the moral rehabilitation of the prisoner and only secondarily on the idea of having prison work defray some of the costs of incarceration.").

[37] SELLERS, *supra* note 18, at 49–50.

[38] *Cf.* John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 AM. J. L. & MED. 447, 458 (2005). Jacobi states: "Imprisonment as punishment, then, was

adopted in nearly every state during the 1820 prison reform.[39] In one 1829 report, for example, the City of Boston praised the penitentiary system, stating, "It is productive, it is healthful, it teaches convicts how to support themselves when they leave prison, it is reformatory, and is consonant with republican principles."[40] In putting the prisoner to work, reformers and legislators believed that they could resolve the country's crime problem by removing its criminals from their "corrupt" environments and transforming them into proper, productive American citizens.[41]

In addition to rehabilitative labor, the Pennsylvania system also emphasized solitary confinement and silence among prisoners as part of their personal penances.[42] Prisoners were not to make eye contact or speak to each other, and were to spend their time either working or studying the Bible.[43] This isolation rendered prisoners' labor grossly inefficient and thus undesirable for the private sector.[44] The Pennsylvania system was incompatible with the cooperative nature of private employment and with the hierarchy of management structures.[45] As a result (and as intended), state officials became the sole controllers of prison labor.

The growing popularity of the penitentiary, however, soon created a system to compete with the Pennsylvania model: the Auburn system.[46] Named after the Auburn Prison in New York and also called the "congregate" system, this model retained the rehabilitative motives of the Pennsylvania variant by requiring silence and segregation into private cells.[47] However, solitude was eventually abandoned in favor of a "collective, factory-like," form of labor.[48] Whereas Pennsylvania-style prisons could produce only small amounts of household goods such as firewood, woven baskets, and repaired shoes, Auburn inmates were able to produce everything from factory-quality shoes to furniture.[49] Recognizing the potential for recouping the state treasury,

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a humanitarian reform in post-revolutionary America. . . . Early in the nation's history, it was anticipated that the substitution of imprisonment as a relatively humane punishment for more brutal forms would reduce crime rates. [As juries had often refused to convict due to the brutality of hanging or whipping, the penitentiary system's predicted] end of jury nullification would lead to more certain consequences for criminal acts and all Americans would choose to obey the law—embodying the Enlightenment ideal of the clear-eyed rationalist." *Id.* (internal quotation marks omitted).

[39] *Id.* (discussing the 1820s prison reform by states, who built penitentiaries as reactions to workhouses' failure to reduce crime and the brutality of prison conditions).

[40] Quigley, *supra* note 33, at 1162 (quoting Boston Pris. Disc. Soc. Rept., 34 (1829)).

[41] Jacobi, *supra* note 38, at 458.

[42] SELLERS, *supra* note 18, at 49; White, *supra* note 7, at 125.

[43] SELLERS, *supra* note 18, at 49.

[44] White, *supra* note 7, at 125.

[45] *Id.*

[46] SELLERS, *supra* note 18, at 49–50; White, *supra* note 7, at 125.

[47] SELLERS, *supra* note 18, at 49; White, *supra* note 7, at 125.

[48] AUSTIN & COVENTRY, *supra* note 9, at 9–10 ("[I]nmates were often engaged as laborers and craftsmen in private-sector activities."); White, *supra* note 7, at 125.

[49] SELLERS, *supra* note 18, at 49; White, *supra* note 7, at 125.

more states adopted the Auburn model during the nineteenth century, turning prison officers into factory managers whose main goal was to make the prison a self-sustaining entity via profit.[50]

Despite the greater focus on prison labor as a profit producer, states insisted that officials retain their tight control over both the prisoners and the nature of their work.[51] Reformation and reintroduction into society—not money—were the main drivers of penitentiary labor.[52] This ideal remained true despite the fact that governments eventually encouraged more involvement from the private sector.[53] States using both models would often award contracts for the sale of prisoners' goods and services, but ensured that the inmates were given fair pay (from which the cost of food, lodging, and clothes were deducted).[54] In 1838, for example, the New Jersey legislature passed an act that required labor from inmates in order to offset the costs of prison upkeep and established for each prisoner an account from which wages and deductions were respectively credited and debited.[55]

Even with the Auburn system's collaborative, more businesslike model, private entities were still discouraged from displacing the state in its role as controller of inmate labor. Though inmates could be leased out to perform services and their goods sold on the open market, the law ensured that any profits arising out of a contract with a private entity ended up in the state's hands. The relevant agency could then redistribute it to the state treasury and the prisoners as it saw fit.[56] As Professor White comments, "[W]hile the Auburn system could profitably employ labor, it was only rarely

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[50] Dolovich, *supra* note 17, at 450–51 ("In the early penitentiaries, prison labor was introduced as part of rehabilitative programs, but it quickly became the means through which state governments could recoup the costs to the state treasury of imprisoning criminals."); *see also* Quigley, *supra* note 33, at 1162 ("Within a few decades . . . the motive to make money emerged as the primary goal of prison labor. . . .").

[51] AUSTIN & COVENTRY, *supra* note 9, at 9–10 (discussing the state's role in negotiating contracts for goods, as well as appointing the head jailer and deciding which of the government contractors could supervise the work).

[52] *See* SELLERS, *supra* note 18, at 50–51 (discussing the premium New Jersey placed on prisoners becoming "self-sufficient" as factory workers as well as making a profit); *see also* Garvey, *supra* note 36, at 348–49. Indeed, reformation and rehabilitation continued to be viewed as the goals of incarceration until the beginning of the private prison boom in the 1980s. Chief Justice Burger's observations regarding the need to combat "idleness" and create "factories within fences" to do so illustrates this fact. SELLERS, *supra* note 18, at 47.

[53] AUSTIN & COVENTRY, *supra* note 9, at 10; Dolovich, *supra* note 17, at 451 (describing contractors' increasing roles from originally supplying only raw materials to the Auburn prison in New York to controlling Louisiana's entire penitentiary under a lease).

[54] SELLERS, *supra* note 18, at 49.

[55] *Id.* at 50.

[56] *Id.* at 49–50 (describing the "prison labor" laws passed in New Jersey and New York that required the profits made by prisons via private contracts be used to make the prison "self sufficient" or to remunerate the prisoners).

that this involved direct private control."[57] The state still acted as a middleman between the prisoners and the private sector who wished to exploit their labor.

Moreover, all antebellum attempts to fully involve private industry failed miserably and were generally considered unwise. The most infamous example occurred in California. In 1852, the state converted a private prison ship in San Francisco Bay into the country's first privately constructed and operated prison—San Quentin.[58] Only four years later, and despite the private contractors' contentions that cost-cutting justified their operation of the facility, a number of mismanagement scandals convinced the state government to take over the prison.[59] A California newspaper even opined, "whatever it cost, a final end had to be put to the system of farming out the management of the state convicts."[60] This sentiment was in accord with the state's general perception that "regardless how much money it might save the taxpayers, a private contract was no way to run the state prison."[61] These sentiments indicate that, by the time the Civil War erupted in 1861, the American philosophy on punishment strongly favored the public prison to private inmate labor regimes.[62]

B. The Thirteenth Amendment and "The Incidents of Slavery"

The next government action to affect prison labor originated from the need to rid the United States of its most ostensible form of oppressive labor control—chattel slavery. Largely rooted in notions of racial superiority, the South's slave system also provided the promise of acquiring social standing via the ownership of "human capital."[63] Poor whites often aspired to own slaves as a symbol of economic independence, and as a result, supported their wealthy counterparts' efforts to enforce anti-education and fugitive slave laws despite the fact that they were just as dominated by the plantation system.[64]

Due to these cultural norms, the abolitionists and Radical Republicans who eventually gained control of the federal government recognized that simply ending the practice would not be enough to end "slavery." Once the Emancipation Proclamation and the Civil War's outcome cemented slavery's demise, Congress began to debate the

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[57] White, *supra* note 7, at 125.

[58] Lifsher, *supra* note 8.

[59] AUSTIN & COVENTRY, *supra* note 9, at 10.

[60] *Id.* (quoting KENNETH LAMOTT, CHRONICLES OF SAN QUENTIN: THE BIOGRAPHY OF A PRISON 74 (1961)).

[61] *Id.*

[62] White, *supra* note 7, at 125–26 (discussing the American move away from private incarceration and toward the modern public prison, and juxtaposing that system with the subject of the next section—the South's slave plantations, which were "private prisons unto themselves").

[63] ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 11–12 (2004).

[64] *Id.* at 11–12, 19.

form and substance of the Thirteenth Amendment.[65] Congress's main goal from the outset was to permanently end unpaid, unjustified, and coercive labor for the benefit of private parties (and everything associated with it) within the United States.[66] One legal historian describes the legislators' attitudes in this manner:

> The incidents of servitude that the Thirteenth Amendment wiped away were endemic to the entire culture. They were neither confined to plantations nor even just to the South. Constitutional protections for slavery percolated into accepted ruthlessness against blacks. They encountered barriers to freedom in their work, family life, child rearing, career pursuits, mobility, and entertainment. The Thirteenth Amendment ended all of these incidents of servitude and provided the United States Congress with the enforcement power to prevent them.[67]

With the immediate goal of phasing out African slavery and the long-term goal of ending private oppression in general, the Radical Republicans set to work drafting an acceptable version of the amendment.[68]

During the congressional debates, various legislators on both sides revealed their intentions regarding this amendment. Most importantly, they wanted language that would end chattel slavery once and for all.[69] However, they anticipated that the Thirteenth Amendment would disallow the state from introducing new forms of involuntary servitude that *resembled* the former practice.[70] Senator Henry Wilson, a lifelong abolitionist, stated:

> [The Thirteenth Amendment] will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is,

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[65] See Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1005–06 (2002), for a succinct overview of the Reconstruction Congress's concerns in the discussions on the Thirteenth Amendment, including the need to outlaw peonage as well as slave-like systems that "degraded labor" and "corrupt[ed] [the] morals" of work.

