

# The New Abolition: The Legal Consequences of Ending All Slavery and Involuntary Servitude

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## ABSTRACT

*The Thirteenth Amendment outlaws slavery and involuntary servitude with one notable exception—those convicted of a crime. Incarcerated workers can, and often are, forced to work for abysmal pay. While the federal amendment has little hope of changing, recent efforts to amend state constitutions to outlaw all forms of involuntary servitude and slavery within particular states offer hope to our nation’s incarcerated workers. This Note chronicles those state developments and argues that they will enable incarcerated workers not only to choose whether to work, but also to get paid minimum wage for their work.*

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\* J.D., Yale Law School, 2023; B.A., Stanford University, 2018. I would like to thank Professor Justin Driver for his thoughtful supervision, feedback, and guidance on this project, and all the editors at the *Harvard Civil Rights-Civil Liberties Law Review*, whose careful attention improved this Note. I am indebted to the men of PACT at Green Haven Prison, who taught me so much about life—and work—in prison, and who became good friends along the way. I’d like to thank Connor Hollenback for his patience, care, and love. Finally, I’m grateful to my family—Mom, Dad, Sam, Henry, and Remy—for everything they do but most of all who they are.

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## INTRODUCTION

“When you think about cotton picking in Texas, where the state does not pay, the point is to remind people that the state owns you. . . . They want to make it parallel to slavery, and they are willing to do it at their own cost.”<sup>1</sup>

From August 21 to September 9, 2018, thousands of prisoners went on strike, refusing to work their assigned jobs.<sup>2</sup> The strikers, represented by the inmate organization Jailhouse Lawyers Speak, issued a list of ten national demands.<sup>3</sup> The second of these demands called for an “immediate end to prison slavery,” requesting that “[a]ll persons imprisoned in any place of detention under United States jurisdiction . . . be paid the prevailing wage in their state or territory for their labor.”<sup>4</sup>

Currently, about 55% of the American prison population, or more than 800,000 prisoners, are compelled, both by law and prison discipline, to work while incarcerated.<sup>5</sup> The payment for this work is abysmal: an average of

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<sup>1</sup> Keri Blakinger & The Marshall Project, *Some Prison Labor Programs Lose Money — Even When Prisoners Work for Pennies*, NBC NEWS (Sept. 2, 2021, 6:00 AM), <https://www.nbcnews.com/news/us-news/some-prison-labor-programs-lose-money-even-when-prisoners-work-n1278326> [<https://perma.cc/UE85-NSYD>].

<sup>2</sup> Note, *Striking the Right Balance: Toward a Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1490 (2019).

<sup>3</sup> Press Release, Nat’l Prisoners Strike Aug. 21st – Sept. 9th 2018, <https://www.dropbox.com/s/r5cr546jlsckghj/Prison%20Strike.pdf?dl=0> [<https://perma.cc/V7RF-SBDU>].

<sup>4</sup> *Id.*

<sup>5</sup> Lauren-Brooke Eisen, *Covid-19 Highlights the Need for Prison Labor Reform*, BRENNAN CTR. FOR JUST. (Apr. 17, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/covid-19-highlights-need-prison-labor-reform> [<https://perma.cc/WY3J-T7H2>]; see also Benjamin R. Syroka, *Unshackling the Chain Gang: Circumventing Partisan Arguments to Reduce Recidivism Rates Through Prison Labor*, 50 U. TOL. L. REV. 395, 396 (2019) (“The most recent Bureau of Justice Statistics census reveals that approximately half of U.S. prisoners

31 cents per hour in federal prisons and 20 cents an hour in state prisons.<sup>6</sup> In some Southern states—all with disproportionately Black prison populations—inmates are not paid for their labor at all.<sup>7</sup> One Louisiana official described the unpaid labor of prisoners as a “necessary evil.”<sup>8</sup>

Frequently, this incarcerated work consists of physical labor in harsh conditions. Prisoners in Texas and Florida are forced to spend hours on the fields, growing the food that they will later eat, using hand-held tools like wooden sticks and hoes.<sup>9</sup> The most common type of prison labor is maintenance jobs such as working in the kitchen, cleaning the grounds, or doing laundry.<sup>10</sup> Some incarcerated individuals are required to work at these jobs for twelve hours a day.<sup>11</sup> Many Occupational Safety and Health Administration (“OSHA”) approved “state plans,” which are meant to provide workplace-safety protections, carve out incarcerated workers—leaving them without regulatory protection.<sup>12</sup>

Such work is required by law. The Bureau of Prisons itself notes that “[s]entenced inmates are required to work if they are medically able” for pay

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worked in some form in 2005.”); Ed Pilkington, *US Inmates Stage Nationwide Prison Labor Strike Over ‘Modern Slavery,’* THE GUARDIAN (Aug. 21, 2018, 1:00 PM), <https://www.theguardian.com/us-news/2018/aug/20/prison-labor-protest-america-jailhouse-lawyers-speak> [<https://perma.cc/NN8J-R7HV>].

<sup>6</sup> Josh Halladay, Note, *The Thirteenth Amendment, Prison Labor Wages, and Interrupting the Intergenerational Cycle of Subjugation*, 42 SEATTLE U. L. REV. 937, 938 (2019).

<sup>7</sup> Conarack, *Work Forced*, THE FLA. TIMES-UNION, <https://stories.usatodaynetwork.com/workforced/> [<https://perma.cc/34DN-K9GF>]; see also Wendy Sawyer, *How Much do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/DM7H-AWV2>] (noting that “[w]ith a few rare exceptions, regular prison jobs are still unpaid in Alabama, Arkansas, Florida, Georgia, and Texas”).

<sup>8</sup> Eli Rosenberg, *Louisiana Sheriff Argues Against Releasing ‘Good’ Prisoners Needed for Money-Saving Menial Labour*, INDEP. (Oct. 13, 2017, 2:58 PM), <https://www.independent.co.uk/news/world/americas/louisiana-sheriff-prisoner-comments-incarceration-hard-labour-modern-slavery-steve-prator-caddo-parish-a7998866.html> [<https://perma.cc/9HV4-Q9CR>].

<sup>9</sup> Kevin Rashid Johnson, *Prison Labor is Modern Slavery. I’ve Been Sent to Solitary for Speaking Out*, THE GUARDIAN (Aug. 23, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike> [<https://perma.cc/ZQJ5-9NTQ>].

<sup>10</sup> Shira Hoffer, *Involuntary Servitude: How Prison Labor is Modern Day Slavery*, HARV. POL. REV. (Feb. 3, 2022), <https://harvardpolitics.com/involuntary-servitude-how-prison-labor-is-modern-day-slavery/> [<https://perma.cc/R6NM-ZF2Z>].

<sup>11</sup> Brittany Hailer, *COVID-19, Rodents, Unpaid Labor: A Year in the Allegheny County Jail Kitchen*, PITT. CURRENT (May 2, 2021), <https://www.prisonlegalnews.org/in-the-news/2021/covid-19-rodents-unpaid-labor-year-allegheny-county-jail-kitchen/> [<https://perma.cc/3FLA-8CP7>] (“Judith White, 34, works about 12 hours a day without compensation in order to avoid being locked in her cell.”); see also *Woodall v. Partilla*, 581 F. Supp. 1066, 1077 (N.D. Ill. 1984) (“In the instant case, Woodall . . . asserts that he worked an average of 16–18 hours per day.”).

<sup>12</sup> Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1427 (2022).

that ranges between “12¢ to 40¢ per hour.”<sup>13</sup> Both federal<sup>14</sup> and state<sup>15</sup> statutes require that prisoners engage in some labor during their incarceration.

Prisons enforce these work requirements via discipline such as solitary confinement, loss of earned good time, and revocation of family visitation.<sup>16</sup> For example, in Florida, those who refuse work “receive a disciplinary report, which can lead to up to 60 days in confinement and the loss of time earned off their sentences. Florida corrections officers write an average of 1,750 disciplinary reports per year for ‘refusing to work.’”<sup>17</sup>

The Thirteenth Amendment explicitly allows this type of forced labor, given that it bans “slavery” and “involuntary servitude . . . except as a punishment for crime . . . .”<sup>18</sup> However, Americans are taking a new hostility to this except clause. Recent books, such as *The New Jim Crow* by Michelle

<sup>13</sup> *Work Programs*, FED. BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/work\\_programs.jsp](https://www.bop.gov/inmates/custody_and_care/work_programs.jsp) [<https://perma.cc/PBJ7-NQDA>].

<sup>14</sup> Crime Control Act of 1990, Pub. L. No. 101-647, § 2905(a)(1), 104 Stat. 4789, 4914 (1990) (“[C]onvicted inmates confined in Federal prisons, jails, and other detention facilities shall work.”).

<sup>15</sup> See, e.g., TENN. CODE ANN. § 41-2-123 (2021) (“All prisoners sentenced to the county workhouse . . . shall be worked on the county roads . . . .”); *id.* § 41-2-146 (2021) (“When any prisoner has been sentenced to imprisonment in a county workhouse or jail . . . the sheriff . . . shall be authorized to permit the prisoner to participate in work programs.”); *id.* § 41-2-120 (2021) (“Any prisoner refusing to work or becoming disorderly may be confined in solitary confinement, or subjected to such other punishment, not inconsistent with humanity, as may be deemed necessary by the sheriff or superintendent for the control of the prisoners, including reducing sentence credits pursuant to the procedure established in § 41-2-111.”); S.D. CODIFIED LAWS § 24-11-28 (2023) (“Every able-bodied prisoner over eighteen and not more than fifty years of age confined in any jail . . . may be required to labor during the whole or some part of each day of his sentence . . . .”); MONT. CODE ANN. § 53-30-132 (2014) (“Able-bodied persons committed to a state prison as adult offenders may be required to perform work as provided for by the department of corrections . . . .”); IOWA CODE § 904.701 (2021) (“An inmate of an institution shall be required to perform hard labor which is suited to the inmate’s age, gender, physical and mental condition, [and] strength . . . .”). TEX. GOV’T CODE ANN. § 497.099 (2023) (“The department shall 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.”); CAL. PENAL CODE § 2700 (2023) (“The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections.”).

<sup>16</sup> Whitney Bennis, *American Slavery, Reinvented*, THE ATL., (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [<https://perma.cc/FN78-M427>]; see also The Indicator from Planet Money, *The Uncounted Workforce*, NPR, at 04:35 (June 29, 2020, 5:01 PM), <https://www.npr.org/2020/06/29/884989263/the-uncounted-workforce> [<https://perma.cc/D3P5-L8R2>] (“[R]efusing to work can also land you in solitary confinement for weeks or even months.”); Johnson, *supra* note 9 <https://www.theguardian.com/commentisfree> [<https://perma.cc/E83V-YSEV>]. (“Prisoners who do not agree to such abject slavery are put in solitary confinement. I know from personal experience.”); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 964 (2019) (“[I]f inmates do not perform according to their overseers’ expectations, punishment is the prison’s recourse.”).

<sup>17</sup> Conarack, *supra* note 7.

<sup>18</sup> U.S. CONST. amend. XIII, § 1. For the remainder of this paper, I will be referring to it as the “except” or “punishment” clause.

Alexander<sup>19</sup> and media features, such as the 2016 documentary “13<sup>th</sup>,”<sup>20</sup> have highlighted the negative consequences of the except clause. In late 2020, following a summer of nationwide protests of systemic racism and police brutality, Democrats in the House and Senate proposed a joint resolution that would remove the except clause from the amendment.<sup>21</sup>

While Congress’s proposal to remove the except clause from the Thirteenth Amendment went nowhere, hope remains: in recent years, states have taken up the charge to end involuntary prison labor in state prisons. Starting in 2018 with Colorado, seven states with provisions mirroring the Thirteenth Amendment have passed amendments removing the except clause from their state constitutions—effectively banning *all* slavery and involuntary servitude within their state’s borders.<sup>22</sup>

Given the novelty of these amendments, their effect on prison labor remains uncertain. Some see removing the except clause as purely symbolic. For example, in 2020, Utah’s Constitutional Amendment C passed.<sup>23</sup> The constitutional amendment banned all slavery and involuntary servitude, eliminating the previous exception allowing slavery and involuntary servitude when used as a punishment for a crime. The ballot for the amendment indicated the “effect” of the amendment would only be to remove the exception, then stated:

The Amendment also clarifies that the ban on slavery and involuntary servitude does not affect the otherwise lawful administration of the criminal justice system. For example, the Amendment does not impact the ability of a court to sentence someone to prison as punishment for a crime or the ability of prisoners to participate in prison work programs.<sup>24</sup>

Meanwhile, many of the most ardent supporters of such amendments construe them capaciously, claiming their approval would end compulsory prison labor and potentially lead to a minimum wage for incarcerated workers.<sup>25</sup>

<sup>19</sup> *About*, THE NEW JIM CROW, <https://newjimcrow.com/about> [https://perma.cc/FC65-TRMD] (noting that “[s]ince its publication in 2010, the book has appeared on the *New York Times* bestseller list for more than a year; been dubbed the ‘secular bible of a new social movement’ by numerous commentators, including Cornel West; and has led to consciousness-raising efforts in universities, churches, community centers, re-entry centers, and prisons nationwide”).

<sup>20</sup> 13TH (Netflix 2016).

<sup>21</sup> Brakton Booker, *Democrats Push ‘Abolition Amendment’ to Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020, 6:43 PM), <https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution> [https://perma.cc/7RE5-M44Z].

<sup>22</sup> The seven states are Colorado, Utah, Nebraska, Alabama, Oregon, Tennessee, and Vermont. *See infra* Part II.

