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NOTE

LOCKED UP AND TRAFFICKED OUT: PRISON LABOR AND THE THIRTEENTH AMENDMENT

MEGAN MASSIE*

“[I]t is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins.”¹

The passage of the Thirteenth Amendment was critical to ending chattel slavery in America. However, its drafters included a specific clause, known as the Punishment Clause, that courts have interpreted to exclude incarcerated individuals from its protection. Systems of oppression have manipulated the Punishment Clause to maintain control over, and traffic the labor of, American minorities, specifically African Americans. A modern form of slavery has emerged: the American penal system. It is critical that this nation aggressively dismantle and permanently eradicate this new form of slavery. Until then, the exploitation of minorities will continue to plague the American criminal justice system.

I. INTRODUCTION

In 1865, as the Civil War ended, the United States South was in tatters, and the lives of millions of enslaved men, women, and children were caught in limbo. Even though it had been over two years since President Abraham Lincoln signed the Emancipation Proclamation,² a majority of America’s

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1. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866), *reprinted in* THE RECONSTRUCTION AMENDMENTS’ DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 122 (Alfred Avins ed., 1967) (Sen. Trumbull’s statement in support of the Civil Rights Act of 1866); William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1313 n.1 (2007).

2. Abraham Lincoln, *The Emancipation Proclamation*, NAT’L ARCHIVES (Jan. 28, 2022), <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation>. For the proclamations themselves, see ABRAHAM LINCOLN, *SPEECHES AND WRITINGS 1859-1865*, at 368–70, 424–25 (Library of America 1989).

nearly four million African Americans remained enslaved.³ Congress faced two major tasks: permanently ending slavery nationwide and finally granting formerly enslaved people the civil rights white freemen had enjoyed for nearly a century.

The result was the passage of the monumental Reconstruction Amendments. The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution “banned slavery, universalized due process, and granted black men the vote.”⁴ The impact of these amendments cannot be understated for how they protected and advanced the lives of African Americans for generations to come. They have not, however, escaped scrutiny, limitation, and criticism throughout the years.

This paper will focus on the shortcomings of the Thirteenth Amendment specifically. This landmark amendment is famously known for ending slavery in America. However, it left one glaring exception known as the Punishment Clause.⁵ The language of this clause has since been manipulated to bring about a new form of slavery: prison labor.

Section two of this paper will explore the history of the Thirteenth Amendment and how the Punishment Clause exploits the labor of incarcerated individuals. This section will include an analysis of caselaw that has consistently held (1) that forcing inmates to work is constitutional and (2) that inmates are exempt from state and federal workers’ rights laws.

Section three will give an overview of how prison labor has changed since the Civil War. It will explore practices from convict leasing to the War on Drugs and the phenomenon of mass incarceration. This section will demonstrate how massive racial disparities in defining and enforcing crime have disenfranchised generations of African Americans. The section will also argue that the criminal justice and prison systems have been used to recreate institutionalized control over communities of color.

Section four will present an originalist argument for interpreting the Thirteenth Amendment. It will explore how originalist thought has been incorrectly applied to misinterpret the scope and reach of the Thirteenth Amendment. This section will argue that a more holistic originalist approach—one that incorporates an overview of prison conditions at the time and an analysis of Congressional intent during the amendment’s drafting and ratification—should be adopted to support a broader application of the

3. *Emancipation Proclamation*, HISTORY (Jan. 26, 2022), <https://www.history.com/topics/american-civil-war/emancipation-proclamation>.

4. Isaac Chotiner, *The Buried Promise of the Reconstruction Amendments*, NEW YORKER (Sept. 9, 2019), <https://www.newyorker.com/news/q-and-a/the-buried-promise-of-the-reconstruction-amendments>; U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

5. Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 214 (2009).

amendment. This holistic originalist application can and should be adopted to protect incarcerated workers.

The fifth and final section will focus on what can be done to combat this form of modern-day slavery. It will identify key constitutional and legislative actions needed to effectively dismantle this institution of control—from amending the Constitution to remove the language of the Punishment Clause to reforming federal legislation around labor trafficking and workers’ rights. This nation’s legislators must take bold steps to stop the exploitation of prison labor.

II. THE THIRTEENTH AMENDMENT AND PRISON LABOR— A HISTORICAL LEGAL OVERVIEW

A. *The Thirteenth Amendment and the Courts*

The Thirteenth Amendment of the United States Constitution was ratified on December 6, 1865. It stated, “[n]either slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”⁶ Over the next two years, Congress also passed the Civil Rights Act of 1866⁷ and the Anti-Peonage Act.⁸ The Thirteenth Amendment’s exception—known as the “punishment clause”⁹—quickly became an area of contention. The judicial system has interpreted this language to deny constitutional protections to the nation’s prisoners.

The Punishment Clause has been relied on to uphold the forced labor of prisoners at the state and federal level. This process began in 1871, only six years after the amendment’s ratification.¹⁰ The Virginia Supreme Court unequivocally declared that prisoners are “the slaves of the State” and not granted protection under the Thirteenth Amendment.¹¹ The Virginia commonwealth could force its inmates to work.¹²

This ideal was further cemented a year later in the Supreme Court’s landmark *Slaughter-House Cases* decision. While the Court did not directly address prison labor, it severely limited the reach of the Thirteenth Amendment.¹³ Future decisions latched onto this reasoning to continuously deny

6. U.S. CONST. amend. XIII, § 1 (emphasis added).

7. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. §§ 1981–1982 (1987))).