[66] *See* TSESIS, *supra* note 63, at 38 ("Radical Republicans sought to make the amendment's scope sweeping. They intended that it provide Congress with the national authority to enact laws that would assure that freedom would not be a hollow word but a national commitment vested with substantive protections.").

[67] *Id.* at 22–23.

[68] *See id.* at 38–48.

[69] *See* Wolff, *supra* note 65, at 1005–06.

[70] *See* Slaughter-House Cases, 83 U.S. 36, 71 (1873) (stating that the purpose of the Civil War amendments was the "freedom of the slave race, the security and firm establishment of that freedom, and the protection . . . from the oppressions of those who had formerly exercised unlimited dominion over him.").

> *everything connected with it or pertaining to it* . . . . [The Amendment] will make impossible forevermore the reappearing of the discarded slave system, and the returning of the despotism of the slavemasters' domination.[71]

Senator Wilson also had a strong belief that the Thirteenth Amendment should not touch only African-Americans but *every citizen*, a conviction reinforced by his upbringing. He was born on a poor farm in New England, and once had himself been "bound-out" by his family to earn money.[72] In the House of Representatives, Representative Ebon Ingersoll agreed that the proposed amendment should also affect "the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of . . . slavery."[73]

The resulting text of the amendment became one of the most succinct—and broad—amendments in the United States Constitution: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[74] Most current scholars agree, due to its broad language, the amendment was meant to apply "[w]henever one person improperly held another in bondage."[75] This implies that the drafters intended the Thirteenth Amendment to end any and all forms of bondage resembling the culture of private control that existed in the plantation slavery system.

As will be discussed in detail later, courts interpreting this amendment have used its inclusive wording to hold that the race of the individual has no weight as far as his or her protection against slavery and involuntary servitude is concerned.[76] Whether the state or a private actor imposes that servitude has been held to be similarly irrelevant.[77] The Thirteenth Amendment imposes a positive duty upon the states to eradicate de facto slavery whenever they recognize it within their borders.[78]

A curiosity of this otherwise far-reaching amendment, however, is that it includes one exception that became quite important, especially in the South, for the status of prisoners and prisons themselves in the years following the Thirteenth Amendment's

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[71] TSESIS, *supra* note 63, at 42 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864)).

[72] *Id.* at 43.

[73] *Id.* at 44.

[74] U.S. CONST. amend. XIII, § 1.

[75] AMAR, *supra* note 16, at 360. Amar also suggests that the Thirteenth Amendment could be read, "Slavery [and] involuntary servitude . . . shall [not] exist." *Id.*

[76] *See* Slaughter-House Cases, 83 U.S. 36, 72 (1872) (establishing that the Thirteenth Amendment applied to citizens regardless of their race); *see also infra* Part I.C.

[77] *See* Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 207 & n.249 (2005) ("A notable exception [to the general notion that most constitutional rights are protected only against governmental action] is the Thirteenth Amendment, which prohibits any form of slavery or involuntary servitude, whether public or private.").

[78] AMAR, *supra* note 16, at 360.

adoption. The Punishment Clause allowed involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted."[79] This portion of the amendment is usually simply recited as part of the text, and hardly analyzed in court opinions or studies. It is either ignored or simply accepted as an absolute condition.[80]

Several reasons may exist for its existence in the amendment. The first, and most easily acceptable, is that nineteenth-century prison labor was not considered an incident of slavery.[81] The Southern slave codes deprived innocent people of pay for their work and the ability to choose their own lifestyle, receive an education, and enjoy the rights and privileges allowed to free citizens under the Constitution.[82] It was this deprivation of life and liberty by private citizens, and upheld by the states, that the Thirteenth Amendment sought to excoriate from American soil.[83] A similar motivation informed the drafting and passage of the Fourteenth Amendment's Due Process Clause.[84] Prisoners, on the other hand, had to be convicted of a crime before they fell under the Punishment Clause's exception. Assuming that a prisoner has no claim to lack of due process, federal courts have largely been in agreement that the state is justified in depriving him or her of his life and liberty (which would include the right to choose the type of work performed and negotiate compensation).[85]

There exists, however, an alternative and equally plausible reason for the inclusion of the Punishment Clause within the Thirteenth Amendment. Though slavery has been considered a form of punishment throughout history, the prison system as it

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[79] U.S. CONST. amend. XIII, § 1.

[80] *Compare* Murray v. Miss. Dep't of Corr., 911 F.2d 1167 (5th Cir. 1990) (per curiam) (stating that compelling an inmate to work without pay is not unconstitutional due to the Punishment Clause without further explanation), *with* Loving v. Johnson, 455 F.3d 562 (5th Cir. 2006) (per curiam) (discussing plaintiff's Fair Labor Standards Act claims without mentioning the Thirteenth Amendment at all, despite similar facts and a citation to *Murray*).

[81] *See Slaughter-House*, 83 U.S. at 69 ("The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery . . . and the obvious purpose was to forbid all shades and conditions of African slavery.").

[82] *See* TSESIS, *supra* note 63, at 22, 106. The traditional list of fundamental rights, privileges, and immunities of free citizens may be found in the classic case Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

[83] TSESIS, *supra* note 63, at 22–23.

[84] *See* U.S. CONST. amend. XIV, § 1. In *Plessy v. Ferguson*, 163 U.S. 537, 553 (1896) (Harlan, J., dissenting), Justice Harlan argues: "[The Thirteenth Amendment] having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment . . . . These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship."

[85] *See* AMAR, *supra* note 16, at 359 ("Neither states nor the federal government would be allowed to . . . permit bondage to creep back onto American soil (save as a criminal punishment, *subject to due process*).") (emphasis added); *infra* Part II.C; *see also Slaughter-House*, 83 U.S. at 116 (Bradley, J., dissenting) ("This right to choose one's calling is an essential part of that liberty which it is the object of government to protect . . . .").

developed in the United States separated those two concepts in the American mindset.[86] Punishment has both a rehabilitative and retributive purpose in American (and now largely Western) thought, whereas antebellum slavery valued dominion, financial gain, and retribution alone.[87] In fact, Hallett claims the wording of the amendment itself created this cognitive separation.[88] He writes, "That the American Thirteenth Amendment simultaneously abolished slavery and initiated 'involuntary servitude' in the United States speaks to the duality of slavery and punishment in the American context."[89] Unlike the ancients and Renaissance Europeans, who *used* slavery to punish offenders and prisoners of war, American history created a culture which treated slavery and criminal justice as completely dichotomous institutions.[90]

C. The Post-Reconstruction Era, "Convict Leasing," and Thirteenth Amendment Interpretation

The first real test of the Thirteenth Amendment came during Reconstruction. Embittered by their shattered agrarian economy and social structure, Southern states found the Punishment Clause to be an excellent loophole for reinstating the plantation economy and its racial hierarchy.[91] "Convict leasing" was the first instance of total private control over the inmate's labor and person, but Southern legislatures nevertheless justified it by borrowing a line from the Pennsylvania and Auburn prison models.[92] The devastated Southern economy left legislatures unable to bear the costs of prison upkeep, proponents argued, and thus inmates must be required to work to pay their own costs.[93] Also, the South was in need of a large pool of cheap labor,

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[86] HALLETT, *supra* note 10, at 4.

[87] *See* TSESIS, *supra* note 63, at 19–20 (describing the sense of "superior purpose" and "wealth" derived from the slave culture); Quigley, *supra* note 33, at 1173 (discussing U.S. Catholic bishops' views that the nation's criminal justice system must change from punitive and retributive to emphasize "restorative justice," and a "constructive and rehabilitative purpose").

[88] HALLETT, *supra* note 10, at 4.

[89] *Id. But see* Quigley, *supra* note 33, at 1165 (writing that the Thirteenth Amendment "allows slavery *and* involuntary servitude as punishment for crimes.") (emphasis added).

[90] *See* SELLERS, *supra* note 18, at 48 (discussing the application of slavery and other punishments by the ancients under the "eye for an eye, and a tooth for a tooth" moral imperative, as well as the introduction of the English workhouse). In an 1850 article, Frederick Douglass highlighted this duality to show the contradiction in American social thought regarding slavery. He stated that "[e]very slaveholder in the land stands perjured in the sight of Heaven, when he swears his purpose to be, the establishment of justice . . . for every such slaveholder knows that his whole life gives an emphatic lie to his solemn vow." TSESIS, *supra* note 63, at 16.

[91] HALLETT, *supra* note 10, at 1–2.

[92] *See supra* note 50 and accompanying text.

[93] *See* Weaver & Purcell, *supra* note 1, at 355 (discussing the South's "criminal surety" statutes, which "allowed those convicted of minor offenses to have their fines [or imprisonment costs] paid off . . . in exchange for labor").

making inmates a ready resource.[94] Laws were passed allowing prisons to lease their prisoners out to plantation owners and other private firms, who provided for inmates' needs and controlled the type of work performed as long as they fulfilled their contractual obligations.[95]

The actual, pernicious reason for the convict lease system, however, can be found in the way it gathered inmate laborers. Realizing that the recently freed slaves often had no homes and could not find a job, many Southern states passed vagrancy laws providing for the arrest and imprisonment of "'[r]ogues and vagabonds, idle or dissolute persons, common night walkers, [p]ersons who neglect their calling,' [and] 'all able-bodied male persons over eighteen . . . who are without means of support.'"[96] While race was not specifically mentioned, this definition was meant to apply to (and was enforced against) African-Americans.[97] A large number of African-Americans were consequently punished for their poverty, only to be leased out to white landowners and subjected to a condition essentially similar to the one they had endured under slavery.[98]

These cruelties, combined with other private prison mismanagement and abuse scandals occurring in the late nineteenth and early twentieth centuries, caused the use of private contractors in incarceration to fall into disfavor.[99] Curiously, however, the courts during this time period never intervened on Thirteenth Amendment grounds to stop convict leasing, the San Quentin affair, or the Arkansas inmate coal-mining incident. In fact, no cases were brought under this amendment in the prison labor context. This, however, may be largely due to America's viewpoint at the time regarding the *purpose* of the Thirteenth Amendment and the Punishment Clause's role in fulfilling it.[100]

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[94] Dolovich, *supra* note 17, at 451.