<sup>23</sup> Jeff Tavss, *Utah to Officially Ban Slavery After Amendment C Passes*, Fox13, (Nov. 3, 2020, 11:47 PM), <https://www.fox13now.com/news/election-2020/utah-to-officially-ban-slavery-after-amendment-c-passes> [https://perma.cc/K7R9-FWWA].

<sup>24</sup> Ballot Measure Utah Constitutional Amendment C, <https://voteinfo.utah.gov/wp-content/uploads/sites/42/2020/09/Constitutional-Amendment-C.pdf> [https://perma.cc/YC22-9BC6].

<sup>25</sup> Deborah N. Archer, *Neither Slavery nor Involuntary Servitude, except as a punishment*

Legal challenges exploring these more capacious theories are underway in Colorado<sup>26</sup> and Alabama.<sup>27</sup> While much of the existing legal scholarship and commentary has focused on the current federal landscape,<sup>28</sup> there has been virtually no sustained attention to the *legal* impact of these new state constitutional efforts. In this Note, I will do just that—analyze the legal implications of removing the except clause, thereby outlawing *all* slavery and involuntary servitude. The paper proceeds as follows: Part I charts the history of prison labor and the original except clause in the Thirteenth Amendment. Part II discusses recent state efforts at removing the except clause from state constitutions. Part III examines the legal ramifications of these amendments, contending that they will successfully end forced prison labor and may also enable the establishment of a minimum wage for incarcerated workers. Finally, Part IV discusses the benefits of ending compulsory labor in prisons and paying incarcerated individuals a minimum wage.

## I. THE HISTORY OF PRISONS, PRISON LABOR, AND THE THIRTEENTH AMENDMENT

### A. *The History of Prison Labor*

“Labour must become the religion of the prisons.”<sup>29</sup>

“[A]ll prisons shall be work-houses.”<sup>30</sup>

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*for crime where of the party shall have been duly convicted, Shall Exist within the United States, or any Place Subject to their Jurisdiction*, N.Y. TIMES: WE THE PEOPLE (Aug. 4, 2021), <https://www.nytimes.com/interactive/2021/08/04/opinion/us-constitution-amendments.html> [<https://perma.cc/2FHK-YFWJ>] (arguing removing the “except” clause “could eradicate a pillar of white supremacy” and “eliminate a powerful incentive to criminalize Black and brown people”); Eric Foner, *We Are Not Done With Abolition*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/opinion/abolition-prison-labor-amendment.html> [<https://perma.cc/EB2N-PKJH>] (arguing that removing the “except” clause would “[r]einforc[e] the idea that all people who work should be paid for their labor”).

<sup>26</sup> First Amended Class Action Complaint, *Lilgerose v. Polis*, No. 2022CV30421, (D. Co. filed Apr. 29, 2022).

<sup>27</sup> Michael Levenson, *Prisoners Sue Alabama, Calling Prison Labor System a ‘Form of Slavery,’* NY TIMES (Dec. 12, 2023) <https://www.nytimes.com/2023/12/12/us/alabama-prisons-lawsuit-labor.html?searchResultPosition=1> [<https://perma.cc/Y827-5AP4>].

<sup>28</sup> See, e.g., Michele Goodwin, *The Thirteenth Amendment’s Punishment Clause: A Spectacle of Slavery Unwilling to Die*, 57 HARV. C.R.-C.L. L. REV. 47, 51–52 (2022) (touching only briefly on state efforts); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1468–69 (same).

<sup>29</sup> LÉON FAUCHER, *DE LA RÉFORME DES PRISONS* 64 (Paris 1838), reprinted in Massimo Pavarini, *The Jacksonian Era: Economic Development, Marginality and Social Control Policy*, in *THE PRISON AND THE FACTORY* 147, 147 (Dario Melossi ed., 2018).

<sup>30</sup> William Penn, *Frame of Government of Pennsylvania—1682*, in 5 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3052, 3061 (Francis Newton Thorpe ed., 1906).

The history of prison labor in America begins with the history of prison in America.<sup>31</sup> Colonial America—following Britain’s lead—had no police force, and thus limited means of apprehending crime.<sup>32</sup> When crime did occur, punishment was often a fine, corporal punishment (such as whippings or the stock), banishment, or a death sentence.<sup>33</sup> These punishments were seen primarily as deterrence mechanisms.<sup>34</sup> Rather than attempt to rehabilitate the offender, colonial governments hoped to frighten the offender into right action.<sup>35</sup> When that didn’t work, colonial governments resorted to banishing or killing the offender to prevent future crimes.<sup>36</sup> Thus, a remarkable number of crimes of the era carried with them the promise of a death sentence. In 1612, Virginia’s governor Sir Thomas Dale enacted the Divine, Moral and Martial Laws, which provided the death penalty for “offenses such as stealing grapes, killing chickens,” and “trading with Indians.”<sup>37</sup> Similarly, under New York’s Duke’s Laws of 1665, offenses such as “striking one’s mother or father,” or denying the “true God,” were punishable by death.<sup>38</sup>

Since incarceration was not a form of punishment for crime, local jails did not incarcerate convicted felons, but instead merely served as warehouses for those awaiting trial, those awaiting their sentence of corporal punishment, or those in debt waiting to pay their fines.<sup>39</sup> However, while imprisonment as a means of punishment for crimes was relatively rare, state-mandated hard labor was not. Indeed, compelled labor can be traced to Roman times, where “*servi poenas*,” or slaves of punishment, were required to work on roads.<sup>40</sup> During the colonial period, workhouses—or institutions designed to provide employment for the indigent—were exported from Europe to the Americas.<sup>41</sup> These workhouses were not a means of punishing felons, but were rather filled with poor people as a means of ensuring every able-bodied person was put to work.<sup>42</sup>

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<sup>31</sup> 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).

<sup>32</sup> David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 100, 101 (Norval Morris & David J. Rothman eds., 1998).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 101–02.

<sup>35</sup> *Id.* at 102.

<sup>36</sup> *Id.* at 101–02.

<sup>37</sup> Michael H. Reggio, *History of the Death Penalty*, in SOCIETY’S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 1, 3 (Laura E. Randa ed., 1997).

<sup>38</sup> *Id.* at 3–4.

<sup>39</sup> Rothman, *supra* note 32, at 101; Harry Elmer Barnes, *Historical Origin of the Prison System in America*, J. CRIM. L. & CRIMINOLOGY 35, 36–37 (1921).

<sup>40</sup> ELINOR MYERS MCGINN, AT HARD LABOR: INMATE LABOR AT THE COLORADO STATE PENITENTIARY, 1871–1940, at 107 (1993).

<sup>41</sup> See Barnes, *supra* note 39, at 36.

<sup>42</sup> See *id.* at 36–37.

With independence, newly-emboldened Americans began to scale back their extreme criminal codes—with most states amending their criminal punishment statutes in the late 1700s.<sup>43</sup> As states eliminated capital punishment, they faced the question of what to do instead.<sup>44</sup> The answer for most was incarceration.<sup>45</sup> The late 1700s saw many states build their first prisons.<sup>46</sup> These early prisons echoed the deterrence ideas of colonial America. Rather than working towards rehabilitating the criminal, prisons were merely meant to assure the would-be-criminal of future punishment.<sup>47</sup> Prisons were casual, undisciplined, and simply consisted of housing all prisoners in a common, shared area.<sup>48</sup> As a result, these prisons were a hotbed of disorder.<sup>49</sup>

As time went on, Americans started rethinking the deterrence-only approach to the prison system, instead implementing ideas of rehabilitation.<sup>50</sup> The goal of rehabilitation often led to a work-requirement for inmates—Christian religions associated idleness with moral degeneration, and work seemed the antidote.<sup>51</sup> Conceived as “laboratories of virtue,” these early prisons were founded on the belief that the prison itself could “transform the character” of the offender via “inculcat[ing] the habits of labor, personal restraint, and submission to the law.”<sup>52</sup> New York and Pennsylvania both developed models of such rehabilitative prisons, each with the “common basis” of “[i]solation and labor.”<sup>53</sup> The ideas spread quickly: by 1835, imprisonment, along with hard labor, was a common punishment for almost all crimes in nearly every state.<sup>54</sup> Most of these prisons required men to work “eight to ten hours a day” in the hopes of modeling “habits of diligence”—as well as bringing “the state a financial return on” the “investment” of building a prison.<sup>55</sup> The prison reformers of this era “had great faith that disciplined

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<sup>43</sup> See Rothman, *supra* note 32, at 102–03.

<sup>44</sup> *Id.* at 103.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 103–04.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 104–05.

<sup>51</sup> See *id.* at 109–110.

<sup>52</sup> MICHAEL MERANZE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760-1835, at 4 (1996).

<sup>53</sup> ENOCH COBB WINES & THEODORE W. DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA, MADE TO THE LEGISLATURE OF NEW YORK 56 (Albany, Van Benthuysen & Sons’ Steam Printing House 1867); Rothman, *supra* note 32, at 105.

<sup>54</sup> Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women’s Reproductive Rights*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 117, 127-28 (2013).

<sup>55</sup> Rothman, *supra* note 32, at 109.



labor” could “build[] within offenders a moral fiber sufficiently strong to resist the criminal temptations that prevailed in the larger society.”<sup>56</sup>

In 1867—just after the Civil War—two commissioners of the Prison Association of New York visited and inspected the prison systems of the Union states to make a report to the New York State legislature.<sup>57</sup> They concluded that “there is one point on which there may be said to be an almost if not quite unanimity . . . that reformation is the primary object to be aimed at in the administration of penal justice.”<sup>58</sup> The way to achieve this reformation included teaching prisoners the “Habits of Industry” as “[w]ork is the only sure basis of an effective system of prison discipline.”<sup>59</sup> The vast majority of prisons at the time followed this advice. Felons were uniformly sentenced to imprisonment at hard labor,<sup>60</sup> and once they got to prison, “those who [were] able to labor [were] set to work at once”<sup>61</sup> averaging between nine to ten hours of work a day.<sup>62</sup> The only exceptions were those states that first required a brief period of solitary confinement.<sup>63</sup> Not only did this labor help “defray[] the public cost of . . . crimes,” but it was also considered “an essential condition of the prisoner’s reformation.”<sup>64</sup> The authors do not mention paying the incarcerated laborers as necessary for this rehabilitation. Instead, they highlight that inculcating the habit of work itself would allow prisoners to successfully reenter society and obtain jobs in the outside world.<sup>65</sup>

Thus, by the time of the Civil War, incarcerated labor was the norm for those convicted of felonies. Drawing on Christian values, this labor was meant to teach the offender a work ethic that would lead to the offender’s reformation. Moreover, this penal labor was compulsory and uncompensated—the labor itself was the reward for prisoners because it was seen as their path to rehabilitation, earning their reentry into free society.

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<sup>56</sup> Francis T. Cullen & Lawrence F. Travis III, *Work as an Avenue of Prison Reform*, 10 *NEW ENG. J. CRIM. & CIV. CONFINEMENT* 45, 53 (1984).

<sup>57</sup> WINES & DWIGHT, *supra* note 53, at 2. (“The states actually visited by the commissioners were: Connecticut, Delaware, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.”).

<sup>58</sup> *Id.* at 61.

<sup>59</sup> *Id.* at 263.

<sup>60</sup> *Id.* at 248.

<sup>61</sup> *Id.* at 143.

<sup>62</sup> *Id.* at 249.

<sup>63</sup> *Id.* at 143.

<sup>64</sup> *Id.* at 248.

<sup>65</sup> *See id.* at 263.

B. *The Passage of the Thirteenth Amendment and the Federal Except Clause*

Around the very same time the commissioners of the Prison Association of New York were visiting and documenting the prison systems of the North, legislators in Congress were drafting and debating what would become the Thirteenth Amendment to the U.S. Constitution. Unchanged since its ratification, the Thirteenth Amendment reads: “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.”<sup>66</sup>

The first anti-slavery amendment—what later became the Thirteenth Amendment—was introduced in the House of Representatives in December of 1863, while the Civil War was ongoing.<sup>67</sup> Representative James Ashley, a Radical Republican, introduced a bill that would outlaw all slavery and involuntary servitude in the United States.<sup>68</sup> The same day, Representative James Wilson proposed an amendment to the Constitution which stated: “Slavery, being incompatible with a free Government, is forever prohibited in the United States; and involuntary servitude shall be permitted only as a punishment for crime.”<sup>69</sup> Thus, from the first day the Thirteenth Amendment was conceived of, punishing crime via involuntary servitude was proposed as a valid exception to the country’s ban on forced labor.

In March 1864, Congress introduced the Thirteenth Amendment in its current form.<sup>70</sup> Senator John Brooks Henderson, a former slave-holding senator from Missouri, co-authored the draft, which essentially imported the slavery regulation from the Northwest Ordinance of 1787 into the U.S. Constitution.<sup>71</sup> The Northwest Ordinance, written by Thomas Jefferson, reflected Jefferson’s goal of generally prohibiting slavery after 1800, but allowing slavery as a punishment for crime,<sup>72</sup> stating: “That, after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in

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<sup>66</sup> U.S. CONST. amend. XIII., § 1.

<sup>67</sup> Goodwin, *supra* note 16, at 924 (citing JOHN A. LOGAN, *THE GREAT CONSPIRACY: ITS ORIGIN AND HISTORY* 529 (New York, A.R. Hart & Co. 1886)).

<sup>68</sup> WAGER SWAYNE, *THE ORDINANCE OF 1787 AND THE WAR OF 1861*, at 70–71 (New York, C.G. Burgoyne 1892).

<sup>69</sup> *Id.* at 71.

<sup>70</sup> Goodwin, *supra* note 16, at 922 (citing Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 6 n.14 (1990)).

<sup>71</sup> Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 990 (2009).

