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## A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?

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## A PROMISE THE NATION CANNOT KEEP: WHAT PREVENTS THE APPLICATION OF THE THIRTEENTH AMENDMENT IN PRISON?

Raja Raghunath\*

### ABSTRACT

The walls of the prison are not solely physical. The doctrine of judicial deference to prison officials, which compels courts to defer to the discretion of those officials in almost all instances, obstructs the effective scrutiny of modern practices of punishment. Since its ratification, the Thirteenth Amendment—which prohibits slavery or involuntary servitude anywhere within the United States or its jurisdiction, except where imposed “as a punishment for crime whereof the party shall have been duly convicted”<sup>1</sup>—has been seen by courts as one brick in this wall. This Article makes the novel argument that, properly read, the amendment should function instead as a breach in this wall—one of sufficient size to allow some needed light to shine within.

Although in some states inmates may still be sentenced to hard labor, in most systems today, they labor under a more general requirement that, if they are able-bodied, they must work. Reading the word “punishment” in the Thirteenth Amendment in a manner consistent with the way that same word is used in the Eighth Amendment, and is understood in the rest of the Constitution, reveals that only those inmates who are forced to work because they have been so *sentenced*—which is not the vast majority of inmates compelled to work in the present day—should be exempted from the general ban on involuntary servitude. In addition to examining the jurisprudence of the Eighth and Fifth Amendments as it relates to this question, this Article also details the history of forced labor programs as punishment, and how courts’ reading of the punishment exception is not supported by either the circumstances surrounding ratification of the Thirteenth Amendment or the ways that courts have construed it as a whole since that time.

This Article argues that the reason courts have broadened the meaning of “punishment” in the Thirteenth Amendment, while simultaneously narrowing it in the Eighth Amendment, is because these directly contradictory acts of constitutional interpretation

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<sup>1</sup> U.S. CONST. amend. XIII, § 1.

both serve the same end of judicial deference to the actions of prison officials, which has resulted in the general abdication by courts of their constitutional obligations to oversee those officials' actions. This Article also theorizes about the potential outcomes of interpreting the Thirteenth Amendment properly with respect to prison labor, and suggests that the resulting recognition of the punitive purposes that have always driven our prison labor programs may actually lead to an improvement in the overall well-being of prisoners, and perhaps of society as a whole.

So this is the Chain Gang. Among ourselves it is most often referred to as The Hard Road, as a noun and as a proper name, capitalized and sacred. In the evening you can see us driving down the highway in a long caravan of black and yellow trucks heading back to Camp. And as we go by we get down on our knees in order to get a better view, our wicked, dirty faces peering through the bars to eyeball at your Free World.<sup>2</sup>

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<sup>2</sup> DONN PEARCE, COOL HAND LUKE 6–7 (1965).

## INTRODUCTION

The walls of the prison are not solely physical. “[C]ontempt, the highest of walls,”<sup>3</sup> reinforces and heightens the barrier between inmates and free society. In the realm of individual rights, the doctrine of judicial deference to prison officials, which compels courts to defer to the discretion of those officials in almost all instances,<sup>4</sup> is a high barrier to the effective scrutiny of modern practices of punishment. Since the time of its ratification in the Reconstruction Era, the Thirteenth Amendment has been improperly employed as one brick in this wall. Properly read, however, the amendment instead functions as a breach in this barrier: not one large enough to permit escape, but a breach of sufficient size to allow some needed light to shine within.

The Thirteenth Amendment prohibits slavery or involuntary servitude anywhere within the United States or its jurisdiction, except where imposed “as a punishment for crime whereof the party shall have been duly convicted.”<sup>5</sup> In the years since ratification of the amendment, federal courts have construed this exception to allow for nearly all forms of forced labor by convicts,<sup>6</sup> except where particular instances of such labor have run afoul of the Eighth Amendment’s ban on “cruel and unusual punishments.”<sup>7</sup> In some states, individuals may still be sentenced to hard labor,<sup>8</sup> but in most systems today, inmates labor under a more general requirement that, if they are able-bodied, they must work.<sup>9</sup>

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<sup>3</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 287 (Alan Sheridan trans., Pantheon Books 1977) (1975) (quoting Michèle Perrot).

<sup>4</sup> See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 121 (1977) (holding, *inter alia*, that reasonable views of correctional officials of possible detriment to the institution from prisoner labor organizing outweighed those inmates’ First Amendment associational rights).

<sup>5</sup> U.S. CONST. amend. XIII, § 1. The amendment reads in full: “SECTION 1. 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. SECTION 2. Congress shall have power to enforce this article by appropriate legislation.” *Id.*

<sup>6</sup> See *Ali v. Johnson*, 259 F.3d 317, 317 (5th Cir. 2001) (“[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.”).

<sup>7</sup> U.S. CONST. amend. VIII; see *Morgan v. Morgensen*, 465 F.3d 1041, 1044 (9th Cir. 2006) (holding that where plaintiff-inmate and “other prison print shop employees noticed that his press was dangerously defective,” and the machine had previously “bucked and almost tore off two of his fingers while he was operating it,” plaintiff who “was subsequently injured when the press caught his hand and tore off his right thumb” was entitled to proceeds for damages against the prison official overseeing the shop for a “violation of the Eighth Amendment”).

<sup>8</sup> See, e.g., VT. CONST. ch. II, § 64 (“[M]eans ought to be provided for punishing by hard labor, those who shall be convicted of crimes not capital, whereby the criminal shall be employed for the benefit of the public, or for the reparation of injuries done to private persons: and all persons at proper times ought to be permitted to see them at their labor.”).

<sup>9</sup> See, e.g., TEX. GOV’T CODE ANN. § 497.099 (Vernon 2007) (“The department shall

Reading the Thirteenth Amendment in a manner that is consistent with the weight of constitutional jurisprudence under the Eighth Amendment<sup>10</sup> and the Fifth Amendment<sup>11</sup> reveals that only those inmates who are forced to work because they have been so *sentenced* should be exempted from the general ban on involuntary servitude. That is not, however, how the courts have ever interpreted the Thirteenth Amendment. Instead, the logic of the prison deference doctrine has driven the judicial broadening of the meaning of punishment where such deference is served,<sup>12</sup> and the narrowing of the meaning of that word in situations where doing so serves the same end.<sup>13</sup> This self-serving act of constitutional interpretation deprives the Thirteenth Amendment of meaning and effect. “If Congress cannot say that being a free man means at least this much” to those held behind prison walls, as the Supreme Court has noted in another context, “then the Thirteenth Amendment made a promise the Nation cannot keep.”<sup>14</sup>

Part I of this Article describes the doctrine of judicial deference to prison officials and its centrality to both our modern system of punishment and the effectuation of prisoners’ rights. This part also offers some predictions as to what might come out of a re-examination, in the manner sought in this Article, of the Thirteenth Amendment’s protections for prisoners. Part II relates the history of forced labor programs as punishment in Western society, and specifically describes how the protections of the Thirteenth Amendment have been held not to apply to such programs. Part III of this Article describes how neither the historical circumstances surrounding ratification of the amendment, nor the relevant ways that courts’ understandings of the amendment have evolved since that time, support the manner in which it is currently applied by courts to prisoners. Part IV describes the parallel jurisprudence of the Eighth and

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require each inmate . . . housed in a facility operated by or under contract with the department to work . . . to the extent that the inmate . . . is physically and mentally capable of working.”)

<sup>10</sup> See *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (drawing a distinction between harms characterized as prison conditions and those “formally meted out *as punishment* by the statute or the sentencing judge,” with the former category only actionable where “some mental element . . . attributed to the inflicting officer” is present).

<sup>11</sup> See *United States v. Ramirez*, 556 F.2d 909, 920–21 (9th Cir. 1976), *cert. denied*, 434 U.S. 926 (1977) (holding, *inter alia*, that the “punitive element [of incarceration] connected with the crime, and the only element still controlled by the sentencing judge, is the loss of freedom for some period of time,” such that prison officials could not “punish individual prisoners for their crimes” without violating the indictment clause of the Fifth Amendment).

<sup>12</sup> See, e.g., *Smith v. Dretke*, 157 F. App’x 747, 748 (5th Cir. 2005) (“The Thirteenth Amendment permits involuntary servitude without pay as punishment after conviction of an offense, even when the prisoner is not explicitly sentenced to hard labor. Consequently, Smith has not shown that the defendants violated his rights by making him hold a prison job.”) (internal citations omitted).

<sup>13</sup> See, e.g., *Helling v. McKinney*, 509 U.S. 25, 42 (1993) (Thomas, J., dissenting) (“The text and history of the Eighth Amendment . . . raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence.”).

<sup>14</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

Fifth Amendments, which have taken the opposite approach to the meaning of the word “punishment” to reach the same end of defeating most prisoner claims for violations of their rights under those amendments.

Part V of this Article explores the philosophical differences between what we understand the phrase “hard labor” to mean, and the properly understood meaning of “punishment” in the Thirteenth Amendment, and asks whether those differences can meaningfully guide the application of the arguments made herein. This part also theorizes about the potential outcomes of such application; in particular, the value of fully understanding the punitive reasons why we compel prisoners to work as a potential constraint on the types of labor to which we compel them. The Article concludes that there exists the possibility that prisoners in particular, and society as a whole, will be better off as a result of adopting this new understanding of the Thirteenth Amendment.

## I. THE DOCTRINE OF JUDICIAL DEFERENCE TO PRISON OFFICIALS AND ITS IMPLICATIONS

### A. *The Abdication of Judicial Responsibility, in Service of Punishment*

In earlier times, the protections of the Constitution were denied to prisoners compelled to work because the beneficial value of the prisoners’ labor was owned by the prison;<sup>15</sup> i.e., they were enslaved by the state.<sup>16</sup> Although such views do not necessarily inform today’s courts,<sup>17</sup> the modern doctrine of prison deference presents a

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<sup>15</sup> See Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 890 (2008) (“The second way that exchange might be lacking is if inmate work, while productive, is in the prison’s possession from the start, rather than being transferred in an exchange between the parties. An argument along these lines appears to underlie courts’ frequent assertion that inmates cannot be employees because ‘the economic reality is that their labor belong[s] to the institution.’”) (internal citations omitted).

<sup>16</sup> See E. Stagg Whitin, *The Caged Man: A Summary of Existing Legislation in the United States on the Treatment of Prisoners*, 3 PROC. ACAD. POL. SCI. 24 (1913) (“The prisoner is the property of the state or a subdivision of the state while he is in penal servitude.”); see also *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 795–96 (1871) (“A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.”).

<sup>17</sup> See, e.g., *Washlefske v. Winston*, 60 F. Supp. 2d 534, 539 (E.D. Va. 1999), *aff’d*, 234 F.3d 179 (4th Cir. 2000); *cert. denied*, 532 U.S. 983 (2001) (“[T]he idea expressed by the court in *Ruffin*, that inmates are no more than ‘slaves of the State,’ has been repeatedly and expressly repudiated by other courts.”).

comparably formidable obstacle to the adoption of an interpretation of the Thirteenth Amendment's "punishment for crime" exception that limits it to those inmates who are compelled to work *as punishment*; that is, to the extent they are so sentenced by a judge or jury.<sup>18</sup>

The strength of the prison deference doctrine is shown by the courts' uniform resistance to attempts by prisoners to invoke other workers' rights, such as the statutory minimum wage (or any wage at all),<sup>19</sup> the protections of the Eighth Amendment's ban on "cruel and unusual punishments" to enforce limits on hours worked,<sup>20</sup> or to hold prison officials liable for constitutional torts when inmates are injured on the job.<sup>21</sup> Although the stated rationale that courts have used has changed over time and in these different contexts, the underlying principle of the judiciary's deference has not,<sup>22</sup> as it is rooted in the essence of our modern system of punishment.

The courts defer to prison administrators because the prison, by definition, operates in an entirely different sphere than the free world that the rest of us inhabit. As the philosopher Michel Foucault described in his landmark work *Discipline and Punish*, the modern prison has supplanted the public square as the site of collective punishment, but the *locus* of that punishment has not changed—it remains the body of the criminal.<sup>23</sup> In lieu of inflicting physical pain as retribution for wrongs, we segregate

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<sup>18</sup> Cf. *Helling*, 509 U.S. at 38 (Thomas, J., dissenting) ("At the time the Eighth Amendment was ratified, the word 'punishment' referred to the penalty imposed for the commission of a crime.") (internal citations omitted).

<sup>19</sup> See generally Zatz, *supra* note 15, at 867–81 (discussing contemporary prison labor and consistent exclusion of prisoners from Fair Labor Standards Act coverage, based on a variety of justifications).

<sup>20</sup> See *Woodall v. Partilla*, 581 F. Supp. 1066, 1077 (N.D. Ill. 1984) ("In the instant case, Woodall does not allege that defendants compelled him to perform labor beyond his physical capabilities or which endangered his health. Nor does he allege that he suffered abusive treatment. Woodall merely asserts that he worked an average of 16–18 hours per day. The complaint is wholly devoid of specific allegations of extreme hardship in his working conditions and thus fails to state a claim under the Eighth Amendment.")

<sup>21</sup> See generally Colleen Dougherty, Comment, *The Cruel and Unusual Irony of Prisoner Work Related Injuries in the United States*, 10 U. PA. J. BUS. & EMP. L. 483, 484 (2008) (arguing that "prisoners in many states can be severely injured while forced to work with defective or unsafe prison machinery but have difficulty seeking a remedy because they cannot meet the onerous deliberate indifference standard required to establish an Eighth Amendment violation"); Amy L. Riederer, Note, *Working 9 to 5: Embracing the Eighth Amendment Through an Integrated Model of Prison Labor*, 43 VAL. U. L. REV. 1425, 1444–47 (2009) (describing various prison labor and non-labor conditions held not sufficient by courts to constitute actionable violations of Eighth Amendment).

<sup>22</sup> See, e.g., *Ex Parte Taws*, 23 F. Cas. 725, 725 (C.C.D. Pa. 1809) (No. 13,768) ("We do not think it right to interfere with the jailer in the exercise of the discretion vested in him, as to the security of his prisoners; unless it appeared that he misused it for purposes of oppression, of which there is no evidence in this case.")

<sup>23</sup> FOUCAULT, *supra* note 3, at 11 ("But the punishment-body relation is not the same as it was in the torture during public executions. The body now serves as an instrument or

the criminal from public view and access to particular rights of the free.<sup>24</sup> Foucault called this “an economy of suspended rights.”<sup>25</sup> Included among these suspended rights are most of the rights of free workers, in part because the notion of providing them to convicted criminals offends popular sensibilities.

David Garland has traced how, in the last forty years, after the rehabilitation of prisoners “was suddenly dislodged from its central, axiomatic position” in criminal justice policy in the early 1970s “and made to occupy a quite different and diminished role in subsequent policy and practice,”<sup>26</sup> we have come to measure our collective well-being by the degree to which criminals are deprived of their rights as punishment, what is called the “retributive” model of punishment.<sup>27</sup> Garland saw this trend as having come so far today that “[t]he interests of victim and offender are assumed to be diametrically opposed: the rights of one competing with those of the other in the form of a zero sum game.”<sup>28</sup> Paul Campos has referred to the inequalities and particular retributive mismatches that necessarily result from seeking such a “reciprocity of suffering”<sup>29</sup> as the “paradox of punishment [that] has become hidden, like the criminal himself, from our view.”<sup>30</sup>

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intermediary: if one intervenes upon it to imprison it, or to make it work, it is in order to deprive the individual of a liberty that is regarded both as a right and as property. . . . Physical pain, the pain of the body itself, is no longer the constituent element of the penalty.”)

<sup>24</sup> See, e.g., M. Kay Harris & Frank M. Dunbaugh, *Premise for a Sensible Sentencing Debate: Giving Up Imprisonment*, 7 HOFSTRA L. REV. 417, 419 (1979) (quoting Dr. Karl Menninger as noting that “[o]ur forefathers’ inventions were replaced by the slow tortures of imprisonment—away from the public view”) (internal citation omitted).

<sup>25</sup> FOUCAULT, *supra* note 3, at 11 (“From being an art of unbearable sensations punishment has become an economy of suspended rights.”). Conservative critics of Foucault find his perspective replete with “romantic myths about incarceration,” and argue that principles that “remain abhorrent to a Foucauldian perspective on corrections” nevertheless are “essential to sound management.” See, e.g., Heather Mac Donald, *The Jail Inferno*, CITY J., Summer 2009, at 12–23.

<sup>26</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 54 (2001). See generally *id.* at ch. 3 (describing how “[a] movement that initially aimed to enhance prisoners’ rights, minimize imprisonment, restrict state power, and end predictive restraint, ultimately ushered in policies that did quite the opposite”).

<sup>27</sup> See Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 441 (“The deontological theory of punishment justifies punishment by appeal to retribution: to take retribution on a wrongdoer is an unconditional duty.”).

<sup>28</sup> GARLAND, *supra* note 26, at 180; see also John Pfaff, *Reform School: Five Myths About Prison Growth Dispelled*, SLATE, Feb. 19, 2009, <http://www.slate.com/id/2211585> (“[I]f we look back historically at the lockup rate for mental hospitals as well as prisons, we have only just now returned to the combined rates for both kinds of incarceration in the 1950s. In other words, we’re not locking up a greater percentage of the population so much as locking people up in prisons rather than mental hospitals. Viewed through this lens, what seems remarkable is not the current era of mass incarceration but the 1960s and ‘70s, during which we emptied the hospitals without filling the prisons.”).