8. 42 U.S.C. § 1994 (originally enacted as Peonage Abolition Act of 1867, ch. 187, § 1, 14 Stat. 546) (providing the language abolishing peonage); 18 U.S.C. § 1581 (originally enacted at ch. 187, 14 Stat. 546) (providing the criminal penalties of the Peonage Abolition Act of 1867).

9. Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 608 (2008); Marion, *supra* note 5, at 214.

10. *Ruffin v. Commonwealth*, 21 Gratt. 790 (Va. 1871).

11. *Id.* at 796.

12. *Id.*

13. The Court discussed how the amendment was created for very limited purposes and could not be used to more broadly protect certain groups of laborers. *Slaughter-House Cases*, 83

prisoners constitutional protections and allow correctional facilities to force them to work,¹⁴ with few limits or exceptions.¹⁵ As it stands today, an incarcerated individual can be forced to work, or they may be subject to punishment from the facility in which they reside.¹⁶

The Punishment Clause has been relied on further to limit the wages of incarcerated laborers. Courts have consistently held that prisoners have no constitutional right to be paid for their work in prison.¹⁷ Inmates cannot seek protection from traditional workers' rights statutes because they are not considered traditional "employees."¹⁸ A prisoner receives payment for his or her work through federal or state statutes only.¹⁹ These wages can be set at any rate²⁰ and conditioned as the government deems proper.²¹

The use of wages can also be restricted.²² In fact, compensation for work in prison is not even considered "wages" at all. Instead, courts define it as a "gratuitous payment authorized by the state as a rehabilitative tool rather than wages."²³ Incarcerated individuals currently lack recourse to be adequately compensated for the work they are forced to do.

U.S. 36, 37 (1872) ("[T]he thirteenth article of amendment was *intended primarily* to abolish African slavery.") (emphasis added).

14. *Ali v. Johnson*, 259 F.3d 317, 317 (5th Cir. 2001) (reiterating "that inmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work"); see *U.S. v. Reynolds*, 235 U.S. 133 (1914); see also *Wilkinson v. McManus*, 216 N.W.2d 264 (Minn. 1974) (demonstrating claims fail at the state level as well).

15. See *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977) (holding that the amendment authorizes a facility to force its prisoners to work 120 hours a week). Only one federal appellate decision to date has suggested prisoners may have some Thirteenth Amendment rights. See *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990). However, the *Ali* court later clarified that the analysis in *Watson* was an "anomaly in federal jurisprudence" and "lacks authority." *Ali*, 259 F.3d at 318.

16. Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>; see *Mikeska v. Collins*, 928 F.2d 126 (5th Cir. 1991).

17. See, e.g., *Loving v. Johnson*, 455 F.3d 562, 562 (5th Cir. 2006).

18. Some inmates have sued under the Fair Labor Standards Act (FLSA) for workplace protections and rights. See *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994). Courts, however, have consistently rejected these arguments because "the relationship between the penitentiary and the inmate worker is not primarily economic" as required by the statute. Bennis, *supra* note 16.

19. See *Jackson v. Fla. Dep't of Corr.*, 790 So. 2d 381, 386–87 (Fla. 2000).

20. See *Richardson v. Rees*, 618 So. 2d 636, 639–40 (La. Ct. App. 1993).

21. See *Cumbey v. State*, 699 P.2d 1094, 1096–97 (Okla. 1985) (upholding the condition that inmates must pay part of their wages to an "inmate trust savings account"); see also *Sigler v. Lowrie*, 404 F.2d 659, 660 (8th Cir. 1968) (determining the state can take prisoner pay to reimburse certain state expenses).

22. See *Sahagian v. Dickey*, 646 F. Supp. 1502 (W.D. Wis. 1986); see also *Meis v. Grammer*, 411 N.W.2d 355 (Neb. 1987).

23. *Commonwealth Dep't of Corr. v. Tate*, 133 A.3d 350, 358 (Pa. Commw. Ct. 2016).

B. *The Judicial Impact on Prison Labor Today*

With the full support of the judiciary, most states and the federal government actively use various forms of prison labor today.²⁴ Incarcerated individuals tend to fall into one of four broad work categories. The first and most common are regular prison jobs—jobs run directly by the Department of Corrections to maintain daily prison operations.²⁵ The second is jobs in state-owned businesses, often called “correctional industries.”²⁶ The third is jobs outside the facility, such as work release programs for lower security risk inmates.²⁷ The fourth and final category is jobs in private businesses.²⁸ Various stakeholders maintain an economic interest in the labor of incarcerated individuals.

Moreover, prisons still freely punish inmates for refusing to work. The Bureau of Prisons’ (BOP) most recent report lists the following as “moderate severity level” violations: “refusal to work or accept a program assignment,” and “unexcused absence from work or a program.”²⁹ Prisoners who engage in such activity will receive “moderately serious sanctions,”³⁰ including solitary confinement, loss of privileges, and other consequences.³¹

Finally, incarcerated laborers are vastly underpaid. The current federal minimum wage is \$7.25,³² and states and localities have minimum wage laws that pay workers more.³³ As of 2017, the average prison inmate made \$0.14 to \$0.63 an hour for regular jobs and \$0.33 to \$1.41 for “correctional industries” jobs.³⁴ Some states pay inmates nothing for regular work.³⁵

24. See Bennis, *supra* note 16; see also James Kilgore, *The Myth of Prison Slave Labor Camps in the U.S.*, COUNTERPUNCH (Aug. 9, 2013), <https://www.counterpunch.org/2013/08/09/the-myth-of-prison-slave-labor-camps-in-the-u-s/>.