<sup>72</sup> *Id.* at 992; Goodwin, *supra* note 16, at 932 (quoting Howe, *supra* note 71, at 992) (“Jefferson was influenced by Cesare Beccaria, an Italian criminologist who protested ‘barbarism in criminal law and procedure’ and proposed perpetual slavery as a more humane alternative to capital punishment.”).

any of the said States, otherwise than in the punishment of crimes whereof the party shall have been duly convicted to have been personally guilty.”<sup>73</sup>

As a result of this new proposal, both Representative Ashley’s original proposal outlawing all slavery and involuntary servitude, and Representative Wilson’s proposal of outlawing all slavery, and only allowing involuntary servitude as a punishment for a crime, appear to have been mostly forgotten.<sup>74</sup> Instead, the House focused its attention on the newer proposal from the Senate Judiciary Committee, which did not appear to distinguish between slavery and involuntary servitude.<sup>75</sup> Most of the debate about the passage of the Thirteenth Amendment focused on the main provision of the Thirteenth Amendment—outlawing slavery—rather than discussing the effects of the clause excepting those convicted of a crime from the Amendment’s provisions.<sup>76</sup> As a result, “[r]ecorded debate over the punishment clause when the House of Representatives promulgated the Thirteenth Amendment was . . . minimal.”<sup>77</sup>

There were more explicit mentions of the “punishment” clause during the Senate debate surrounding the passage of the Thirteenth Amendment.<sup>78</sup> Senator Charles Sumner, noted abolitionist, objected to the existence of the “punishment” clause:

I understand that it starts with the idea of reproducing the Jeffersonian ordinance. I doubt the expediency of reproducing that ordinance. It performed excellent work in its day; but there are words in it which are entirely inapplicable to our time. . . . They are the limitation, “otherwise than in the punishment of crimes whereof the party shall have been duly convicted.” Now, unless I err, there is an implication from those words that men may be enslaved as a punishment of crimes whereof they shall have been duly convicted. There was a reason, I have said, for that at the time, 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.<sup>79</sup>

Senator Trumbull, the Chair of the Judiciary Committee, noted the Committee on the Judiciary considered an amendment stating, “All persons are free before the law, so that no person can hold another as a slave,” and

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<sup>73</sup> SWAYNE, *supra* note 68, at 32.

<sup>74</sup> See Howe, *supra* note 71, at 994–95.

<sup>75</sup> See *id.* at 995.

<sup>76</sup> *Id.* at 992.

<sup>77</sup> *Id.* at 994.

<sup>78</sup> *Id.* at 995.

<sup>79</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864).

decided against it.<sup>80</sup> Senator Trumbull urged Senators to accept “language as reported by the committee,” because it would “accomplish” the goal of “abolish[ing] slavery and prevent its existence . . . although” the language of the amendment “may not be the best possible form.”<sup>81</sup> Senator Sumner then decided he would not “pursue any of the propositions” he had offered for changing the amendment, and asked to withdraw them.<sup>82</sup> Congress passed the Thirteenth Amendment on January 31, 1865, and it was ratified in December of that year.<sup>83</sup>

Some scholars suggest Congress’s “absence of discussion” about the punishment clause when debating the drafting of the Thirteenth Amendment “implies the existence of common knowledge” related to what the clause meant.<sup>84</sup> There is some evidence that “by the time of the [Thirteenth] Amendment’s adoption, the prohibition on ‘slavery’ and ‘involuntary servitude’ . . . had a well-settled place in American law.”<sup>85</sup> At the time, the public meaning of the term “slavery” was “informed by commonly recognized conditions of slavery in the antebellum period.”<sup>86</sup> This suggests legislators did not intend for the “punishment provision” to have “some unusual meaning,” but rather intended to allow the government to “force duly convicted criminals to live the life of a slave.”<sup>87</sup> The meaning of “involuntary servitude” also appears to be informed by the common practice of the time. Wager Swayne, a Union General writing in the decades following the passage of the Thirteenth Amendment, asserted that “involuntary servitude,” as used in both the Northwest Ordinance and later in the Thirteenth Amendment, was “meant to preclude the enforcement of contracts to serve for a term of years, or for life.”<sup>88</sup> Swayne specifically referred to the “custom at that time prevalent in this country” of “shipmasters and merchants . . . bringing over white immigrants under contracts to serve for a term of years, in lieu of the payment of passage money.”<sup>89</sup> This practice, known as indentured servitude, was prevalent in all parts of America from its early colonies through the 19th century. Some historians estimate that 48% of the voluntary migrants

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<sup>80</sup> *Id.* Senator Sumner asserted the word “free” was a mistake and should have instead read as “equal.” *Id.* Senator Trumbull worried this would lead to a situation here “before the law, a woman would be equal to a man, a woman would be as free as a man.” *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/13th-amendment#:~:text=Passed%20by%20Congress%20on%20January,slavery%20in%20the%20United%20States> [https://perma.cc/GYW3-YKNN] (last reviewed May 10, 2022).

<sup>84</sup> Howe, *supra* note 71, at 992.

<sup>85</sup> David R. Upham, *The Understanding of “Neither Slavery Nor Involuntary Servitude Shall Exist” Before the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL’Y 137, 139 (2017).

<sup>86</sup> Howe, *supra* note 71, at 996.

<sup>87</sup> *Id.*

<sup>88</sup> SWAYNE, *supra* note 68, at 32–33.

<sup>89</sup> *Id.* at 33 n\*.

to America (e.g., those who were not convicted prisoners or enslaved) committed to an initial period of indentured servitude.<sup>90</sup>

Thus, while the Thirteenth Amendment granted freedom to many, at the very same time, it enshrined involuntary labor practices in our Constitution, allowing existing practices of slavery and involuntary servitude to remain constitutionally sanctioned—so long as those laboring were first convicted of a crime.

### C. *Why Was Prison Labor Excepted?*

Scholars continue to debate why the Thirteenth Amendment excepted slavery and involuntary servitude in cases where the individual was convicted of a crime. No record of the Senate Judiciary Committee's deliberation survives, making the precise motives or intentions of the Senators involved difficult to ascertain.<sup>91</sup> From what record does exist, it appears the except clause may be attributed to prevailing social norms and the desire to secure Democratic support.

The historical account points to a common belief that prison labor was acceptable, and often seen as a desirable way to rehabilitate inmates—suggesting that the except clause was emblematic of society's views of the role of labor in incarceration. During this period, few constitutional protections were extended to prisoners.<sup>92</sup> So, denying incarcerated individuals labor rights was consistent with the utter disregard of prison conditions during that era. The Thirteenth Amendment's except clause also was in harmony with prevailing ideas about the necessity of work for rehabilitation: most white citizens of the time believed forcing convicted criminals to perform hard labor could reform them.<sup>93</sup>

Courts of the era also seemed to endorse the idea that work was an assumed part of a prison sentence. In 1876, just eleven years after the passage of the Thirteenth Amendment, the Supreme Court heard the case of *Ex parte*

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<sup>90</sup> Christopher Tomlins, *Reconsidering Indentured Servitude: European Migration and the Early American Labor Force, 1600-1775*, 42 LAB. HIST. 5, 7, 9 (2001).

<sup>91</sup> MICHAEL VORENBERG, FINAL FREEDOM, THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 53 (2001).

<sup>92</sup> See *Ruffin v. Commonwealth*, 62 Va. 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 . . . . 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.”); MARGO SCHLANGER, SHEILA BEDI, DAVID M. SHAPIRO & LYNN S. BRANHAM, INCARCERATION AND THE LAW: CASES AND MATERIALS 42 (W. Acad. Publ'g, 10th ed., 2020) (noting that “*Ruffin v. Commonwealth* reflected a general notion prevailing in the United States through the 19th century that prisoners had no rights” and therefore “lost the protection afforded by state and federal constitutions”).

<sup>93</sup> Gutierrez, *supra* note 54, at 127.

*Karstendick*.<sup>94</sup> Karstendick was convicted of a federal crime and sentenced to sixteen months at a federal penitentiary in West Virginia where work was required.<sup>95</sup> Karstendick sought to be incarcerated in a different facility, where he would not be required to work, arguing since “imprisonment in a penitentiary necessarily implies imprisonment at hard labor” and “here the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment, is in excess of the power conferred.”<sup>96</sup> The Court rejected the argument, instead finding “where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence,” but even if “the statute requires imprisonment alone,” courts can still require the individual to be sent to an institution “where labor is exacted as part of the discipline and treatment of the institution.”<sup>97</sup> Thus, the Supreme Court endorsed the idea of labor as part of the “discipline and treatment” of incarcerated individuals—even in the absence of a sentence explicitly requiring imprisonment at hard labor. Similarly, in the oft-quoted 1871 case of *Ruffin v. Commonwealth*—decided about five years after the passage of the Thirteenth Amendment—the Supreme Court of Virginia concluded that a convicted felon is a “slave of the state” and thus may remain in a “state of penal servitude.”<sup>98</sup>

The Thirteenth Amendment’s except clause might also be attributed to short-term political calculus. Republicans were concerned with the desires of War Democrats, or members of the Democratic party who supported the Union in the Civil War Effort, because the votes of such War Democrats were needed to pass the amendment.<sup>99</sup> The except clause—drawn from the Northwest Ordinance drafted by Thomas Jefferson—carried Jefferson’s pedigree, thereby attracting Democratic support, and was already tried and tested through its use in the Northwest Territory.<sup>100</sup> The immediate political expediency of the except clause was coupled with an inability to predict the clause’s long-term negative consequences, as Republicans almost certainly failed to predict ways in which the clause would later be used to exploit Black labor.<sup>101</sup>

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<sup>94</sup> 93 U.S. 396 (1876).

<sup>95</sup> *Id.* at 397.

<sup>96</sup> *Id.* at 399.

<sup>97</sup> *Id.*

<sup>98</sup> *Ruffin v. Commonwealth*, 62 Va. 790, 795–96 (1871).

<sup>99</sup> VORENBERG, *supra* note 91, at 58.

<sup>100</sup> Pope, *supra* note 28, at 1476 (“It seems more likely, however, that [the “except” clause’s] presence in the Amendment reflected the general prestige of the Northwest Ordinance rather than any particular views about the Punishment Clause. Anti-slavery Republicans venerated the Ordinance for its alleged success at eliminating slavery in the Northwest Territory. Moreover, an Amendment that merely echoed ‘Jefferson’s Ordinance’ held out the possibility of attracting support from Democrats.”).

<sup>101</sup> See *id.* at 1477 (explaining that “[w]ith the benefit of hindsight, the peril posed by the Clause might seem obvious” but “[a]t the time, however, there were few harbingers” and

Regardless of what lawmakers originally intended for the Thirteenth Amendment's except clause, its result was enabling Southern states to continue to legally force Black individuals into conditions resembling slavery. Before the Thirteenth Amendment's passage, prison populations were small—especially in the South.<sup>102</sup> In the years following its passage, Southern states engaged in “the capture and imprisonment of thousands of random indigent citizens, almost always under the thinnest chimera of probable cause or juridical process.”<sup>103</sup> Southern states passed vagrancy laws—which criminalized unemployment<sup>104</sup>—and a host of other laws meant to criminalize everyday activities. These new laws were enforced primarily against Black individuals.<sup>105</sup> With this influx in Black convicts, southern states expanded their use of convict leasing—allowing private individuals to “lease” those who had been convicted, put them to work, and keep the profits.<sup>106</sup> Some convict leasing had occurred before the Civil War in both the North and the South.<sup>107</sup> However, following ratification of the Thirteenth Amendment, there was a large increase in convict leasing, particularly in the South.<sup>108</sup> Convicted individuals were forced to work and were subjected to dangerous and deplorable conditions that frequently resulted in death.<sup>109</sup>

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detailing that major newspapers, abolitionist meetings, and African American conventions did not discuss the “punishment” clause); Holly Etheridge, *In Practice but Not in Name: The Futility of the Thirteenth Amendment in Protecting Against Forced Labor in Correctional Facilities and Detention Centers in the U.S.*, 55 UIC L. REV. 549, 553 (2022) (“[A]t the amendment’s ratification, its supporters focused mainly on its proposal and ratification and likely failed to foresee how the Punishment Clause could be abused.”); ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 45 (2019). (“The criminal exception, almost unmentioned in the debates of 1864 and 1865, [took] on baleful significance as a constitutional justification for the exploitation of the labor of convicts.”)

<sup>102</sup> Pope, *supra* note 28, at 1477.

<sup>103</sup> DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II*, at 7 (2008).

<sup>104</sup> Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 613 (2018).

<sup>105</sup> *Id.* at 614.

<sup>106</sup> Holly Etheridge, *In Practice but Not in Name: The Futility of the Thirteenth Amendment in Protecting Against Forced Labor in Correctional Facilities and Detention Centers in the U.S.*, 55 UIC L. REV. 549, 555 (2022). Many scholars have chronicled the way in which the “except clause” was harnessed by southern governments to create criminal systems designed to incarcerate and exploit Black people via convict leasing. *See, e.g.*, DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); Cortney E. Lollar, *The Costs of the Punishment Clause*, 106 MINN. L. REV. 1827, 1830 (2022).

<sup>107</sup> Howe, *supra* note 71, at 1009.

<sup>108</sup> *See id.* at 1010 (“By 1880, every former Confederate state except Virginia was renting a large proportion of its state prisoners to lessees interested in exploiting their labor for private gain.”); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 422 (2009) (detailing the sharp increase in the practice of convict leasing following the passage of the Thirteenth Amendment).

<sup>109</sup> Holly Etheridge, *In Practice but Not in Name: The Futility of the Thirteenth Amendment in Protecting Against Forced Labor in Correctional Facilities and Detention Centers in the U.S.*, 55 UIC L. REV. 549, 555 (2022).