<sup>29</sup> Paul Campos, *The Paradox of Punishment*, 1992 WIS. L. REV. 1931, 1936.

<sup>30</sup> *Id.* at 1940.

The interplay between these various forces in our system of punishment has led to what one court described as a “tension” in the modern doctrine of prison deference

between the view that a prisoner enjoys many constitutional rights, which rights can be limited only to the extent necessary for the maintenance of a person’s status as prisoner (or parolee), and the view that a prisoner has only a few rudimentary rights and must accept whatever regulations and restrictions prison administrators and State law deem essential to a correctional system.<sup>31</sup>

In 1974, a year after the above statement was made by the United States Court of Appeals for the Seventh Circuit, the Supreme Court emphatically proclaimed that there was no “iron curtain” between prisoners and their constitutional rights.<sup>32</sup> At least one observer optimistically predicted that, as judges had “begun to delve into the rationale behind prison regulations,” in the future “a recital of ‘security’ or ‘rehabilitation’ as the purpose of such regulations will not automatically justify them.”<sup>33</sup> However, after a few years of rising crime rates<sup>34</sup> and a number of Supreme Court decisions rejecting such a fulsome approach to prison litigation,<sup>35</sup> by the end of the 1970s others were seeing a “clearly marked trend towards a presumptive validity for prison regulations,”<sup>36</sup> a trend that continues today.<sup>37</sup>

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<sup>31</sup> *Morales v. Schmidt*, 489 F.2d 1335, 1338 (7th Cir. 1973); see also Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 213 (1980) (attributing the doctrine of judicial deference to, *inter alia*, “the traditional distinction drawn by courts between rights and privileges,” such that “courts often labelled all features of prison existence as privileges, and consequently denied review”).

<sup>32</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) (“But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.”).

<sup>33</sup> Sarah M. Singleton, Note, *Unionizing America’s Prisons—Arbitration and State-Use*, 48 IND. L.J. 493, 495 n.12 (1973).

<sup>34</sup> See GARLAND, *supra* note 26, at 106 (“From the mid-1960s onwards, rates of property and violent crime that were double and treble those of pre-war rates increasingly became an acknowledged and commonplace feature of social experience. By the early 1990s, despite some levelling off, the recorded rates were as much as ten times those of forty years before.”).

<sup>35</sup> See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (“[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”); see also *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977).

<sup>36</sup> Robbins, *supra* note 31, at 218.

<sup>37</sup> See *Wilkinson v. Austin*, 545 U.S. 209, 228 (2005) (“It follows that courts must give substantial deference to prison management decisions before mandating additional

Today's courts rely heavily upon the doctrine of prison deference to defeat prisoner claims, irrespective of whether the inmate rights at issue have actually been violated.<sup>38</sup> In an earlier era, this was referred to by one observer as a "'hands-off' doctrine," which, until approximately the late 1960s and early 1970s, compelled "a majority of state and federal courts [to] follow[] a policy of declining jurisdiction over most litigation involving prisons."<sup>39</sup> The modern federal courts often locate the source of their deference in the separation of powers envisioned in the Constitution, noting that the branches of government that are tasked by that document with implementing our system of punishment are the legislature and the executive.<sup>40</sup> As Foucault has pointed out, the roots of this deference actually extend farther back in history than the American Revolution, to the first institutions of penitentiary confinement.<sup>41</sup> Even the first Western jailers, in the sixteenth and seventeenth centuries, demanded a degree of autonomy from the judicial apparatus that created the need for their very profession.<sup>42</sup>

As a result of this history, where courts have wished to preserve the impregnability of the prison's walls from the intrusion of prisoners' rights under Constitutional amendments *other* than the Thirteenth, they have engaged in a far more exacting analysis than they have in the Thirteenth Amendment context, and examined whether the purposes behind the treatment of prisoner-litigants supported categorizing that treatment as "punishment."<sup>43</sup> The question presented by this Article is whether that more exacting

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expenditures . . . "); *Jones*, 433 U.S. at 125 ("The District Court, we believe, got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement.").

<sup>38</sup> See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (holding facially valid a restriction on inmate-to-inmate correspondence, but striking a regulation prohibiting inmates from marrying, as the former was reasonably related to a legitimate penological objective, in that case security, but the latter was not).

<sup>39</sup> *Robbins*, *supra* note 31, at 211 & n.10.

<sup>40</sup> See *id.* at 212 (describing the "basic argument" of separation of powers basis for judicial deference as the fact that "control over prison management lies exclusively with the legislative branch of government," and "federal and state statutes delegate exclusive responsibility for administration of prisons to the executive branch of government, including wide discretion over routine prison matters"); see also *Bell*, 441 U.S. at 548 ("[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.") (citations omitted).

<sup>41</sup> See FOUCAULT, *supra* note 3, at 121 ("[The] functioning [of the oldest penitentiary, the Rasphuis of Amsterdam, opened in 1596,] obeyed three great principles: the duration of the penalties could, at least within certain limits, be determined by the administration itself, according to the prisoner's conduct . . . Work was obligatory; it was performed in common . . . and, for the work done, the prisoners received wages.").

<sup>42</sup> See *id.* at 129 ("The agent of punishment must exercise a total power, which no third party can disturb; the individual to be corrected must be entirely enveloped in the power that is being exercised over him. Secrecy is imperative, and so too is autonomy, at least in relation to this technique of punishment: it must have its own functioning, its own rules, its own techniques, its own knowledge; it must fix its own norms, decide its own results.").

<sup>43</sup> See *infra* Part IV.

analysis, if brought to bear on prisoners' Thirteenth Amendment claims, would yield any benefits for them or only result in greater hardship.

*B. The Hard Road, and What Condemnation to it May Illuminate*

The chain gang prisoners in the novel *Cool Hand Luke* referred to their grueling conditions of forced road labor as “The Hard Road.”<sup>44</sup> Compliance with the punitive demands of a properly understood Thirteenth Amendment, as argued for in this Article, could mean that much prison labor would return to something akin to this Hard Road. The decisions that would have to be made for the implementation of such a return would therefore provide the opportunity to revisit the discussion of who among us is—and is not—properly sent down that road. The prospect of The Hard Road would also introduce, in all concerned, the (hopefully) self-limiting awareness that we are subjecting individuals to unpleasant conditions not for their own purported benefit, but as a penalty for their commission of a crime, so it is incumbent on us to get it right and not overdo it.<sup>45</sup>

For jurisdictions wishing to retain a general inmate work requirement, the most direct response to a Supreme Court opinion returning us to The Hard Road would likely be to lobby for the enactment of a sentencing statute that explicitly includes hard labor or, where such statutes already exist,<sup>46</sup> for their broader application. The legislative, administrative, and expert bodies that exist (or that are created)<sup>47</sup> for such an undertaking would then be given the opportunity to examine the state of prison work requirements, and the nature of modern punishment generally, in their relevant systems, thereby opening to public inquiry the largely unseen lives of the more than 2.3 million people incarcerated in the United States, the highest per-capita rate of imprisonment in the world.<sup>48</sup>

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<sup>44</sup> See PEARCE, *supra* note 2, at 6.

<sup>45</sup> See, e.g., Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 484 (1968) (“Because treatment is regarded as a benefit, though it may involve pain, it is natural that less restraint is exercised in bestowing it, than in inflicting punishment.”); Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRAL. REV. 379, 403–404 (1979) (arguing that retributivism is “the most appropriate theory upon which to construct a just system of definite sentences,” as it “is honest about punishment-as-pain, and therefore, it seeks to limit punishment,” and provides “truth-in-labeling,” insofar as it acknowledges “that punishment is an unpleasant thing to impose on another human being and fellow citizen”) (internal citations omitted).

<sup>46</sup> See LA. REV. STAT. ANN. § 14:30(C)(2) (2008) (declaring that for the crime of first degree murder, “the offender shall be punished by death or life imprisonment at hard labor”); see also BLACK’S LAW DICTIONARY 721 (7th ed. 1999) (noting, in the definition of “hard labor,” that “[s]everal states (such as Louisiana, Maine, and New Jersey) impose hard labor as a sentence for a variety of crimes”).

<sup>47</sup> See, e.g., Ryan Grim, *Webb Crime Bill Moving in House*, HUFFINGTON POST, June 24, 2009, [http://www.huffingtonpost.com/2009/06/24/webb-crime-bill-moving-in\\_n\\_220381.html](http://www.huffingtonpost.com/2009/06/24/webb-crime-bill-moving-in_n_220381.html) (“The Senate bill was introduced by Sen. Jim Webb and would create a commission to make recommendations on the reform of everything from sentencing to drug policy.”).

<sup>48</sup> Pierre Thomas & Jason Ryan, *U.S. Prison Population Hits All-Time High: 2.3 Million*

The flowering of a thousand such examinations across the country could be seen as a cause for guarded optimism. The doctrine of prison deference does have limits, after all, and, in their more extreme forms, those limits are easily identifiable as such. For example, it has been argued that a plain reading of the Thirteenth Amendment would allow for the imposition of either involuntary servitude *or* slavery as punishment for crime.<sup>49</sup> However, we no longer view the infliction of pain—or rather, too *much* pain<sup>50</sup>—as an acceptable form of punishment,<sup>51</sup> so presumably sentencing convicted criminals to slave-like conditions (or granting prison wardens the discretion to treat them as such)<sup>52</sup> is not an acceptable policy option. Justice Antonin Scalia has admitted, for example, that he doubts whether any originalist judge would permit whipping or branding against an Eighth Amendment challenge, “[e]ven if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791 . . . .”<sup>53</sup> Clearly there are situations where our modern definition of punishment will necessarily, and correctly,<sup>54</sup> trump what we take to be our understanding of the original meaning of the term.<sup>55</sup>

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*Incarcerated: DOJ Report Reveals Record Numbers in Prisons Last Year, With Huge Economic Impacts*, ABC NEWS, June 6, 2008, <http://abcnews.go.com/TheLaw/story?id=5009270>.

<sup>49</sup> See generally Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. \_\_\_ (forthcoming 2009), available at <http://ssrn.com/abstract=1347156>.

<sup>50</sup> See *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977) (“Compelling prison inmates to work does not contravene the Thirteenth Amendment . . . . However there are circumstances in which prison work requirements can constitute cruel and unusual punishment . . . [such as where] ‘prison officials knowingly . . . compel convicts to perform physical labor which is beyond their strength, or which constitutes a danger to their lives or health, or which is unduly painful . . . .’”) (internal citations omitted).

<sup>51</sup> See, e.g., *Morgan v. Morgensen*, 465 F.3d 1041, 1046 (9th Cir. 2006) (“For our purposes, we conclude that the evidence, viewed in the light most favorable to Morgan, shows that Canady violated Morgan’s constitutional right not to be compelled to perform work that endangered his health and caused undue pain.”).

<sup>52</sup> But see ARIZ. REV. STAT. ANN. § 31-251(A) (2008) (“The director has the authority to require that each able-bodied prisoner under commitment to the state department of corrections engage in hard labor for not less than forty hours per week.”); *Watson v. Graves*, 909 F.2d 1549, 1551–53 (5th Cir. 1990) (denying Thirteenth Amendment challenge by prisoners who “had [not] been sentenced to hard labor” by their being “assigned to work for the Sheriff’s daughter and son-in-law”).

<sup>53</sup> Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

<sup>54</sup> See, e.g., H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 691 (1987) (“It is apparently the hope of some originalists that history can serve as a way out of the realm of personal choice. They think that if we accord authority to the opinions of the founders, we can preclude judges, and ourselves, from importing into constitutional interpretation our own values, preferences, individual viewpoints, and subjective and societal blindness and prejudice . . . . [E]ven if this flight from choice were appropriate, it is impossible if history is the chosen escape route.”).

<sup>55</sup> See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (finding Alabama’s use of “hitching post” to discipline chain gang inmates an “obvious” violation of “the ‘basic concept

But when would “hard labor” be too “hard” in this sense? The recent reintroduction of chain gangs in Alabama, and the hurried retraction of this policy in the face of litigation,<sup>56</sup> despite strong public support for the practice,<sup>57</sup> illustrates that some of the traditional forms of inmate labor no longer fall within the acceptable legal boundaries of modern punishment.<sup>58</sup> How will the relevant decision-makers determine that the labor which particular criminals will be compelled to do is “hard” enough to meet its punitive purpose,<sup>59</sup> yet remain compliant with the other constitutional protections afforded prisoners? Each jurisdiction will have to define, according to its values, the types of forced labor that will be considered punitive in this respect, but this exercise does not have purely abstract implications. For example, it has been observed that, where inmates are subjected in apparently arbitrary fashion to additional hardship as punishment for their crimes, such impositions detract from, rather than add to, the prospects for reducing those inmates’ recidivism.<sup>60</sup> Such additional hardship also detracts from the calculus of proportionality that is inherent in setting out appropriate punishments for crime.<sup>61</sup>

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underlying the Eighth Amendment[, which] is nothing less than the dignity of man”) (internal citations omitted).

<sup>56</sup> See generally Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 453, 456–57 (1997) (describing the newly-elected Governor of Alabama’s reinstatement of chain gangs on May 3, 1995, and the state’s subsequent cessation of the “practice of chaining inmates together” on “June 19, 1996, without being ordered to do so by the Court . . . in a settlement with the Southern Poverty Law Center . . .”).

<sup>57</sup> See *id.* at 453 & n.92 (“Polling showed that an overwhelming majority of Alabamians approved of the idea.”).

<sup>58</sup> But see *id.* at 458 (“Chain gangs still exist and continue to prosper in Alabama. The Alabama Department of Corrections still has high-risk prisoners working on the roads, and they still are bound in chains. Each prisoner on the chain gang has his legs shackled together, but is not chained to other inmates.”) (internal citations omitted).

<sup>59</sup> See JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* 158–59 (James T. McHugh ed., Prometheus Books 2009) (1830) (“If labour then, even though forced, will in time lose much of its hardship, how much easier will it become when the duration and the mode are in some measure regulated by the will of the labourer himself; when the bitter ideas of infamy and compulsion are removed, and the idea of gain is brought in to sweeten the employment?”); see also FOUCAULT, *supra* note 3, at 240 (“The labour of prisoners was remunerated in France. This posed a problem: if work in prison is remunerated, that work cannot really form part of the penalty.”).

<sup>60</sup> See, e.g., FOUCAULT, *supra* note 3, at 266 (“The arbitrary power of administration: ‘The feeling of injustice that a prisoner has is one of the causes that may make his character untamable. When he sees himself exposed in this way to suffering, which the law has neither ordered nor envisaged, he becomes habitually angry against everything around him; he sees every agent of authority as an executioner; he no longer thinks that he was guilty: he accuses justice itself.’”) (internal citation omitted).

<sup>61</sup> See, e.g., Morris, *supra* note 45, at 480 (“[T]he deprivation, in this just system of punishment, is linked to rules that fairly distribute benefits and burdens and to procedures that strike

Requiring policymakers and the public at large to confront the implications of compliance with a properly-understood Thirteenth Amendment therefore has the potential to initiate an illuminating debate about our modern system of incarceration, a system larded with injustices, but one for which we have yet to discern any effective alternative.<sup>62</sup> Even if such a discussion never occurs in our wider society, the judiciary's response to a Supreme Court decision returning us to The Hard Road would, at a minimum, conclusively answer the question of whether "the freedom that Congress is empowered to secure under the Thirteenth Amendment"<sup>63</sup> includes in any of its aspects the rights of prisoners to be free from forced labor.<sup>64</sup>

A return to The Hard Road would not mean the end of all "non-hard" prison labor programs. It would simply mean that inmate participation in such programs could no longer be compelled, a result that should serve, rather than detract from, those programs' non-punitive purposes.<sup>65</sup> The other tangible outcome in the law that may result from this return is the creation of what one observer has called, in another context, the "blameless liberty" of the criminally accused.<sup>66</sup> With respect to prison labor programs, such a blameless liberty would take the form of a (non-legally enforceable) right of prisoners to refuse to work except where they have been sentenced to do so.<sup>67</sup> The right would be "non-legally enforceable" in the sense that the doctrines of prison deference and qualified immunity would still allow for a broad latitude of behavior on the part of officials, as they do in the due process context,<sup>68</sup> thus permitting those

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some balance between not punishing the guilty and punishing the innocent.").

<sup>62</sup> See, e.g., FOUCAULT, *supra* note 3, at 232 ("We are aware of all the inconveniences of prison, and that it is dangerous when it is not useless. And yet one cannot 'see' how to replace it. It is the detestable solution, which one seems unable to do without.").

<sup>63</sup> Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

<sup>64</sup> Cf. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) ("A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."); Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 851 (2009) ("Since the zenith of the Civil Rights Movement in the late 1960s, the character and extent of American citizenship have been redrawn by the steady growth in the penal population. The emergence of mass imprisonment—historically high and concentrated rates of incarceration—represents a new type of institutionalized inequality.").

<sup>65</sup> See Edward M. Kennedy, *Symposium on Sentencing, Part I: Introduction*, 7 HOFSTRA L. REV. 1, 3–4 (1978) ("Abolition of prison rehabilitation programs is not the answer. Indeed, such programs should be expanded, especially in the areas of vocational and educational training. What is needed is the abolition of compulsory rehabilitation, particularly as a justification for imprisonment.") (internal citations omitted).

<sup>66</sup> Alice Ristroph, Essay, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601, 628 (2009).

<sup>67</sup> See *id.* at 602–03.