25. This includes services such as cooking, laundry services, and janitorial services. Wendy Sawyer, *How Much do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

26. *Id.* These services can range from fighting fires to operating call centers. *Prison Labor in the United States: How Prevalent Is It Today?*, SAGE LECTURE SPARK (Mar. 23, 2020), <https://sagelecturespark.com/2020/03/23/3-24-20-prison-labor-in-the-united-states-how-prevalent-is-it-today/>.

27. These programs are often run by the Department of Corrections, but it is possible for community organizations to pay the inmates’ wages. Sawyer, *supra* note 25.

28. Sawyer, *supra* note 25.

29. E. ANN CARSON, BUREAU OF JUST. STAT., FEDERAL PRISONER STATISTICS COLLECTED UNDER THE FIRST STEP ACT, 2020, DOC. NO. NCJ 255111, 16 (2021), <https://bjs.ojp.gov/content/pub/pdf/fpscfsa20.pdf>.

30. *Id.*

31. See TENN. CODE ANN. § 41-2-120(a); see also Bennis, *supra* note 16.

32. 29 U.S.C. § 206.

33. See, e.g., MINN. DEPT. OF LAB. & INDUS., MINNESOTA’S MINIMUM WAGE LAWS (2022), https://www.dli.mn.gov/sites/default/files/pdf/minimum_wage.pdf.

34. Sawyer, *supra* note 25. For a comprehensive state-by-state analysis on prison wage policy, see Wendy Sawyer, *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html.

35. Alabama, Arkansas, Georgia, South Carolina, and Texas are a few examples. Sawyer, *supra* note 34.

Others take a variety of deductions on these wages to cover court costs, donations to Crime Victims Reparation Funds, and court-ordered family support.³⁶ Nationwide, incarcerated individuals remain underpaid and often face financial handicaps on their earnings.

Courts have consistently interpreted the Punishment Clause of the Thirteenth Amendment to mean that prisons can force inmates to work for little to no compensation. The effect of these decisions is demonstrated by a look at prison labor today. Incarcerated inmates are often forced to work under the threat of punishment at rates vastly lower than what the average citizen earns. The pain of this reality, however, is not felt equally.

III. THE DEVELOPMENT OF PRISON LABOR AFTER THE CIVIL WAR: FROM CONVICT LEASING TO THE ERA OF MASS INCARCERATION

A. *Prison Labor in the South Through Reconstruction: The 1860s Through 1920s*

The year 1865 marked the end of the enslavement of African Americans. It also marked the beginning of America's first prison boom.³⁷ The South, still battered from the destruction and death of war, faced another problem: an economic depression at the loss of its free labor supply.³⁸ Almost immediately, officials pushed to regain control over minorities by capitalizing on the white public anxiety toward formerly enslaved people.³⁹ With this movement came the Jim Crow Era.

One of the main vehicles used to regain control was the criminal justice system. State and local leaders quickly passed ordinances and laws criminalizing activities such as “walking without a purpose,”⁴⁰ “mischief,”⁴¹ and “insulting gestures.”⁴² These new “crimes” were enforced primarily and aggressively against black citizens.⁴³ The result: black people were swept off the street and into Southern jails and prisons.⁴⁴

36. Sawyer, *supra* note 34.

37. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 39–40 (10th Anniversary ed., 2020).

38. RUTH DELANEY, RAM SUBRAMANIAN, ALISON SHAMES & NICHOLAS TURNER, *REIMAGINING PRISON* 38 (2018), <https://www.vera.org/reimagining-prison-web-report>.

39. *Id.*

40. *Id.*

41. ALEXANDER, *supra* note 37, at 38.

42. ALEXANDER, *supra* note 37, at 38.

43. ALEXANDER, *supra* note 37, at 38; DELANEY ET AL., *supra* note 38, at 38. For this reason, they were infamously called the Black Codes. Kathy Roberts Forde & Bryan Bowman, *Exploiting Black Labor After the Abolition of Slavery*, CONVERSATION (Feb. 6, 2017, 10:39 PM), <https://theconversation.com/exploiting-black-labor-after-the-abolition-of-slavery-72482>.

44. DELANEY ET AL., *supra* note 38, at 38 (“By the 1870s, almost all of the people under criminal custody of the Southern states—a full 95 percent—were black.”). A boom in the prison population meant the creation of new prison facilities. Many of these prisons, notably, were built on former plantations. Angelina Clapp, Kyel Towler & Ryan Ritter, ‘*Slaves of the State*’: 13th

Once back under state control, black Americans were put to work. Southern states exploited black labor during this period primarily through convict leasing and prison farms.⁴⁵ When convict leasing began to fade in the early twentieth century, chain gangs took their place.⁴⁶ Chain gangs used primarily black labor; white prisoners were rarely included.⁴⁷

Since black prisoners now belonged to the state, private industries no longer had a vested property interest in the health and well-being of these workers.⁴⁸ This development led to abysmal working conditions. Black laborers were often starved, beaten, whipped, sexually violated, and worked to exhaustion.⁴⁹ Many were left for dead and simply replaced by another inmate laborer.⁵⁰

By the beginning of the twentieth century, every Southern state utilized convict labor and saw massive economic profits.⁵¹ The Jim Crow Era was in full effect, and its harmful ideas and policies created unlivable conditions for many Southern blacks.