This expansion of convict leasing can be explained by the except clause of the Thirteenth Amendment: shortly after the amendment's passage, John T. Morgan, a Confederate General and Senator from Alabama, approvingly noted that since "the Constitution gives the power to inflict involuntary servitude as a punishment for crime, a law should be so framed as to enable the judicial authorities of the State to sell into bondage again those negroes who should be found guilty of certain crimes."<sup>110</sup>

Recognizing the effects of the except clause, in 1866, the National Anti-Slavery Standard, an abolitionist journal, explained that such new laws in Florida had:

establish[ed] a system of slavery more odious and oppressive than the old system. . . . To evade the constitutional amendment which prohibits slavery or involuntary servitude except as a punishment for crime, they have enlarged the catalogue of crimes. These Florida rebels have placed it in their own power to force the negroes into vagrancy, and they have made vagrancy a crime for which the freedman may be sold into servitude for a year at a time.<sup>111</sup>

Some Congressmen, recognizing the way in which the South was exploiting Black labor via the Thirteenth Amendment's except clause, attempted to course-correct via joint resolution. In 1867, Representative Kasson introduced a joint resolution to clarify the scope of the Thirteenth Amendment, stating that "the true intent and meaning of" the Thirteenth Amendment was to "prohibit[] slavery or involuntary servitude forever in all forms, except in direct execution of a sentence imposing a definite penalty according to law."<sup>112</sup> This resolution was passed by the House, but the bill was postponed "indefinitely" in the Senate.<sup>113</sup>

After Representative Kasson's failure, there were few efforts to make changes to the text of the Thirteenth Amendment for the next 150 years. However, in recent years, there has been a renewed effort to re-examine and potentially amend the Thirteenth Amendment. The next Section will discuss these efforts and their ensuing successes.

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<sup>110</sup> SIDNEY ANDREWS, *THE SOUTH SINCE THE WAR: AS SHOWN BY FOURTEEN WEEKS OF TRAVEL AND OBSERVATION IN GEORGIA AND THE CAROLINAS* 323 (1866) (quoting county newspaper's paraphrase of a public speech).

<sup>111</sup> NATIONAL ANTI-SLAVERY STANDARD, *Southern Codes for Freedmen*, (June 9, 1866), <https://nyshistoricnewspapers.org/?a=d&d=naas18660609-01.1.1&e=-----en-20--1--txt-txIN----->. [<https://perma.cc/W7UQ-N7E6>].

<sup>112</sup> See CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867).

<sup>113</sup> Gutierrez, *supra* note 54, at 134-35.



## II. THE PRESENT: STATE MOVEMENT TO GET RID OF THE EXCEPT CLAUSE

In June of 2023, a group of Democratic lawmakers re-introduced a joint resolution in the House and Senate named the “Abolition Amendment” that would remove the except clause from the Thirteenth Amendment—thereby prohibiting the imposition of involuntary servitude or slavery on incarcerated individuals.<sup>114</sup> These Democrats built on previous efforts, started in 2020, to pass such an amendment.<sup>115</sup> While these efforts continue to receive a lot of attention from the press, they are unlikely to result in any constitutional change. Amendments to the U.S. Constitution require a two-thirds majority vote in both the Senate and the House of Representatives,<sup>116</sup> which is nearly impossible given the current state of political polarization. However, a federal constitutional amendment is not the only way to outlaw slavery from the United States—scholars have noted that an alternative “channel for advocacy is enacting legislation to ban slavery, including for conviction of a crime, state by state.”<sup>117</sup>

States have taken up this call to action. The past five years have seen extraordinary momentum as states have begun paying renewed attention to their own except clauses in state constitutions. Much of the groundwork behind this movement has come from the Abolish Slavery National Network, which has been specifically working towards removing exceptions for slavery and involuntary servitude in both the U.S. Constitution and state constitutions across the country.<sup>118</sup>

As of this paper’s publication, seven states have already amended their state constitutions to abolish slavery and involuntary servitude in all forms.<sup>119</sup> Almost every other state retains the exception, or doesn’t mention

<sup>114</sup> Shawna Mizelle, *Ahead of Juneteenth, Congressional Lawmakers Again Seek to Remove Exception for Slavery from US Constitution*, CNN POLITICS (June 16, 2023, 12:54 PM), <https://www.cnn.com/2023/06/16/politics/abolition-amendment-slavery-constitution/index.html#:~:text=The%2013th%20Amendment%20presently%20says,place%20subject%20to%20their%20jurisdiction.%E2%80%9D> [<https://perma.cc/C7FY-9XQA>].

<sup>115</sup> Braktkton Booker, *Democrats Push ‘Abolition Amendment’ to Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020, 6:43 PM), <https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution> [<https://perma.cc/KD82-3K5H>].

<sup>116</sup> U.S. CONST. art. 5.

<sup>117</sup> Goodwin, *supra* note 16, at 983.

<sup>118</sup> See ABOLISH SLAVERY NATIONAL NETWORK, <https://abolishslavery.us/> [<https://perma.cc/M2HR-GTQH>].

<sup>119</sup> See Aaron Morrison, *Slavery, Involuntary Servitude Rejected by 4 States’ Voters*, AP NEWS (Nov. 9, 2022) <https://apnews.com/article/2022-midterm-elections-slavery-on-ballot-561268e344f17d8562939cde301d2cbf> [<https://perma.cc/7DAD-WTYP>] (noting that in the 2022 election, voters in Alabama, Oregon, Tennessee, and Vermont passed ballot measures changing “their state constitutions to prohibit slavery and involuntary servitude as punishment for crime,” bringing the total number of states banning slavery up to eight since Colorado, Nebraska, and Utah had already approved similar measures and Rhode Island has banned slavery since 1843). These states join Rhode Island, which banned all forms of slavery in its state constitution in 1843. See R.I. CONST. art. 1, § 4; see also Fred Zilian, *In 1843, Slavery was Banned in Rhode Island*, NEWPORT DAILY NEWS (May 28, 2018, 6:14 PM), <https://www.newportri.com/>

slavery or involuntary servitude in its state constitution at all.<sup>120</sup> This Section chronicles state efforts to abolish slavery and involuntary servitude from state constitutions, and predicts such efforts will expand to other states and continue to be successful.

### A. Colorado

Colorado led the way on this effort, beginning back in 2016, when the state first endeavored to ban slavery from its state constitution. The relevant provision of the Colorado State Constitution was almost identical to the Thirteenth Amendment of the U.S. Constitution, stating: “There shall never be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted.”<sup>121</sup> In 2016, the Colorado legislature unanimously approved an amendment removing the except clause for a general referendum ballot.<sup>122</sup> However, in 2016, the measure failed to pass the general referendum by a margin of less than one percent (and less than 20,000 votes).<sup>123</sup> At the time, the ballot question read: “Shall there be an amendment to the Colorado constitution concerning the removal of the exception to the prohibition of slavery and involuntary servitude when used as a punishment for persons duly convicted of a crime?”<sup>124</sup> Commentators and voters noted the ballot language in 2016 was so long and confusing that many voters didn’t realize that they were voting against abolishing slavery in Colorado.<sup>125</sup>

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story/lifestyle/columns/2018/05/28/looking-back-at-our-history-in-1843-slavery-was-banned-in-rhode-island/12119944007/ [https://perma.cc/P7F6-F3VH].

<sup>120</sup> As described in *supra* note 119, Rhode Island is an exception, as it has banned slavery since 1843. See ABOLISH SLAVERY NETWORK, *Resources*, <https://abolishslavery.us/resources> [https://perma.cc/8WAY-YSF3] (tracking each state’s constitutional provisions concerning slavery); HUMAN TRAFFICKING SEARCH, *Efforts by States to Eliminate the Exception Allowing Slavery or Involuntary Servitude as Punishment for a Crime*, <https://humantraffickingsearch.org/efforts-by-states-to-eliminate-the-exception-allowing-slavery-or-involuntary-servitude-as-punishment-for-a-crime> [https://perma.cc/N5VB-5H8T] (same, as of 2021).

<sup>121</sup> BALLOTPEDIA, *Colorado Amendment A, Removal of Exception to Slavery Prohibition for Criminals Amendment (2018)*, [https://ballotpedia.org/Colorado\\_Amendment\\_A,\\_Removal\\_of\\_Exception\\_to\\_Slavery\\_Prohibition\\_for\\_Criminals\\_Amendment\\_\(2018\)](https://ballotpedia.org/Colorado_Amendment_A,_Removal_of_Exception_to_Slavery_Prohibition_for_Criminals_Amendment_(2018)) [https://perma.cc/3XPB-Q8UG].

<sup>122</sup> Chris Walker, *Amendment A Clearly Asks Coloradans: Should the State Abolish Slavery?* WESTWORLD (Oct. 24, 2018, 6:14 AM), <https://www.westworld.com/news/after-defeat-in-2016-abolish-slavery-colorado-comes-back-with-amendment-a-10926880> [https://perma.cc/MTD3-XMH5].

<sup>123</sup> *Id.*

<sup>124</sup> BALLOTPEDIA, *Colorado Removal of Exception to Slavery Prohibition for Criminals, Amendment T (2016)*, [https://ballotpedia.org/Colorado\\_Removal\\_of\\_Exception\\_to\\_Slavery\\_Prohibition\\_for\\_Criminals,\\_Amendment\\_T\\_](https://ballotpedia.org/Colorado_Removal_of_Exception_to_Slavery_Prohibition_for_Criminals,_Amendment_T_) [https://perma.cc/87WW-BCKH].

<sup>125</sup> *Id.*; see also Daniel Victor, *Colorado Voters on the Verge of Keeping Slavery Exception in State Constitution*, NY TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/us/colorado-slavery-state-constitution.html> [https://perma.cc/5ANT-32BR]; BALLOTPEDIA, *Colorado Amendment A, Removal of Exception to Slavery Prohibition for Criminals Amendment (2018)*, [https://ballotpedia.org/Colorado\\_Amendment\\_A,\\_Removal\\_of\\_Exception\\_to\\_Slavery\\_](https://ballotpedia.org/Colorado_Amendment_A,_Removal_of_Exception_to_Slavery_)

Two years later, in 2018, the state legislature again unanimously approved adding a new antislavery amendment to the ballot—this time making a concerted effort to ensure that the ballot language was clear.<sup>126</sup> On November 6, 2018, Colorado voters passed Amendment A, which amended Section 26, Article II of the Colorado Constitution to say: “Slavery prohibited. There shall never be in this state either slavery or involuntary servitude” and cutting “except as a punishment for crime, whereof the party shall have been duly convicted.”<sup>127</sup> A summary of the ballot measure, published in the Colorado Ballot Information Booklet (colloquially known as the “Blue Book”)<sup>128</sup> explained “[t]he U.S. Supreme Court has defined ‘involuntary servitude’ as a condition of servitude in which one person is forced to work for another person 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>129</sup>

The Blue Book also lists the text of the measure, which includes an acknowledgement that “work provides myriad individual and collective benefits,” so that “the purpose of this proposed constitutional amendment is not to withdraw legitimate opportunities to work for individuals who have been convicted of a crime, but instead to merely prohibit compulsory labor from such individuals.”<sup>130</sup>

### B. Other State Movements

The success in Colorado spurred other efforts across the country. Two years later, Utah’s voters overwhelmingly passed a similar measure.

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Prohibition\_for\_Criminals\_Amendment\_ [https://perma.cc/6HAR-KWK] (“In 2016, an identical amendment, Amendment T, appeared on the 2016 general election ballot in Colorado. Like the 2018 amendment, it passed unanimously in the legislature, but Amendment T was defeated at the ballot box. In 2016, 49.6 percent of voters voted yes and 50.32 percent voted no on the amendment, leaving the constitution unchanged and allowing forced, unpaid labor by convicted criminals. Proponents of Amendment T say they believe the amendment failed because voters may have been confused by the wording of the ballot question.”).

<sup>126</sup> Walker, *supra* note 124.

<sup>127</sup> H.R. Con. Res. 18-1002, 75th Gen. Assemb., 2d Reg. Sess. (Colo. 2018).

<sup>128</sup> COLORADO GENERAL ASSEMBLY, *Ballot Information Booklet (Blue Book)*, https://leg.colorado.gov/content/initiatives/initiatives-blue-book-overview/ballot-information-booklet-blue-book [https://perma.cc/TVP7-BD7W] (“The purpose of the ballot information booklet is to provide voters with the text, title, and a fair and impartial analysis of each initiated or referred constitutional amendment, law, or question on the ballot. The analysis must include a summary of the measure, the major arguments both for and against the measure, and a brief fiscal assessment of the measure.”).

<sup>129</sup> LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, *2018 State Ballot Information Booklet and Recommendations on Retention of Judges, Research Publication No. 702-2*, at 39 (2018), https://leg.colorado.gov/sites/default/files/2018\_english\_final\_for\_internet\_1.pdf [https://perma.cc/2QKP-EJAQ]. This definition comes from *United States v. Kozminski*, 487 U.S. 931 (1988).