[95] Mari Matsuda, Professor of Law, Georgetown University School of Law, Planet Asian America, Address Before the Asian Law Caucus Dinner (Mar. 2000), *in* 8 ASIAN L.J. 169, 174 & n.22 (2001).

[96] Nancy A. Ozimek, *Reinstitution of the Chain Gang: A Historical and Constitutional Analysis*, 6 B.U. PUB. INT. L.J. 753, 762 (1997) (quoting FLA. STAT. §§ 3570–71 (1905), a typical vagrancy statute).

[97] *Id.*; *see also* HALLETT, *supra* note 10, at 53 (discussing passage of "pig laws" aimed at imprisoning poor blacks for stealing food as well as the general Southern feeling of the "Negro crime problem").

[98] HALLETT, *supra* note 10, at 2.

[99] AUSTIN & COVENTRY, *supra* note 9, at 11; *see also* Charles W. Thomas, *Correctional Privatization in America: An Assessment of Its Historical Origins, Present Status, and Future Prospects*, *in* CHANGING THE GUARD: PRIVATE PRISONS AND THE CONTROL OF CRIME 73 (ALEXANDER TABARROK, ed., 2003) (describing the "brutality" of convict leasing and other "strikingly callous and exploitative" forms of private contractor collusion in imprisonment throughout American history).

[100] *See supra* notes 79–89 and accompanying text (relating Reconstruction era's view of punishment versus slavery).

Although the Thirteenth Amendment's proper interpretation was questionable during Reconstruction, it received its first serious treatment by the Supreme Court in 1872—just as the era was drawing to a close. In the *Slaughter-House Cases*, a group of private butchers challenged a Louisiana statute banning animal slaughter in all but one section of New Orleans, which effectively granted a monopoly to one area slaughterhouse.[101] As the regulation essentially required petitioners to work for the city or not at all, one of petitioners' arguments was that the law subjected them to "involuntary servitude" and hence violated the Thirteenth Amendment.[102]

Justice Miller, writing for the majority, quickly dispensed with this argument. He responded to the butchers' claim by appealing to the legislative purpose.[103] Giving modern readers a glimpse into Reconstruction America's attitudes, Justice Miller related the exact "purpose" to which he was referring:

> [N]o one can fail to be impressed with the one pervading purpose . . . lying at the foundation of each, and without which none of them would have been even suggested; we mean *the freedom of the slave race*, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[104]

As slavery's abolition was the end to be achieved, Miller continued, protection of the butchers' interest in pursuing their occupation was invalid as a Thirteenth Amendment claim.[105] The prohibition against involuntary servitude was meant only to end "slave-like relations," and more specifically, those tied to the experience of African slaves in the United States.[106]

In subsequent Supreme Court cases, Justice Miller's application of the Thirteenth Amendment was held to be authoritative when parties other than African-Americans sought relief for oppressive conditions. As such, the Court effectively inhibited the

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[101] Slaughter-House Cases, 83 U.S. 36, 57–60 (1872).

[102] *Id.* at 66.

[103] *Id.* at 72 ("[I]n any fair and just construction of any section or phrase of [the Thirteenth, Fourteenth, or Fifteenth] [A]mendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, [and] the evil which they were designed to remedy . . . .").

[104] *Id.* at 71 (emphasis added).

[105] *Id.* at 72; TSESIS, *supra* note 63, at 66.

[106] TSESIS, *supra* note 63, at 66; *see also* Julie Chi-hye Suk, *Equal By Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 328 (2007) (arguing that the *Slaughter-House* court focused on the American memory of slavery as the proper scope of the Thirteenth Amendment rather than a general application of the terms "slavery" and "involuntary servitude").

amendment's use as an expander of civil rights in the late nineteenth century.[107] Restraint was, of course, both politically and culturally expedient at the time, as Congress and the nation were trying to end Reconstruction and its abolitionist ideals.[108]

Justice Bradley's opinion in the *Civil Rights Cases*,[109] known mostly for its rulings on the Fourteenth Amendment's scope, also affected Thirteenth Amendment jurisprudence by differentiating the two amendments from each other.[110] The Thirteenth Amendment, Bradley argued, "simply abolished slavery" and gave Congress the power to regulate private individuals' actions in order to eradicate it.[111] On the other hand, the Fourteenth Amendment gives the federal government the power to nullify state laws that either abridge citizens' privileges and immunities or deprive persons of life, liberty, or property without due process.[112] This private/state action dichotomy rendered the two amendments "different," and thus the Fourteenth Amendment could not be used to strike down slavery-related actions *against the states*.[113]

From *Slaughter-House*'s limitation of the Thirteenth Amendment to its historical purpose and the *Civil Rights Cases*' separation of it from state actions, the amendment became all but dead letter.[114] With these two cases firmly rooted in American jurisprudence, the Fourteenth Amendment instead emerged as the major vehicle for civil rights protection, but even it was not successful until *Brown v. Board of Education*[115] and the later passage of the 1964 Civil Rights Act.[116] Indeed, Justice Bradley seemed stalwart in his conviction that the Thirteenth Amendment protected only the "fundamental" rights of African-Americans such as freedom and citizenship against their former masters. Consequently, the Court did not uphold the "social" rights of every American, such as the right to eat in a restaurant or, for this Note's purposes, the right to perform private work for wages.[117]

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[107] TSESIS, *supra* note 63, at 67.

[108] *Id.*

[109] 109 U.S. 3 (1883).

[110] *See* TSESIS, *supra* note 63, at 67.

[111] *Civil Rights Cases*, 109 U.S. at 23.

[112] *Id.*

[113] *Id.*; *see* Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 744 n.159 (2003) (arguing that the Supreme Court struck down the Civil Rights Act of 1875 in the *Civil Rights Cases* because it was (1) beyond Congress's Thirteenth Amendment enforcement powers as "not directly related to slavery," and (2) beyond the Fourteenth Amendment's enforcement power due to its applicability to private, not state, action).

[114] *See* TSESIS, *supra* note 63, at 74.

[115] 347 U.S. 483 (1954).

[116] *See, e.g.*, TSESIS, *supra* note 63, at 73 ("The *Civil Rights Cases* were a missed opportunity to further the racially tolerant vision of the Thirteenth Amendment. The nation had to wait until 1964 to end discrimination in public accommodations.").

[117] *Civil Rights Cases*, 109 U.S. at 22 (delineating the "fundamental" rights of citizens as the rights to "make and enforce contracts, to sue, be parties, give evidence, and to inherit,

Removing the Thirteenth Amendment from claims against the states, along with the Punishment Clause itself, may have caused the lack of response from the Supreme Court toward convict leasing and other attempts at the privatization of state punishment.[118] There was, however, a glimmer of hope for those who took a more expansive view of the Thirteenth Amendment's potential. Even in the *Slaughter-House Cases*, after declaring the end of African slavery to be the Amendment's purpose, Justice Miller conceded that the Thirteenth Amendment could be utilized to shield other groups from economic exploitation.[119] He wrote:

> We do not say that no one else but the negro can share in this protection. . . . [I]t forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery . . . within our territory, this amendment may safely be trusted to make it void.[120]

At least, then, the Supreme Court acknowledged that Congress did not intend for the amendment to stop at ending African bondage. Instead, its broad wording allowed future legislatures and courts to dismantle any system that may arise which *resembled* slavery.[121]

Justice Harlan reminded the *Civil Rights Cases* Court of this feature of the Thirteenth Amendment in his dissent.[122] He asserted that the federal government, by virtue of the amendment's second section, had the prerogative to rid the country of the "badges and incidents" of slavery and involuntary servitude.[123] Even as early as 1867, Justice Chase held that "indenture" of any form was illegal as a violation of the Thirteenth Amendment and the Civil Rights Act of 1866, which was enacted under the

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purchase, lease, sell and convey property"); *see* Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1392–93 & n.233 (2005) (separating economic and social rights such as "the right to a living wage" and equal access to public education from the Reconstruction era definition of "civil rights").

[118] *See supra* note 99 and accompanying text.

[119] Slaughter-House Cases, 83 U.S. 36, 72 (1872).

[120] *Id.*

[121] *Id.* ("Both the language and spirit of these articles are to have their fair and just weight in any question of construction."); Michael H. LeRoy, *Compulsory Labor in a National Emergency: Public Service or Involuntary Servitude? The Case of Crippled Ports*, 28 BERKELEY J. EMP. & LAB. L. 331, 355 (2007).

[122] Civil Rights Cases, 109 U.S. 3, 33 (1883) (Harlan, J., dissenting) ("The terms of the Thirteenth Amendment are *absolute and universal*. They embrace every race which then was, or might thereafter be, within the United States.") (emphasis added).

[123] *Id.* at 35 ("That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce . . . the Thirteenth Amendment may be exerted . . . for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable.").

amendment's enforcement section.[124] The Thirteenth Amendment, he argued, established freedom "as the constitutional right of all persons in the United States."[125] The Thirteenth Amendment, therefore, was to be considered just as great a guarantor of freedom as the Fourteenth Amendment or any of the incorporated constitutional provisions.

As the twentieth century dawned, the Thirteenth Amendment had been rendered ineffective and convict leasing was in full swing. By the 1920s, however, the system was falling out of favor, but not due to Thirteenth Amendment concerns.[126] Instead, white paid laborers felt that they were losing valuable opportunities to the cheap labor provided largely by black inmates.[127] To address this problem, constituencies looked to the executive and legislative branches. In 1905, for example, President Theodore Roosevelt issued an executive order preventing federal agencies from contracting with convict labor on government projects.[128] Congress later passed the Hawes-Cooper Act of 1929, allowing states to ban the importation of convict-made goods from other states.[129] Responding to further pressure from suffering Americans during the Great Depression, the New Deal Congress passed the Ashurst-Sumners Act in 1935. This act not only banned convict-made goods, but also made their interstate importation a federal crime.[130]

Due to these measures, convict leasing and private prison operation eventually faded away at the state level, though some form of it existed in Southern counties until the Civil Rights Era.[131] From the early 1940s until the early 1980s, there was "virtually *no* private sector involvement in correctional services."[132] At both the state and federal levels, the operations and administration of prisons was "delegated to governmental agencies, authorized by statute, staffed by government employees, and funded solely by the government."[133]

Though this period was admittedly "brief" in American history and one not initiated by the federal courts using the Thirteenth Amendment, subsequent decisions from the 1940s to the 1980s revealed that the Court was changing its view on both the Amendment and its applicability to other servile and custodial relationships.[134]

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[124] *In re* Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247).