B. An Expansion of Prison Labor North: The 1920s Through 1960s

Beginning in the 1910s, black Americans fled north hoping to escape the horrors of the Jim Crow South. This phenomenon was known as The Great Migration.⁵² Before this time, nearly ninety percent of the country's black citizens lived in the South.⁵³ Over the next six decades, however, more than six million African Americans would leave for Northern and Western states.⁵⁴

Escaping from the South did not mean African Americans escaped racism and institutional harm. Instead, they were met with a similar response in the North as they had already experienced down South. Public anxiety about increasing crime rates was high—and largely directed at black citi-

Amendment, Mass Incarceration and the Prison Industrial Complex, JAMES MADISON CTR. FOR CIVIC ENGAGEMENT & DUKES VOTE BLOG (Sept. 17, 2020), <https://sites.lib.jmu.edu/civic/2020/09/17/slaves-of-the-state-13th-amendment-mass-incarceration-and-the-prison-industrial-complex/>.

45. ALEXANDER, *supra* note 37, at 39–40; DELANEY ET AL., *supra* note 38, at 34, 37–39; Forde & Bowman, *supra* note 43.

46. Forde & Bowman, *supra* note 43. Chain gangs were “brutal form[s] of forced labor in which incarcerated people toiled on public works, such as building roads or clearing land.” DELANEY ET AL., *supra* note 38, at 39.

47. During this period, “at least nine-tenths of all leased convicts were black.” Forde & Bowman, *supra* note 43.

48. Forde & Bowman, *supra* note 43.

49. Forde & Bowman, *supra* note 43.

50. See ALEXANDER, *supra* note 37, at 39.

51. Forde & Bowman, *supra* note 43.

52. Isabel Wilkerson, *The Long-Lasting Legacy of the Great Migration*, SMITHSONIAN MAG. (Sept. 2016), <https://www.smithsonianmag.com/history/long-lasting-legacy-great-migration-180960118/>.

53. *Id.*

54. By 1970, only fifty-three percent of the nation's African American population lived in the South. DELANEY ET AL., *supra* note 38, at 40–41.

zens.⁵⁵ Additionally, many whites began to accept new theories of racial inferiority as “science.”⁵⁶ The response was massive prison expansion. The country’s prison rate notably increased from the 1920s to the 1940s.⁵⁷ Minorities, again, felt the wrath of the criminal justice system the most.⁵⁸

The country began an era of prison reform in the early 1940s. Advocates pushed for improved prison conditions and a rehabilitative approach to punishment.⁵⁹ These reforms, however, were typically reserved for Anglo prisoners—a group considered more “capable of reform.”⁶⁰ Minority inmates were often left out of these new, more humane, programs.⁶¹ They would get little relief until the Civil Rights Movement, over a decade later.

The Civil Rights Movement started to gain traction in the 1950s but exploded in the 1960s. A series of historic judicial decisions and civil rights legislation vastly improved the conditions of minorities in the North and the South.⁶² Jim Crow was finally dismantled after having a nearly century-long chokehold on the country.⁶³ However, whatever victories that came would be, in many ways, short-lived.

C. *Prison Labor Today: The Era of Mass Incarceration*

The end of Jim Crow did not mean the end of racism in America. Instead, white citizens remained wary of minority populations and worried that continued activism would bring nationwide chaos. Many officials manipulated this anxiety, and a new form of social control emerged—this time through coded rhetoric with racist undertones rather than blatantly racist policies.⁶⁴

The early 1970s saw a shift from the activism and advancement of the Civil Rights Movement. An economic recession swept the country, hitting urban centers the worst.⁶⁵ Black men particularly struggled during this time.⁶⁶ This impact, combined with a media that perpetuated the myth of black criminality, gave many oppressors the footing needed to successfully

55. See DELANEY ET AL., *supra* note 38, at 40.

56. These “sciences,” along with pop culture portrayals of black men as criminal menaces—*The Birth of a Nation* being one of the most egregious examples of this—sharpened the divide between white and black nationwide. DELANEY ET AL., *supra* note 38, at 41.

57. DELANEY ET AL., *supra* note 38, at 40.

58. “[R]acial disparities in prison populations roughly doubled in the Northern states most affected by the Great Migration.” DELANEY ET AL., *supra* note 38, at 42.

59. See DELANEY ET AL., *supra* note 38, at 42–43.

60. DELANEY ET AL., *supra* note 38, at 43.

61. DELANEY ET AL., *supra* note 38, at 43.

62. For an in-depth analysis of the gains of the Civil Rights Movement, see ALEXANDER, *supra* note 37, at 47–50.

63. ALEXANDER, *supra* note 37, at 47–50.

64. DELANEY ET AL., *supra* note 38, at 44; see Clapp et al., *supra* note 44.

65. DELANEY ET AL., *supra* note 38, at 45.

66. DELANEY ET AL., *supra* note 38, at 45.

push a new idea that would quickly reinstate the harms of Jim Crow: the War on Drugs.⁶⁷ The “law and order” era in America had begun.

The War on Drugs was initially presented as a response to the increase in drug abuse and crime in the United States. The federal government poured money into law enforcement agencies and made drug arrests a top priority.⁶⁸ The legislature also completely overhauled the criminal narcotics code, making sentencing ranges and mandatory minimums more severe for all drug cases.⁶⁹

The War on Drugs, however, became less about fixing the country’s drug problem and more about reasserting control over minorities. Nearly every legislative and administrative policy was directed at people of color, specifically black men.⁷⁰ For example, one focus of this “war” was crack-cocaine. Even though it was no more addictive nor prevalent than powder cocaine, users and dealers of crack-cocaine were targeted and faced lengthier sentences than those who used and sold powder cocaine. The difference between the two? Urban blacks tended to use crack-cocaine, while affluent whites tended to use powder cocaine.⁷¹

Enforcement was unbalanced in other ways as well. African Americans were, and still are, consistently investigated and arrested more often than their white counterparts. They receive harsher sentences and longer prison terms.⁷² Even though data demonstrates that people of color and white people use and deal drugs at the same rate, disparities remain.⁷³