<sup>130</sup> *Id.*

Amendment C to the Utah Constitution passed on November 3, 2020,<sup>131</sup> with over 80% of voters in favor.<sup>132</sup> Almost identical to the Colorado Amendment, Utah’s constitutional amendment asked voters to “remove the language that allows slavery and involuntary servitude as punishment for a crime,” noting “[i]t is not involuntary servitude if the person can choose not to do the work.”<sup>133</sup> However, the Utah amendment also “clarif[ied] that the ban does not affect the otherwise lawful administration of the criminal justice system” such that “the Amendment does not impact the ability of a court to sentence someone to prison as punishment for a crime or the ability of prisoners to participate in prison work programs.”<sup>134</sup> Moreover, the Utah ballot proposal noted “[n]o argument was submitted against Constitutional Amendment C” and no Senators or Representatives had voted to oppose the bill.<sup>135</sup> The same year, Nebraska passed an almost identical bill with 68% of the vote.<sup>136</sup>

This trend appears to be carrying into other states as well. In the 2022 midterm elections, four states—Alabama, Oregon, Tennessee, and Vermont—all voted to change their state constitutions to prohibit slavery and involuntary servitude as punishment for crime.<sup>137</sup> In 2023, both houses of the Nevada Legislature—with no votes against the bill<sup>138</sup>—passed a resolution seeking to amend the Nevada Constitution in a similar manner.<sup>139</sup> In 2023, the New

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<sup>131</sup> Tavss, *supra* note 23.

<sup>132</sup> STATE OF UTAH: OFFICE OF THE LIEUTENANT GOVERNOR, 45 (Nov. 23, 2020) (reporting 80.5% voting in favor of Constitutional Amendment C) <https://voteinfo.utah.gov/wp-content/uploads/sites/42/2021/02/2020-General-Election-Canvass.pdf> [<https://perma.cc/SB8W-6NDQ>].

<sup>133</sup> VOTEINFO.UTAH.GOV, *Constitutional Amendment C*, <https://voteinfo.utah.gov/wp-content/uploads/sites/42/2020/09/Constitutional-Amendment-C.pdf> [<https://perma.cc/3N6G-73FS>]; *see also* UTAH STATE LEGISLATURE, H.J.R. 8 PROPOSAL TO AMEND UTAH CONSTITUTION - SLAVERY AND INVOLUNTARY SERVITUDE PROHIBITION, <https://le.utah.gov/~2019/bills/static/HJR008.html> [<https://perma.cc/23GM-Q2SJ>].

<sup>134</sup> VOTEINFO.UTAH.GOV, *supra* note 133.

<sup>135</sup> *Id.*

<sup>136</sup> BALLOTPEDIA, *Nebraska Amendment 1, Remove Slavery as Punishment for Crime from Constitution Amendment (2020)*, [https://ballotpedia.org/Nebraska\\_Amendment\\_1\\_Remove\\_Slavery\\_as\\_Punishment\\_for\\_Crime\\_from\\_Constitution\\_Amendment\\_1](https://ballotpedia.org/Nebraska_Amendment_1_Remove_Slavery_as_Punishment_for_Crime_from_Constitution_Amendment_1) [<https://perma.cc/S4R4-L2RC>] (2020).

<sup>137</sup> Morrison, *supra* note 106.

<sup>138</sup> AJR10, NEVADA LEGISLATURE, <https://www.leg.state.nv.us/App/NELIS/REL//81st2021/Bill/7795/Overview> [<https://perma.cc/PGV5-D6V6>].

<sup>139</sup> *Id.*; *see also* Jessica Hill, *Anti-Slavery Amendment Advances to Senate Floor*, LAS VEGAS REVIEW-JOURNAL (Feb. 21, 2023, 5:19 PM), <https://www.reviewjournal.com/news/politics-and-government/nevada/2023-legislature/anti-slavery-amendment-advances-to-senate-floor-2732714/> [<https://perma.cc/3LBW-SPDN>] (noting that the bill “was approved unanimously by the Legislature in 2021. Because it would amend the constitution, however, two successive Legislatures must approve the resolution before it goes before voters.”).

York<sup>140</sup> and Washington<sup>141</sup> state legislatures both also considered bills that would remove involuntary servitude in the state for any reason.

### C. *Potential Opposition*

What's remarkable about most state efforts to remove the except clause from their state constitutions is the lack of any sort of coordinated opposition—indeed, most of the bills that have passed to date did so overwhelmingly. Despite the remarkable success of these bills, there has been a growing tide of resistance, as conservative lawmakers have begun to fear the impact of these amendments.

In October of 2020, Nebraska state Senator Mike Groene published an Op-Ed in which he lamented his vote in favor of the Nebraska amendment banning slavery and involuntary servitude—acknowledging that he “regret[ed]” voting for the bill because “when a judge gives a sentence of community service, making a young vandal clean up his graffiti, or when a convict is required to attend rehabilitation classes as a condition of release from confinement, both could be considered involuntary servitude or a form of slavery,” and therefore worrying that if Nebraska’s anti-slavery amendment passes, “taxpayers may be forced to pay convicts a minimum wage to make their bed.”<sup>142</sup> Senator Groene attributed his voting for the bill to being “caught up in our present national atonement mood over an evil scar on the American conscience.”<sup>143</sup>

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<sup>140</sup> Rebecca C. Lewis, *NY Proposed Constitutional Amendment Would Ban Prison Slave Labor*, CITY & STATE NEW YORK (Feb. 8, 2023), <https://www.cityandstateny.com/policy/2023/02/ny-proposed-constitutional-amendment-would-ban-prison-slave-labor/382705/> [<https://perma.cc/V9NG-RLY7>].

<sup>141</sup> TARRA SIMMONS, *Simmons Introduces the Real Labor, Real Wages Act to End ‘Slavery Loophole’ in Washington State* (Dec. 8, 2022), <https://housedemocrats.wa.gov/simmons/2022/12/08/simmons-introduces-the-real-labor-real-wages-act-to-end-slavery-loop-hole-in-washington-state/> [<https://perma.cc/XPP4-GAWJ>]. This bill would also require that incarcerated workers in Washington prisons be paid minimum wage.

<sup>142</sup> Mike Groene, *Where I Stand on Nebraska’s Six Ballot Measures*, THE NORTH PLATTE TELEGRAPH (Oct. 15, 2020), [https://nptelegraph.com/opinion/columnists/groene-where-i-stand-on-nebraskas-six-ballot-measures/article\\_419cb36a-0e77-11eb-bad8-bbeb34e3dde3.html](https://nptelegraph.com/opinion/columnists/groene-where-i-stand-on-nebraskas-six-ballot-measures/article_419cb36a-0e77-11eb-bad8-bbeb34e3dde3.html) [<https://perma.cc/STT6-EH2M>]. Even assuming the arguments in this Note are correct and removing the “except” clause means incarcerated people cannot be forced to labor, Senator Groene’s claim is likely not: courts have indicated there is a personal housekeeping exception to the Thirteenth Amendment, since the Thirteenth Amendment was designed to prevent a “condition of enforced compulsory service of *one to another*.” *Hodges v. United States*, 203 U.S. 1, 16, (1906), *overruled on other grounds by Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (emphasis added); *see also* *Channer v. Hall*, 112 F.3d 214, 218 (5th Cir. 1997) (“Several courts have held that compelling individuals who are involuntarily confined in mental institutions to perform housekeeping tasks does not violate the Thirteenth Amendment.”); *McGarry v. Pallito*, 687 F.3d 505, 514 (2d Cir. 2012) (“We are prepared to continue to assume that correctional institutions may require inmates to perform personally related housekeeping chores such as, for example, cleaning the areas in or around their cells, without violating the Thirteenth Amendment.”).

<sup>143</sup> Groene, *supra* note 142.

During the 2022 midterms, Louisiana voters also had the chance to eliminate slavery from their state constitution—though they were unable to do so, with 61% of voters voting against the change.<sup>144</sup> While the original version of the bill, sponsored by Democrat Edmon Jordan, would have simply stated that all forms of slavery and involuntary servitude are prohibited, conservative opponents worried that the bill would eliminate prison labor entirely.<sup>145</sup> A compromise, authored by Republican Richard Nelson, suggested using the same qualification that Utah had used previously—stating that the ban on slavery and involuntary servitude “does not apply to otherwise lawful administration of the criminal justice system.”<sup>146</sup> With that compromise, the bill passed the House and Senate of Louisiana unanimously.<sup>147</sup> However, after the bill passed the legislature, the bill’s original sponsor—Representative Jordan—withdrew his support for the bill because of the “ambiguity” with the compromise version.<sup>148</sup> Some voters became confused—unsure if they were voting for or against eliminating slavery.<sup>149</sup> In the 2023 legislative session, Representative Jordan reintroduced the bill, which passed the House but failed in the Senate, as Senators felt the bill was largely symbolic, and questioned the need for it.<sup>150</sup> Other lawmakers accused Representative Jordan of being “disingenuous” in claiming the bill was meant to be symbolic, while actually hoping that the bill would end the forced labor of convicts.<sup>151</sup>

The opposition isn’t limited to only conservative, southern states—California legislators also rejected an anti-slavery bill in 2022, after the

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<sup>144</sup> See Curtis Bunn, *Black Voters in Louisiana ‘Embarrassed’ by State’s Failure to Pass Anti-Slavery Amendment*, NBC NEWS (Nov. 23, 2022, 3:22 PM), <https://www.nbcnews.com/news/nbcblk/black-voters-louisiana-embarrassed-states-failure-pass-anti-slavery-am-rcna57162> [https://perma.cc/9QA9-96UX]; Kaitlyn Radde, *Louisiana Voters Rejected an Antislavery Ballot Measure. The Reasons Are Complicated*, NPR (Nov. 17, 2022, 1:33 PM), <https://www.npr.org/2022/11/17/1137398039/louisiana-voters-rejected-an-antislavery-ballot-measure-the-reason-is-complicate> [https://perma.cc/A4A4-TWHT].

<sup>145</sup> Lorena O’Neil, *The Story Behind Why Louisiana Voted Against a Ban on Slavery*, LOUISIANA ILLUMINATOR (Nov. 17, 2022, 4:34 PM), <https://lailluminator.com/2022/11/17/the-story-behind-why-louisiana-voted-against-a-ban-on-slavery/> [https://perma.cc/D8AB-7XZ4].

<sup>146</sup> *Id.*

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

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Greg Hilburn, *Louisiana Senate Kills Bill to Symbolically Ban Slavery in State Constitution*, SHREVEPORT TIMES (June 5, 2023, 2:17 PM), <https://www.shreveporttimes.com/story/news/2023/06/05/louisiana-senate-kills-bill-to-symbolically-ban-slavery-in-state-constitution/70289801007/#:~:text=Louisiana%20Senate%20kills%20bill%20to%20symbolically%20ban%20slavery%20in%20state%20Constitution&text=Louisiana%27s%20Senate%20killed%20a%20bill,years%20after%20the%20Civil%20War> [https://perma.cc/96F4-XJCT].

<sup>151</sup> Greg Hilburn, *Bill to Symbolically Abolish Slavery Advances in Louisiana, But Not Without Hard Feelings*, LAFAYETTE DAILY ADVERTISER (May 11, 2023, 10:27 AM), <https://www.theadvertiser.com/story/news/2023/05/09/symbolic-bill-to-abolish-slavery-in-louisiana-advances-after-heated-debate-and-angry-words/70197206007/> [https://perma.cc/AVQ4-BGUV].

bill did not pass the Senate by the deadline for the November ballot.<sup>152</sup> In California, the legislative analysis of the bill specifically noted that the bill's passage could prompt a lawsuit seeking to force the state to pay inmates minimum wage<sup>153</sup>—which would be a stark change, since California inmate salaries currently range from 8 cents to 37 cents per hour.<sup>154</sup> Thus, the bill's opponents were concerned it would disrupt rehabilitative work programs in county jails and state prisons.<sup>155</sup> California legislators have reintroduced the bill in 2023, with hopes that it will reach ballots in California's general election in November 2024.<sup>156</sup>

Thus, while Louisiana and California represent at least temporary defeats for such legislation, they also demonstrate the power of such bills and the challenges in mounting opposition. When the bills' proponents frame the issue as a vote for or against slavery, even conservative lawmakers find voting against the bill to be a challenge. In Louisiana, the conservative lawmakers expressed discomfort at voting against the bill—leading to their decision to try to force a compromise bill instead. Representative Mike Johnson, a Republican, noted that the bill was “set up in such a way” that he “worr[ie]d if you were to disagree and vote against this bill it might appear to some that a vote no would be a vote yes for slavery” because it was “being billed as an antislavery bill.”<sup>157</sup> This harkens back to the reasoning of Senator Groene of Nebraska for why he voted for his own state's version of the bill. Moreover, committed advocates continue to push the issue, suggesting that it is only a matter of time until they are successful.

### III. THE FUTURE: LEGAL RAMIFICATIONS OF GETTING RID OF THE EXCEPT CLAUSE

Incarcerated individuals have been largely unsuccessful in bringing suits against prisons seeking minimum wage and an end to compulsory

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<sup>152</sup> Marcus D. Smith, *Anti-Slavery Measure Sits in California Senate, Disappointing Prison Reform Advocates*, SACRAMENTO BEE (June 30, 2022, 3:54 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article263044338.html> [https://perma.cc/Q5X5-GXN8].

<sup>153</sup> Adam Beam, *California Assembly Advances Involuntary Servitude Amendment*, ASSOCIATED PRESS (March 21, 2022, 8:25 PM), <https://apnews.com/article/california-legislature-constitutions-slavery-state-legislature-fe9f2992d4c45b904fccb3394f276544> [https://perma.cc/XZ6S-7M28].

<sup>154</sup> *Id.*

<sup>155</sup> Smith, *supra* note 152.

<sup>156</sup> Hannah Wiley, *California lawmakers revive effort to ban involuntary servitude as punishment for crimes*, LOS ANGELES TIMES (Feb. 27, 2023 5AM PST), <https://www.latimes.com/california/story/2023-02-27/california-involuntary-servitude-slavery-constitution-amendment-prisons> [https://perma.cc/YQB2-4AUM].