[125] *Id.*

[126] Weaver & Purcell, *supra* note 1, at 359–60.

[127] AUSTIN & COVENTRY, *supra* note 9, at 11; Weaver & Purcell, *supra* note 1, at 359–60.

[128] AUSTIN & COVENTRY, *supra* note 9, at 11.

[129] *Id.*

[130] Quigley, *supra* note 33, at 1162; *see* 18 U.S.C. § 1761(a) (2006).

[131] White, *supra* note 7, at 133.

[132] Jeff Sinden, *The Problem of Prison Privatization: The US Experience*, *in* CAPITALIST PUNISHMENT: PRISON PRIVATIZATION & HUMAN RIGHTS 39, 41 (Andrew Coyle et al. eds., 2003) [hereinafter CAPITALIST PUNISHMENT] (emphasis added).

[133] *Id.*

[134] White, *supra* note 7, at 134 (arguing that the public sector only "enjoyed a near monopoly in the business of incarceration" for "a relatively brief period from about the 1940s through the 1970s").

Pollock v. Williams,[135] decided by the Supreme Court in 1944, defied the *Slaughter-House/Civil Rights Cases* tradition and directly applied the Thirteenth Amendment to strike down a Florida statute.[136] In fact, the Court found the Thirteenth Amendment argument to be so powerful, it did not even find it necessary to reach the petitioner's Fourteenth Amendment claim.[137]

The particular statute in question was a so-called "peonage" law, which made it a state crime, subject to imprisonment and a fine, for a laborer to refuse to repay his employer's advance when leaving employment.[138] A private corporation signed a contract with Pollock promising a $5 advance, but had not paid it by the time Pollock left the job.[139] Despite this fact, Sheriff Williams and the State of Florida claimed that he was still under contract and thus subject to criminal penalty.[140] The majority declared that the peonage law amounted to "involuntary servitude," forcing a person to labor against his will, and thus was facially unconstitutional on Thirteenth Amendment grounds.[141]

In the *Pollock* opinion, Justice Jackson, after finding the Thirteenth Amendment to be effective in invalidating laws requiring compulsory labor to pay off a debt or obligation, made an interesting observation on the Punishment Clause. Commenting on this exception for involuntary servitude, he stated:

> The undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways *which society may compel*. . . . Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that *no indebtedness* warrants a suspension of the right to be free from compulsory service.[142]

The only form of forced labor compatible with the post-Reconstruction system, Jackson seems to be arguing, is *public* forced labor accompanying criminal punishment. Combined with the fact that *Pollock* was drafted during a time when control

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[135] 322 U.S. 4 (1944).

[136] Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1655–56 (2001).

[137] *Pollock*, 322 U.S. at 5–6.

[138] Goluboff, *supra* note 136, at 1655.

[139] *Pollock*, 322 U.S. at 6; Goluboff, *supra* note 136, at 1655.

[140] *Pollock*, 322 U.S. at 5–6.

[141] *Id.* at 7–9, 24.

[142] *Id.* at 17–18 (internal citations omitted) (emphasis added).

of the prison system had reverted completely to public authorities, the Court would have believed that such was the norm in criminal punishment as well as the one envisaged by the Thirteenth Amendment's drafters.[143]

Another breakthrough came with the Court's 1968 decision, *Jones v. Alfred H. Mayer Co.*[144] Handed down during the Civil Rights Era, *Jones* affirmed that the Thirteenth Amendment is a separate and effective tool in protecting civil rights—though maybe not as effective as the amendment that directly follows it.[145] The majority, per Justice Stewart, utilized the "badges and incidents" language to find that citizens may bring discrimination claims against private actors under the Thirteenth Amendment and § 1982.[146]

The Court did so by first asserting that the Thirteenth Amendment is self-executing: "'By its own unaided force and effect,' the Thirteenth Amendment 'abolished slavery, and established universal freedom.'"[147] Second, in contravention to the *Civil Rights Cases*, the Court held that the Enabling Clause of the amendment granted Congress the unqualified power to abolish all institutions and practices resembling slavery instituted by public *and* private actors.[148] Despite this victory for the Thirteenth Amendment, it came too late to address the problem of prison labor for private parties. By the 1960s, the state governments were back in control of the nation's ever-increasing incarceration rates.[149] It would not be long, however, before new criminal issues and the sheer numbers of incarcerated citizens caused the states to seek new methods of imprisonment.

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[143] *See supra* notes 86–90 and accompanying text. In the passage regarding the criminal punishment exception to involuntary servitude, Justice Jackson cited to a Supreme Court case from 1914, which also mentions the state as the only authority capable of imposing involuntary servitude upon criminal conviction:

> There can be no doubt that *the State* has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the Thirteenth Amendment . . . . Of course, *the State* may impose fines and penalties which must be worked out *for the benefit of the State*, and in such manner as *the State* may legitimately prescribe.

United States v. Reynolds, 235 U.S. 133, 149 (1914) (emphasis added).

[144] 392 U.S. 409 (1968).

[145] TSESIS, *supra* note 63, at 82 ("[*Jones*] interpreted the [Thirteenth] [A]mendment as a broad protection of civil liberties.").

[146] *See* 42 U.S.C. § 1982 (2000) (granting "[a]ll citizens of the United States" the same property rights as "white citizens").

[147] *Jones*, 392 U.S. at 439.

[148] *Id.* at 438 ("It has never been doubted . . . 'that the power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation' includes the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.'") (internal citation omitted) (quoting Civil Rights Cases, 109 U.S. 3, 20, 23 (1883)).

[149] White, *supra* note 7, at 134 (stating that public entities had a "near monopoly" in incarceration from the 1940s to the 1970s).

D. The Private Prison Boom in the 1980s

During the Reagan presidency, the United States famously announced its "War on Drugs." Prior to the 1980s, drugs were considered more of a public health concern.[150] President Reagan, however, advocated for stricter federal criminal laws against the production, possession, and distribution of narcotics. His efforts resulted in the passage of the Comprehensive Crime Control Act and the Sentencing Reform Act, which eliminated federal parole and established mandatory minimum sentences for drug-related crimes.[151] While dramatically increasing the number of inmates in federal prisons, these acts also started a national trend for state politicians who wanted to be seen as "tough on crime."[152] By the end of the decade, the prison population of the United States had experienced a 115% increase.[153]

The rise in prison populations and a harsher criminal justice system were complemented by yet another trend from the Reagan era: privatization. The widespread belief that the government should get "off the backs" of the American people extended from health care to trash collecting, and the criminal justice system was no exception.[154] Believing that the rising prison population could be accommodated more safely and efficiently by competition in the marketplace, two prominent Tennessee politicians, Tom Beasley and Doc Crants, founded Corrections Corporation of America (CCA) in 1983.[155] The concept was inspired by the federal government's first privatization project in 1979 when it hired a private company to construct and operate alien detention centers for the Immigration and Naturalization Service.[156] Headquartered in Nashville, CCA currently controls a majority of Tennessee penitentiaries as well as the greatest portion of market share in private corrections nationwide.[157] By the mid-1990s, CCA and its primary competitor, Wackenhut Corrections, controlled 75% of the private prison market.[158] In 2007, CCA reported nearly $1.5 billion in net income.[159] The company operates 65 prison facilities, including 41 entirely owned by

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[150] HALLETT, *supra* note 10, at 54.

[151] Sinden, *supra* note 132, at 42.

[152] *Id.* (providing the "Three Strikes legislation," first passed in California in 1994, as an example of proactive punishment legislation among the states).

[153] Phillip J. Wood, *The Rise of the Prison Industrial Complex in the United States*, *in* CAPITALIST PUNISHMENT, *supra* note 132, at 16, 17–18 (outlining the "decade-by-decade" percentage increase in incarceration rates, including a 53% increase in 1970s, 115% in the 1980s, and a further 77% increase in the 1990s).

[154] Sinden, *supra* note 132, at 41.

[155] Greene, *supra* note 4, at 11.

[156] *See* Wood, *supra* note 153, at 18; *see also* AUSTIN & COVENTRY, *supra* note 9, at 12 (stating that, by 1984, the INS had contracts with two private prison companies to detain illegal aliens, and the number had expanded to seven by 1988).

[157] Greene, *supra* note 4, at 11–12. For a thorough historical overview of CCA see *id.* at 11–18.

[158] Dolovich, *supra* note 17, at 459.

[159] CCA 2007 ANNUAL REPORT, *supra* note 6, at 2.

CCA, in 19 states and the District of Columbia.[160] In total, they have a design capacity of 78,000 beds.[161]

The growth of entities such as CCA can be attributed directly to the states' perceived need for them as a cost effective response to the incarceration of an increasingly higher rate of criminals. After entering into contracts, states then begin shipping inmates to the new prisons, which may sometimes be out of state.[162] By simply providing the contract money and not having to worry about salaries for prison guards or maintenance, states believe that private prisons provide large savings to their treasuries while still accommodating the ever-growing number of incarcerated criminal offenders.[163] Also, private companies are perceived as more efficient in constructing and operating these facilities.[164] Finally, these prisons are often considered cleaner and safer than their state-run counterparts.[165] As a result, the number of state-contracted private prison inmates has risen almost every year since the industry's inception, reaching 87,860 in 2007.[166] This was a 3.3% increase from the previous year, and constituted 7.4% of the state inmate population nationwide.[167] An even higher increase is apparent in the federal prison system, with the number of private prisoners increasing by 12.1%.[168] Given the history of its criminal punishment philosophy and the constitutional imperative to prevent private exploitation of citizens, it is appropriate to question this relatively new privatization trend in American criminal justice.[169] Specifically, one must ask whether a privately held prisoner has a colorable claim against the state and the private prison corporation on the grounds that their incarceration and involuntary servitude violate the Thirteenth Amendment.[170]

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[160] *Id.* at 14.