The emphasis on nonviolent, drug-related crimes has caused the prison population to explode. In 1970, roughly 200,000 people were serving time in prison.⁷⁴ By 2018, however, that number had increased to nearly 1.5 million.⁷⁵ African Americans have been disproportionately affected by this increase. For example, African American men are six times as likely to be incarcerated as white men.⁷⁶ Today, one in three black men and one in eighteen black women born after 2001 are likely to spend time in prison

67. Clapp et al., *supra* note 44.

68. ALEXANDER, *supra* note 37, at 92.

69. *See Racial Disparities in Sentencing: Hearing on Reports of Racism in the Justice System of the United States*, 153rd Inter-Am. Comm’n H.R. (Oct. 27, 2014) (written submission of the American Civil Liberties Union).

70. *See id.* at 8; *see also* DELANEY ET AL., *supra* note 38, at 44–45.

71. *See* ALEXANDER, *supra* note 37, at 65.

72. *See* ALEXANDER, *supra* note 37, at 237–38.

73. In fact, recent data has shown that white young men are more likely to be small-time drug dealers than their black cohorts. *See* ALEXANDER, *supra* note 37, at 254.

74. NAZGOL GHANDNOOSH, SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1 (2021), <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/>.

75. *Id.* at 2.

76. *Id.* at 5.

during their lifetime.⁷⁷ Moreover, black offenders receive longer sentences than similarly situated white offenders.⁷⁸

Disparities exist within the prison walls as well. For example, younger inmates of color end up housed in private prisons at higher rates than their white counterparts.⁷⁹ Similarly, higher rates of Anglo prisoners are housed in public facilities.⁸⁰ These disparities extend to prison work. For example, white men in prison are favored for certain positions over men of color.⁸¹ Black men specifically are often forced to take on tasks that perpetuate the racist ideology of pushing them to the “back of the house.”⁸² They are often limited in their work assignments which can prevent them from obtaining certain skills that may be useful upon release.⁸³

In sum, the prison population began to change rapidly at the close of the Civil War. The criminal justice system was utilized to regain control over formerly enslaved people. These trends continued for the next century until the Civil Rights Movement ended Jim Crow-era policies. Oppressors rebranded again and used the War on Drugs to usher in a new era of mass incarceration. Now, African Americans are being imprisoned and are at the mercy of state control at higher rates and for longer periods than at any time in history. They also face disparities inside the prison walls for the work they are often forced to complete, further perpetuating harm.

IV. AN ORIGINALIST REVIEW OF THE THIRTEENTH AMENDMENT: HOW THE COURTS GOT IT WRONG

Originalism is one constitutional theory that legal scholars use to interpret the Constitution and that judges use when applying constitutional provisions during judicial review. Originalists argue that the “text of the Constitution itself” is the main determiner of how a provision should be

77. Compared to one in nine men overall and one in fifty-six women overall. *Id.*

78. See Clapp et al., *supra* note 44.

79. Rina Palta, *Why For-Profit Prisons House More Inmates of Color*, NPR: CODE SWITCH (Mar. 13, 2014, 7:12 AM), <https://www.npr.org/sections/codeswitch/2014/03/13/289000532/why-for-profit-prisons-house-more-inmates-of-color>.

80. *Id.* Private prisons are controversial for a variety of reasons. For example, they tend to have higher rates of violence, poorer medical care, and less-trained staff compared to public prisons. So, minority inmates experience disparities simply by being housed at greater rates in these facilities. See *id.*

81. Courtney A. Crittenden, Barbara A. Koons-Witt & Robert J. Kaminski, *Being Assigned Work in Prison: Do Gender and Race Matter?*, 13 FEMINIST CRIMINOLOGY 359, 374 (2018) (“Specifically, Black men represented the highest percentage of men participating in agriculture and facility services assignments, while a higher percentage of White men worked in public works and prison industries.”).

82. *Id.* at 363. Surprisingly, however, these differences in work assignments do not have a significant effect on wage distribution. *Id.* at 372.

83. *Id.* at 377–78 (“[T]he consequences of learning these limited types of skills can limit inmates in their search for gainful employment outside of prison (citation omitted). This is particularly notable because of our findings that Black men are more likely to be assigned these roles.”).

interpreted.⁸⁴ However, many originalists also rely on “sources beyond the written text of a constitutional provision in attempting to discern the text’s meaning, primarily, the intentions of the text’s drafters.”⁸⁵ Simply put, originalists believe “[t]he Constitution is a written instrument. As such its meaning does not alter.”⁸⁶ What Congress meant when adopting a constitutional provision governs what that provision means now.

Many courts have adopted an originalist approach to interpreting the Thirteenth Amendment.⁸⁷ They have consistently held that the amendment’s language intended to exclude incarcerated individuals from its protection, no matter how the penal system may have changed since its passage.⁸⁸ This narrow interpretation is misguided. Instead, a holistic originalist approach demonstrates that the current state of prison labor falls within the scope and protection of the Thirteenth Amendment. Two key historical sources support this argument. The first source is an analysis of the state of corrections when the amendment was debated and adopted. The second source is the intent of the key stakeholders responsible for the amendment’s drafting and passage.

First, the corrections system in the United States before the Civil War demonstrates one flaw in the current originalist interpretation of the Thirteenth Amendment. Early in the country’s history, a robust correctional system was nonexistent.⁸⁹ Many of the first American “jails” were makeshift structures meant as temporary holding sites for persons accused of a crime.⁹⁰ The penal system focused on capital and corporal punishment for crimes, so persons were held for only short periods.⁹¹

It was not until the late eighteenth and early nineteenth centuries that any prison system emerged.⁹² As debates over the Thirteenth Amendment began, no comprehensive prison infrastructure existed in the nation, and

84. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 377 (2013).