<sup>157</sup> Blake Paterson, *This 'Slavery Exception Clause' Won't be Removed from Louisiana Constitution After Proposal Fails*, THE ADVOCATE (May 11, 2021), [https://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_4b9263e8-b277-11eb-9011-378ff2d13d60.html](https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_4b9263e8-b277-11eb-9011-378ff2d13d60.html) [https://perma.cc/87L6-FRVS].

work, but recently, some scholars have brought renewed attention to their efforts—on both originalist and textualist grounds. James Gray Pope, a constitutional law professor, has argued, based on the original intent of the drafters of the Thirteenth Amendment, “convicted offenders retain protection against slavery or involuntary servitude unless it has been imposed as a punishment for the specific crime whereof they have been duly convicted”—e.g., when the individual has been explicitly sentenced to “hard labor.”<sup>158</sup> Textualists have attempted to interpret the meaning of “punishment” in the Thirteenth Amendment by referring to how courts have interpreted the word “punishments,” as it appears in the Eighth Amendment.<sup>159</sup> For example, Raja Raghunath has argued for reading “the word ‘punishment’ in the Thirteenth Amendment in a manner consistent with the way that same word is used in the Eighth Amendment,” which would mean only the small minority of inmates who are explicitly sentenced to hard labor can be forced to work.<sup>160</sup> Raghunath’s argument relies on the Supreme Court’s assertion that, in the Eighth Amendment context, “punishment” refers to a purposefully imposed sanction—“a deliberate act intended to chastise or deter”<sup>161</sup>—rather than the indignities and harms related to prison life that were not purposefully inflicted.<sup>162</sup> If “punishment” in the Thirteenth Amendment was read in a similar fashion, then only those *explicitly* sentenced to work *for the purpose of punishment* can be forced to work, rather than those who are forced to work as a mere incidental part of their time in prison.<sup>163</sup>

Courts have universally declined to adopt such arguments.<sup>164</sup> For instance, after a Texas prisoner brought a civil rights action challenging the

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<sup>158</sup> Pope, *supra* note 28, at 1468-69; *see also* Wafa Junaid, *Forced Prison Labor: Punishment for a Crime?*, 116 NW Univ. L. Rev. 1099, 1117 (2022) (“[O]riginalist understanding of punishment is centered on treatment imposed as part of a court-ordered sentence.”).

<sup>159</sup> The Eighth Amendment reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. Comparing the meaning of “punishments” in the Eighth Amendment to “punishment” in the Thirteenth Amendment is a method of constitutional interpretation known as “intratextualism,” which refers to when “the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase” in order to “promote a certain coherence in interpretation and avoid the appearance of ad hoc adjudication; absent a good reason for doing otherwise, similar constitutional commands should be treated similarly for reasons analogous to the doctrinal principle that like cases should be treated alike.” Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748, 790-91 (1999).

<sup>160</sup> Raghunath, *supra* note 108, at 395; *see also* Goodwin, *supra* note 16, at 978 (“From a strict textualist point of view, modern-day prison slavery is not actually permitted by the Punishment Clause because it is not itself ‘punishment’ even though it is ancillary to the sentence actually imposed.”); Kamal Ghali, *No Slavery Except As A Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 611 (2008) (arguing for “a parallel interpretation of the word [punishment] in both” the Eighth and Thirteenth Amendments).

<sup>161</sup> *Wilson v. Seiter*, 501 U.S. 294, 300 (1991). For example, “if a prison boiler malfunctions accidentally during a cold winter, an inmate would have no basis for an Eighth Amendment claim, even if he suffers objectively significant harm.” *Id.*

<sup>162</sup> Raghunath, *supra* note 108, at 429.

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

<sup>164</sup> Junaid, *supra* note 158, at 1101.



constitutionality of a requirement that he work without pay, the Fifth Circuit held that “the reading of the words of the [Thirteenth] Amendment” was “all that could possibly be necessary to treat as frivolous” the plaintiff’s claim.<sup>165</sup> The court found that since the plaintiff had “been duly convicted of a crime and was serving sentence in the Texas prison as punishment for that crime,” “[h]is situation in precise words is exempted from the application of the Thirteenth Amendment.”<sup>166</sup> Other circuits have dismissed such claims along similar grounds.<sup>167</sup>

But there may be a new opportunity for such lawsuits to succeed: as states have begun to amend their state constitutions to ban slavery and involuntary labor in all forms, activists and lawyers have begun to see a chance to reform prison labor via state law. Using the ongoing Colorado litigation as a case study, this section explores two of those potential legal avenues: suits challenging prisons’ practices of involuntary labor and suits challenging prisons’ practice of paying inmate workers at rates far below minimum wage—or paying them nothing at all. Based on previous case law surrounding these issues, I conclude that these lawsuits should succeed.

### A. *Compulsory Work*

In December 2020, Andrew Mark Lamar—an incarcerated individual in Colorado—filed suit against the Colorado Department of Corrections (“DOC”) arguing that since the DOC “ordered [him] to work” in food service by “threaten[ing] the use of ‘Restricted Privileges,’” the DOC violated the Colorado Constitution’s ban on *all* involuntary servitude and slavery.<sup>168</sup> The district court dismissed his lawsuit, finding Mr. Lamar “did not (1) ‘plausibly plead that he is to work by force or threatened physical or legal coercion’”; or (2) “cite to any legal authority to support his contention that the

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<sup>165</sup> *Wendt v. Lynaugh*, 841 F.2d 619, 620 (5th Cir. 1988).

<sup>166</sup> *Id.*

<sup>167</sup> *See, e.g., Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (“Prison rules may require appellant to work but this is not the sort of involuntary servitude which violates Thirteenth Amendment rights.”); *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977) (“Compelling prison inmates to work does not contravene the Thirteenth Amendment.”); *Omasta v. Wainwright*, 696 F.2d 1304, 1305 (11th Cir. 1983) (holding that the Thirteenth Amendment’s prohibition against involuntary servitude is not implicated when an inmate is forced to work, even though the conviction may be subsequently reversed); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (“The Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work.”); *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999) (holding that pretrial detainees may be required to perform some services without a violation of the Thirteenth Amendment).

<sup>168</sup> Michael Karlik, *Appeals Court Says Prohibition on Involuntary Servitude Not Applicable to Prison Labor*, COLORADO POLITICS (Nov. 2, 2022), [https://www.coloradopolitics.com/courts/appeals-court-says-prohibition-on-involuntary-servitude-not-applicable-to-prison-labor/article\\_f18a725c-2267-11ed-b33c-6f1fbd3a1b84.html#:~:text=Colorado%20voters%20who%20made%20slavery,of%20Appeals%20ruled%20last%20week](https://www.coloradopolitics.com/courts/appeals-court-says-prohibition-on-involuntary-servitude-not-applicable-to-prison-labor/article_f18a725c-2267-11ed-b33c-6f1fbd3a1b84.html#:~:text=Colorado%20voters%20who%20made%20slavery,of%20Appeals%20ruled%20last%20week) [https://perma.cc/UPT3-VMR4].

amount of pay or loss of privileges can constitute involuntary servitude.”<sup>169</sup> In August of 2022, a Colorado Court of Appeals affirmed that dismissal.<sup>170</sup> The appellate court examined the legislative history of the amendment using Colorado’s “Blue Book.”<sup>171</sup> The court noted the Blue Book “stated that the purpose of Amendment A was ‘not to withdraw legitimate opportunities to work for individuals who have been convicted of a crime, but instead to merely prohibit compulsory labor from such individuals.’”<sup>172</sup> Based on those statements, the court concluded that “voters did not intend to abolish the DOC inmate work program by virtue of passing Amendment A. Instead, they show that the voters intended to prohibit the imposition of involuntary servitude upon individuals who had been convicted of a crime.”<sup>173</sup>

While disappointing for those who opposed coerced prison labor, Mr. Lamar’s defeat does not indicate that other, similar lawsuits will fail. For one, the appellate court’s opinion was designated as “unpublished” meaning it cannot be used as precedent.<sup>174</sup> In addition, Mr. Lamar litigated the issue pro se—a challenging prospect given the perplexity of the issue. Indeed, the appellate court noted that while, on appeal, Mr. Lamar attempted to argue that “refusing to work could result in sanctions, including restrictive privileges, arrest, handcuffing, restrictive housing, delayed parole hearings, and loss of earned time and good time,” since he “did not make those allegations in the complaint” the court refused to consider those allegations.<sup>175</sup>

While Mr. Lamar’s appeal was pending, back in February of 2022, incarcerated individuals in Colorado filed a class action seeking “a permanent injunction ordering” the Colorado Department of Corrections “to cease requiring compulsory labor” by those incarcerated and “a court order declaring unconstitutional the statutes and regulations that mandated incarcerated people must work against their will.”<sup>176</sup> Unlike Mr. Lamar, this class action

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<sup>169</sup> Lamar v. CDOC, No. 21CA0511, at 2 (Colo. App. Aug. 18, 2022) (unpublished opinion) (describing and quoting the district court opinion).

<sup>170</sup> *Id.*

<sup>171</sup> See *id.* at 6 (“While not binding, the Blue Book provides important insight into the electorate’s understanding of the amendment when it was passed and also shows the public’s intentions in adopting the amendment.” (citing Grossman v. Dean, 80 P.3d 952, 962 (Colo. App. 2003))).

<sup>172</sup> *Id.* at 7 (citing Legis. Council, Colo. Gen. Assembly, Rsch. Pub. No. 702-2, 2018 State Ballot Information Booklet, at 40).

<sup>173</sup> *Id.*

<sup>174</sup> Michael Karlik, *Appeals Court Says Prohibition on Involuntary Servitude Not Applicable to Prison Labor*, COLORADO POLITICS (Nov. 2, 2022), [https://www.coloradopolitics.com/courts/appeals-court-says-prohibition-on-involuntary-servitude-not-applicable-to-prison-labor/article\\_f18a725c-2267-11ed-b33c-6f1fbd3a1b84.html#:~:text=Colorado%20voters%20who%20made%20slavery,of%20Appeals%20ruled%20last%20week](https://www.coloradopolitics.com/courts/appeals-court-says-prohibition-on-involuntary-servitude-not-applicable-to-prison-labor/article_f18a725c-2267-11ed-b33c-6f1fbd3a1b84.html#:~:text=Colorado%20voters%20who%20made%20slavery,of%20Appeals%20ruled%20last%20week) [https://perma.cc/UPT3-VMR4].

<sup>175</sup> Lamar v. CDOC, No. 21CA0511, at 9–10 (Colo. App. Aug. 18, 2022) (unreported opinion).

<sup>176</sup> Class Action Complaint at 3, Lilgerose v. Polis, No. 2022CV30421 (Colo. Dist. Ct. filed May 27, 2022).

has the backing of civil rights firms, the support of the ACLU of Colorado, and the assistance of the MacArthur Justice Center.<sup>177</sup>

Like Mr. Lamar, this newer complaint cites Amendment A—the Colorado Amendment that removed the except clause from the Colorado state constitution—as the foundation of its claims.<sup>178</sup> The lead plaintiffs note that they, along with likely thousands of other incarcerated individuals in Colorado, were punished via placement in more restrictive housing units when they failed to show up for work assignments.<sup>179</sup> In addition, these plaintiffs lost earned time or good time—resulting in longer prison stays.<sup>180</sup> This is enshrined in Colorado prison regulation: “‘failure to work’ inside the prison is a class 2 violation, which can result in the loss of up to 30 days of good time.”<sup>181</sup>

The Colorado litigation is ongoing.<sup>182</sup> Based on the history, case law, and a plain reading of the Colorado constitution, the Colorado plaintiffs should succeed. Even if those plaintiffs don’t succeed, similarly situated plaintiffs in other states should bring similar suits—after all, state court precedent cannot bind those outside the state. The following sections will explain why the Colorado plaintiffs, and other similarly situated plaintiffs from other states that have passed analogous amendments, should succeed. Notably, the following arguments rely on originalism and textualism, in the hopes that even conservative judges who are traditionally hostile to claims of prisoners’ rights may be persuaded to find in favor of the plaintiffs.

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<sup>177</sup> *Lilgerose v. Polis, et al*, MACARTHUR JUST. CTR., <https://www.macarthurjustice.org/case/lilgerose-v-polis-et-al/> [<https://perma.cc/VJ2J-L9EV>] (noting that the MacArthur center “filed an amicus brief with the Colorado trial court supporting these plaintiffs’ efforts to fully realize the promise of abolition once and for all”); *see also* Amicus Brief in Support of Plaintiffs, *Lilgerose v. Polis*, No. 2022CV30421 (Colo. Dist. Ct. filed June 17, 2022) (amicus brief of Macarthur Justice Center); *Lawsuit Filed Challenging Polis Administration’s Alleged Violations of State Constitutional Amendment Prohibiting Involuntary Servitude*, TOWARD JUST. (Feb. 15, 2022), <https://towardsjustice.org/litigation/amendment-a/> [<https://perma.cc/5PX6-ZJCF>] (“The plaintiffs are represented by Towards Justice and Maxted Law LLC.”).

<sup>178</sup> Class Action Complaint, *supra* note 176, at 2.

<sup>179</sup> Allison Sherry, *Prisoners Allege Force Labor Violates Colorado’s Anti-Slavery Law*, CPR NEWS (Feb. 15, 2022, 3:25 PM), <https://www.cpr.org/2022/02/15/prisoners-allege-forced-labor-violates-states-anti-slavery-law/> [<https://perma.cc/VZH9-T46X>].

<sup>180</sup> *Id.*; *see also* Class Action Complaint, *supra* note 176 ¶¶ 32-33.