[161] *Id.*

[162] Lifsher, *supra* note 8 (describing a recent California prison contract with CCA to relocate prisoners to an Arizona prison at a cost to the State of $63 per inmate per day).

[163] *See* Sinden, *supra* note 132, at 43 ("According to privatization advocates, pressure from shareholders to provide dividends will lead to more cost-effective operations."); Boghosian, *supra* note 77, at 191–93.

[164] Sinden, *supra* note 132, at 43.

[165] *See* Lifsher, *supra* note 8 (relating the story of Mark Childress, an inmate who claims that he feels safer and more comfortable at the private prison than his gang-infested prior facility in California).

[166] William J. Sabol & Heather Couture, U.S. DEP'T OF JUSTICE, Bulletin NCJ 221944, PRISON INMATES AT MIDYEAR 2007, 5 (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf [hereinafter PRISON INMATES].

[167] *Id.* The total number of state prisoners, as of June 30, 2007, was 1,395,916 inmates. *Id.* at 1 tbl.1.

[168] *Id.* at 5 tbl.6.

[169] *See supra* note 52 and accompanying text (describing the prevalent reform/rehabilitation motivation behind the penitentiary system); *supra* note 149 and accompanying text (quoting Pollock v. Williams, 322 U.S. 4, 17 (1944) ("The undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.")).

[170] As this Note argues in the next section, the prisoner will need to avoid the Punishment

II. MAKING THE PRIVATE PRISONER'S CASE FOR "SLAVERY AND INVOLUNTARY SERVITUDE"

A. The Plaintiff Prisoner's Standing

Before discussing the merits, it is essential to any constitutional claim to first establish standing—that the potential plaintiff has suffered an injury "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[171] As state governments have subjected prisoners to private incarceration, a prisoner would most likely bring a Thirteenth Amendment cause of action under 42 U.S.C. § 1983.[172] In other words, the plaintiff prisoner, to be successful, would first have to prove that the prisoner's predicament constitutes "slavery" or "involuntary servitude" in contravention of the Thirteenth Amendment. In both establishing standing and proving causation, the prisoner would also be required to show that this involuntary servitude is the result of the state's decision to contract with a private prison corporation.

B. The Private Prisoner's Thirteenth Amendment Claim

A § 1983 suit to uphold a modern private prisoner's Thirteenth Amendment rights, like Fourteenth Amendment actions, necessarily requires an analysis of his or her living and working conditions.[173] Since avoidance of the Punishment Clause must be based on a historical argument, any parallel between modern private prisoners

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Clause by taking an originalist stance: private prison contracts were not the form of incarceration foreseen by the Thirteenth Amendment drafters when they provided this constitutional exception. *See supra* notes 86–90 and accompanying text (discussing the theory of incarceration that explains the drafters' inclusion of the Punishment Clause).

[171] Allen v. Wright, 468 U.S. 737, 751 (1984).

[172] 42 U.S.C. § 1983 (2000) (providing a cause of action to any person who has been deprived of his or her constitutional rights "under color of any statute . . . of any State or Territory or the District of Columbia"). It is also worth noting that the Prisoner Litigation Reform Act imposes an extra requirement on prisoners that does not hinder the ordinary citizen before filing suit. Prior to filing a § 1983 suit, the prisoner must exhaust all available administrative remedies. 42 U.S.C. § 1997e(a) (2000). Failure to do so renders many prisoner actions frivolous. *See* Loving v. Johnson, 455 F.3d 562, 563 (5th Cir. 2006) (stating that the District Court denied petitioner's motion as frivolous under § 1997e). This Note will assume that the prisoner has exhausted all administrative remedies. It is not entirely clear, however, that complete exhaustion of remedies is required in prisoner civil rights cases under § 1997e when the target of the suit is a state rather than the federal government. *See* Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999), *cert. denied*, 528 U.S. 954 (1999) ("[S]ection 1983 does not in general require exhaustion of state remedies.").

[173] For a first-hand description of living and working conditions inside a private prison see K.C. CARCERAL, PRISON, INC.: A CONVICT EXPOSES LIFE INSIDE A PRIVATE PRISON (2006).

and antebellum slaves, Reconstruction-era leased convicts, or peonage workers is helpful.[174] Admittedly, most of the prisoners' work is "housework and upkeep of the prison itself."[175] Some examples include laundry, cleaning duties, library staffing, and food service.[176] Nevertheless, some private prison inmates do produce goods for private contractors as a result of the Percy Amendment, which exempted certain prisons from the Sumners-Ashurst Act's ban on prison-made goods.[177] The Percy Amendment and most state contracts require only "a competitive wage," usually commensurate with the wage paid to public inmates for the same work.[178]

If one had only this cursory view of the private prisoner's work conditions, he or she might argue that a Thirteenth Amendment claim is at least irrelevant and at most ludicrous. Private prisoners perform only menial tasks, and certainly are not subject to the highway, chain gang-like work that prevailed in convict leasing and has reemerged in some public prison systems.[179] Additionally, no serious legal argument could be made that these prisoners are being treated as property similar to antebellum slaves.

Indeed, many courts have adopted this narrow view of modern prison labor, deciding that the Punishment Clause renders the Thirteenth Amendment a nonstarter.[180] In the private prison context, however, one must place the prisoners' remuneration and tasks performed in the context of the industry itself. Private prison companies are publicly traded entities.[181] CCA, Wackenhut, and others have boards of directors, shareholders, and executives, all of whom depend on an influx of prisoners to make a profit.[182] By living in, cleaning, and maintaining the prison, as well as engaging in other forms of labor either mandated or allowed by the state, the prisoners contribute to the success of these prisons at annual reviews and among popular perception. Additionally, prisoner labor reduces corporate costs, as CCA and others do not have to

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[174] *See* Weaver & Purcell, *supra* note 1, at 370; *supra* Part I.B–C.

[175] Quigley, *supra* note 33, at 1162–63.

[176] *Id.* at 1166.

[177] Weaver & Purcell, *supra* note 1, at 370.

[178] *Id.*

[179] *Id.* at 361.

[180] *Cf.* Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999), *cert. denied*, 528 U.S. 954 (1999) (citing a string of cases which "assume the propriety" of private confinement despite the Thirteenth Amendment); Murray v. Miss. Dep't of Corr., 911 F.2d 1167, 1167 (5th Cir. 1990) (per curium), *cert. denied*, 498 U.S. 1050 (1991) (citing the Thirteenth Amendment to support the proposition that "[c]ompelling an inmate to work without pay is not unconstitutional").

[181] *See* Corrections Corporation of America Investor Relations, http://investor.shareholder.com/cxw (last visited Aug. 13, 2009) (listing CCA's current stock price and shareholder information); *see also* Christian Parenti, *Privatized Problems: For-Profit Incarceration in Trouble*, *in* CAPITALIST PUNISHMENT, *supra* note 132, at 30, 30–31 (discussing CCA's and Wackenhut's first public offerings).

[182] Parenti, *supra* note 181, at 31 (listing the early boards of directors of CCA and Wackenhut).

hire low-level staff to carry out menial tasks.[183] Cost reduction does not, however, occur only in prisoners' labor. It is also apparent in their living conditions, with inmates receiving meager living conditions and less rehabilitative drug programs in an effort to turn profits.[184] The resulting increase in profit margins renders the corporation more successful, and hence more attractive to state legislatures.[185] Consequently, prison labor's contributions to the corporation lead to more state contracts, and thus further the profit-making objective of the corporation.

Hallett writes, "Under the auspices of prison privatization, crime and criminals become *engines of private investment* . . . . For shareholders in private prison companies, inmates have quite literally become commodities rather than liabilities."[186] Each shareholder in a private prison company, therefore, has an interest in ensuring that crime and criminal punishment remain high, and that the prisons are filled and well kept by prison labor.[187] On the other hand, state taxpayers consider prisoners a drain on resources, giving them an incentive to pressure lawmakers to rehabilitate them and make them productive members of society.[188]

Other relevant constitutional differences exist between the prisoner in a private facility and his public counterparts. Modern public prisoners, like those in the early Pennsylvania system, are put to work mainly to rehabilitate them and/or teach them a skill.[189] Their low wage is due simply to their prisoner status.[190] Private prisoners, however, are placed in cheap living conditions and put to work primarily to cut costs.[191]

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[183] *See* AUSTIN & COVENTRY, *supra* note 9, at iii ("[I]t was discovered that . . . the average saving from privatization was only about 1 percent, and most of that was achieved through lower labor costs."); Garvey, *supra* note 36, at 392 ("Requiring prisoners to defray the cost of incarceration is an old idea, and it's beginning to enjoy renewed popularity.").

[184] Sinden, *supra* note 132, at 40 (discussing the "corner-cutting" that occurs at private prisons in order to reduce expenses).

[185] *See* CCA 2007 ANNUAL REPORT, *supra* note 6, at 5 ("CCA's success has been due to a number of factors . . . . We provide our government partners with a cost-effective way to manage their growing prison populations while avoiding the large capital expenditures associated with new prison construction.").

[186] HALLETT, *supra* note 10, at 17–18.

[187] For example, in CCA's 2007 annual report, the company stated to its shareholders and potential investors, "We continue to benefit from a *positive environment* where the demand for prison beds exceeds the supply, and we believe CCA is well positioned to take advantage of this market dynamic." CCA 2007 ANNUAL REPORT, *supra* note 6, at 2 (emphasis added).

[188] HALLETT, *supra* note 10, at 18.

[189] Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005).