<sup>68</sup> See, e.g., Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952 (2009) (upholding qualified immunity of high officials involved in long-term detention of Arab-Muslim immigration violators after September 11, 2001 because the complaint did not "contain facts plausibly showing that

officials to seek out alternative ways to coerce or convince individual prisoners to obey work requirements.<sup>69</sup>

The pendulum could, however, swing in the other direction, leading to a proliferation of nondiscretionary hard-labor sentencing statutes that embrace the extremes of retributive justice's demand for punishment as "an unconditional duty."<sup>70</sup> The argument has been made that the "imposition of a draconian penalty can upset the proper balance between society, the victim, and the offender just as surely as the crime itself has done."<sup>71</sup> It is more difficult to argue today for such a conservation of harm between the incarcerated and non-incarcerated worlds, since,

[L]ike the pre-modern sanctions of transportation or banishment, the prison now functions as a form of exile, its use shaped less by a rehabilitative ideal and more by what Rutherford calls an "eliminative" one . . . . [T]he offender is rendered more and more abstract, more and more stereotypical, more and more a projected image rather than an individuated person.<sup>72</sup>

In lieu of genuine human understanding, then, some clarity on the nature of the debate in which we are engaged would be welcome. If the Supreme Court were to return us to The Hard Road, the many jurisdictions that would inevitably wish to retain their existing apparatuses of prison labor would be forced to take the kind of legislative action that would lay bare the extent of their desire to declare that this land of internal exile, what Foucault called the "carceral archipelago,"<sup>73</sup> is a place that is effectively outside of "the United States, or any place subject to their jurisdiction," for the purposes of the Thirteenth Amendment rights of the individuals whom we have banished to that place. The only question that remains is whether the potential benefits of making this discovery will outweigh the individual human costs of the official actions that would be the source of such revelations.

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petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin"; instead, "[a]ll it plausibly suggest[ed] was that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity").

<sup>69</sup> See FOUCAULT, *supra* note 3, at 247 ("All this 'arbitrariness' which, in the old penal system, enabled the judges to modulate the penalty and the princes to ignore it if they so wished, all this arbitrariness, which the modern codes have withdrawn from the judicial power, has been gradually reconstituted on the side of the power that administers and supervises punishment.").

<sup>70</sup> Huigens, *supra* note 27, at 441 & n.11.

<sup>71</sup> *Id.* at 442.

<sup>72</sup> GARLAND, *supra* note 26, at 178–79.

<sup>73</sup> FOUCAULT, *supra* note 3, at 301.

## II. RE-EXAMINING THE THIRTEENTH AMENDMENT'S IMPLICATIONS FOR PRISON LABOR

### A. *The History of Forced Labor as Punishment*

In the present day, “well over 600,000, and probably close to a million, inmates are working full time in jails and prisons throughout the United States.”<sup>74</sup> In the federal system alone, which saw its inmate population increase more than 650% from 1980 to 2005,<sup>75</sup> UNICOR, the trade name for Federal Prison Industries, Inc., employs almost 20,000 of this total,<sup>76</sup> and is the thirty-ninth largest federal contractor.<sup>77</sup> In Colorado, the state correctional industries employ “approximately 1,500 inmates at sixteen DOC facilities located throughout Colorado,” in activities as diverse as “dog adoption and training,” the production of “high quality office furnishings,” “forms printing and distribution,” “wild land firefighting and reclamation,” and horse wrangling.<sup>78</sup> Neither the federal nor Colorado courts sentence criminals to hard labor; instead, the prison systems in both jurisdictions promulgate a general work requirement for all able-bodied inmates.<sup>79</sup>

Forced labor is a form of punishment that predates the penitentiary,<sup>80</sup> and it accompanied incarceration as punishment even in its earliest forms.<sup>81</sup> In this country,

[i]n the early colonial period, imprisonment was usually an “intermediate step in the punishment process”; the convicted criminal was temporarily confined while awaiting punishment and, with the exception of those who suffered capital punishment, he was released after the penalty had been executed . . . . Among the punishments inflicted were death, flogging, mutilation, branding,

<sup>74</sup> Zatz, *supra* note 15, at 868.

<sup>75</sup> CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS: FEDERAL PRISON INDUSTRIES 4–5 (2007) [hereinafter CRS REPORT].

<sup>76</sup> *Id.* at Summary.

<sup>77</sup> Posting of Imagine a World in Which Prisoners Have . . . to <http://www.dailykos.com/storyonly/2008/8/4/14245/73239/33/562362> (Aug. 4, 2008, 11:44 PDT).

<sup>78</sup> *Colorado Correctional Industries: We Build Opportunity* 7, 21, available at [http://www.coloradoci.com/bin\\_htm/aboutUs.html?intro](http://www.coloradoci.com/bin_htm/aboutUs.html?intro) (last visited Nov. 24, 2009).

<sup>79</sup> See COLO. REV. STAT. ANN. § 17-24-102(1) (West 2008) (“[T]o the extent possible, all able-bodied offenders should be employed.”); 28 C.F.R. § 545.20(a)(2) (“Sentenced inmates who are physically and mentally able to work are required to participate in the work program.”).

<sup>80</sup> See ELINOR MYERS MCGINN, AT HARD LABOR: INMATE LABOR AT THE COLORADO STATE PENITENTIARY, 1871–1940, at 107 (1993) (“Whereas the penitentiary had been chiefly a product of the nineteenth century, convict labor on roads was certainly not a new concept; in fact, it had been a traditional role for *servi poenas* (slaves of punishment or convicts) during the Roman times, if not before.”) (internal citations omitted).

<sup>81</sup> See FOUCAULT, *supra* note 3, at 121 (“Work was obligatory; it was performed in common . . . and, for the work done, the prisoners received wages.”).

stocks, [and] pillory . . . . It was not until the late eighteenth and early nineteenth centuries that the new states supplemented or replaced these forms of punishment with imprisonment and imprisonment at hard labor.<sup>82</sup>

For lesser crimes, “[c]onfinement at hard labor in a workhouse or house of correction for periods of less than a year was a punishment commonly imposed in America in the colonial period . . . for offences not deemed serious.”<sup>83</sup> Forced labor as punishment shared some of the expressive purposes of the pre-penitentiary public punishments.<sup>84</sup> In Europe, the “chain-gang, a tradition that went back to the time of the galley slaves,”<sup>85</sup> represented a transitional form of punishment during the period when the penitentiary replaced the public infliction of pain as the primary penalty for law-breaking, as “it combined in a single manifestation the two modes of punishment: the way to detention unfolded as a ceremonial of torture.”<sup>86</sup> The visibly grueling conditions of the roadwork to which the chain gang prisoners in *Cool Hand Luke* were subjected<sup>87</sup> illustrate additional potential reasons why prolific road-building societies such as the Roman Empire thought to use conscripted labor for such tasks.<sup>88</sup>

In their development in the American colonies, “incarceration and inmate labor became bedfellows for a variety of reasons,”<sup>89</sup> including that, “since the inception of

<sup>82</sup> United States v. Ramirez, 556 F.2d 909, 911 (9th Cir. 1976) (internal citations omitted); see also James J. Misrahi, Note, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective*, 33 AM. CRIM. L. REV. 411, 413 (1996) (noting that the “history of American prisons is also the history of labor in prisons . . . . Prisons were organized around the concept of work in order to reform the inmate.”).

<sup>83</sup> United States v. Moreland, 258 U.S. 433, 445 (1922) (Brandeis, J., dissenting). Justice Brandeis also stressed that the “labor which inmates were required to perform was not imposed as punishment or as a means of disgrace. Nor was the confinement imposed primarily as punishment.” *Id.* at 447.

<sup>84</sup> See, e.g., *id.* at 448–49 (Brandeis, J., dissenting) (stating that 1786 Pennsylvania reform “substituting imprisonment for death, as the penalty for some of the lesser felonies . . . provided specifically that the imprisonment should be attended by ‘continuous hard labor publicly and disgracefully imposed.’ Hard labor as thus prescribed and practiced was merely an instrument of disgrace”).

<sup>85</sup> FOUCAULT, *supra* note 3, at 257.

<sup>86</sup> *Id.*

<sup>87</sup> See PEARCE, *supra* note 2, at 118 (“Our shovel handles were slimy with sweat, our bodies covered with mud, our lungs choked with the stench of tar and its heat and with the cloud of dust that billowed away behind us.”). But see BENTHAM, *supra* note 59, at 166 (“In public works, the infamy of their publicity tends to render the individuals more depraved than the habit of working tends to reform them.”).

<sup>88</sup> See, e.g., FOUCAULT, *supra* note 3, at 109 (“Public works meant two things: the collective interest in the punishment of the condemned man and the visible, verifiable character of the punishment. Thus the convict pays twice; by the labour he provides and by the signs that he produces.”).

<sup>89</sup> MCGINN, *supra* note 80, at 53.

the penitentiary, there has rarely been an occasion on which the degenerative effects of inmate idleness have not been decried,<sup>90</sup> and both of the schools of American penitentiary reform that arose “during the Jacksonian era . . . had great faith that disciplined labor was an essential ingredient in building within offenders a moral fiber sufficiently strong to resist the criminal temptations that prevailed in the larger society.”<sup>91</sup> Thirty years ago, a study of various state prison-labor regimes by the United States Department of Justice found that the unanimity on this question remained unchanged: “Ironically, the view that prisoners ought to work during confinement is supported both by penologists who advocate that prisons serve a rehabilitative purpose as well as by those who advocate that prisons serve a punishment and/or deterrence function.”<sup>92</sup>

Whatever the justification, former North Carolina Governor Jim Hunt expressed the basic rationale that has always held sway in the United States when he said, “Every able-bodied prisoner in North Carolina ought to be working and working hard.”<sup>93</sup>

From the beginning, these reasons have helped inmate labor “persist[] as the *sine qua non* of imprisonment” in this country.<sup>94</sup> “[B]y 1835 confinement and hard labor were the most common punishments for all but the relatively few capital crimes in most states.”<sup>95</sup> In 1876, the Supreme Court expressed the common law rule of the era when it held various federal sentencing statutes to mean that

where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases.<sup>96</sup>

One legal observer of the era noted similar trends in the states,<sup>97</sup> where separate sentences of hard labor and incarceration were not held necessary to subject inmates

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<sup>90</sup> Francis T. Cullen & Lawrence F. Travis III, *Work as an Avenue of Prison Reform*, 10 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 45, 53 (1984).

<sup>91</sup> *Id.*

<sup>92</sup> National Criminal Justice Reference Service, *Study of the Economic and Rehabilitative Aspects of Prison Industry—Prison Industry Statutes* 4 (1978), NCJ 046046 [hereinafter NCJRS Study] (on file with the author).

<sup>93</sup> North Carolina Department of Correction, *Putting Inmates to Work*, <http://www.doc.state.nc.us/work/> (last visited Nov. 24, 2009). In North Carolina, “all able-bodied prison inmates shall be required to perform diligently all work assignments provided for them,” and a failure to do so “may result in disciplinary action.” N.C. GEN. STAT. § 148-26(a) (2009).

<sup>94</sup> MCGINN, *supra* note 80, at 53.

<sup>95</sup> *United States v. Ramirez*, 556 F.2d 909, 912 n.4 (9th Cir. 1976) (citing BLAKE MCKELVEY, *AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915*, at 7, 16 (1936)).

<sup>96</sup> *Ex Parte Karstendick*, 93 U.S. 396, 399 (1876).

<sup>97</sup> *See generally* Whitin, *supra* note 16, at 17–18 (noting that in Tennessee the “sentence of the court whether expressly provided or not is understood to be a sentence to hard labor,”

to both penalties at once,<sup>98</sup> although not all states agreed that this was always appropriate.<sup>99</sup>

Despite this conflation of the penalties of incarceration and forced labor by courts and legislators through the nineteenth century, it still remained the case—at least in the federal system—that “[h]ard labor was a distinct penalty expressly authorized for specific crimes and penitentiary confinement, while not included in the penalty clauses of particular offenses, was ordered by the sentencing judge as part of the punishment.”<sup>100</sup> Since before this time, hard labor punishment without incarceration was also an available penalty in the United States military,<sup>101</sup> and remains one today.<sup>102</sup> However, by the turn of the twentieth century, “hard labor had become primarily a disciplinary measure used in nearly all institutions regardless of the sentence, instead of a punishment for specific crimes . . . .”<sup>103</sup> In 1909, “[a]s part of its revision and recodification of the penal code . . . Congress eliminated hard labor from the punishment clause of each section,”<sup>104</sup> but made sure to note that “[t]he omission of the words ‘hard labor’ from the provisions prescribing the punishment in the various sections of this Act, shall not be construed as depriving the court of the power to impose hard labor as a part of the punishment, in any case where such power now exists.”<sup>105</sup> It is only since 1948 that “the [federal] district courts have not been permitted to impose

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and in a number of other states, “hard labor, under reasonable restrictions as required in most prisons, is healthful for mind and body and, in the judgment of prisoners is a veritable boon, compared with enforced idleness”).

<sup>98</sup> See, e.g., *Pounders v. State*, 74 So. 2d 640 (Ala. Ct. App. 1954) (holding that sentence to perform hard labor to pay for costs was not improper where court might lawfully have imposed a sentence to hard labor).

<sup>99</sup> See, e.g., *Ex Parte Arras*, 20 P. 683, 683–84 (Cal. 1889) (voiding judgment that “impose[d] hard labor as a part of the penalty in case the fine is not paid” on the basis that only “prisoners convicted of felonies” could be sent to the state prison where such labor took place, and holding that the “court below had no jurisdiction to impose hard labor as a part of the punishment” for the non-felonious offense).

<sup>100</sup> *Ramirez*, 556 F.2d at 913; see also DAVID GARLAND, *PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES* 7 (1985) (“‘Imprisonment’ is to be distinguished from ‘penal servitude’ in as much as the former involved sentences of up to two years with or without hard labour (which, after 1865, was uniformly enforced whether or not the court had explicitly ordered it) and was served in a local prison. Penal servitude, on the other hand, was to be served in a convict prison . . .”).

<sup>101</sup> See Major Joseph B. Berger III, *Making Little Rocks Out of Big Rocks: Implementing Sentences to Hard Labor Without Confinement*, *ARMY LAW.*, Dec. 2004, at 1, 6 (“Hard labor, with or without confinement, was established as a permissible punishment in the U.S. Army nearly 200 years ago.”).

<sup>102</sup> *Id.* at 5 (“Hard labor without confinement is an allowable punishment at a court-martial . . .”).

<sup>103</sup> *Ramirez*, 556 F.2d at 915.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 915 (quoting Act of March 4, 1909, ch. 321, § 338, 35 Stat. 1088, 1153 (codified at 18 U.S.C. § 572 (1940))).

the punishment of hard labor. . . . [I]t is available to prison administrators as one part of the ‘individualized system of discipline, care, and treatment’ . . . .”<sup>106</sup>

Similar trends emerged later in the states, such as Colorado, where the inmates in the first United States penitentiary located there, before statehood, quarried the building materials for and built the prison.<sup>107</sup> In 1972, the state general assembly revised the criminal code to remove an existing discretionary hard labor sentencing statute, but retained a general work requirement for state prisoners<sup>108</sup> that had existed in some form for many years.<sup>109</sup> Some states, mainly in the Southeast, continue to retain hard-labor sentencing laws today. In Alabama, for example, the relevant statute mandates that “[s]entences for felonies shall be for a definite term of imprisonment, which imprisonment includes hard labor.”<sup>110</sup> Where such statutes are retained, they are in some instances quaint in their terms, such as in Nebraska, where the sentence of an individual who is sentenced “to imprisonment in the jail of the county as a punishment” is required to include “that the convict . . . be kept at hard labor in the jail,”<sup>111</sup> but as an alternative to such labor, “the sentence may require the convict to be fed on bread and water only, the whole or any part of the term of imprisonment.”<sup>112</sup>

It was also around the beginning of the twentieth century that elements of free society, most notably a newly-militant labor movement,<sup>113</sup> began to agitate against the further expansion of prison labor, leading to a succession of legislative enactments meant to curb such growth.<sup>114</sup> “As a result of this legislation, the number of prisoners

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<sup>106</sup> *Id.* at 917 (quoting 18 U.S.C. § 4081 (2009)).

<sup>107</sup> See Colorado Department of Corrections Facilities: Colorado Territorial Correctional Facility, available at <http://exdoc.state.co.us/secure/comboweb/webllets/index.php/facilities/view/9> (last visited Nov. 24, 2009); see generally MCGINN, *supra* note 80, ch. II (describing siting and construction of Territorial Penitentiary). The prison is still in operation, and is now called the Colorado Territorial Correctional Facility.

<sup>108</sup> Compare COLO. REV. STAT. § 39-10-11 (1883) (“Whenever any person shall be lawfully sentenced for crime by the judge of any district court in this State, to imprisonment in the State prison, or to any county jail, it shall be competent for the court awarding such sentence to incorporate therein a provision that the person so sentenced shall be kept at hard labor during the term of such imprisonment, or for any specified portion thereof, as may be adjudged by the said court.”), with COLO. REV. STAT. § 17-24-102(1) (2008) (“[T]o the extent possible, all able-bodied offenders should be employed . . .”).

<sup>109</sup> See PRISON INDUS. REORGANIZATION ADMIN., THE PRISON PROBLEM IN COLORADO 29 (1940) (hereinafter PIRA SURVEY) (“The law provides ‘that every able-bodied convict shall be put to and kept at the work most suitable to his or her capacity. . . .’”).

<sup>110</sup> ALA. CODE § 13A-5-6(a) (LexisNexis 2009).