<sup>181</sup> COLORADO DEP’T OF CORRECTIONS, *Administrative Regulations* 11, 29 (Feb. 1, 2023) [chrome- https://www.prisonpolicy.org/scans/disciplinepolicies/colorado-15001.pdf](https://www.prisonpolicy.org/scans/disciplinepolicies/colorado-15001.pdf) [<https://perma.cc/H9C2-YYK>] (listing “Failure to Work” as a Class II offense with a maximum sanction of losing 30 days of good time).

<sup>182</sup> MAXTED LAW, *Class Action Attorney*, <https://www.maxtedlaw.com/class-action-attorney> [<https://perma.cc/J3Z3-UCCQ>] (noting that *Lilgerose v. Polis* “remains pending” after “[a] motion to dismiss filed by the Governor and CDOC was partially denied”); Meg Anderson, *Colorado banned forced prison labor 5 years ago. Prisoners say it’s still happening*, NPR (Nov. 13, 2023 5:00 AM ET), <https://www.npr.org/2023/11/13/1210564359/slavery-prison-forced-labor-movement> [<https://perma.cc/5A7N-7QEA>] (explaining “Lilgerose, the man assigned to his prison’s kitchen, and another prisoner filed a lawsuit . . . The case is now in discovery.”).

### 1. *Original Meaning*

Currently, courts are faced with determining what “[t]here shall never be in this state either slavery or involuntary servitude” means without the accompanying “except as a punishment for crime, whereof the party shall have been duly convicted.”<sup>183</sup> In doing so, it is likely that at least some courts will turn to the original meaning of the Thirteenth Amendment of the United States Constitution. While the amendments to state constitutions are happening today, amendments “normally account for and, to the extent they do not override existing provisions, are read in harmony with the constitution they amend.”<sup>184</sup> Thus, courts are likely to use the state’s “antecedent constitution”—as well as the original provision of the Thirteenth Amendment in the United States Constitution—“to generate meaning for the same polity’s current constitution.”<sup>185</sup> After all, it is hard to determine what effect state legislators and voters *intended* to have by cutting the exception without a clear understanding of what “slavery” and “involuntary servitude” mean.

The original meaning of the Thirteenth Amendment indicates that the prisoners’ suit should be successful. While many prison advocates use the language of “slavery”<sup>186</sup> to make their case against compelled work in prisons, as a legal matter, arguing that prisoners are engaged in involuntary servitude is likely a more straightforward argument. Before the Thirteenth Amendment was drafted, the term “involuntary servitude” was being used in state constitutions; thus, there was a developed body of case law helping to define the term.<sup>187</sup> Specifically, courts and legislatures drawing the line between permissible enforcement of contracts and the creation of “involuntary servitude” looked at four interrelated factors: (1) Did the employee enter the contract freely, or did the employer have power over the employee?; (2) Was the employee compensated for her work with “bona fide consideration”?; (3) “[w]ere there temporal limits on the contract,” or was it indefinite?; and (4) Was there an element of “abuse” or a claim that the employer would “capture” the employee if she tried to quit?<sup>188</sup> Popular usage from the period immediately before the Thirteenth Amendment was adopted supports this view—as authors used the term “involuntary servitude” to refer to relationships that fell short of slavery but were distinguished from ordinary contracts by “fraudulent or coerced initiation, the absence of fair consideration, and an extended period of duration.”<sup>189</sup>

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<sup>183</sup> COLO. CONST. art. 2., § 26.

<sup>184</sup> Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L. J. 326, 348 (2022).

<sup>185</sup> *Id.* at 333.

<sup>186</sup> See Nat’l Prisoners Strike Aug. 21st – Sept. 9th 2018, *supra* note 3 (demanding “[a]n immediate end to prison slavery”).

<sup>187</sup> Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2023–24 (2009).

<sup>188</sup> *Id.* at 2024.

<sup>189</sup> *Id.* at 2056.

Applying these same factors to the current system of penal labor, nearly every prison would be found to be forcing at least some of its prisoners to work under conditions of involuntary servitude. First, no incarcerated individual enters a contract with prison staff “freely” when originally receiving a work assignment. As discussed above, most states have regulations *requiring* prisoners to work—meaning the incarcerated individual is already legally obligated to work before any sort of negotiation, decision, or contracting can take place. Moreover, this work takes place in the custodial environment of a prison—an environment that the Supreme Court has correctly noted is *per se* coercive.<sup>190</sup> Second, incarcerated workers are rarely compensated for their work with “bona fide consideration”<sup>191</sup>—indeed, in many states, prisoners are paid nothing at all, and in others, prisoners are paid just pennies an hour.<sup>192</sup> Third, while some prisoners’ “contracts” to work for the prison are temporally limited by the lengths of their stays, prisoners may be sentenced to life in prison and have no such limits—and even those with short sentences do not have any mandatory end-points, as their “contracts” to work are theoretically infinite, and can be expanded any-time their sentences are extended or they are convicted again. Finally, since prisons frequently punish those individuals who fail to work with time in solitary or taking away good time credits—thereby lengthening the required time the individual must be in prison and required to work—there is, in a very real sense, threats of psychological abuse and an element of “capture” for refusing to work.

## 2. Contemporary Case Law Meaning

Case law defining “involuntary servitude” provides further evidence that the labor of incarcerated individuals qualifies as such. Much of this case law is federal—as previous generations attempted (and failed) to make the case against compelled prison labor under the federal Thirteenth Amendment. Although this federal case law is not binding on state courts, it suggests by analogy how state courts will interpret their state constitutions. In addition, many state courts tend to interpret their laws coextensively with federal laws or otherwise see federal judicial interpretations as persuasive.<sup>193</sup> This suggests that federal decisions are instructive of how state courts will rule.

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<sup>190</sup> See *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) (“Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”).

<sup>191</sup> Oman, *supra* note 187, at 2091.

<sup>192</sup> See ACLU, *Captive Labor: Exploitation of Incarcerated Workers* (June 15, 2022), <https://www.aclu.org/news/human-rights/captive-labor-exploitation-of-incarcerated-workers> [<https://perma.cc/7GDD-DF77>]; 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/#:~:text=With%20a%20few%20rare%20exceptions,assigned%20to%20regular%20prison%20jobs> [<https://perma.cc/9UKD-5MVK>].

<sup>193</sup> See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 703 (2016) (discussing how “federal law exerts a gravitational force that draws states to mimic federal law even when federal law does not require state conformity”).

At baseline, courts at various levels have made it clear that “involuntary servitude” embraces a wider range of conduct than antebellum slavery.<sup>194</sup> The Supreme Court has explained the “undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery[,] but to maintain a system of completely free and voluntary labor throughout the United States.”<sup>195</sup> The Court concluded that “[w]hen the master can compel and the laborer cannot escape the obligation to go on,” and “there is no power below to redress” by switching employers, the conditions qualify as involuntary labor.<sup>196</sup> Of course, prisoners ordinarily have no agency over the choice to “switch employers,” thus presenting the very problem the Supreme Court feared: these prisoners are at the complete mercy of their prison employers. However, the Court also carved out an exception to otherwise impermissible involuntary servitude for those convicted of crimes, noting “forced labor has been sustained as a means of punishing crime”<sup>197</sup> and such “[f]orced labor . . . may be consistent with the general basic system of free labor.”<sup>198</sup>

Caselaw generally indicates that this exception is premised directly on the except clause of the Thirteenth Amendment—suggesting if lawmakers remove the except clause, this caselaw-derived exception falls away, too. For example, in 1922, the Supreme Court noted that “imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, ‘involuntary servitude for crime,’ spoken of in the provision of the Ordinance of 1787, and of the Thirteenth Amendment of the Constitution, by which all other slavery was abolished.”<sup>199</sup> Since the Supreme Court has explicitly defined “imprisonment at hard labor” as “involuntary servitude,” states that have abolished *all* involuntary servitude without exception also should have abolished “imprisonment at hard labor, compulsory and unpaid.”<sup>200</sup>

Circuit courts agree that prisoners can be compelled to work specifically because of the Thirteenth Amendment’s exception. For example, the Seventh Circuit explicitly held that it was the Thirteenth Amendment that “excludes convicted criminals from the prohibition of involuntary servitude” and that the Amendment thus creates the legal conditions necessary so that “prisoners may be required to work.”<sup>201</sup> According to the Ninth Circuit,

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<sup>194</sup> See, e.g., *Slaughter–House Cases*, 83 U.S. 36, 69 (1872) (“The word servitude is of larger meaning than slavery. . . .”); *McGarry v. Pallito*, 687 F.3d 505, 510 (2d Cir. 2012) (“[I]t is well-settled that the term ‘involuntary servitude’ is not limited to chattel slavery-like conditions.”).

<sup>195</sup> *Pollock v. Williams*, 322 U.S. 4, 17 (1944); see also *Pallito*, 687 F.3d at 510 (explaining the Thirteenth Amendment “was intended to prohibit all forms of involuntary labor, not solely to abolish chattel slavery”).

<sup>196</sup> *Pollock*, 322 U.S. at 18.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 17.

<sup>199</sup> *United States v. Moreland*, 258 U.S. 433, 437 (1922) (quoting *Ex parte Wilson*, 114 U.S. 417, 429 (1885)).

<sup>200</sup> *Id.*

<sup>201</sup> *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (quoting *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir.), cert. denied, 375 U.S. 915 (1963)); see also *Lockett v. Neubauer*,

“[w]here a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises.”<sup>202</sup> The Fifth Circuit agreed that the “Thirteenth Amendment permits involuntary servitude without pay as punishment after conviction of an offense,”<sup>203</sup> because the “[T]hirteenth [A]mendment specifically allows involuntary servitude as punishment after conviction of a crime.”<sup>204</sup> This case law suggests that the *only* reason that the compelled labor of prisoners is constitutional is because of the except clause. And once that clause is gone, that reason is eliminated as well.

Furthermore, the Supreme Court has clarified that involuntary servitude includes labor coerced through use of the legal system, not simply through physical force. In its most recent decision on the matter, *United States v. Kozminski*, the Court concluded that “‘involuntary servitude’ necessarily means 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>205</sup> In so holding, the Court explicitly referenced the except clause of the Thirteenth Amendment. It explained the “express exception of involuntary servitude imposed as a punishment for crime provides some guidance” in interpreting the Thirteenth Amendment because “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>206</sup> *Kozminski* suggests forced prison labor must necessarily count as “involuntary servitude” under the Thirteenth Amendment. After all, the Court reasons, otherwise the Thirteenth Amendment’s exception for forced prison labor would be meaningless.

Perhaps the best counterargument to all this is found in *Butler v. Perry*, a Supreme Court case that restricted the Thirteenth Amendment’s definition of “involuntary servitude.”<sup>207</sup> In *Butler*, a defendant was convicted of failing to show up to his required work assignment. He challenged the applicable Florida law, one that conscripted all able-bodied men in the state into road work.<sup>208</sup> The defendant claimed that this statute was “invalid” because it “impose[d] involuntary servitude not as a punishment for crime, contrary to

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No. 05-3209-SAC, 2005 WL 3557780, at \*4 (D. Kan. Dec. 28, 2005) (“First, the Thirteenth Amendment excludes convicted criminals from its prohibition of involuntary servitude, so prisoners may be required to work without any compensation.”) (quoting *Vanskike*, 974 F.2d at 809).

<sup>202</sup> *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963).

<sup>203</sup> *Smith v. Dretke*, 157 F. App’x 747, 747–48 (5th Cir. 2005).

<sup>204</sup> *Murray v. Mississippi Dep’t of Corr.*, 911 F.2d 1167, 1167 (5th Cir. 1990).

<sup>205</sup> *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

<sup>206</sup> *Id.*

<sup>207</sup> 240 U.S. 328 (1916).

<sup>208</sup> *Id.* at 331 (quoting Chapter 6537, Laws of Florida (Acts of 1913, pp. 469, 474, 475)) (requiring “every able-bodied male person” to “work on the roads and bridges of the several counties for six days of not less than ten hours each in each year when summoned so to do”).

the Thirteenth Amendment to the Federal Constitution.”<sup>209</sup> The Court noted “the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation, would tend to produce like undesirable results” and “certainly was not intended to interdict enforcement of those duties which individuals owe to the state.”<sup>210</sup> Applying this language, courts might attempt to use *Butler* to limit the term “involuntary servitude” to forms of labor that are similar to chattel slavery. This would likely exclude modern prison labor regimes from the definition of “involuntary servitude.”<sup>211</sup>

However, such a restrictive reading of the Thirteenth Amendment conflicts with both its text and its original intent, which explicitly mentions *both* involuntary servitude and slavery. Indeed, the Thirteenth Amendment’s inclusion of “involuntary servitude” would be superfluous if courts interpreted that term as synonymous with “slavery.” Since judges frequently read constitutional text to avoid redundancy in the language,<sup>212</sup> they would likely seek to differentiate involuntary servitude from slavery. Moreover, the Supreme Court indicated in *Kozminski*—which the Court decided decades after *Butler*—that the Thirteenth Amendment distinguished between slavery and involuntary servitude. In *Kozminski*, the Court pointed out that while the “primary purpose of the [Thirteenth] Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, . . . the Amendment was not limited to that purpose.”<sup>213</sup> Circuit courts since *Butler* also have universally rejected the case’s restrictive reading of the Thirteenth Amendment’s “involuntary servitude” definition.<sup>214</sup> Congress seems to support this interpretation, as Congress has

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<sup>209</sup> *Id.* at 332–33.

<sup>210</sup> *Id.*

<sup>211</sup> James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude”*, 119 *YALE L.J.* 1474, 1513–16 (2010).

<sup>212</sup> See John M. Golden, *Redundancy: When Law Repeats Itself*, 94 *TEX. L. REV.* 629 (2016).

<sup>213</sup> *Kozminski*, 487 U.S. at 942.