[190] Murray v. Miss. Dep't of Corr., 911 F.2d 1167, 1168 (5th Cir. 1990) (per curiam), *cert. denied*, 498 U.S. 1050 (1991) ("[C]ompensating prisoners for work is not a constitutional requirement but, rather, is by the grace of the state.") (quoting Mikeska v. Collins, 900 F.2d 833, 837 (5th Cir. 1990)).

[191] AUSTIN & COVENTRY, *supra* note 9, at 29–30 ("Privatization opponents are concerned about possible deterioration in the quality of inmate services. History shows that privately operated facilities are often plagued by problems associated with the quest for higher earnings."); Dolovich, *supra* note 17, at 474.

Additionally, states hire, train, and equip the officers that oversee their correctional facilities.[192] This renders the state liable for the actions of prison wardens, guards, and support staff under the "state action" doctrine for any civil rights violations.[193] Private prison employees, on the other hand do not have the same status.[194]

With all of these factors under consideration, one begins to formulate a Thirteenth Amendment case for the private prisoner plaintiff, even if he or she only sweeps the floors and cleans the bathrooms. After sentence is imposed, the prisoner, via a contract between the state and a private prison company, is sent to a private correctional facility. The prisoner is then made to work under the direction of prison guards hired by the corporate office for little to no wages. Also, the prisoner is forced to live in more meager conditions than state prisoners as a corporate cost-cutting measure.[195] Finally, both their living and working conditions serve the notion that a private prison is cheaper and more efficient than the alternative, which helps the corporation secure more state contracts and increase the value of shareholders' investments.[196]

At the very least, the private prison corporation in this scenario parallels the state contractors who took advantage of the vagrancy laws to gain cheap labor through convict leasing.[197] At the worst, however, the exploitation of criminals' lives for profit is a "badge or incident" of slavery under cases such as *Turner* or *Pollock*. Whether one agrees or disagrees with these statements, all can agree that this situation is certainly not the "involuntary servitude" allowed by the Thirteenth Amendment's framers under the Punishment Clause.

C. Preparing for Trial: An Analysis of the Case Law

Since the private prison boom, courts have had varied attitudes toward the status of these new prisons and the Thirteenth Amendment. While no case addressing this precise issue has ever come before the Supreme Court, a number of federal appellate courts have had the opportunity to address Thirteenth Amendment arguments in relation to private prisoners. Nevertheless, the typical response is to entirely dismiss the issue. Relying on the notion, supported by *Slaughter-House Cases* and the *Civil Rights Cases*, that the Thirteenth Amendment is relegated to history, a federal court

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[192] *Cf.* Joshua Miller, *Worker Rights in Private Prisons*, *in* CAPITALIST PUNISHMENT, *supra* note 132, at 140, 142 (discussing the disparities in hiring and salaries of state guards versus private guards).

[193] Sarro v. Cornell Corr., Inc., 248 F. Supp. 2d 52, 60–61 (D.R.I. 2003) ("[I]mmunity for prison guards arose 'out of their status as public employees at common law' . . . . [T]he detention of individuals . . . is an exclusively governmental function.") (quoting Richardson v. McKnight, 521 U.S. 399, 404–05 (1997)).

[194] See discussion of *Richardson v. McKnight*, *infra* notes 228–45 and accompanying text.

[195] *See* HALLETT, *supra* note 10, at 17–18.

[196] *See supra* note 192 and accompanying text.

[197] *See supra* notes 95–97 and accompanying text.

is more likely to move on to potential Fourteenth Amendment, Eighth Amendment, or statutory claims.

One early example is *United States v. Olson*.[198] The defendants argued at trial that the war draft constituted a condition of involuntary servitude in violation of the Thirteenth Amendment.[199] Borrowing exact language from an earlier Supreme Court case, the court stated that "the term 'involuntary servitude' was intended to cover those forms of compulsory labor akin to African slavery, which in practical operation would tend to produce like undesirable results."[200] Without analyzing the specific condition imposed on American males by the Selective Service Act, the court moved on to the defendant's Fifth Amendment claim.[201]

More recently, the Fifth Circuit Court of Appeals engaged in the same dismissive behavior. In *Watson v. Graves*,[202] a Louisiana sheriff and prison warden instituted a work-release program in which prisoners could work outside the jail for private individuals or businesses.[203] Two prisoners assigned to work for the sheriff's daughter and son-in-law sued under § 1983, claiming that the program violated the Thirteenth Amendment and the Fair Labor Standards Act (FLSA).[204] In hardly one page, the court disposed of the prisoners' Thirteenth Amendment argument.[205] To the contention that the Punishment Clause did not apply to the prisoners because labor was not imposed as a sentence, the court answered that it was irrelevant because the plaintiffs had not been subjected to involuntary servitude.[206] The court stated, "Involuntary servitude is defined as 'an action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement.'"[207] Consequently, if the prisoner has a choice, there is no involuntary servitude.[208] Combined with the Punishment Clause's general idea that "the requirement that incarcerated prisoners work without pay does not constitute involuntary servitude in violation of the [T]hirteenth [A]mendment," then, the prisoners had no legitimate claim, and the court proceeded to the FLSA arguments.[209] No discussion of the condition created

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[198] 253 F. 233 (W.D. Wash. 1917).

[199] *Id.* at 238.

[200] *Id.* (quoting Butler v. Perry, 240 U.S. 328, 332 (1916)).

[201] *Id.*

[202] 909 F.2d 1549 (5th Cir. 1990).

[203] *Id.* at 1551.

[204] *Id.* at 1550 n.1.

[205] *Id.* at 1552–53.

[206] *Id.* at 1553.

[207] *Id.* at 1552 (quoting United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964)).

[208] *Id.* at 1552–53 ("The choice of whether to work outside of the jail . . . or remain inside the jail . . . may have indeed been 'painful' and quite possibly illegal under state law, but the evidence shows that neither [plaintiff] was forced to work or continued to work against his will.").

[209] *Id.* at 1552.

by the work-release program, and whether it was a "badge or incident" of slavery as required by prior Thirteenth Amendment cases, ever occurred in the opinion.[210]

Pischke v. Litscher stands as one notable exception to the general dearth of case law directly pitting the Thirteenth Amendment against the privatized prison system, albeit in dicta.[211] Petitioner Pischke, a Wisconsin inmate, filed a habeas corpus petition with the local federal district court.[212] He claimed that the Wisconsin statute authorizing the State to enter into contracts with out-of-state private prisons to house prisoners violated the Thirteenth Amendment.[213] Chief Judge Posner affirmed the district court's denial of the petition, holding that "[t]he challenge here is not to being in custody, but *to the location in which* one is in custody."[214] Such arguments, he continued, are best brought as § 1983 challenges to the inmate's living conditions in private prisons.[215] Though this determination adequately disposed of the case, Posner further warned, in dicta, that it would be "foolish" for the petitioner to attempt to refile his claim.[216] By bringing a § 1983 claim under the Thirteenth Amendment, private prison inmates "will merely waste their money and earn a strike."[217] Defending his statement, Posner launched a full attack on the Thirteenth Amendment's applicability to private prisons:

> The Thirteenth Amendment, which forbids involuntary servitude, has an express exception for persons imprisoned pursuant to conviction for crime. Nor are we pointed to or can think of any other provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government. A number of cases assume the propriety of such confinements. . . .[218]

The Seventh Circuit, as a result, effectively employed the Punishment Clause to foreclose prisoners—whether incarcerated by the state or a private entity—from ever bringing Thirteenth Amendment claims. "A prisoner has a legally protected interest in the conduct of his keeper," Posner concluded, "but not in the keeper's identity. Let Wisconsin prisoners have no doubt of the complete lack of merit of their Thirteenth Amendment claims."[219] Interestingly, however, Posner's only support for this

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[210] *See supra* note 122 (quoting Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting)).

[211] 178 F.3d 497, 500 (7th Cir. 1999), *cert. denied*, 528 U.S. 954 (1999).

[212] *Id.* at 499.

[213] *Id.*

[214] *Id.* at 499–500 (emphasis added).

[215] *Id.* at 500.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 500–01 (internal citations omitted).

contention was that no court had "opined to the contrary," and that one non-majority judge had "said the practice is constitutional."[220]

By far, *Pischke* is the strongest use of the amendment's language. The Fifth Circuit, for example, came to the same essential conclusion, but at least analyzed the Thirteenth Amendment claim and did not foreclose the possibility of a successful prisoner plaintiff.[221] Later, in *Loving v. Johnson*, the court stated that prisoners fit the definition of "employees" under the FLSA when made to work for a private firm, but they could never be employees of the prison.[222] Due to the fact that the inmate worked "in and for the prison" as a launderer, therefore, the court denied his FLSA claim.[223] Nevertheless, the court still failed to discuss the prisoner's constitutional status when the prison and the private firm are one and the same.

Despite Posner's strict adherence to a strong Punishment Clause regardless of prison identity,[224] the judiciary's history of considering punishment a state function,[225] other circuits' failure to adopt uniform standards,[226] and the Supreme Court's view of private prisons all suggest that the Supreme Court may disagree with *Pischke*.[227] Instead of finding that identity of the incarcerator is irrelevant, the Supreme Court has clearly held that private versus public is an important distinction in the prison context.[228] In *Richardson v. McKnight*, a prisoner in a Tennessee private prison sued his guards for a § 1983 violation.[229] The guards responded that they were immune from such lawsuits under the doctrine of "qualified immunity," as they were acting under color of state law.[230] The Court rejected this argument, however, stating that "[h]istory

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[220] *Id.* at 500 (citing Pinaud v. County of Suffolk, 52 F.3d 1139, 1161–62 (2d Cir. 1995) (Jacobs, J., concurring in part and dissenting in part)).

[221] *See* Murray v. Miss. Dep't of Corr., 911 F.2d 1167, 1167–68 (5th Cir. 1990) (per curiam) (holding that a state inmate is not entitled to damages for work without pay because the Thirteenth Amendment allows involuntary servitude as punishment for crime).

[222] *See* 455 F.3d 562, 563 (5th Cir. 2006) (per curiam).