<sup>111</sup> NEB. REV. STAT. ANN. § 29-2208 (LexisNexis 2009).

<sup>112</sup> *Id.*

<sup>113</sup> See Dougherty, *supra* note 21, at 489 (“[I]n the early twentieth century, increasing pressure from labor unions turned prison labor into a ‘major political issue.’”).

<sup>114</sup> See generally *id.* at 489–90 (discussing events surrounding passage of reforms such as the Hawes-Cooper Act in 1929 and the Ashurst-Sumners Act in 1935); Zatz, *supra* note 15, at 869 (“Since roughly the New Deal era, prison industries have been tightly regulated,

laboring while in prison has greatly decreased from the numbers laboring in the nineteenth and [early] twentieth centuries.”<sup>115</sup>

Thus, as the modern correctional regime began to take form, forced labor by inmates “was not considered an essential element of the penitentiary punishment,” but it remained widespread nonetheless, in part due to the experiences of some observers “that it was in fact an alleviation” of the inmates’ conditions.<sup>116</sup> Whatever its salutary benefits, the compelled nature of the work had not vanished, as it remained the case that “a refusal to work universally [was] treated as a disciplinary infraction.”<sup>117</sup> Furthermore, while “[t]hose who support prisoner labor explain that it contributes to the discipline of the prison population, combats idleness, allows the prisoner to pay back the state for the costs of incarceration, and teaches marketable skills that can be used upon re-entry to the community,”<sup>118</sup> the work programs did not always appear to effectively serve their asserted goals of rehabilitation and education, particularly where those goals conflicted with the ability of the programs to generate revenue or be financially self-sustaining.<sup>119</sup> As the Department of Justice noted in its own survey of such programs, “[d]espite the statutory language articulating a rehabilitative

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most prominently through the Ashurst-Sumners Act’s criminal prohibition on the sale of inmate-produced goods in interstate commerce.”)

<sup>115</sup> Dougherty, *supra* note 21, at 491; *see also* FOUCAULT, *supra* note 3, at 25 (“[T]he penitentiary . . . , forced labour and the prison factory appear with the development of the mercantile economy. But the industrial system requires a free market in labour and, in the nineteenth century, the role of forced labour in the mechanisms of punishment diminishes accordingly and ‘corrective’ detention takes its place.”).

<sup>116</sup> *United States v. Moreland*, 258 U.S. 433, 449 (1922) (Brandeis, J., dissenting); *see also* FOUCAULT, *supra* note 3, at 269–70 (“Work must be one of the essential elements in the transformation and progressive socialization of convicts. Penal labour ‘must not be regarded as the complement and as it were an aggravation of the penalty, but as a mitigation, of which it is no longer possible to deprive the prisoner.’”).

<sup>117</sup> Josephine R. Potuto, *The Modern Prison: Let’s Make It a Factory for Change*, 18 U. TOL. L. REV. 51, 54 (1986); *see also* *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir. 1990), *withdrawn and superseded by* 928 F.2d 126 (5th Cir. 1991) (“All TDCJ inmates, unless specially classified, are expected to work. The refusal to work, by a group or even a single inmate, presents a serious threat to the orderly functioning of a prison. Any unjustified refusal to follow the established work regime is an invitation to sanctions.”).

<sup>118</sup> Dougherty, *supra* note 21, at 485.

<sup>119</sup> *See* Gordon Lafer, *The Politics of Prison Labor: A Union Perspective*, in *PRISON NATION: THE WAREHOUSING OF AMERICA’S POOR* 120, 125 (Tara Herivel & Paul Wright eds., 2003) (“[P]rison work programs themselves are not operated along job-training lines. Prisoners are not selected for work based on their need for training, but just the opposite: employers look for prisoners who *already* have the skills needed for their jobs. Even those prisoners who do pick up skills often are being trained in jobs that do not exist, or do not pay living wages, in the free economy.”); *see also* FOUCAULT, *supra* note 3, at 240 (“Moreover, wages reward the skill of the worker and not the improvement of the convict: ‘The worst subjects are almost everywhere the most skilful workers; they are the most highly remunerated, consequently the most intemperate and least ready to repent.’”) (internal citations omitted).

purpose . . . the statutory provisions reviewed indicate that the primary benefit from the establishment of prison industries is to be derived by the state.”<sup>120</sup>

There may also exist goals for the prison labor programs that go unsaid. Foucault saw forced labor as “one of the essential elements in the transformation and progressive socialization of convicts,”<sup>121</sup> but did not agree that this transformation and socialization was directed towards *reducing* recidivism.<sup>122</sup> Instead, he argued that the unconscious and unspoken purpose of the penitentiary and hard labor (the latter “necessarily accompanying” the former),<sup>123</sup> was the production of “a politically or economically less dangerous” form of illegality, one that could be safely divided from law-abiding society.<sup>124</sup> The importance of creating this division overrode the consideration of factors such as the negative effects such a consolidation of law breakers would have on those trapped on the other side of the divide,<sup>125</sup> and the circumstances of how those individuals arrived there. That is, whether they had become incarcerated criminals through incorrigible social predation, technical violations of laws prohibiting inarguably minor forms of misconduct,<sup>126</sup> or some middle ground between those two extremes, was not a relevant consideration, because they were all part of the same segregated criminal class.<sup>127</sup> Under Foucault’s view, then, the distinction between forced labor as punishment and forced labor as rehabilitation is an irrelevant one.<sup>128</sup>

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<sup>120</sup> NCJRS Study, *supra* note 92, at 6.

<sup>121</sup> FOUCAULT, *supra* note 3, at 269.

<sup>122</sup> *Id.* at 269–70 (“Work must be one of the essential elements in the transformation and progressive socialization of convicts. Penal labour ‘must not be regarded as the complement and as it were an aggravation of the penalty, but as a mitigation, of which it is no longer possible to deprive the prisoner.’”) (citation omitted).

<sup>123</sup> *Id.* at 240 (“Work is neither an addition nor a corrective to the régime of detention: whether it is a question of forced labour, reclusion or imprisonment, it is conceived, by the legislator himself, as necessarily accompanying it.”).

<sup>124</sup> *Id.* at 277 (“For the observation that prison fails to eliminate crime, one should perhaps substitute the hypothesis that prison has succeeded extremely well in producing delinquency, a specific type, a politically or economically less dangerous—and, on occasion, usable—form of illegality . . .”).

<sup>125</sup> See Morris E. Lasker, *Presumption Against Incarceration*, 7 HOFSTRA L. REV. 407, 412 (1979) (“While incarceration may limit the individual’s contribution to crime in the community during the period of his imprisonment, numerous studies of prison life indicate that it in fact generates *more* crime, and simply confines it within the prison.”).

<sup>126</sup> See, e.g., Barbara Ehrenreich, *Is It Now a Crime to Be Poor?*, N.Y. TIMES, Aug. 9, 2009, at WK9 (describing the incarceration of a homeless man after “the police swept through the shelter in the middle of the night looking for men with outstanding warrants,” and the individual “did indeed have a warrant—for not appearing in court to face a charge of ‘criminal trespassing’ (for sleeping on a sidewalk in a Washington suburb)”).

<sup>127</sup> See, e.g., Mac Donald, *supra* note 25, at 20–21 (ascribing misconduct by correctional officers to “corruption” by inmates, who “often share community ties” with officers, and speculating that two particular officers found to have engaged in misconduct “were undoubtedly lazy (and probably also part of the same criminal culture to which their charges belonged)”).

<sup>128</sup> Cf. GARLAND, *supra* note 26, at 42 (noting “the puzzling fact that one of the most

Prison labor, as seen from this perspective, occupies a nebulous space overlapping two of the “three great schemata” to which Foucault argued “the carceral apparatus has recourse”; namely, “the economic model of force applied to compulsory work” and “the technico-medical model of cure and normalization”—what he respectively called “the workshop” and “the hospital.”<sup>129</sup> The blurring of these two distinct ends illustrates their relative unimportance in our system of punishment.<sup>130</sup>

After all, even the motivations for the penultimate punitive action that was taken against Cool Hand Luke—making him repeatedly dig a ditch and then refill it for days on end—were described by his jailers to him in what would be characterized today as rehabilitative or administrative terms, i.e., to get his “mind right” and ensure he would no longer “backslide” into his previous escape-prone behavior.<sup>131</sup> This elision highlights the misleading nature of these categories. What really drove us to force our prisoners to work from the beginning was “the belief that prisoners were a separate group deserving only punishment and deprivation; prison labor was perceived as merely a part of that punishment. Even when theory evolved so as to characterize prison labor as rehabilitative, this perspective remained continued.”<sup>132</sup> Thus, although “the idea expressed by the court in *Ruffin v. Commonwealth*, that inmates are no more than ‘slaves of the State,’ has been repeatedly and expressly repudiated by other courts,”<sup>133</sup> prisoners remain as a class “distinct[] from free labor,” in a way that “inheres not just in the present organization of their work but also in their persons more deeply.”<sup>134</sup>

One observer has noted that modern courts faced with work-related claims by prisoners often seem to “imply that, absent imprisonment, inmate workers would be single, unemployed, and adrift.”<sup>135</sup> Adopting such a perspective on prisoners allowed

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frequently used sanctions of the post-war period—the fine—was completely devoid of rehabilitative pretensions”).

<sup>129</sup> FOUCAULT, *supra* note 3, at 248. The third schemata he described as “the politico-moral schema of individual isolation and hierarchy,” or “[t]he cell.” *Id.*

<sup>130</sup> Cf. Victor Rabinowitz, *The Expansion of Prisoners’ Rights*, 16 VILL. L. REV. 1047, 1054 (1971) (“The present prison system . . . is really designed for only two purposes. One is to punish people . . . [and] the other is to quarantine them . . . . All the talk about reform and deterrence is nonsense.”).

<sup>131</sup> See PEARCE, *supra* note 2, at 262–65.

<sup>132</sup> Leroy D. Clark & Gwendolyn M. Parker, *The Labor Law Problems of the Prisoner*, 28 RUTGERS L. REV. 840, 841 (1975); see also Zatz, *supra* note 15, at 885 (discussing an instance where the court declined to find that an inmate was an employee for FLSA purposes, due to “the essentially penological nature of labor performed by prisoners for a prison.”) (quoting *George v. SC Data Ctr., Inc.*, 884 F. Supp. 329, 332 (2007)).

<sup>133</sup> *Washlefske v. Winston*, 60 F. Supp. 2d 534, 539 (E.D. Va. 1999), *cert. denied*, 532 U.S. 983 (2001).

<sup>134</sup> Zatz, *supra* note 15, at 934; see also GARLAND, *supra* note 100, at 260 (“Today’s penal complex does not prevent or stop crime in the main—the normal forms of socialisation and integration do that . . . . Rather, it administers criminals and criminality, managing ‘social failures’ and not repairing them.”).

<sup>135</sup> Zatz, *supra* note 15, at 934.

those courts to act on what Foucault called, in a different era, “the principle of non-idleness.”<sup>136</sup> That is, “it was forbidden to waste time, which was counted by God and paid for by men . . . [it was] a moral offence and economic dishonesty.”<sup>137</sup> Within such an ideological construct, the forced labor of inmates could be simultaneously justified as being both selfless and punitive, and remain hidden behind penitentiary walls, in “a context in which it appears to be free of all excess and all violence.”<sup>138</sup> In service of this pretense, courts have willingly abdicated their role in overseeing the boundaries of inmates’ compelled labor, under any number of different potentially applicable laws.<sup>139</sup>

### *B. Forced Labor under the Thirteenth Amendment and Other Laws*

“[C]ourts have rarely taken the thirteenth amendment inside the prison gates,”<sup>140</sup> preferring instead to “uniformly reject[] claims that the prison-labor system imposes involuntary servitude in violation of the thirteenth amendment.”<sup>141</sup> In one instance, the United States Court of Appeals for the Fifth Circuit relied upon what it viewed as the “precise and literal wording of the Thirteenth Amendment,” as well as “the unwavering line of authority which applies the Thirteenth Amendment precisely as it is written,” in rejecting a prisoner’s challenge to forced labor without compensation in the Texas prison system.<sup>142</sup> In another, the Seventh Circuit held that forced labor “imposed as an incident to a conviction of crime” was “punishment for crime excepted from the prohibition of the Thirteenth Amendment,”<sup>143</sup> although the dissenting judge on the panel pointed out in his portion of the opinion that this holding was not supported by a plain reading of the amendment.<sup>144</sup>

Judge Jacques Wiener of the Fifth Circuit once agreed with an inmate-litigant’s argument “that a prisoner who is not sentenced to hard labor retains his thirteenth

<sup>136</sup> FOUCAULT, *supra* note 3, at 154.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 302.

<sup>139</sup> *See generally* Zatz, *supra* note 15.

<sup>140</sup> Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 606 (1989).

<sup>141</sup> *Id.*

<sup>142</sup> *Wendt v. Lynaugh*, 841 F.2d 619, 621 (5th Cir. 1988).

<sup>143</sup> *United States ex rel. Smith v. Dowd*, 271 F.2d 292, 295 (7th Cir. 1959), *cert. denied*, 362 U.S. 978 (1960); *see also* *Omasta v. Wainwright*, 696 F.2d 1304, 1304 (11th Cir. 1983) (“[W]here prisoner was incarcerated pursuant to presumptively valid judgment . . . and was forced to work pursuant to prison regulations or state statutes, Thirteenth Amendment’s prohibition against involuntary servitude was not implicated even though the conviction was subsequently reversed.”); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963), *cert. denied*, 375 U.S. 915 (1963) (“Where a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises.”).

<sup>144</sup> *Dowd*, 271 F.2d at 298 (Parkinson, J., dissenting) (“The exception in the Thirteenth Amendment does not read *punishment incident to crime* . . . . It clearly and succinctly states ‘as a punishment for crime’. We have no right to rewrite the Amendment and extend the provisions of the exception to include that which is clearly without its ambit.”).

amendment rights.”<sup>145</sup> His colleague Judge Edith Jones later described this position as “an anomaly in federal jurisprudence” that, “[t]o the extent [it] conflicts with” earlier precedents, “lacks authority.”<sup>146</sup> Judge Jones instead reaffirmed the doctrinal authority of the line of cases that expressly disagreed with Judge Wiener’s reading of the amendment, and “reiterate[d] that inmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.”<sup>147</sup>

Courts express a consistent hostility to prisoners’ work-related rights claims, which helps explain their equally consistent rejection of the Hard Road approach that is argued for in this Article. This hostility has also been demonstrated by courts’ use of prisoner workers-rights claims to make attempts to combat violations of inmates’ *other* constitutional rights more difficult.<sup>148</sup> Perhaps the most famous example of this approach came in response to “the issue of inmate labor unions, a focal point of prison activism during the 1970s,” when the “[p]rison authorities’ fierce resistance met Supreme Court approval in *Jones v. North Carolina Prisoners’ Labor Union, Inc.*”<sup>149</sup> In the *Jones* opinion, Justice William Rehnquist reaffirmed that “[p]risons, it is obvious, differ in numerous respects from free society.”<sup>150</sup> The Court overturned a district court’s grant of equitable relief to inmates challenging regulations forbidding them from solicitation, meeting, and the distribution of publications in support of a labor organizing effort on the basis that, *inter alia*, the lower court’s “requirement of a demonstrable showing that the Union was in fact harmful [was] inconsistent with the deference federal courts should pay to the informed discretion of prison officials.”<sup>151</sup>

In other words, it did not matter that the “appellee’s two expert witnesses, both correctional officers who had dealt with inmate reform organizations, testified that such groups actually play a constructive role in their prisons,” or that the “weight of professional opinion seems to favor recognizing such groups.”<sup>152</sup> Such facts were

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<sup>145</sup> *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990). Judge Wiener’s opinion on this issue may have been motivated in part by his outrage at the “egregious nature of this misanthropic situation in the instant case,” which had served to “disabuse[] [him] of th[e] innocent misconception” that “in the last decade of the twentieth century scenarios such as the one now before us no longer occurred in county or parish jails of the rural south except in the imaginations of movie or television script writers.” *Id.* at 1550.

<sup>146</sup> *Ali v. Johnson*, 259 F.3d 317, 318 (5th Cir. 2001) (citations omitted).

<sup>147</sup> *Id.* at 317.

<sup>148</sup> Another area where this has been done is in the cases involving the due process rights of pretrial detainees. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (holding that “if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment’”).

<sup>149</sup> *Zatz*, *supra* note 15, at 923 (citing *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977)).

<sup>150</sup> *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977).

<sup>151</sup> *Id.* at 136 (citation omitted).

<sup>152</sup> *Id.* at 145 (Marshall, J., dissenting); *see also* Paul R. Comeau, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor*, 21 BUFF. L. REV. 963, 979 (1971) (“Inmate leadership is present in all prisons . . . . The constructive use

insufficient to disturb “the full latitude of discretion” that “courts should allow the prison administrators.”<sup>153</sup> Justice Thurgood Marshall protested to no avail that “the realities of running’ a school or a city are also ‘complex and difficult,’ and that those charged with these tasks . . . also possess special ‘professional expertise,’” but “in no First Amendment case of which I am aware has the Court deferred to the judgment of such officials simply because their judgment was ‘rational.’”<sup>154</sup>

One observer described *Jones* as “shift[ing] the burden of proof away from the state by compelling the plaintiff to rebut the officials’ general speculations as to the union’s possible disruption to orderly administration,” and “emphatically la[ying] the groundwork for almost absolute judicial deference to many aspects of prison life.”<sup>155</sup> As described below, the courts’ Thirteenth Amendment holdings with respect to prisoners are not founded in any historical or original understandings of the amendment itself, and can only be understood as expressions of this same doctrine of “absolute judicial deference.”