85. Carter, *supra* note 1, at 1331. In his article, Professor Carter explains that originalism exists “on a spectrum,” noting some originalist scholars reject consulting any source outside a constitutional provision’s language itself. Carter, *supra* note 1, at 1331 n.65. These strict textualists, however, are in the minority, and it is common practice for an originalist to consult additional historical sources for context. *See* Carter, *supra* note 1, at 1330 n.59.

86. *South Carolina v. United States*, 199 U.S. 437, 448 (1905).

87. *See* Carter, *supra* note 1, at 1335.

88. *See supra* Part II.

89. *See* MARY K. STOHR & ANTHONY WALSH, *CORRECTIONS: THE ESSENTIALS* 23–44 (3d ed. 2019) (ebook).

90. *Id.* at 39.

91. Roger T. Pray, *How Did Our Prisons Get That Way?*, 38 *AM. HERITAGE* (July/Aug. 1987), <https://www.americanheritage.com/how-did-our-prisons-get-way>.

92. During this time, there were primarily “two basic forms of prison: the individual system, represented by Pennsylvania, and the congregate system, represented by Auburn.” *Id.* For an extensive analysis of these early forms of prison, see *id.*; see also STOHR & WALSH, *supra* note 89, at 36.

incarcerated numbers remained low.⁹³ So, when the amendment (and more importantly, the Punishment Clause) was first considered, very few Americans would have fallen outside of the amendment's scope—a stark difference from today.

Second, an analysis of the debates during the Thirteenth Amendment's passage and the intent of its key stakeholders shows that the current originalist approach to the amendment is incorrect. Many of the amendment's drafters had deep abolitionist roots.⁹⁴ Still, both moderate and radical Republicans in Congress intended the amendment to be far sweeping.⁹⁵

Senator Charles Sumner—a radical Republican and one of the amendment's coauthors—explained that the Thirteenth Amendment would cover “every proposition relating to slavery.”⁹⁶ His colleague Senator Lyman Trumbull—another coauthor and noted moderate Republican—agreed. He stated that “with the destruction of slavery necessarily follows the destruction of the incidents of slavery.”⁹⁷ Finally, Senator Henry Wilson encapsulated its intended scope stating that the Thirteenth Amendment would “obliterate the last lingering vestiges of the slave system . . . all it was and is, everything connected with it or pertaining to it, from the face of the nation.”⁹⁸ The consensus was clear: the amendment would eradicate any form of slavery from the nation and “that the amendment would empower Congress to pass legislation directed at any incidents of servitude.”⁹⁹

Both the historical context of prisons at the time of the Thirteenth Amendment's passage and the clear intent of its drafters demonstrates how courts have misinterpreted its scope. Instead, a proper originalist analysis shows that the amendment was intended to be applied broadly. The badges and vestiges of slavery in any form were the amendment's main aim, not

93. See Barry Godfrey & Steven Soper, *Prison Records from 1800s Georgia Show Mass Incarceration's Racially Charged Beginnings*, CONVERSATION (May 22, 2018, 6:48 AM), <https://theconversation.com/prison-records-from-1800s-georgia-show-mass-incarcerations-racially-charged-beginnings-96612>. Exact prison records from the early to mid-nineteenth century are difficult to come by. This article, however, offers insight into early prison populations through the lens of one state: Georgia. Georgia only sent an average of forty people per year to prison before the Civil War. It was not until after the war ended and the Thirteenth Amendment was passed that the prison population exploded in the state. *Id.*

94. See ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 40–43 (2004).

95. *Id.* at 38 (“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.”).

96. *Id.* at 39.

97. *Id.* at 53.

98. *Id.* at 42 (emphasis omitted).

99. *Id.* at 45. Even the amendment's opponents recognized its broad scope if passed. Robert Mallory, an outspoken Democrat, noted the amendment would surely “lead to racial equality” which he and many of his fellow Democrats feared. *Id.* at 46. Even so, this pushback did not prevent the amendment, as written, from being passed and later ratified. For an in-depth analysis of the ratification process, see *id.* at 35–37.

simply ending chattel slavery. When the prison population began to explode and its racial disparities became obvious, courts should have concluded that the amendment could and should apply to prison labor. Instead, they have inappropriately limited the reach of the Thirteenth Amendment. The result has been the reinvention of slavery in the modern American correctional system. The time has come to adopt the appropriate view, expand the amendment's scope, and stop the labor trafficking of prison workers.

V. POSSIBLE SOLUTIONS TO STOP LABOR TRAFFICKING IN PRISON

Recognizing prison labor as a form of human exploitation is only the first step. Academics, legal practitioners, and activists must adopt laws, policies, and procedures that can dismantle this modern form of slavery and permanently eradicate it from the nation. Advocates can achieve these goals in two key ways: by amending the Constitution or updating federal labor trafficking and workers' rights laws.