[223] *Id.*

[224] *See supra* text accompanying note 216.

[225] *See supra* note 142 and accompanying text (addressing *Reynolds*, *Pollock*, and the state's central role in judicial determinations of labor as punishment under the Thirteenth Amendment).

[226] *Compare* Ali v. Johnson, 259 F.3d 317, 318 (5th Cir. 2001) (describing *Watson* as "an anomaly in federal jurisprudence" and holding that no issue of involuntary servitude arises in prisoner cases on private property, though not specifically private *prisons*), *with* Davis v. Hudson, No. 00-6115, 2000 U.S. App. LEXIS 18913, at *8–*9 (10th Cir. Aug. 4, 2000) (disagreeing with *Pischke* and holding that "[t]here is a very significant difference between a state permitting a private person to hold another in involuntary servitude and a state contracting with a private party to administer a facility," and recognizing that there may be cases of private prisoner exploitation that could take the prisoner's involuntary servitude claim outside of the Thirteenth Amendment's "state imprisonment exception.").

[227] *See infra* text accompanying notes 224–26.

[228] *See, e.g.*, Richardson v. McKnight, 521 U.S. 399 (1997) (denying private prison guards § 1983 qualified immunity).

[229] *Id.* at 401.

[230] *Id.* at 401–02.

does *not* reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards."[231] As the private prison management "firm is systematically organized to perform a major administrative task for profit," the state's contract "grant[s] this private firm freedom to respond to those market pressures through rewards and penalties that operate directly upon its employees."[232] Since these aspects of the private firm can control the behavior of employees, the immunity typically granted to a public prison guard as a government employee is unnecessary.[233]

Two important aspects of *Richardson* must be mentioned with regard to a potential Thirteenth Amendment claim. First, the Court insulated the public prison system from liability for the actions of the private prisons with whom it contracts.[234] Implicitly, then, the Court also recognized that private prison companies and states' departments of corrections are two different entities with different interests.[235] As other courts have held, the government's interest is in rehabilitating the offender.[236] The private prison, on the other hand, exists solely for profit.[237] Given the Supreme Court's recognition of this function, it becomes easier to make the argument that, in the private prison's hands, an inmate plaintiff is subjected to slavery-like conditions. He is dehumanized to nothing more than a commodity—being sustained at a modest price while used to increase the value of CCA's, Wackenhut's, and similar companies' shares.[238]

Second, *Richardson* creates the possibility of a claim against private prison officials for constitutional rights violations.[239] If a private inmate can bring an action against the officials who hold him, unlike his counterparts in the public prison, one must ask which of the prisoners' rights render that distinction important and thus give meaning to this right to sue. As even the Seventh Circuit has held, prisoners are not "employees" as defined in the FLSA.[240] Rights given to employees are obtained by contract, whereas prisoners have not contracted with either the state or the private prison company to perform services.[241] Instead, prisoners have been "taken out of

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[231] *Id.* at 404.

[232] *Id.* at 409–10.

[233] *See id.* at 411.

[234] *See* White, *supra* note 7, at 138.

[235] *See Richardson*, 521 U.S. at 412 ("The organizational structure is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior . . . pressures not necessarily present in government departments.").

[236] *See* Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005) ("If [the prison] puts [inmates] to work, it is to . . . keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside.").

[237] *See Richardson*, 521 U.S. at 409 ("[CCA] is systematically organized to perform a major administrative task for profit.").

[238] *See* Dolovich, *supra* note 17, at 474–75 (discussing the pressure private prison companies receive from shareholders and contracting states to "economize," and the effects it has on prisoners).

[239] *See id.* at 486.

[240] *See* Sanders v. Hayden, 544 F.3d 812, 814 (7th Cir. 2008); *Bennett*, 395 F.3d at 409.

[241] *See* Hale v. Arizona, 993 F.2d 1387, 1395 (9th Cir. 1993) ("[Prisoners] 'have not

the national economy" to work toward their rehabilitation.[242] The circuits are, therefore, essentially in accord with the idea that a prisoner never has the right to sue for labor rights.

In determining that the public-private distinction is immaterial regarding a prisoner's right to wages, Posner reasoned that "neither the rights nor the liabilities of a state agency should be affected by its decision to contract out a portion of the services that state law obligates it to provide."[243] *Richardson*, however, clearly holds that a state agency's liabilities *are* affected by its decision to send inmates to a private facility. Once the agency does so, it effectively requires the prisoner to seek relief against his private holders and not the state.[244] Not only are these suits allowable, *Richardson*'s public jail versus private prison distinction practically requires the inmate, if he wants to challenge his conditions, to sue the private corrections corporation or challenge its contract with the state under § 1983.[245]

The isolation and liability of the private prison industry created by *Richardson* could prove extremely beneficial to an inmate seeking redress under the Thirteenth Amendment.[246] Though the Supreme Court has held those who work in private prisons to be performing state action sufficient to satisfy § 1983,[247] finding state action is irrelevant in the Thirteenth Amendment context. It regulates both private and public acts that create the "badges and incidents" of slavery.[248] Regarding the prison work performed by private inmates, then, there is only one remaining question: If prisoners

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contracted with the government to become its employees. Rather, they are working as part of their sentences of incarceration.'") (quoting Vanskike v. Peters, 974 F.2d 806, 810 (7th Cir. 1992)).

[242] *Id.*

[243] *Bennett*, 395 F.3d at 410.

[244] *Compare* Richardson v. McKnight, 521 U.S. 399, 411 (1997) ("Hence a judicial determination that 'effectiveness' concerns warrant special immunity-type protection in respect to [the governmental] system does not prove its need in respect to the [private prison system]."), *with* White, *supra* note 7, at 139 ("Notwithstanding *McKnight*'s clarifying functions, then, the state still seems able to reduce its level of legal responsibility to inmates when it incarcerates them in private prisons.").

[245] These suits based on the contract are still possible because, although the Court ruled that private prison guards are not state actors for purposes of immunity, *Richardson* left open the question of the state's involvement in § 1983 liability. *See* Paul Howard Morris, *The Impact of Constitutional Liability on the Privatization Movement After* Richardson v. McKnight, 52 VAND. L. REV. 489, 516 (1999).

[246] *But see* Dolovich, *supra* note 17, at 486 (arguing that *Richardson* may not make much difference to private prisoners, as the right prisoners seek to assert must be "clearly established" before it can survive).

[247] West v. Atkins, 487 U.S. 42, 54 (1988).

[248] *See* Bailey v. Alabama, 219 U.S. 219, 241 (1911) ("'[T]he Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.'") (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).

are not employees of the private firm, and they are not under state custody, what is their condition? The only plausible answer seems to be an illegal one—that of private indentured servants.

D. The Prisoner Plaintiff's Rights and Chances for Success

Under these circumstances, a Supreme Court claim for a private prisoner under the Thirteenth Amendment is at least plausible, if not potentially successful. Under *Richardson*, the state, when it performs its contract with the private prison firm, essentially removes the inmates from its purview when it requires their incarceration at sentencing and then transfers them to a private facility. It places them on private property under the supervision of private officers, who are treated by the Supreme Court as members of a profit-driven, cost-reducing system that does not share the public prison philosophy of rehabilitation and inmate reform.[249] At least one circuit has held that a prisoner is an "employee" under FLSA when the state department of corrections sends him to work for a private firm.[250] Nevertheless, they can never be employees of their prisons, either public or private, because "[p]eople are not imprisoned for the purpose of enabling them to earn a living."[251] The private prison thus exploits these prisoners to make profit with the state's permission, while the prisoners are legally forbidden from being considered its employees and taking part of that revenue. As such, their condition appears to be that of involuntary servants akin to antebellum slaves, the "Chinese coolie[s]," or "Mexican peonage" victims mentioned by Justice Miller.[252]

Contrary to *Pischke* and similar cases, the legislative and judicial history of the Punishment Clause does not allow the establishment of involuntary servitude alone to dispose of the question.[253] It allows a prisoner, duly convicted of a crime, to be compelled to work without pay during the period of incarceration.[254] Nevertheless, the history of this clause in both Congress and the courts speaks against Posner's

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[249] *Compare Richardson*, 521 U.S. at 410 (finding that private prison corporations are driven by the market's competitive pressures), *with* Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005) (distinguishing prisoners from employees because the purpose of their work is either to offset costs, keep them out of trouble, or equip them with skills for the outside world).

[250] *See* Watson v. Graves, 909 F.2d 1549, 1556 (5th Cir. 1990).

[251] *Bennett*, 395 F.3d at 410.

[252] Slaughter-House Cases, 83 U.S. 36, 72 (1872).

[253] *See supra* note 141 and accompanying text (arguing that the prohibition against involuntary servitude was included for the protection of free labor, and therefore any allowable compulsory labor must be separated from the right of free citizens to choose their profession, enter contracts, etc.); *see also Bailey*, 219 U.S. at 241 (holding that the purpose of the Thirteenth Amendment was "to make labor free").

[254] *See* AMAR, *supra* note 16, at 359 (distinguishing involuntary servitude of prisoners because they have been deprived of their liberty via due process, thus not offending the rights of free laborers).

conclusion and holds that the incarcerator's identity *does* matter. The Punishment Clause was drafted at a time when criminal punishment was considered a function of the state, and was totally under the state's control.

As Justice Bradley noted in *Pollock*, forced labor is a punishment "which society may compel," but otherwise labor in the United States must be free and voluntary.[255] The Thirteenth Amendment was never meant to authorize criminals to be put to work against their will for a profit motive, as indeed that would violate the amendment's spirit at the time of its drafting. Instead, the exception was made due to the state's different motives in forcing a prisoner to work, i.e., rehabilitation and turning the prisoner into a prosperous taxpayer rather than a tax consumer. As private prison corporations' motives differ, the Court could consider their actions in housing and working inmates, and the state's actions facilitating them, to constitute a "badge or incident" of involuntary servitude similar to a convict lease system. The logical conclusion, then, is that state private prison contracts, and indeed the industry in its current form, violate the Thirteenth Amendment's prohibition against such activity.