### III. USING TRADITION AND HISTORY AS A TOOL FOR INTERPRETING THE THIRTEENTH AMENDMENT

#### A. *The Ratification of the Thirteenth Amendment*

An amendment to the Constitution prohibiting slavery or involuntary servitude anywhere in the United States or its territories was first introduced in the House of Representatives and the Senate on December 14, 1863, and January 13, 1864, respectively.<sup>156</sup> “The version of the amendment that ultimately prevailed” was written by the Senate Judiciary Committee using “language that closely paralleled the slavery provision in the [Northwest] Ordinance [of 1787],”<sup>157</sup> which prohibited slavery “in areas north of the Ohio River.”<sup>158</sup> This prohibition was reputedly drafted in its earliest

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of inmate leadership is an obvious way to avoid riots. Some type of inmate self-government that involves honest and well supervised elections of inmate representatives to discuss problems, make recommendations and perhaps, even take some responsibilities from the administration could be helpful.”) (citation omitted).

<sup>153</sup> *Jones*, 433 U.S. at 136.

<sup>154</sup> *Id.* at 141 (Marshall, J., dissenting) (citations omitted). Justice Marshall expressed similar outrage when the Court a few years later took the same tack in the case of a pretrial detainee bringing a due process claim. *See Bell v. Wolfish*, 441 U.S. 520, 568 (Marshall, J., dissenting) (“[B]y blindly deferring to administrative judgments on the rational basis for particular restrictions, the Court effectively delegates to detention officials the decision whether pretrial detainees have been punished.”).

<sup>155</sup> Robbins, *supra* note 31, at 216.

<sup>156</sup> Alexander Tsesis, *The Thirteenth Amendment’s Revolutionary Aims*, in PROMISES OF LIBERTY (forthcoming) (manuscript at 8 n.70), available at <http://ssrn.com/abstract=1023762>.

<sup>157</sup> Howe, *supra* note 49, at 9.

<sup>158</sup> Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 626 (2008).

form by Thomas Jefferson.<sup>159</sup> One observer has argued that it represented “the first known use of the punishment clause in federal efforts to abolish slavery, and it became a template for subsequent efforts.”<sup>160</sup>

The antislavery language was introduced late in the debates surrounding the ordinance,<sup>161</sup> and there is no record of its language being examined in a meaningful way by a Congress that was depleted by the Constitutional Convention that was also underway at that time.<sup>162</sup> In any case, the prohibition did not provoke much controversy, perhaps because it “was not so obnoxious to southern men generally as it might otherwise be,” as it was included alongside a clause requiring the return of fugitive slaves.<sup>163</sup>

The narrower language originally proposed in the House of Representatives for the Thirteenth Amendment “would have allowed only indentured servitude of prisoners, but not slavery,”<sup>164</sup> but “the drafters of the Thirteenth Amendment spent little time discussing alternative wordings.”<sup>165</sup> There are no records of the debates within the Senate Judiciary Committee regarding the amendment.<sup>166</sup> Instead, “[t]he focus of the original debate about the thirteenth amendment was not on its punishment clause but on its central prohibition and its second section on enforcement.”<sup>167</sup>

Despite the extensive debates over the values and objectives of the thirteenth amendment, the members of the Reconstruction Congress directed very little attention to its actual text. The members of Congress rarely considered whether the actual language of the amendment conveyed the breadth of meanings its advocates ascribed to it. In the end, the amendment’s text was selected more for its symbolic significance than for its ability to state the members’ intention with exactness.<sup>168</sup>

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<sup>159</sup> Howe, *supra* note 49, at 11. *But see* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 450 n.70 (1989) (“Despite the attribution of this phrase to Jefferson by the Reconstruction Congress, there is some historical evidence that he did not coin the phrase.”).

<sup>160</sup> Ghali, *supra* note 158, at 626.

<sup>161</sup> JAY A. BARRETT, *EVOLUTION OF THE ORDINANCE OF 1787*, at 77 (1891) (“[T]he proposition did not appear in the report, and not until Congress had fairly finished consideration of the ordinance, was the part relating to slavery brought forward.”).

<sup>162</sup> *Id.* at 78 (“The Congress of the summer of 1787 was materially affected by the sessions of the Constitutional Convention. Many of the strong men of North and South were attending it at Philadelphia, and the Old Congress was left with a somewhat quiet and peaceable company of men. Its most efficient members were heartily in sympathy with the amendment in question, and naturally carried much influence with them.”).

<sup>163</sup> *Id.* at 79.

<sup>164</sup> Ghali, *supra* note 158, at 627.

<sup>165</sup> *Id.* at 626.

<sup>166</sup> VanderVelde, *supra* note 159, at 449 n.64.

<sup>167</sup> Howe, *supra* note 49, at 10.

<sup>168</sup> VanderVelde, *supra* note 159, at 448–49. The Supreme Court of that era seemed similarly unperturbed by the existence of any ambiguity in the wording of the amendment. *See*

The Senate passed the amendment without much delay on April 8, 1864, but it failed in the House on June 15, and ultimately only passed that body in its next session, “[a]fter much cajoling, vote swapping, and patronage dealing,” as well as the re-election of Abraham Lincoln, on January 31, 1865.<sup>169</sup> “Senators and representatives expressed a variety of views about the amendment’s scope. Consequently, they left little in the way of an authoritative, contemporary perspective beyond the virtually universal belief among congressmen that the amendment should accomplish much more than the mere abolition of chattel slavery.”<sup>170</sup> Over ten months later, and nearly eight months after Lee’s surrender at Appomattox, the Thirteenth Amendment was ratified by enough states to be declared adopted by the Secretary of State on December 18, 1865.<sup>171</sup>

As one modern observer described it, “the Thirteenth Amendment was not simply intended by its framers to create a vacuum, but instead to secure a positive end-state.”<sup>172</sup> Toward this end, Section 2 of the amendment “provided the authority to end all manner of subjugation, not only chattel slavery.”<sup>173</sup> However, since the time of its ratification, courts have almost uniformly held “that prisoners are ‘explicitly excepted from’” the amendment’s protections, relying on a definition of “punishment,” as used in the amendment, that “includ[es] more than the actual prison sentence.”<sup>174</sup>

As discussed in detail below, this definition is broader than, and bears little resemblance to, the ways the word “punishment” is understood and used in the jurisprudence construing other constitutional rights and protections of prisoners.<sup>175</sup> The ramifications of adopting such a categorical interpretation of the exception immediately became apparent, as the proponents of slavery sought to evade the Thirteenth Amendment’s positive ban with a startling innovation.

### *B. Early Understandings of the Thirteenth Amendment*

In the early years of Reconstruction, following the Civil War, “the southern states came to rely heavily on convict-lease systems to handle their prisoners, and those systems led to a dark history of savagery that matched the worst abuses of slavery.”<sup>176</sup>

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*Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69 (1873) (“Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.”).

<sup>169</sup> Howe, *supra* note 49, at 9.

<sup>170</sup> ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 38 (2004).

<sup>171</sup> Howe, *supra* note 49, at 10.

<sup>172</sup> Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855, 857 (2007).

<sup>173</sup> Tesis, *supra* note 156, at 11. *But see* VanderVelde, *supra* note 172, at 858 (“Congress has only utilized its authority under section 2 a mere five times in almost 150 years.”).

<sup>174</sup> Ghali, *supra* note 158, at 621–22 (citations omitted).

<sup>175</sup> *See Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (“If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.”).

<sup>176</sup> Howe, *supra* note 49, at 25.

In convict leasing, inmates were leased to private parties to engage in compelled labor for those parties' economic benefit, a variant on the practice of forced labor as punishment that was not itself new.<sup>177</sup> But "the southern leasing systems that arose after 1865 were unprecedented in the number of prisoners involved, in the heavy use of black prisoners and in the unfettered control given to the leasing parties."<sup>178</sup>

In 1867, John Kasson, a Republican Congressman from Iowa, sought to pass legislation clarifying that the intent of Congress with the amendment was not to permit the convict lease system that had developed in its wake.<sup>179</sup> He saw that system as "taking advantage of the 'except as a punishment' language of the Thirteenth Amendment in order to maintain slavery."<sup>180</sup> His resolution proclaimed that

the true intent and meaning of said amendment prohibits slavery or involuntary servitude forever in all forms, except in direct execution of a sentence imposing a definite penalty according to law, which penalty cannot, without violation of the Constitution, impose any other servitude than that of imprisonment or other restraint of freedom under the immediate control of officers of the law and according to the usual course thereof, to the exclusion of all unofficial control of the person so held in servitude.<sup>181</sup>

In the debate surrounding this resolution, Representative Kasson further clarified that what he intended to communicate by the resolution was that, for forced labor to be permissible under the Thirteenth Amendment,

there must be a direct condemnation into that condition under the control of the officers of the law, like the sentence of a man to hard labor in the State prison in the regular and ordinary course of law, and that is the only kind of involuntary servitude known to the Constitution and the law.<sup>182</sup>

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<sup>177</sup> See FOUCAULT, *supra* note 3, at 266–67 (quoting early nineteenth century critic asking, "[A]re not our prisoners sold, like the slaves, by entrepreneurs and bought by manufacturers . . . Is this how we teach our prisoners honesty? Are they not still more demoralized by these examples of abominable exploitation?"); Dougherty, *supra* note 21, at 488 ("[I]n 1844, during an economic depression, Louisiana leased its penitentiary for five years to a private company for \$50,000 a year."); see also Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340, 360–62 (1994) (discussing interpretive rationale in various court decisions that "removes most pre-Civil War forms of labor from the reach of the Thirteenth Amendment," including conscripted maritime service and roadwork).

<sup>178</sup> Howe, *supra* note 49, at 26 (internal citations omitted).

<sup>179</sup> See Ghali, *supra* note 158, at 627.

<sup>180</sup> *Id.*

<sup>181</sup> CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867).

<sup>182</sup> *Id.* at 345–46.

The resolution passed the House,<sup>183</sup> but was postponed indefinitely by the Senate Judiciary Committee because it “[thought] the whole subject [was] covered by the civil rights bill.”<sup>184</sup>

This somewhat opaque statement of reasons may have meant that the senators on the Judiciary Committee had repudiated Representative Kasson’s interpretation of the amendment that they had authored.<sup>185</sup> An alternate, narrower reading of the statement is as a simple reference to Section 2 of the Civil Rights Act of 1866, which forbade “any person . . . under color of any law” from subjecting “any inhabitant of any State or Territory” to “different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude . . . or by reason of his color or race, than is prescribed for the punishment of white persons.”<sup>186</sup>

Some of the statements made at the time of passage of the Civil Rights Act,<sup>187</sup> as well as subsequent interpretations of the amendment or Act that were adopted by the Supreme Court<sup>188</sup> and contemporary observers, are in agreement with this interpretation of its prohibitions.<sup>189</sup> With respect to the punishment exception *specifically*, notwithstanding the Judiciary Committee’s statement that “the whole subject” of the amendment had already been “covered,”<sup>190</sup> there was no contrary existing reading of that exception that had emerged from the original debates surrounding ratification

<sup>183</sup> Howe, *supra* note 49, at 29 n.279.

<sup>184</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1866 (1867).

<sup>185</sup> See Ghali, *supra* note 158, at 628–29 (“[T]he fact that the bill was postponed indefinitely in the Senate might be evidence that the drafters of the Thirteenth Amendment explicitly rejected Kasson’s view of the punishment clause.”); Howe, *supra* note 49, at 29 n.279 (“[A]bandonment of the resolution in the Senate raises doubt that the actual authors of the amendment agreed with the resolution.”).

<sup>186</sup> Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–82 (2000)).

<sup>187</sup> See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866) (statement of Sen. Wilson) (discussing former Confederate states passing laws to maintain freed slaves in slave-like conditions, referring to an instance “[i]n North Carolina [in which] two men were sold into slavery for years under the vagrant laws”).

<sup>188</sup> See *The Civil Rights Cases*, 109 U.S. 3, 22 (1883) (“Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form.”).

<sup>189</sup> See THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 299 (1868) (“Nor will the exception permit the convict to be subjected to other servitude than such as is under the control and direction of the public authorities, in the manner heretofore customary . . . [I]t might well be doubted if a law which should allow the convict to be placed upon the auction-block and sold to the highest bidder . . . was in harmony with the spirit of the constitutional prohibition.”).

<sup>190</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1866 (1867).

of the amendment to which the committee could have been referring.<sup>191</sup> The absence of a definitive historical record on this issue therefore confounds further attempts to deduce the complete meaning of the Thirteenth Amendment's exception solely by way of such sources.<sup>192</sup>

Furthermore, there had already been resistance at the time of the amendment's ratification by some in Congress regarding the nature and scope of the amendment's prohibitions,<sup>193</sup> despite the fact that "most of the southern states and their representatives [had] withdraw[n]" as a result of the ongoing Civil War, with the result that "Congress was composed primarily of representatives of northern states."<sup>194</sup> While

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<sup>191</sup> See Powell, *supra* note 54, at 669 (warning that, "on some issues of interpretation the founders said nothing at all useful"); VanderVelde, *supra* note 159, at 450 ("Other than eliminating chattel slavery, the phrase carried with it no other fixed meaning. Instead, the language assumed mythical proportions in the Reconstruction debates because it was attributed to Thomas Jefferson. The members of Congress took solace in the fact that although they were amending a sacred document, they did so with the language of one of its original architects.") (internal citations omitted); see also Howe, *supra* note 49, at 12 ("Recorded debate over the punishment clause when the House of Representatives promulgated the thirteenth amendment was also minimal."); 34 CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. Sumner) (objecting that the words of the punishment exception did "no good there, but they absolutely introduce[d] a doubt," since "at the time [of the Northwest Ordinance], for I understand that it was the habit in certain parts of the country to convict persons or to doom them as slaves for life as punishment for crime, and it was not proposed to prohibit this habit. But slavery in our day is something distinct, perfectly well known, requiring no words of distinction outside of itself"). Responses to Sumner's objection "did not focus specifically on the punishment clause." Howe, *supra* note 49, at 13.

<sup>192</sup> See, e.g., Powell, *supra* note 54, at 668 ("What is fundamentally wrong here is that the interpreter is treating the Constitution itself as an empty shell, a container into which the founders originally poured meaning that we now can extract by historical investigation. Having done so, we need pay little attention to the labels on the container. This is fundamentally unacceptable, for it effectively denies that we have a written Constitution at all (or locates the Constitution in the scattered and fragmentary records of its framing and adoption), and opens the door to the very subjectivity in interpretation that originalists avow a desire to escape.").

<sup>193</sup> See CONG. GLOBE, 38th Cong., 1st Sess. 1490 (1864) (statement of Sen. McDougall) ("The slaves of ancient time were not the slaves of a different race. The Romans compelled the Gaul and the Celt, brought them to their own country, and some of them became great poets, and some eloquent orators, and some accomplished wits, and they became citizens of the republic of Greece, and of the republic of Rome, and of the empire. This is not the condition of these persons with whom we are now associated and about whose affairs we undertake to establish administration. They can never commingle with us."); *id.* at 1484 (statement of Sen. Powell) ("[The negro] is an inferior man in his capacity, and no fanaticism can raise him to the level of the Caucasian race. The white man is his superior, and will be so whether you call him a slave or an equal. It has ever been so, and I can see no reason why the history of all the past should be reversed.").

<sup>194</sup> VanderVelde, *supra* note 159, at 444; see also Nina Shen Rastogi, *Uh . . . Mind if I Sit Here?: What's going to happen to the Minnesota and Illinois Senate seats?*, SLATE, Jan. 5, 2009, <http://www.slate.com/id/2207908> ("The 13th Amendment, for example, which formally abolished slavery, made its way through Congress during the tail end of the Civil War, when

abolitionists and proponents saw the proposed Thirteenth Amendment as a positive ban on all forms of slavery and involuntary servitude,<sup>195</sup> its opponents expressed concern that the amendment was an improper and overreaching exercise of the power to amend the Constitution, particularly at a time when the Civil War was still being fought.<sup>196</sup> Among the Republicans, there was a faction that “urged that the amendment strictly be limited to enslaved blacks, and . . . adamantly resisted any broader interpretation . . . .”<sup>197</sup>

The Senate Judiciary Committee may simply have lacked the political will or desire, two years later, to re-engage in these difficult debates, even though the seats of the former Confederate states in both the House and the Senate remained unoccupied.<sup>198</sup> The silence of the Thirteenth Amendment’s authors on the scope of the punishment exception in this instance<sup>199</sup> may foretell a similar reluctance on the part of modern legislatures to engage in the difficult debates called for by this Article. But their silence is also a blessing, as it relieves us of the burden of “obedience to history,” and forces us to “use some process of generalization or analogy to go beyond what history can say.”<sup>200</sup>

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both the Senate and the House were refusing to seat members from rebel states. That meant there were 52 active senators, with 20 vacant Southern seats, when the amendment passed in January 1865. (The final vote was 38-6.)”.

<sup>195</sup> See TESIS, *supra* note 170, at 103 (Pennsylvania Congressman M. Russell Thayer wondered: “What kind of freedom is that which is given by the amendment of the Constitution, and if it is confined simply to the exemption of the freedom from sale and barter? Do you give freedom to a man when you allow him to be deprived of those great natural rights to which every man is entitled by nature?”).