A. Amend the Thirteenth Amendment

The boldest and most effective reform to protect the labor of incarcerated individuals would be to amend the Thirteenth Amendment. However, many view amending the Constitution as "effectively impossible."¹⁰⁰ Article V of the Constitution lays out the difficult, involved process of enacting an amendment. First, an amendment can only be proposed in one of two ways: (1) by two-thirds of the House of Representatives and the Senate, or (2) by a congressional convention after a request by two-thirds of the states.¹⁰¹ Then, the proposed amendment must be ratified by three-fourths of the states.¹⁰² Since the Constitution's ratification, only twenty-seven amendments out of over 11,000 proposals have been enacted through this process.¹⁰³

Despite the clear obstacles, an amendment is the necessary and best solution. Removing the Punishment Clause is the quickest and most effective way to dismantle labor exploitation in prison. It would immediately expand the amendment's protections to inmates at the state and federal levels. Current public and private prison policies would become unconstitutional and need a dramatic overhaul to adequately protect and promote prisoners' rights. For example, prison facilities could no longer use solitary confinement to coerce prisoners into working or as punishment if they refused. They would no longer be able to refuse to pay—or vastly under-

100. Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), <https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html>.

101. U.S. CONST. art. V.

102. *Id.*

103. Posner, *supra* note 100.

pay—inmates for their work. Working while incarcerated would finally be a free choice with adequate pay.¹⁰⁴

While a difficult task to complete, the idea does have some popularity among certain political groups already.¹⁰⁵ The “Abolition Amendment,” as it has been dubbed, accurately echoes the ideals the original drafters of the Thirteenth Amendment had in mind. For example, amendment sponsor Senator Jeff Merkley has said that as Americans “take on the long and difficult challenge of rooting out systemic racism in our nation, ending the slavery loophole in the [Thirteenth] Amendment is [a] critical step in that challenge.”¹⁰⁶

The Abolition Amendment, however, remains partisan.¹⁰⁷ Legal scholars and lobbyists should adopt the originalist approach to the Thirteenth Amendment proposed in Section IV of this paper to help gain bipartisan support for the amendment. Conservatives tend to adopt an originalist perspective of the Constitution.¹⁰⁸ If scholars can successfully convince conservative lawmakers to adopt this holistic originalist perspective regarding the Thirteenth Amendment, the nation can take its first critical step toward passing the Abolition Amendment. The sooner such an amendment is ratified, the sooner the nation can eliminate labor trafficking inside its prisons.

B. *Federal Legislation: The TVPA and Fair Labor Standards Act*

An alternative reform involves changes in the federal legislature. Two federal statutes provide opportunities to help protect trafficked inmates: the labor trafficking provisions of the Victims of Trafficking and Violence Prevention Act (TVPA) and the Fair Labor Standards Act (FLSA). Minor changes to these statutes can provide wide-sweeping protections for workers behind bars. Additionally, a legislative change is far easier to achieve

104. It is unlikely prison labor will disappear because many inmates want to work. They often find work fulfilling and some work assignments help prepare them for the job market upon release. Josh Wood, ‘Most Prisoners Want to Work’ – the Shop Where Inmates’ Crafts Fill the Shelves, *GUARDIAN* (July 6, 2019, 2:00 AM), <https://www.theguardian.com/us-news/2019/jul/06/most-prisoners-want-to-work-the-shop-where-inmates-crafts-fill-the-shelves> (“He [a prisoner] is currently working between 30 and 35 hours a week and says he is happy to do so.”); Justin Miller, *Both Red and Blue States Rely on Prison Labor*, *AM. PROSPECT* (Oct. 17, 2017), <https://prospect.org/labor/red-blue-states-rely-prison-labor/> (“Most prisoners in my experience want to work, and jobs for prisoners can be a very positive thing . . . [but] there’s a real potential for exploitation and abuse.”).

105. Brakkton Booker, *Democrats Push ‘Abolition Amendment’ to Fully Erase Slavery from U.S. Constitution*, *NPR* (Dec. 3, 2020, 6:43 PM), <https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution>.

106. *Id.*

107. Currently, the proposed amendment has no Republican sponsors in either the House of Representatives or the Senate. *Id.*

108. See Whittington, *supra* note 84, at 375, 386; see also Carter, *supra* note 1, at 1330.

than a constitutional one.¹⁰⁹ While legislative protections may not be as permanent and powerful as a constitutional amendment, they could provide quicker relief to exploited inmates.

1. *The Labor Trafficking Amendments of the TVPA: § 1589 and § 1590*

The first critical step to protecting incarcerated workers is removing correctional facilities' ability to force inmates to work. Congress can achieve this by broadening labor trafficking statutes to include prisoners. Specifically, it should amend the labor provisions of the TVPA. The TVPA defines *labor trafficking* as "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."¹¹⁰ One common form of labor trafficking is forced labor.¹¹¹

Congress first passed the forced labor provision as part of the TVPA in 2000.¹¹² Congress drafted the law in part as a response to the Supreme Court's decision in *United States v. Kozminski*.¹¹³ The provision was meant to expand the types of coercion that might result in forced labor, granting greater protection to trafficked victims.¹¹⁴ To further thwart labor trafficking in the United States, Congress also passed a provision targeting traffickers and any person or group that helps perpetuate any form of labor trafficking.¹¹⁵ Minor changes in each provision could finally protect inmates working in prison.

Section 2 of the Thirteenth Amendment explicitly gives Congress the power to expand the labor provisions of the TVPA to inmates.¹¹⁶ To do so would simply require adding some language to the current statutes. Section 1589 currently reads, "[w]hoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the follow-

109. See *The Amendment Process*, HARRY S. TRUMAN LIBR. & MUSEUM, <https://www.trumanlibrary.gov/education/three-branches/amendment-process> (last visited Aug. 28, 2022).

110. 22 U.S.C. § 7102(11)(B). This definition presently excludes prisoners as the type of "person" protected from labor exploitation. See *supra* Part II.