III. TURNING THE PRIVATE PRISON PUBLIC: A PROPOSED SOLUTION

Despite the Thirteenth Amendment concerns, it is a bit unrealistic to call for the complete shutdown of the private prison industry. Its recent popularity and wide use would cause even the Supreme Court to pause at such a suggestion. It is, after all, a billion dollar industry.[256] Additionally, these prisons have been lauded for bringing needed economic investment and jobs to poverty stricken rural areas.[257] The good news, however, is that these prisons do not have to go away, or even lose profitability, in order to avoid Thirteenth Amendment concerns. As this Note has argued, the major historical and constitutional problem with incarcerating prisoners and putting them to work, as one California prison official has admitted, is that it is a "core state function."[258] If these prisons and their employees were brought under the purview of the state, therefore, the Thirteenth Amendment issue of private exploitation would dissipate.[259] After all, the Thirteenth Amendment certainly allows the state to compel

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[255] Pollock v. Williams, 322 U.S. 4, 17–18 (1944).

[256] *See* White, *supra* note 7, at 134.

[257] Sinden, *supra* note 132, at 44; *see* Leslie Berestein, *Company Wants to Build a Mega-Prison in County*, SAN DIEGO UNION-TRIB., Mar. 20, 2008, at A1, *available at* http://www.signonsandiego.com/news/metro/20080320-9999-ln20ccal.html (describing a CCA illegal immigrant detention facility contract, which will create 375 jobs).

[258] Lifsher, *supra* note 8; *see also* United States v. Reynolds, 235 U.S. 133, 149 (1914).

[259] This solution, legislatively converting the constructed prison into a quasi-state entity, has been suggested elsewhere in other contexts. *See* David J. DelFiandra, *The Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983*, 38 DUQ. L. REV. 591, 615–16 (2000) (suggesting the legislative imposition of "quasi-private" prisons to resolve the immunity problem created by *Richardson*).

post-conviction involuntary servitude via the Punishment Clause.[260] As the federal government and the states hold the responsibility for both their criminal punishment systems and procurement regimes, even the Supreme Court has recognized that legislatures must take action within their administrative codes to remove the taint of prisoner civil rights violations in private facilities.[261]

For each state, there are statutes and/or provisions in its administrative code regarding the solicitation and award of prison construction and operation contracts.[262] When these contracts were first distributed in the 1980s, the haste to privatize corrections led many states to be lenient in oversight and accountability standards. This has led to problems with prison guard training, abuse of prisoners, and corruption in the twenty-first century.[263] Understandably, Reagan-era beliefs reinforced the notion that all the state had to do was pay the contract price, and the rest would be taken over by the private firm. The lack of oversight of private prison officials, however, was the impetus for Eighth Amendment, FLSA, and Thirteenth Amendment legal arguments that followed as well as the exposure to liability set forth in *Richardson*.[264]

Nearly all states that allow private prison contracting require some form of reporting, usually that the prisons comply with the standards outlined by the American Correctional Association (ACA).[265] Some scholars nonetheless scoff at this requirement since ACA accredited facilities are considered among the worst in the nation.[266] Tennessee, the birthplace of CCA and the first state to privatize, has one of the most relaxed standards.[267] The Tennessee Code explicitly states that the private firm, not the state, employs the guards and is responsible for them.[268] The District of Columbia, possibly due to its small size and great need to send prisoners elsewhere, is also quite lenient in its standards, simply allowing prisoners to be shipped to any prison "operated *or contracted for* by the Bureau of Prisons."[269] In fact, D.C.'s administrative code

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[260] *See* Tourscher v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999) (holding that the state may compel a prisoner to work at any time post-conviction, even pending appeal, as long as the conviction is presumptively valid).

[261] Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 72 (2001) ("Whether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide.").

[262] *See* Sinden, *supra* note 132, at 45; *see, e.g.*, CAL. PENAL CODE § 6031.6 (West 2000); VA. CODE ANN. § 53.1-262 (2005).

[263] Sinden, *supra* note 132, at 45; *see also* Lifsher, *supra* note 8 ("Critics counter that states that use private prisons get what they pay for: Guards are poorly paid and trained, and private prisons experience more escapes and more disciplinary problems that state-run institutions . . . .").

[264] *See supra* Part II.C.

[265] *See* Dolovich, *supra* note 17, at 488.

[266] *See* Sinden, *supra* note 132, at 45.

[267] *See* Greene, *supra* note 4, at 11–12 (outlining how CCA has "prospered greatly" in Tennessee due to its two legislative bids to take over the state's prison system).

[268] TENN. CODE ANN. § 41-24-113 (West 2008).

[269] D.C. CODE § 24-101(a) (2001) (emphasis added).

goes on to list specific types and numbers of prisoners who will be committed to private facilities, with only slight mention of the status of private prison employees.[270]

California is better in this regard, requiring reporting and sanctions if health and safety laws are violated, but it still does not provide for state liability or conditions placed in the initial contract.[271] Texas and Arkansas, by contrast, are relatively new to prison privatization compared to other states and thus are still developing their contracting laws. However, no trend has appeared that would suggest greater state oversight of private prisons.[272]

In reviewing the state codes, therefore, a scheme similar to that adopted by Virginia seems to have come the closest to avoiding the Thirteenth Amendment problem. Its Corrections Private Management Act (CPMA) authorizes the public procurement of private prison contracts, but it is accompanied by an extensive portion of the Virginia Administrative Code.[273] In those regulations, Virginia requires private prisons to compensate inmates at levels commensurate to the state department of corrections pay schedule,[274] send its employees to the same training that public prison guards receive,[275] and report all revenue-producing activities to the state.[276] Furthermore, the CPMA does not allow the state prison authority to delegate the determination of inmate work performed or wages received to the private prison corporation.[277] In other words, if the inmate works or is paid, it is at the behest and benefit of the state.

Essentially, this code makes private prisons an arm of the state. It takes the living conditions, work environment, and cost-cutting incentives out of the private contractor's hands, and redirects them toward the state agency. The contract, essentially, is for the construction and daily management of the prison—and nothing more. The guards must be trained and the prison is subject to stringent and regular reporting standards.[278] This facet is especially important since one of the greatest civil rights criticisms against private prisons is the lack of accountability and oversight.[279] By pulling oversight, prison employees, and inmate conditions back under the state umbrella, Virginia's procurement system takes the privately held inmate out of the profit-driven environment and reestablishes rehabilitation as the goal of incarceration, thus answering both the immunity problem of *Richardson* and the exploitation factor shunned by the Supreme Court's early Thirteenth Amendment cases.

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[270] *Id.* at § 24-101(c).

[271] CAL. PENAL CODE § 6031.6(b)(3), (c) (West 2000).

[272] *See* AUSTIN & COVENTRY, *supra* note 9, at 25 (stating that Texas even requires cost-cutting as a legislative prerequisite to contracting with a private prison corporation).

[273] Corrections Private Management Act, VA. CODE ANN. § 53.1-261 to -267 (2005).

[274] 6 VA. ADMIN. CODE § 15-45-200 (2003).

[275] *Id.* at § 15-45-1930.

[276] *Id.* at § 15-45-190.

[277] VA. CODE ANN. § 53.1-265(4) (2005).

[278] *See* 6 VA. ADMIN. CODE § 15-45-150 (2003), *id.* at § 15-45-70.

[279] Sinden, *supra* note 132, at 45.

Due to Virginia's administrative safeguards, its procurement regime is the most successful at avoiding any Thirteenth Amendment concerns. As a further benefit, its takeover of prison management reduces the amount of other § 1983 suits that could be brought due to unmonitored prison abuses. On the other hand, there is a downside to having such strict standards. As of 2003, Virginia only had one private prison within its borders.[280] In 2008, Virginia's private prison inmates numbered a mere 1579.[281] While this number may be small, Virginia inmates in private prisons can at least be sure that it is the Commonwealth holding them and putting them to work without the taint of exploitation by a board of directors. The administrative code effectively removes the incentive for legislators to reduce oversight of prison conditions in the name of cutting costs. Finally, by maintaining the state's responsibility over Virginia inmates, the code also allows the state to focus on other ways of reducing its prison population.[282]

CONCLUSION

Since the Thirteenth Amendment's passage in 1865, three distinct interpretations of the Punishment Clause have emerged. The first considered the entire amendment dead letter after African slavery was abolished, and the second allowed the state to punish its criminals, i.e., those convicted and deprived of liberty via due process, through work as a dedication to Penn and the early penitentiary reformers. The third, which became apparent after the private prison boom of the 1980s evidenced by *Pischke* and other circuit cases, disturbingly neglects the state's role in incarceration and assumes that the Punishment Clause is an absolute bar to prisoners' claims of involuntary servitude. Given the profit-driven motive of these corporations, the rising inmate population, and the widespread failure of the criminal justice system to prevent recidivism, such a judicial stance could be extremely harmful to the nation's attempts to improve its punishment regimes.

Many scholars have asserted the moral problems accompanying the recent private exploitation of inmates. By combining the Supreme Court's early rulings on the Thirteenth Amendment with its recent decision in *Richardson*, a moral argument can be made into a viable legal argument. A state, by contracting its inmates out of a rehabilitative system and into the marketplace, subjects them to involuntary servitude that constitutes a badge or incident of slavery. The Supreme Court is at least poised to render such a decision. By pulling the inmates and prison employees back under the public umbrella via their procurement standards, states and the federal government can do much to avoid the issues that bristle the feathers of scholars, civil rights groups, and prison guard unions.

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[280] *See* Parenti, *supra* note 181, at 35.

[281] *See* Ronald Fraser, Editorial, *Virginia's Prison Gravy Train*, ROANOKE TIMES, Mar. 28, 2008, at B9, *available at* http://www.roanoke.com/ditorials/commentary/wb/156157.

[282] *See id.* (discussing Virginia's need to reduce state prison populations by ridding the criminal code of mandatory minimums, which are championed by private prison corporations).