<sup>196</sup> See 35 CONG. GLOBE 38th Cong., 2nd Sess. 528 (1865) (statement of Rep. Kalbfleisch) (“In my opinion the amendment you now propose to provide for may stand in the way of both peace and Union. Even while this measure is under discussion messengers are passing between Washington and Richmond, and if these men are successful, and if the negotiations they propose to inaugurate result in anything, the very question we now propose to commit ourselves upon will form the chief obstacle in the way of a settlement of our difficulties.”); CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864) (statement of Sen. Powell) (“I do not believe it was ever designed by the founders of our Government that the Constitution of the United States should be so amended as to destroy property.”).

<sup>197</sup> VanderVelde, *supra* note 159, at 445; see also CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866) (statement of Sen. Cowan) (“The true meaning and intent of that amendment was simply to abolish negro slavery. That was the whole of it. . . . What more did it do? Nothing . . .”).

<sup>198</sup> Howe, *supra* note 49, at 29 n.279.

<sup>199</sup> *Id.*

<sup>200</sup> Powell, *supra* note 54, at 665 (“But once it is conceded that the Constitution speaks to questions that those who adopted it did not answer, it becomes obvious that in such cases the interpreter must use some process of generalization or analogy to go beyond what history can say. The inevitable disputes over whether a given interpretation over-generalizes or is based on a faulty analogy are not resolvable by historical means; at this point history, and originalism as a program of obedience to history, have no more to add to constitutional discourse.”).

History has, after all, already had its role in restricting the core power of the Thirteenth Amendment to ban slavery or involuntary servitude anywhere in the United States or its jurisdiction. The abolitionists who advocated a broader reading of the amendment comprised the faction that is “generally recognized as having carried the day,”<sup>201</sup> but the dissenters’ narrow reading of the Thirteenth Amendment ultimately succeeded in defining the scope of the amendment’s application for decades to come, after the Supreme Court’s 1883 decision in the *Civil Rights Cases*.<sup>202</sup> In that decision, the Court read Section 2 of the amendment to only “clothe[] Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . .”<sup>203</sup> In the eyes of many modern observers, the Court thereby restricted all future federal legislation passed under Section 2 to that which “only end[ed] practices directly related to institutional slavery, including impediments to black court testimony and property ownership,”<sup>204</sup> and “reduced the amendment to its least common denominator: the abolition of mid-nineteenth century southern racial chattel slavery.”<sup>205</sup>

The Supreme Court had first held, in 1872, that, “[u]ndoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter,” and, therefore, “if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.”<sup>206</sup> After its opinion in the *Civil Rights Cases*, though, and for the remainder of the nineteenth century and beyond, the Court continued to “read the Thirteenth Amendment as a narrow rule against slavery-like forms of involuntary servitude.”<sup>207</sup> It was not until the early twentieth century that the Court would explicitly uphold a statute on the basis that the Thirteenth Amendment’s protections extended farther than this,<sup>208</sup> and it was not until the modern civil rights era that the Court would

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<sup>201</sup> VanderVelde, *supra* note 159, at 445.

<sup>202</sup> 109 U.S. 3 (1883).

<sup>203</sup> *Id.* at 20.

<sup>204</sup> Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1826 (2006) (citing *Civil Rights Cases*, 109 U.S. at 22).

<sup>205</sup> VanderVelde, *supra* note 159, at 503.

<sup>206</sup> Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873).

<sup>207</sup> Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1638 (2001).

<sup>208</sup> *Bailey v. Alabama*, 219 U.S. 219, 241–42 (1911) (upholding 1867 anti-peonage statute enacted under Section 2 authority as “a valid exercise of this express authority,” because “Congress was not concerned with mere names or manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained or enforced.”); *see also* *United States v. Reynolds*, 235 U.S. 133, 143, 150 (1914). One observer sees these “peonage” cases as the “exception” to the otherwise nearly-uniform view of the courts that

begin to affirmatively apply the amendment's protections on that basis,<sup>209</sup> thereby "recalling the Civil War Rights Statutes into service after a century's desuetude."<sup>210</sup>

As discussed above, one constant that remained throughout this time period was that the federal courts continued to reject any application of the amendment's protections within prison walls, a view that remains consistently held, with some scattered exceptions in dicta,<sup>211</sup> through the present day. This stands in striking contrast to how those same courts have construed the meaning of "punishment," where it has arisen in the context of other amendments to the Constitution.

#### IV. USING DOCTRINE AND PRECEDENT AS A TOOL FOR INTERPRETING THE THIRTEENTH AMENDMENT

##### *A. The Meaning of Punishment in the Eighth Amendment*

The language of the Eighth Amendment<sup>212</sup> was, like the Thirteenth Amendment, taken from an earlier provision in the Northwest Ordinance of 1787.<sup>213</sup> These "amendments are the only two provisions of the Constitution that purport to regulate the treatment of prisoners,"<sup>214</sup> and the only instances where the word "punishment" appears in the amendments, although it also appears twice in the Constitution itself.<sup>215</sup>

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"the thirteenth amendment [is not] protective of the convicted prisoner." Howe, *supra* note 49, at 34 n.330.

<sup>209</sup> See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); see also Goluboff, *supra* note 207, at 1675 ("The South had in many respects operated as a separate labor market into the middle of the twentieth century . . . . Maintaining the impermeability of the southern labor market, however, was precisely the goal of many state and local enticement, emigrant agent, hitchhiking, and vagrancy laws.").

<sup>210</sup> *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343, 1345 (5th Cir. 1987).

<sup>211</sup> See, e.g., *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990) ("We agree that a prisoner who is not sentenced to hard labor retains his thirteenth amendment rights; however, in order to prove a violation of the thirteenth amendment the prisoner must show he was subjected to involuntary servitude or slavery."). But see *Ali v. Johnson*, 259 F.3d 317, 318 (5th Cir. 2001) ("*Watson's* statement about involuntary servitude is an anomaly in federal jurisprudence.").

<sup>212</sup> U.S. CONST. amend. VIII. The amendment reads in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

<sup>213</sup> Gorman, *supra* note 56, at 462; see also BARRETT, *supra* note 161, at 61, 86–87 (relevant text of ordinance reads, "[A]ll fines shall be moderate, and no cruel or unusual punishments shall be inflicted").

<sup>214</sup> Ghali, *supra* note 158, at 611.

<sup>215</sup> See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . . [and] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . ."); U.S. CONST. art. III, § 3 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

The Eighth Amendment prohibits the “inflict[ion]” of “cruel and unusual punishments.”<sup>216</sup> Through the nineteenth century, it was generally understood that “the prohibition extended only to such punishment as amounted to torture, involved unnecessary cruelty, or shocked the conscience of the community.”<sup>217</sup> At the beginning of the twentieth century, however, the Supreme Court recognized that state courts had considered that, based on a “precept of justice that punishment for crime should be graduated and proportioned to offense,” certain punishments “might be so disproportionate to the offense as to constitute a cruel and unusual punishment.”<sup>218</sup> A half-century later, the Court went further and proclaimed that the “basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>219</sup> Because “the words of the Amendment are not precise,” and “their scope is not static,” for courts to properly apply its protections, “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>220</sup>

Until 1991, “it was assumed, if not established, that the conditions of confinement are themselves part of the punishment, even if not specifically ‘meted out’ by a statute or judge.”<sup>221</sup> It was during this era that the Court first held, in *Estelle v. Gamble*,<sup>222</sup> “that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ . . . proscribed by the Eighth Amendment.”<sup>223</sup> As one observer saw it, “[s]ince *Estelle v. Gamble*, the Supreme Court has adhered to the view that punishment means more than one’s actual sentence.”<sup>224</sup> However, in 1991, in *Wilson v. Seiter*,<sup>225</sup> a majority opinion authored by Justice Scalia sharply proscribed the circumstances under which the Court would so expand the meaning of punishment.<sup>226</sup>

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<sup>216</sup> U.S. CONST. amend. VIII. The Supreme Court has held that this prohibition applies through the Fourteenth Amendment to set substantive limits on the sentences states may impose. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (“We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.”).

<sup>217</sup> Commentary, *Constitutional Law—Eighth Amendment—Cumulative Impact of Deplorable Conditions of Confinement in State Prison Constitutes Cruel and Unusual Punishment, Even Though Inmates Were Subjected Incidentally Rather Than in Deliberate Retribution for Criminal Conduct*, 23 ALA. L. REV. 143, 145 n.16 (1970) [hereinafter *Alabama Commentary*].

<sup>218</sup> *Weems v. United States*, 217 U.S. 349, 367–68 (1910) (citation and quotations omitted).

<sup>219</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>220</sup> *Id.* at 100–01.

<sup>221</sup> *Farmer v. Brennan*, 511 U.S. 825, 856 (1994) (Blackmun, J., concurring) (citations omitted).

<sup>222</sup> 429 U.S. 97 (1976).

<sup>223</sup> *Id.* at 104 (citation omitted).

<sup>224</sup> Ghali, *supra* note 158, at 634 (citing *Gamble*, 429 U.S. at 106, which held that prisoners must prove “deliberate indifference” to their medical needs).

<sup>225</sup> 501 U.S. 294 (1991).

<sup>226</sup> *Id.*

In *Wilson*, the Court distinguished between harms that it characterized as prison *conditions* and those that are “formally meted out *as punishment* by the statute or the sentencing judge,” with the former category of harms only being actionable where “some mental element . . . attributed to the inflicting officer” is present.<sup>227</sup> Stated differently, “Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind.”<sup>228</sup> The animating concern for Justice Scalia in promulgating this rule was that prison officials should be immune from constitutional tort damages where the proximate cause of harm was not something that “has been deliberately administered for a penal or disciplinary purpose.”<sup>229</sup>

The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century. . . . [I]f [a] guard accidentally stepped on [a] prisoner’s toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.<sup>230</sup>

In dissenting from subsequent Court majorities, Justice Clarence Thomas characteristically expressed this concern in more sweeping terms: “The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation.”<sup>231</sup> As he saw it, the Court had “made clear in *Estelle* that the Eighth Amendment plays a very limited role in regulating prison administration.”<sup>232</sup> He also believed that “the 185 years of uniform precedent”<sup>233</sup> prior to *Estelle*, “consistent with [the amendment’s] text and history,”<sup>234</sup> provided strong “support [for] the view that judges or juries—but not jailers—impose ‘punishment,’”<sup>235</sup> and that “[t]hat is also the primary definition of the word today.”<sup>236</sup> Accordingly, the operative principle to which the federal courts adhere today in construing the amendment is that “[t]he Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments’ . . . . [A]n official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.”<sup>237</sup>

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<sup>227</sup> *Id.* at 300 (emphasis in original).

<sup>228</sup> *Id.* at 302.

<sup>229</sup> *Id.* at 300 (citation and quotations omitted).

<sup>230</sup> *Id.* (citing *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)).

<sup>231</sup> *Hudson v. McMillian*, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting).

<sup>232</sup> *Id.* at 20.

<sup>233</sup> *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting).

<sup>234</sup> *Id.* at 39.

<sup>235</sup> *Id.* at 40.

<sup>236</sup> *Id.* at 38.

<sup>237</sup> *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994).

Admittedly, there are textual differences in the usages of the word “punishment” in the Eighth and Thirteenth Amendments, respectively. For one thing, the Eighth Amendment uses a verb to ban a particular *action* (no “cruel and unusual punishments [shall be] inflicted”),<sup>238</sup> while the Thirteenth Amendment bans the *existence* of slavery or involuntary servitude, except as punishment (“Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist . . .”).<sup>239</sup> For another, the word is singular in the Thirteenth Amendment but plural in the Eighth, although this distinction seems irrelevant for interpretative purposes.<sup>240</sup>

The importance of the word “inflicted” in Eighth Amendment jurisprudence can be seen in the second of the two requirements that must be met to find that a prison official has violated the amendment: the “prison official must have a ‘sufficiently culpable state of mind.’”<sup>241</sup> This requirement “follows from the principle that ‘only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.’”<sup>242</sup> What the presence of the verb does, then, is provide for an *additional* category of wrongful conduct, i.e., situations where “the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, [but] some mental element [can still] be attributed to the inflicting officer.”<sup>243</sup> The baseline understanding of the meaning of “punishment” as something that is “formally meted out” as such “by the statute or the sentencing judge,”<sup>244</sup> is not itself modified.

Finally, the fact that the Eighth Amendment employs an active voice, and the Thirteenth a passive one, should not affect the meaning of “punishment” as used respectively in these amendments. It would be a slender reed indeed to rely on such a latter-day grammatical distinction to differentiate the substantive nature of these amendments’ protections, where no other meaningful basis for doing so exists.<sup>245</sup>

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<sup>238</sup> U.S. CONST. amend. VIII.

<sup>239</sup> U.S. CONST. amend. XIII; *see Ghali, supra* note 158, at 633–34 (“The Eighth Amendment’s use of punishment is part of a prohibition. It forbids certain kinds of punishments—cruel and unusual ones. The Thirteenth Amendment’s use of punishment is part of an exception to the amendment . . . [T]he punishment clause limits the amendment’s reach.”).

<sup>240</sup> *See Ghali, supra* note 158, at 633 (“It is true that the Eighth Amendment’s usage of punishment is plural, whereas the Thirteenth Amendment’s usage is singular. But that is hardly a distinction that makes a difference. Both uses of punishment appear to contemplate some kind of a penalty.”).

<sup>241</sup> *Farmer*, 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)).

<sup>242</sup> *Id.*; *see also Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (“The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency . . .”).

<sup>243</sup> *Wilson v. Seiter*, 501 U.S. 294, 300 (1991); *see also Alabama Commentary, supra* note 217, at 149 (“Had these conditions of confinement been imposed as part of the punishment for breach of prison rules, or had juries required them as part of the punishment for criminal acts, their constitutionality would indubitably be an eighth amendment question.”).

<sup>244</sup> *Wilson*, 501 U.S. at 300.

<sup>245</sup> *See, e.g., Powell, supra* note 54, at 673–74 (“[T]he founders’ purposes, intentions, and concerns—indeed, the whole of their discussions of matters of high politics—took place in

*B. The Meaning of Punishment under the Fifth Amendment*

Although the word “punishment” does not appear in the Fifth Amendment, the meaning of the word has always played an important role in judicial understandings of the amendment’s protections. “The distinction between disciplinary and administrative judgments pervade[d] the case law”<sup>246</sup> under the Due Process clauses of the Fifth and Fourteenth Amendments<sup>247</sup> until 1995, when the Supreme Court in *Sandin v. Conner*<sup>248</sup> rejected an inmate’s argument “that any state action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause.”<sup>249</sup> As the majority saw it in *Sandin*, the “punishment of incarcerated prisoners . . . effectuates prison management and prisoner rehabilitative goals.”<sup>250</sup> The Court accordingly held that the dispositive issue for due process purposes was whether the action taken subjected the inmate in question to “the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.”<sup>251</sup> This remains the governing rule today.<sup>252</sup>

While the Court has moved its due process jurisprudence away from the focus on punitive intent that animates so much of its Eighth Amendment jurisprudence, an older strand of case law construing another portion of the Fifth Amendment squarely addresses the meaning of punishment under the Constitution, and has not been modified or overruled. These cases concern the scope of the protections contained in the Fifth Amendment’s first clause, which states that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”<sup>253</sup>

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a thought-world, and were conducted in a political language, distinct from our own . . . . The founders, in short, must be translated before they can contribute to our conversation.”)

<sup>246</sup> *Wallace v. Robinson*, 940 F.2d 243, 253 (7th Cir. 1991) (Cudahy, C.J., dissenting), *cert. denied*, 503 U.S. 961 (1992).

<sup>247</sup> U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>248</sup> 515 U.S. 472 (1995).

<sup>249</sup> *Id.* at 485.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 486.

<sup>252</sup> *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 222–23 (2005).

<sup>253</sup> U.S. CONST. amend. V.

In 1885, the Supreme Court observed that, “[f]or more than a century, imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered an infamous punishment in England and America,” for purposes of the protections of the Indictment Clause of the Fifth Amendment, because it fell into the class of punishments “that consist principally in their ignominy.”<sup>254</sup> On this basis, a decade later the Court held, in *Wong Wing v. United States*,<sup>255</sup> that the “imprisonment at hard labor” of three Chinese immigrants “before [their] sentence of deportation [was] to be carried into effect” was a clear violation of these protections.<sup>256</sup> As the Court saw it, if Congress sought to “subject[] the persons of such aliens to infamous punishment at hard labor” in furtherance of immigration policy, “such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.”<sup>257</sup>

A later generation of the Court confirmed that the punishment that was infamous for these purposes was the *labor by itself*, not the incarceration. “In other words, it was declared that if imprisonment was in any other place than a penitentiary and was to be at hard labor, the latter gave it character, that is, made it infamous and brought it within the prohibition of the Constitution.”<sup>258</sup> Because of this prohibition, “Congress could not legally invest the Commissioner with power to make hard labor an adjunct of the imprisonment,” since this was “beyond the power of legislation to direct without making provision ‘for a judicial trial to establish the guilt of the accused.’”<sup>259</sup>

In the late nineteenth and early twentieth centuries, as described previously, American prison systems moved from imposing forced labor as punishment in individual cases to mandating it generally for administrative purposes. In the federal system, these reforms meant that “the two noncapital infamous punishments lost their character as punishments imposed by a sentencing court and became part of the disciplinary regimen and rehabilitative program established by the Attorney General and the newly created Bureau of Prisons.”<sup>260</sup>

Under the rule of the Indictment Clause cases exemplified by *Wong Wing*, the discretion that shifted to the Executive allowed the Attorney General to “establish a disciplinary regimen or take punitive action because of the needs of the institution,” but *not* to “punish individual prisoners for their crimes.”<sup>261</sup> The “punitive element connected with the crime,” namely “the loss of freedom for some period of time,” remained “the only element still controlled by the sentencing judge.”<sup>262</sup> Therefore,

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<sup>254</sup> *Ex Parte Wilson*, 114 U.S. 417, 428 (1885) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*377) (quotations omitted).