111. Off. on Trafficking in Persons, *Labor Trafficking Fact Sheet*, ADMIN. FOR CHILD. & FAMILIES, https://www.acf.hhs.gov/sites/default/files/documents/orr/fact_sheet_labor_trafficking_english.pdf (last visited Apr. 11, 2020).

112. *Involuntary Servitude, Forced Labor, and Sex Trafficking Statutes Enforced*, U.S. DEP'T OF JUST. [hereinafter DOJ], <https://www.justice.gov/crt/involuntary-servitude-forced-labor-and-sex-trafficking-statutes-enforced> (Aug. 6, 2015).

113. *Id.* The *Kozminski* court determined that the involuntary servitude statute—18 U.S.C. § 1584—required the use or threatened use of physical or legal coercion in order to obtain a conviction. *United States v. Kozminski*, 487 U.S. 931, 953 (1988).

114. See 18 U.S.C. § 1589.

115. *Id.* § 1590; see also DOJ, *supra* note 112.

116. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

ing means”¹¹⁷ The legislature should amend the language to read, “whoever knowingly provides or obtains the labor services of a person, *including persons currently incarcerated following conviction of a crime*, by any of, or by any combination of, the following means” That provision would unequivocally protect prisoners from forced labor while serving time.

Similarly, language can be added to § 1590 to subject prison facilities and their staff to the TVPA. The statute’s current language states, “[w]hoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both.”¹¹⁸ A new subdivision could be added reading something like, “correctional facilities and their staff are subject to the provisions of this chapter and thus cannot willingly recruit, harbor, transport, provide, or obtain by any means, any person for labor or services in violation of [this chapter].”

2. *Reimagining the Fair Labor Standards Act*

Removing work requirements and protecting prisoners against forced labor is only one step in preventing the exploitation of inmate labor.¹¹⁹ Next, the government must ensure that necessary workers’ protections are in place for the prison workforce. Like any other laborer, incarcerated workers deserve to be adequately compensated for their work and to work under safe and reasonable conditions.

The FLSA guarantees many workers’ rights and protections. The FLSA defines the employer/employee relationship,¹²⁰ sets a national minimum wage,¹²¹ sets hours for a standard workweek and dictates overtime procedures,¹²² and protects employees from discrimination in the workplace.¹²³ Overall, its effect on the American workforce has been improved labor standards and working conditions that benefit millions of working Americans. However, prisoners have notably been excluded from these benefits.¹²⁴ Congress must rectify this gap and start to recognize prisoners under the FLSA.

Section 203 of the FLSA currently defines an “employer” to “include[] any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency,” but

117. 18 U.S.C. § 1589.

118. *Id.* § 1590.

119. This is especially true considering it is likely many inmates will want to and continue to choose to work while incarcerated. *See* Wood, *supra* note 104; *see also* Miller, *supra* note 104.

120. 29 U.S.C. § 203.

121. *Id.* § 206.

122. *Id.* § 207.

123. *Id.* § 218.

124. *See supra* Part II.B.

excludes labor organizations.¹²⁵ Since courts have concluded that prison facilities are not considered “employers” under this definition,¹²⁶ Congress must amend the statute to include prisons explicitly. Section 203 also defines “employee” as “any individual employed by an employer.”¹²⁷ Congress must clearly define the incarcerated worker as an employee and establish an employer/employee relationship between prisoners and the work programs that employ them.

Once prisoners are correctly identified as employees under the FLSA, they will enjoy full coverage of its protections. Prisons will have to pay fair wages, closing pay gaps at the state and federal level.¹²⁸ Additionally, prisons will no longer be able to force incarcerated workers into grueling workweeks. Instead, their hours can be adequately regulated. Finally, the FLSA will protect prisoners across every race and gender from discrimination in their work assignments.¹²⁹ Broadening the FLSA will ensure fairness and safety in the correctional workspace.

VI. CONCLUSION

The passage of the Thirteenth Amendment was a monumental step forward in American history. However, the loophole left by the Punishment Clause prevented the amendment from achieving its true goal: eradicating any incidents and vestiges of slavery from the nation. Chattel slavery has reinvented and implemented itself into the American corrections system. The wrongs caused by the Punishment Clause must be righted. Key constitutional and legislative changes can remedy this harm. These changes can finally eliminate the remnants of slavery that exist through the exploitation of prison labor. Work in prison should be a choice made freely. Incarcerated individuals deserve the dignity to make that choice and be adequately compensated and protected if they do. It is time to end labor trafficking behind this nation’s prison walls.

125. 29 U.S.C. § 203(d).

126. *See supra* Part II.

127. 29 U.S.C. § 203(e)(1). There are certain exceptions to this definition of “employee” that are inapplicable here. *Id.* § 203(e)(2)–(4).

128. While not explored here in depth, many public policy arguments already exist to support adequately paying inmates. For example, many inmates owe restitution they are unable to pay and have continuing child support obligations that they cannot meet. Adequately paying prisoners can have the unintended effect of providing support to victims and their families, as well as to innocent dependents that took no part in their parent’s criminal behavior. CATERINA G. ROMAN & NATHAN LINK, CHILD SUPPORT, DEBT, AND PRISONER REENTRY: EXAMINING THE INFLUENCES OF PRISONERS’ LEGAL AND FINANCIAL OBLIGATIONS ON REENTRY, REP. NO. 248906 (2015), <https://www.ojp.gov/pdffiles1/nij/grants/248906.pdf>; *see* Denis-Marie Ordway, *Criminal Restitution: Tens of Billions in Debt Remain Unpaid*, JOURNALIST’S RES. (Mar. 5, 2018), <https://journalistsresource.org/criminal-justice/criminal-restitution-debt-victims/>.

129. *See supra* Part II.