<sup>255</sup> 163 U.S. 228 (1896).

<sup>256</sup> *Id.* at 235–36.

<sup>257</sup> *Id.* at 237.

<sup>258</sup> *United States v. Moreland*, 258 U.S. 433, 437 (1922).

<sup>259</sup> *Id.* at 440 (citation omitted).

<sup>260</sup> *United States v. Ramirez*, 556 F.2d 909, 914 (9th Cir. 1977).

<sup>261</sup> *Id.* at 920.

<sup>262</sup> *Id.* at 921.

the United States Court of Appeals for the Ninth Circuit concluded that “[w]ithin this system punishments can be distinguished, for the purpose of applying the indictment clause, only in terms of the length of time during which a prisoner is deprived of his freedom.”<sup>263</sup>

Under this view, as in the Eighth Amendment decisions previously discussed, “punishment for crime” is, by definition,<sup>264</sup> *only* that which is explicitly handed down by the judiciary as such. This is also the generally accepted meaning of the concept of “punishment.”<sup>265</sup> The judges in these cases drew upon this broadly-held societal norm to hold that prison officials lack the ability in themselves to “punish individual prisoners for their crimes.”<sup>266</sup> This means that the distinction between forced labor for rehabilitative purposes and for punishment is a meaningful one,<sup>267</sup> and mandates that the *only* involuntary servitude of prisoners that would not be prohibited by the Thirteenth Amendment is that to which they are sentenced by a judge or jury.

What distinguishes the cases construing the Fifth Amendment’s Indictment Clause from the Eighth Amendment cases is that the Eighth Amendment cases dealt primarily with the question of official intent in the *absence* of a sentence, while the Fifth Amendment cases addressed the *substance* of the sentence in question. Civil challenges to sentences<sup>268</sup> are a type of claim to which the doctrine of prison deference

<sup>263</sup> *Id.* The court then held “that a criminal defendant who is subject to confinement for more than one year must be prosecuted by an indictment.” *Id.*

<sup>264</sup> The formulation is somewhat redundant by its terms, and dates back in usage at least as far as the Roman Empire. See *Punishment*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/punishment/> [hereinafter STANFORD ENCYCLOPEDIA] (referencing “the classic norms of Roman law, *nulla poena sine leges* and *nulla poena sine crimen* (no punishments outside the law, no punishments except for a crime)”).

<sup>265</sup> See *id.* (“Harms of various sorts may befall a wrong-doer, but they do not count as punishment except in an extended sense unless they are inflicted by personal agency,” since “not all socially authorized deprivations count as punishments; the only deprivations inflicted on a person that count are those imposed in consequence of a finding of criminal guilt . . .”).

<sup>266</sup> *Ramirez*, 556 F.2d at 920.

<sup>267</sup> Cf. STANFORD ENCYCLOPEDIA, *supra* note 264 (“What marks out nonpunitive deprivations from the punitive ones is that they do not express social condemnation.”). But see *id.* (“[N]o single explicit purpose or aim is built by definition into the practice of punishment. The practice, as Nietzsche was the first to notice, is consistent with several functions or purposes . . .”).

<sup>268</sup> See *Adams v. United States*, 372 F.3d 132, 134–35 (2d Cir. 2004) (“Title 28 U.S.C. §§ 2241 and 2255 each create mechanisms for a federal prisoner to challenge his detention, but the two sections offer relief for different kinds of perceived wrongs. Section 2255 provides relief in cases where the sentence: (1) was imposed in violation of the U.S. Constitution or the laws of the United States; or (2) was entered by a court without jurisdiction to impose the sentence; or (3) exceeded the maximum detention authorized by law; or (4) is otherwise subject to collateral attack. We have held that § 2255 is the appropriate vehicle for a federal prisoner to challenge the *imposition* of his sentence . . . . Section 2241 by contrast is the proper means to challenge the *execution* of a sentence. In a § 2241 petition a prisoner may seek relief from such things as, for example, the administration of his parole, computation of his sentence by parole officials, disciplinary actions taken against him, the type of detention, and prison conditions in the facility where he is incarcerated.”) (citations omitted).

properly has no application, as sentencing has always been one of the judiciary's essential functions.<sup>269</sup> This may be the reason why courts have felt more inclined to parse the meaning of "punishment" in these two contexts—so as to establish boundaries of authority between the separate branches<sup>270</sup>—than they have been in construing the protections of the Thirteenth Amendment.

This does not mean that prisoner-claimants have encountered increased success in litigation based on the courts' usage of this definition of punishment. There are no significant published Indictment Clause decisions of more recent vintage than the 1970s, other than those pertaining to immigration detainees,<sup>271</sup> but those cases have not led to the greater effectuation of detainees' rights in this context.<sup>272</sup> Nor are inmate civil challenges to their sentences generally an area of greater success than so-called "conditions of confinement" cases.<sup>273</sup> Notwithstanding the notion that no "iron curtain [exists] between the Constitution and the prisons,"<sup>274</sup> this rate of failure is illustrative of the modern approach to our generally despised incarcerated class.<sup>275</sup>

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<sup>269</sup> Cf. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (disagreeing "that the Judicial Branch must defer to Executive and Legislative Branch decisionmaking," where "the issue [they] address[ed] is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States"), *superseded by* 8 C.F.R. § 241.14 (2001).

<sup>270</sup> Cf. *United States v. Moreland*, 258 U.S. 433, 441 (1922) ("When an accused is in danger of an infamous punishment if convicted, he has a right to insist that he be not put upon trial except on the accusation of a grand jury.") (citations omitted).

<sup>271</sup> See, e.g., *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387, 1390 (10th Cir. 1981) (citing *Wong Wing* in support of holding that "an excluded alien in physical custody within the United States may not be 'punished' without being accorded the substantive and procedural due process guarantees of the Fifth Amendment," and, therefore the alien's "continued incarceration [for no reason] other than the fact that no country has agreed to take him [was] insufficient reason to hold him further").

<sup>272</sup> See, e.g., *Carrera-Valdez v. Perryman*, 211 F.3d 1046, 1048 (7th Cir. 2000) ("The only arguably contrary decision [to the majority rule that "an excludable alien may be detained indefinitely when his country of origin will not accept his return"], *Rodriguez-Fernandez v. Wilkinson* . . . has not garnered adherents and is of doubtful vitality in its own circuit.") (citations omitted). Similarly, in the earliest stages of the War on Terror, there was little concern with such individuals' rights as a general rule. See, e.g., OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), <http://www.usdoj.gov/oig/special/0306/index.htm> (detailing abuses of force and process committed against individuals detained on immigration charges following terrorist attacks of September 11, 2001).

<sup>273</sup> See, e.g., JOHN SCALIA, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL APPEALS, 1999 WITH TRENDS 1985–99, at 5 (2001) (noting that, "during 1995, 65% of habeas and § 2255 motions were dismissed").

<sup>274</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

<sup>275</sup> See FOUCAULT, *supra* note 3, at 287 ("At the dawn of the twentieth century . . . surrounded by contempt, the highest of walls, the prison finally closed in on an unpopular

If the return to The Hard Road that is argued for in this Article similarly does not lead to meaningful differences in the application of the Thirteenth Amendment's protections to prisoners, it will be for reasons that go beyond the meager winning percentage of prisoner constitutional claims in the court system—reasons that link to the roots of the penitentiary system and the role forced labor plays in it.

## V. THE IMPORTANCE OF PROPERLY APPLYING THE THIRTEENTH AMENDMENT IN PRISON

### A. *The Difference Between Forced Labor as Punishment and “Hard Labor”*

As this Article has explored, the notion that criminals should be forced to work as part of their punishment is a long-standing pillar of collective morality with an ancient foundation.<sup>276</sup> We teach our children that, to the extent such labor is useful *and* publicly humiliating, it serves its purpose.<sup>277</sup> The infliction of pain as an incident to, or necessary component of,<sup>278</sup> such labor has a separate identity and distinct value.<sup>279</sup> The additional notion that such work can be beneficial to the administration of the prison<sup>280</sup> or the welfare of the inmate, to the degree that it actually provides useful education or training,<sup>281</sup> is of a more recent vintage, but still as old as penitentiary confinement in Western Europe and the New World.<sup>282</sup>

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people.”) (quoting MICHÈLE PERROT, *DÉLINQUANCE ET SYSTÈME PÉNITENTIAIRE DE FRANCE AU XIX SIÈCLE* (1975) (unpublished)).

<sup>276</sup> See discussion *supra* Part II.A.

<sup>277</sup> See, e.g., *CARS* (Walt Disney Pictures 2006) (Lightning McQueen is made to repave the main road in town that he has destroyed using “Bessie,” an old paving machine, as punishment.).

<sup>278</sup> See BENTHAM, *supra* note 59, at 153 (“It is manifest, therefore, that when a punishment of the laborious kind is appointed, another punishment must necessarily be appointed along with it. There are, therefore, in every such case, two different punishments at least necessarily concerned.”).

<sup>279</sup> Cf. PEARCE, *supra* note 2, at 262–65 (Cool Hand Luke is made to repeatedly dig and fill in a hole, and is also beaten. When he ultimately pretends to submit, he only asks not to be beaten, without mention of the task.).

<sup>280</sup> See Misrahi, *supra* note 82, at 413–14 (arguing that the open-population “Auburn” prison model that is the norm today won out over the competing “Walnut Street” total-segregation model in the early 1800s, because a “system of complete isolation . . . places great constraints on the ability to introduce industrial techniques into the prison setting because labor is necessarily limited to handicraft of an artisan nature”); see also Dougherty, *supra* note 21, at 486–87 (“[T]he Walnut Street Jail had difficulty sustaining itself economically,” while “[t]he Auburn Penitentiary was economically self-sufficient and made a profit for the government by producing goods such as footwear, clothing, carpets, barrels, harnesses, and furniture.”).

<sup>281</sup> See PIRA SURVEY, *supra* note 109, at 1 (listing, as one “basic concept[] of a modern State penal system,” the provision of “[u]seful work for every prisoner, both to preserve and develop his own capacity for work and through his labor to reduce the cost to the taxpayers of keeping him in prison”).

<sup>282</sup> See FOUCAULT, *supra* note 3, at 242 (“The prison is not a workshop; it is, it must be of itself, a machine whose convict-workers are both the cogs and the products; it ‘occupies

This rehabilitative concept never intruded very far into the public consciousness, in the same way that the rehabilitative model of corrections as a whole failed to do so.<sup>283</sup> Thus, it seems entirely possible that any public examination of the current prison labor regime in the United States would result in a public demand for more grueling prison work programs.<sup>284</sup> What would be interesting to know would be whether the phrase “working hard,” as used by former Governor Hunt,<sup>285</sup> means something different in the context of prisoners than it does in the free world.

*Webster’s Dictionary* defines “hard labor” as “[c]ompulsory physical labor assigned to criminals as part of a prison term.”<sup>286</sup> *Black’s Law Dictionary* defines it more precisely as “[w]ork imposed on prisoners as additional punishment, usu[ally] for misconduct while in prison,”<sup>287</sup> and notes that it can be imposed as a sentence in “[s]everal states” and “in military sentencing.”<sup>288</sup> Neither definition explicitly contemplates forced labor programs for rehabilitative, administrative, or educational purposes, reflecting the absence of such non-punitive considerations in the traditional understanding of labor as punishment,<sup>289</sup> however much of a role those considerations played in the development of such programs in this country.<sup>290</sup>

The term “hard labor” presumably embodies a set of properties that can be contrasted with a different set of properties embodying a separate condition, that of “non-hard,” but nonetheless forced, labor.<sup>291</sup> The latter condition is also presumably

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them continually, with the sole aim of filling their moments.’ . . . If, in the final analysis, the work of the prison has an economic effect, it is by producing individuals mechanized according to the general norms of an industrial society . . .”).

<sup>283</sup> See GARLAND, *supra* note 26, at 10 (arguing that the “penal-welfare framework” represented “the aspirational values of political elites rather than the sensibilities of the general public,” and that these values “no longer set the emotional tone for public discourse about crime and punishment”).

<sup>284</sup> See *id.* at 9 (“Punishment—in the sense of expressive punishment, conveying public sentiment—is once again a respectable, openly embraced, penal purpose . . .”).

<sup>285</sup> See Cullen & Travis, *supra* note 90.

<sup>286</sup> WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 564 (1986).

<sup>287</sup> BLACK’S LAW DICTIONARY 721 (7th ed. 1999).

<sup>288</sup> *Id.* But see Berger, *supra* note 101, at 1 n.5 (noting that “[c]urrent military dictionaries do not define hard labor”) (citations omitted).

<sup>289</sup> See, e.g., MCGINN, *supra* note 80, at 7 (“When man disobeyed and was driven from the Garden of Eden for his sins, his punishment mandated that ‘in the sweat of thy face shalt thou eat bread.’ From the beginning omniscient wisdom chose labor as the first means to restore fallen man.”) (internal citation omitted).

<sup>290</sup> See ORLANDO FAULKLAND LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776–1845, at 10 (1922) (“When William Penn . . . founded the province of Pennsylvania, he brought from the British monarch permission to establish a penal code of most exceptional mildness, which . . . allowed the substitution of imprisonment at hard labor for former bloody punishments . . . . In a tour of Holland, he had inspected the Dutch work-houses, which . . . were well-developed institutions for the amendment of lawbreakers through compulsory labor.”).

<sup>291</sup> See Berger, *supra* note 101, at 3 (“What was legally permissible [as of 1886], however, was arduous, physical labor that, although it may have caused some physical suffering or pain,

less harsh from the perspective of the inmate,<sup>292</sup> to a degree that would ideally correlate to whatever “the punishment’s intended punitive impact”<sup>293</sup> is meant to be. This is consistent with the originating purpose of punishment by forced labor as, in part, an act of public shaming,<sup>294</sup> which has both a deterrent goal<sup>295</sup> and a symbolic, “expressive” one.<sup>296</sup>

But how much more harsh should forced labor be than what non-incarcerated working people endure? The question can be answered by looking at two of the penological justifications that are used for the labor.<sup>297</sup> Most criminologists “devolve into two broad camps: the retributive and the consequentialist.”<sup>298</sup> As Campos explained,

[t]he retributive view is founded on the idea of desert—we punish the criminal because the blameworthiness he has incurred through his actions makes it morally fitting (perhaps imperative) that we do so. The consequentialist position is essentially utilitarian: Punishment is justifiable to the extent that the good results that

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was commensurate with the full demands of justice.”). The Army Major who made these observations offered examples of hard labor that he believed would be constitutionally permissible today, including “strictly punitive tasks such as repetitively filling and emptying sandbags,” and “hav[ing] the Soldier dig fighting positions . . . for the sole punitive purpose of having the Soldier fill them back in.” *Id.* at 12.

<sup>292</sup> *See id.* at 5 (“Since the establishment of the [Uniform Code of Military Justice], at least one court has recognized that when executed, the ‘labor required of present-day prisoners [sentenced to hard labor] is often no more strenuous than the cutting of grass or leaf raking.’”) (quoting *United States v. Bruce*, 17 M.J. 1083, 1085 (A.F.C.M.R. 1984)).

<sup>293</sup> *Id.* at 7.

<sup>294</sup> *See* FOUCAULT, *supra* note 3, at 109 (“Public works meant two things: the collective interest in the punishment of the condemned man and the visible, verifiable character of the punishment. Thus the convict pays twice; by the labour he provides and by the signs that he produces.”).

<sup>295</sup> *See, e.g.,* Berger, *supra* note 101, at 8 (“The performance of meaningful hard labor in post stockades would have the distinctively desirable effect of making the prisoner remember his time spent in the stockade and instilling in him a strong desire never to return.”) (citation omitted).

<sup>296</sup> *See, e.g.,* Pugsley, *supra* note 45, at 401 (describing “what Professor Feinberg has termed ‘the expressive function of punishment’” as requiring, *inter alia*, that “condemnation is expressed by hard treatment, and the degree of harshness of the latter expresses the degree of reprobation of the former,” such that “[p]ain should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation”) (citing JOEL FEINBERG, *DOING AND DESERVING* 98, 117 (1970)).

<sup>297</sup> *But see* Huigens, *supra* note 27, at 439 (describing as “[o]ne of three pervasive confusions in commonplace punishment theory” the “conflat[ion of] two different things: the ends of punishment and theories of punishment”).

<sup>298</sup> Campos, *supra* note 29, at 1931; *see also* Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601, 603 (2009) (describing “the two main camps in punishment theory, retributivism and consequentialism”).

flow from it (primarily deterring future violations of the law) outweigh the evil consequences that result from inflicting pain on the individuals who are punished.<sup>299</sup>

The two “camps” represent abstractions of the opposite ends of the penological theory spectrum, and correctional policies will usually employ some mix of both in their purposes and justifications.<sup>300</sup>

Either the retributive or consequentialist views of punishment can be employed to provide a floor, a minimum amount of “hardness” that will qualify forced labor as punishment.<sup>301</sup> Under retributive principles, to the extent such labor is forced upon the convict for that convict’s own betterment, it may be ignominious but it does not, philosophically at least, constitute punishment for crime.<sup>302</sup> Consequentialist principles impose a comparable demand that the labor be sufficiently “hard” to deter individuals from committing prohibited acts.<sup>303</sup>

The ceiling on the severity of such punishments can similarly be located in either school of thought.<sup>304</sup> The retributive limitation on the power to punish is contained in the modern understanding of the meaning of the adjectives “cruel and unusual” in the Eighth Amendment.<sup>305</sup> As previously discussed, when the Supreme Court first pronounced the Eighth Amendment’s protections in the twentieth century, it focused on whether certain punishments “might be so disproportionate to the offense as to constitute a cruel and unusual punishment.”<sup>306</sup> This is the essence of retributivism,

<sup>299</sup> Campos, *supra* note 29, at 1931.

<sup>300</sup> See, e.g., Paul H. Robinson, Commentary, *Criminal Justice in the Information Age: A Punishment Theory Paradox*, 1 OHIO ST. J. CRIM. L. 683, 685 (2004) (“Desert commonly has more influence than crime control in assigning criminal liability, but the two share control of sentencing.”).

<sup>301</sup> See, e.g., Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 290–91 (2005) (stating that consequentialism, or “deterrence concerns,” can set the “floor” with respect to an appropriate amount or degree of punishment).

<sup>302</sup> Cf. GARLAND, *supra* note 26, at 36 (“In contrast to the judicial power to punish, which had long been subject to scrutiny and review, the powers of social workers and psychologists were regarded in a more benign, apolitical light . . . . Their mission was viewed as an uplifting, civilizing one that tried to distance itself and its objectives from the penal mechanisms in which it operated.”).

<sup>303</sup> See Christopher, *supra* note 301, at 282 (citing R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 5–6 (1996)) (stating that “consequentialism conceives punishment as a means to an end”).

<sup>304</sup> Cf. *id.* at 290–91 (citing H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 8–11 (1968)) (stating that “retributivist considerations” can determine the “ceiling” on the “amount or degree of punishment”).

<sup>305</sup> But see Howe, *supra* note 49, at 40 (arguing that “[t]he thirteenth amendment clause is more easily understood as bounding future growth in the application of the eighth amendment language rather than yielding to it”).

<sup>306</sup> Weems v. United States, 217 U.S. 349, 368 (1910) (quoting McDonald v. Commonwealth, 53 N.E. 874, 875 (Mass. 1899)).

which “demands a reciprocity of suffering.”<sup>307</sup> Consequentialist principles, for their part, foreclose the use of particular punishments where their utility is deemed to have sufficiently diminished in comparison to the harms they visit.<sup>308</sup>

The question that naturally follows the setting of these upper and lower limits is whether the meaning of “punishment for crime,” as understood in the Thirteenth Amendment, takes up the entirety of the space between these limits.<sup>309</sup> One could reasonably observe that the *practice* of forced labor as punishment actually extends further in many instances today, downwards into the category of “non-hard” forced labor,<sup>310</sup> which is understandable given the primarily consequentialist justifications that are used for modern prison labor programs.<sup>311</sup> The courts are not correct that such labor can rightfully be called punishment, for the purposes of escaping the Thirteenth Amendment’s prohibitions, simply by virtue of it occurring in prison.

### *B. The Potential of the Thirteenth Amendment in the Alternate Universe of The Hard Road*

If Thirteenth Amendment jurisprudence had followed the historical arc that constitutional due process jurisprudence has described, it too would have arrived at the question of substance as the crucial one, as the case law recently did in that line of cases. This Article argues that the protections of the Thirteenth Amendment should rightfully have been applied by courts using the same distinction between disciplinary and rehabilitative/administrative actions which historically animated the due process cases,<sup>312</sup> until the test changed in 1995 in *Sandin v. Conner*.<sup>313</sup> In such a world, Judge Wiener’s view that convicted prisoners still retain some Thirteenth Amendment rights would have been the governing rule, rather than an outlier statement. With the abandonment of the punitive/administrative distinction in the due process context post-*Sandin*, this alternate-universe Thirteenth Amendment jurisprudence would likely

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<sup>307</sup> Campos, *supra* note 29, at 1936.

<sup>308</sup> See Huigens, *supra* note 27, at 442 (“The imposition of a draconian penalty can upset the proper balance between society, the victim, and the offender just as surely as the crime itself has done.”).

<sup>309</sup> U.S. CONST. amend. XIII, § 1.

<sup>310</sup> See Lafer, *supra* note 119, at 121 (listing examples of modern prisoner labor, such as “telemarketing,” “pack[ing] and ship[ping] thousands of copies of Windows software,” and “clean[ing] the stock shelves” at local stores).

<sup>311</sup> See, e.g., N.C. GEN. STAT. ANN. § 148-26(a) (West 2009) (“Work assignments and employment shall be for the public benefit to reduce the cost of maintaining the inmate population while enabling inmates to acquire or retain skills and work habits needed to secure honest employment after their release.”).

<sup>312</sup> See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) (holding that no due process right was implicated in “the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons,” because “administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration”).

<sup>313</sup> 515 U.S. 472 (1995).

also have seen a shift towards looking at the *nature* of the inmate's deprivation as the dispositive issue. Any such substantive inquiry would follow, as the due process cases ostensibly follow, "the principle of minimalism (less is better), that is, given any two punishments not ruled out . . . and roughly equal in retributive and preventive effects for a given offense and class of offenders, the less severe punishment is to be preferred to the more severe."<sup>314</sup>

Indeed, the existing Thirteenth Amendment cases of *this* universe look at that very issue of substance, in instances where the individuals whose constitutional rights are claimed to have been violated are not incarcerated.<sup>315</sup> In the governing case in this area, *United States v. Kozminski*,<sup>316</sup> the defendants were criminally prosecuted for keeping "two mentally retarded men" as unpaid laborers on their farm, "in poor health, in squalid conditions, and in relative isolation from the rest of society."<sup>317</sup> In addition to holding the men in these conditions, the government also argued that the Kozminskis used those same conditions "to cause the victims to believe they had no alternative but to work on the farm."<sup>318</sup> The Supreme Court took this opportunity to define involuntary servitude for the purposes of criminal liability under the Thirteenth Amendment as "a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."<sup>319</sup> Congress subsequently expanded this definition to include coercion through threats of "psychological, financial, or reputational harm."<sup>320</sup>

Any existing non-voluntary prison labor program, whether supported by an administrative requirement or a sentence, would likely qualify under the *Kozminski* test

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<sup>314</sup> STANFORD ENCYCLOPEDIA, *supra* note 264.

<sup>315</sup> The exceptions to this rule came in the early twentieth century, when the Supreme Court held the labor being compelled to have been known to the common law prior to the ratification of the amendment. *See* *Butler v. Perry*, 240 U.S. 328, 331–33 (1916) (denying Thirteenth Amendment challenge to road work conscription, since "[f]rom Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads," and the amendment "introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc."); *see also* *The Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) ("Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.").

<sup>316</sup> 487 U.S. 931 (1988).

<sup>317</sup> *Id.* at 934.

<sup>318</sup> *Id.* at 936.

<sup>319</sup> *Id.* at 952.

<sup>320</sup> 18 U.S.C. § 1589(c)(2) (2006).

as at least a form of legal coercion, as the Court itself acknowledged in that opinion: “The express exception of involuntary servitude imposed as a punishment for crime provides some guidance. The fact that the drafters felt it necessary to exclude this situation indicates that they thought involuntary servitude includes at least situations in which the victim is compelled to work by law.”<sup>321</sup>

It does not matter for these purposes whether an individual claiming to be held in involuntary servitude was paid for this work,<sup>322</sup> but that detail would probably matter to the average citizen, as would the type of work that was being required of inmates. Garland has noted how “the fact that the language and affect of punitiveness disappeared from official discourse while remaining strongly present in popular culture and common sense would re-emerge as an important source of tension in the 1980s and 1990s.”<sup>323</sup>

Similarly, whatever the actual rationales for these programs, members of the public might not consider the following examples of modern prison labor programs (compulsory or otherwise) as “hard labor” in any sense: in the federal system, “fleet management and vehicular components,” “recycling activities,” and “services (which includes data entry and encoding),”<sup>324</sup> in Washington state, manufacturing “aircraft components”;<sup>325</sup> or in California, staffing an airline “reservations service” call center.<sup>326</sup> The existence of these strikingly pedestrian categories of labor is not a recent innovation. In Colorado, as early as 1939, inmates were employed not only in making license plates, but also “knit goods,” soap, and mattresses, and in farming.<sup>327</sup>

Accordingly, forcing legislatures to amend their criminal statutes to bring their jurisdictions’ general work requirements into compliance with the Thirteenth Amendment bears the heavy risk of making the overall prison labor situation worse from the prisoners’ perspectives.<sup>328</sup> Garland has warned that the “highly charged political

<sup>321</sup> *Kozminski*, 487 U.S. at 942.

<sup>322</sup> See Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions for an Age-Old Problem*, 55 CATH. U. L. REV. 141, 160 (2005) (“[I]n order to prevail in a suit alleging a violation of Section 1 of the Thirteenth Amendment, a plaintiff will have to prove that he was ‘compelled by force, coercion, or imprisonment and against his will to labor for another whether or not he is paid.’”) (citation omitted).

<sup>323</sup> GARLAND, *supra* note 26, at 41.

<sup>324</sup> CRS REPORT, *supra* note 75, at 3.

<sup>325</sup> Paul Wright, *Making Slave Labor Fly: Boeing Goes to Prison*, in PRISON NATION, *supra* note 119, at 114.

<sup>326</sup> Lafer, *supra* note 119, at 121.

<sup>327</sup> See PIRA SURVEY, *supra* note 109, at 31–34.

<sup>328</sup> See, e.g., Leonard Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 37 (1978) (“Is there not a substantial risk that available rehabilitative programs will diminish or disappear? Would not that danger be even greater to jurisdictions which adopt the Model Sentencing and Corrections Act of the National Conference of Commissioners on Uniform State Laws, which *guarantees* inmates a statutory right not to be rehabilitated, a right *not* to participate in treatment programs?”).

discourse [that] now surrounds all crime control issues” means that “every decision is taken in the glare of publicity and political contention and every mistake becomes a scandal.”<sup>329</sup> This often results in pointlessly expressive enactments, such as the proposal introduced by Nevada Senator John Ensign in 2008 to require a 50-hour workweek for federal prison inmates.<sup>330</sup> Such is the nature of what is “very much a *political* process,” to be “governed not by any criminological logic, but instead by the conflicting interests of political actors and by the exigencies, political calculations and short-term interests that provide their motivations.”<sup>331</sup>

However, as this Article has argued, we have throughout our history forced convicted criminals to work as punishment for their crimes, and continue to, although we have not always clearly understood our motivations for doing so. A return to The Hard Road would at least clarify that our purpose in compelling this labor is punitive, and that awareness may by itself constrain our actions in ways that we are not constrained when we believe (or we are told) that we are acting in the prisoner’s own best interest.<sup>332</sup>

#### CONCLUSION: THE HARD ROAD AS ONE THAT IS POTENTIALLY LESS TRAVELED

The political forces described above could simply prevent any action whatsoever on these issues, which is different from saying that the number of hard labor programs in the country will not increase.<sup>333</sup> There is, after all, another long-standing meaning of the word “punishment” that is consistent with the courts’ Thirteenth Amendment holdings, if not their Fifth or Eighth Amendment ones, and courts could stand firm on this meaning as the appropriate one in this instance. Broadly stated, this is the view that “punishment is the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person’s guilty behavior.”<sup>334</sup> There is no language of intent or invocation of sentencing here, only the notion that “punishment is an objectively judged loss or burden imposed on a convicted offender.”<sup>335</sup> The Supreme Court has similarly conflated the circumstantial and purposeful imposition of prison conditions in its due process jurisprudence.<sup>336</sup> This conflation ignores the distinction between non-punitive

<sup>329</sup> GARLAND, *supra* note 26, at 13.

<sup>330</sup> Prisoner Opportunity, Work, and Education Requirement (POWER) Act, S. 3695, 110th Cong. (2008).

<sup>331</sup> GARLAND, *supra* note 26, at 191.

<sup>332</sup> See Pugsley, *supra* note 45, at 391–97.

<sup>333</sup> See, e.g., Riederer, *supra* note 21, at 1453 (noting that, in recent years, “most states have instituted some form of labor program, and a growing number of states have included hard labor as a component of their programs. Furthermore, some states are experimenting with new models of prison labor programs, drawing on historical models”).

<sup>334</sup> Morris, *supra* note 45, at 482–83.

<sup>335</sup> STANFORD ENCYCLOPEDIA, *supra* note 264.

<sup>336</sup> See *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (“[P]unishment of incarcerated prisoners” has as one of its aims to “effectuate[] prison management and prisoner rehabilitative goals.”).

practices such as rehabilitation, which has a forward-looking purpose—to change future conduct—with punishment, which is necessarily backwards-looking and premised on conduct that has already occurred.<sup>337</sup> It also obscures the potential for even punitively-motivated forced-labor programs to be less “hard” than one might initially imagine, but still serve retributive purposes.<sup>338</sup>

In the same way that the different goals of prison labor are invoked in overlapping ways that reveal their unimportance,<sup>339</sup> so too are the circumstances of such labor’s imposition glossed over in revealing fashion.<sup>340</sup> The ultimate value being served is simply the “belie[f], in theory at least, that prisoners should work—and work hard.”<sup>341</sup> The tenacity of this belief can be seen in the doctrinally puzzling argument of the Army Major who argued that hard labor, with or without imprisonment, remains a constitutionally permissible sentence under the Uniform Code of Military Justice.<sup>342</sup> The Major also argued that, as the jurisdiction of the Court of Appeals for the Armed Forces (CAAF) is “confined to ‘the review of specified sentences imposed by courts-martial,’”<sup>343</sup> the CAAF has no authority to rule on the “nature of the hard labor” to which a soldier is assigned, as that “is a commander’s decision, not a judicial one . . . and not a finding or sentence over which the court can exercise jurisdiction.”<sup>344</sup>

The jailer in such a world does indeed possess the power to punish, which, lacking punitive intent or “deliberate indifference,”<sup>345</sup> the Supreme Court has emphatically proclaimed he does *not* possess under the Eighth Amendment. Perhaps a court intending to make this rule explicit will at least proffer a reason why there are two different meanings, in two different amendments, of the same word, both times to the detriment of the rights of prisoners under the Constitution. Courts presented with

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<sup>337</sup> See Ernest van den Haag, *Punitive Sentences*, 7 HOFSTRA L. REV. 123, 130 (1978) (“Punishment, then, *need not* rest on anything but past threats; and it *cannot* rest on the desire for rehabilitation or incapacitation both of which refer only to future conduct. . . . [H]owever useful punishment is in rehabilitating or incapacitating, neither is logically related to punishment’s essential function: to *deter* from crime.”).

<sup>338</sup> See, e.g., Riederer, *supra* note 21, at 1469–81 (setting forth model statutes for proposed punitive hard-labor program).

<sup>339</sup> Cf. *Ewing v. California*, 538 U.S. 11, 25 (2003) (“[T]he Constitution ‘does not mandate adoption of any one penological theory’ . . . [and a] sentence can have a variety of justifications.”) (citation omitted).

<sup>340</sup> *But see* *Wallace v. Robinson*, 940 F.2d 243, 252 (7th Cir. 1991) (Cudahy, C.J., dissenting) (“[T]he inquiry into intent should not be abandoned simply because a majority of this court may believe that it is not cost-effective. The line that Illinois draws between disciplinary and administrative reasons for official action reflects a deeply-rooted belief in the importance of intent in this context. . . . As Justice Holmes once observed, ‘even a dog distinguishes between being stumbled over and being kicked.’”) (citation omitted).

<sup>341</sup> Berger, *supra* note 101, at 2.

<sup>342</sup> See generally *id.*

<sup>343</sup> *Id.* at 16 (citing *Clinton v. Goldsmith*, 526 U.S. 529 (1999)).

<sup>344</sup> *Id.*

<sup>345</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

such a seemingly inexplicable difference between the two amendments, from the standpoint of the inmates affected,<sup>346</sup> could also reasonably conclude, as courts in the area of administrative law have, that such a broad grant of power to correctional officials should at least be tempered by the requirement that there exist intelligible bases for the different actions they undertake with such power.<sup>347</sup>

Former Attorney General Ramsey Clark once remarked that “[t]here are few better measures of the concern a society has for its individual members and its own well being than the way it handles criminals.”<sup>348</sup> The return of The Hard Road that is called for in this Article would provide an opportunity for us to once again measure the extent of an individual’s rights that we wish to withdraw upon his or her conviction for crime. This is a question of ongoing and vital importance to those already incarcerated, but its importance to those of us who remain free is comparably high, and not as attenuated as we might imagine at first blush.

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<sup>346</sup> Cf. *Wilkerson v. Stalder*, No. 00-304-C, 2007 WL 2693852, at \*18 (M.D. La. Sep. 11, 2007) (“If an official’s actions are taken with no legitimate penological basis, it does not matter whether the claimed violation is under the Eighth Amendment or the Fourteenth Amendment or both amendments, as is the case here . . . . Changing amendments does not turn improper motivation into proper motivation.”).

<sup>347</sup> See, e.g., *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (describing nondelegation doctrine as requiring “that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an ‘intelligible principle’ to guide the exercise of the delegated discretion”) (citations omitted).

<sup>348</sup> *Alabama Commentary*, *supra* note 217, at 153 n.50.