<sup>214</sup> *United States v. Calimlim*, 538 F.3d 706, 711 (7th Cir. 2008) (upholding conviction for subjecting a domestic worker to forced labor based mainly on defendants’ threats not to send money back to her home in the Philippines and warnings as to the domestic worker’s “precarious position under the immigration laws”); *United States v. Bradley*, 390 F.3d 145, 150–51 (1st Cir. 2004), vacated on other grounds, 545 U.S. 1101 (2005) (“[f]or the purpose of showing involuntary servitude . . . ‘serious harm’ is broadly defined as any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious under all surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring harm”); *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir. 1964) (concluding work obtained or maintained by the use or threatened use of physical or legal coercion is “akin to African slavery . . . although without some of the latter’s incidents” and concluding it “would be grotesque to read ‘involuntary servitude’ as not covering a situation where an employee was physically restrained by guards,” or where servitude was created “by a credible threat of imprisonment”).



extended the involuntary servitude clause beyond physical or legal coercion to include psychological coercion in other contexts.<sup>215</sup>

The *Butler* Court itself recognized that its decision was not final, explicitly stating its holding could be curtailed by future constitutional amendments. In ruling against the defendant in *Butler*, the Supreme Court concluded:

In view of ancient usage and the unanimity of judicial opinion, it must be taken as settled that, *unless restrained by some constitutional limitation*, a [s]tate has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation.<sup>216</sup>

The state constitutions that have expressly forbidden any form of involuntary labor seem to be the very constitutional limitation that even the *Butler* Court agreed could restrain the state from compelling the labor of its citizens.

Thus, based on Supreme Court and circuit court precedent, existing prison labor programs should qualify as “involuntary servitude.” Under *Kozminski*—which held that *either* physical or legal coercion can constitute involuntary servitude—prison labor should qualify as involuntary servitude since it is legally compelled through administrative punishments, such as solitary confinement or lengthening one’s sentence.<sup>217</sup> Furthermore, this definition of involuntary servitude does not change based on whether the individual in question was paid for this work—of particular relevance to those incarcerated workers who are paid meager wages.<sup>218</sup> Indeed, the victims in *Kozminski* were originally paid \$15 per week, though nothing in the Court’s analysis turns on that fact.<sup>219</sup> Historical understandings of slavery and involuntary servitude support this point, as slaves were occasionally paid meager sums for their work.<sup>220</sup>

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<sup>215</sup> Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1486 (codified at 18 U.S.C. § 1589 (2000)).

<sup>216</sup> *Butler*, 240 U.S. at 330 (emphasis added).

<sup>217</sup> Raghunath, *supra* note 108, at 440–41 (“Any existing non-voluntary prison labor program, whether supported by an administrative requirement or a sentence, would likely qualify under the *Kozminski* test 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.’”) (quoting *United States v. Kozminski*, 487 U.S. 931, 942 (1988)).

<sup>218</sup> 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.’”) (quoting 16A C.J.S. Constitutional Law § 482 (1984)).

<sup>219</sup> *Kozminski*, 487 U.S. at 931.

<sup>220</sup> See, e.g., *Slavery FAQs: Work*, THE JEFFERSON MONTICELLO (“Some enslaved people received small amounts of money, but that was the exception not the rule. The vast majority of

Litigation over the meaning of “involuntary servitude” in pre-conviction carceral contexts lends further support to the conclusion that prison work programs constitute involuntary servitude. Such examples are instructive of how courts might interpret the cases of convicted individuals after the repeal of the except clause—as repealing that clause ideally means that there is no legal difference between convicted and unconvicted individuals for purposes of the Thirteenth Amendment. For example, in *McGarry v. Pallito*, the Plaintiff alleged that while he was a pretrial detainee, prison officials compelled him to work in the prison laundry through threatening to (1) give him an Inmate Disciplinary Report, which would affect when he would be eligible for release; and (2) put him in administrative segregation, which “involve[d] lock-up for 23 hours-a-day and the use of shackles.”<sup>221</sup> The Second Circuit held that these “allegations plausibly allege ‘threat of physical restraint or physical injury’” under *Kozminski*.<sup>222</sup> While the prison attempted to “justify the work requirement . . . on the ground that it serve[d] a legitimate rehabilitative interest,” the Second Circuit rejected this claim, holding the Plaintiff “plausibly state[d] a claim under the Thirteenth Amendment.”<sup>223</sup> The Court concluded “[b]ecause the Thirteenth Amendment ‘denounces a status or condition, irrespective of the manner or authority by which it is created,’ . . . institutions housing pretrial detainees are not exempt from the Amendment’s scope.”<sup>224</sup>

Similarly, *Ruelas v. County of Alameda* provides another instructive example of a court concluding that a carceral work program constitutes involuntary servitude—this time, in the context of an immigration detention facility.<sup>225</sup> In *Ruelas*, the plaintiffs alleged they had been forced to work while awaiting immigration proceedings in violation of the Thirteenth Amendment, and, since they had not yet been convicted of any crime, the “except” clause did not exempt the facilities.<sup>226</sup> The work program at issue in *Ruelas* operated similarly to the work programs at most prisons: the detainees alleged that the immigration authorities coerced them into participating in the work program through the “threat of punishment, including lengthier sentences and solitary confinement.”<sup>227</sup> The court noted the threats alone were “sufficient” to plead that the defendants had “violated Plaintiffs’ Thirteenth Amendment rights.”<sup>228</sup> Similarly, in the post-conviction context,

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labor was unpaid.”).

<sup>221</sup> 687 F.3d 505 (2d Cir. 2012).

<sup>222</sup> *Id.* at 511–12.

<sup>223</sup> *Id.* at 509.

<sup>224</sup> *Id.* at 511 (quoting *Clyatt v. United States*, 197 U.S. 207, 216 (1905)).

<sup>225</sup> 519 F. Supp. 3d 636 (N.D. Cal. 2021).

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

<sup>227</sup> *Id.* at 658.

<sup>228</sup> *Id.*; see also *Barrientos v. CoreCivic, Inc.* 951 F.3d 1269, 1273–74 (11th Cir. 2020), in which detainees at federal immigration detention facility brought a class action, alleging the facility’s “voluntary” work program violated the Trafficking Victims Protection Act (TVPA)

when individuals fail to show up for a work assignment, prisons may move those individuals into solitary confinement or take away good time credits, thereby lengthening the prisoners' sentence.<sup>229</sup>

In sum, whether under the original meaning of the “involuntary servitude” or modern courts' interpretations of that term, the labor regime of modern-day prisons should constitute involuntary servitude. Thus, for states that have explicitly banned “involuntary servitude,” incarcerated plaintiffs' lawsuits challenging those prison conditions and regulations should be successful.

### 3. Counterarguments

Granted, the impact of amendments banning all forms of slavery and involuntary servitude is uncertain. States that have passed amendments eliminating all slavery and involuntary servitude have been reticent to alter their rules concerning inmate labor<sup>230</sup>—indicating change will not come from legislation alone, and litigation is likely required for these amendments to bring benefits to incarcerated workers. Opponents to such litigation efforts will likely assert that an alteration to the existing prison labor regime conflicts with both the original and intended meaning of the amendments.

Those hoping to maintain the status-quo of prison labor regimes, and ward off litigation efforts, may point to the text accompanying the

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because they were unlawfully coerced into working. In *Barrientos*, the plaintiffs further alleged that they were compelled to work by the “withholding [of] basic necessities like food, toothpaste, toilet paper, and soap” and “through deprivation of outside contact with loved ones”—specifically, detainees were required to “purchase expensive ‘phone cards’ from the commissary if they wish to speak with loved ones who are unable to make the trip to the detention center.” Similarly, prisoners are often required to use their meager salaries to pay for basic necessities, such as menstrual products, (Kimberly Haven, *Why I’m Fighting for Menstrual Equity in Prison*, ACLU (Nov. 8, 2019), <https://www.aclu.org/news/prisoners-rights/why-im-fighting-for-menstrual-equity-in-prison> [<https://perma.cc/8PFL-RJWU>] (“Thirty-eight states have no law requiring the provision of menstrual products to incarcerated people.”)), or phone calls with loved ones (Lindsey Pipia, *Many families struggle to pay for phone calls with loved ones in U.S. prisons*, NBC News (Dec. 31, 2019, 6:00 AM), <https://www.nbcnews.com/news/us-news/many-families-struggle-pay-phone-calls-loved-ones-u-s-n1107531> [<https://perma.cc/6BN7-WSCQ>]). The *Barrientos* court concluded that “private contractors that operate such work programs are not categorically excluded from the TVPA, and may be liable if they knowingly obtain or procure the labor or services of a program participant through the illegal coercive means explicitly listed in the TVPA.” *Barrientos*, 951 F.3d 1269, 1277–78.

<sup>229</sup> See Junaid, *supra* note 158, at 1132 (“[P]rison officials routinely place incarcerated individuals in solitary confinement for refusing to work”); see also Johnson, *supra* note 9; TENN. CODE ANN. § 41-2-123 (2021) (“All prisoners sentenced to the county workhouse . . . shall be worked on the county roads . . .”); *id.* § 41-2-120 (“Any prisoner refusing to work or becoming disorderly may be confined in solitary confinement, or subjected to such other punishment, not inconsistent with humanity, as may be deemed necessary by the sheriff or superintendent for the control of the prisoners, including reducing sentence credits.”).

<sup>230</sup> See Marsha Mercer, *Yes, Slavery Is on the Ballot in These States*, STATELINE (Aug. 22, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/08/22/yes-slavery-is-on-the-ballot-in-these-states> [<https://perma.cc/7X47-CKWC>].

amendments in various voters' guides as evidence.<sup>231</sup> Indeed, the Colorado Court of Appeals—the only court which has addressed this issue so far—did just that, using the Colorado Blue Book as evidence to establish that “voters did not intend to abolish the DOC [Department of Corrections] inmate work program by virtue of passing Amendment A,” and thus, the Colorado amendment does not change the existing programs of mandatory work regimes in prisons.<sup>232</sup> Advocates for keeping the existing prison-labor regime may bolster this claim by asserting that, at present, incarcerated workers are not slaves or indentured servants because incarcerated individuals are not physically forced to work, but merely penalized for not working.<sup>233</sup>

Opponents to litigation efforts may also use legislative history to defend against challenges to the existing prison labor regime. They may argue that at least some, if not most, of the legislators involved in drafting the amendments to state constitutions did not intend for the amendments to change prison work conditions. They may also point to statements made by advocates of these amendments from the time the amendments were passed. For example, in Colorado, advocates of the amendments claimed that the amendments “won’t have a direct impact on prison reform or how inmates are treated” but were just meant to be a symbolic rejection of slavery.<sup>234</sup>

However, attempts to assert that these amendments do not outlaw existing prison-labor regimes should fail. With the increasing conservatism of the judiciary, today’s statutory interpretation often relies exclusively on the text of the statute—without any consideration for legislative history.<sup>235</sup> Under such an analysis, any explanation provided in the voter guides, along with any legislative history indicating the legislators’ intentions for the amendment, would be irrelevant. Moreover, even under the “traditional” approach of courts, “[t]he plain meaning of a statute governs its interpretation, unless negated by strongly contradictory legislative history.”<sup>236</sup> Thus, if a statute is ambiguous, legislative history may be decisive. In this case, the amendments all unambiguously outlaw all coerced labor—making any attempt to point to accompanying written or verbal explanations of the intended result of these amendments unavailing. Courts inclined to consider legislative history in

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<sup>231</sup> See LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, *supra* note 129. VOTEINFO.UTAH.GOV, *supra* note 133.

<sup>232</sup> Lamar v. CDOC, 21CA0511 (Colo. App. 2022) (unpublished opinion) (describing and quoting the district court opinion).

<sup>233</sup> See Mercer, *supra* note 230.

<sup>234</sup> Andrew O’Reilly, *Colorado ballot measure would remove ‘slavery’ from state constitution*, FOX NEWS (July 30, 2018), <https://www.foxnews.com/politics/colorado-ballot-measure-would-remove-slavery-from-state-constitution> [<https://perma.cc/6423-6EG8>] (quoting Kamau Allen, an organizer at Abolish Slavery Colorado).

<sup>235</sup> See Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265 n.1 (2020); Diarmuid F. O’Scannlain, “We Are All Textualists Now”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 304 (2017).

<sup>236</sup> William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

other cases may decide against doing so in this case because the text of the amendments clearly prohibits all compulsory labor.

Moreover, the legislative history surrounding these amendments does not clearly lead to the contrary conclusion. To start, these amendments were passed by the voting public, not just legislators. Unlike traditional statutes, there is no clear recorded legislative history outlining why citizens voted for these amendments or debating the legal ramifications of their passage. As a result, any attempt to ascertain what the voting public meant when passing these amendments involves guesswork and would be unlikely to lead to the type of clarity that could rebut the amendments' plain meaning.

In addition, even if a court assumed that the published explanation accompanying the amendments in various voters' guides indicates what voters really thought about the amendments, those explanations do not rule out the conclusion that the amendments outlaw current prison-labor regimes. Recall that the Colorado Blue Book included that "the purpose of this proposed constitutional amendment is not to withdraw legitimate opportunities to work for individuals who have been convicted of a crime, but instead to merely prohibit compulsory labor from such individuals."<sup>237</sup> That explanation fits squarely within the legal claim that, at present, incarcerated workers are laboring under conditions of involuntary servitude. Indeed, the explanation uses the phrase "legitimate opportunities to work," which suggests that incarcerated workers should have some choice over whether to work or not. Moreover, the explanation indicates that the purpose of the amendment is to "prohibit compulsory labor from such individuals"—the same purpose as lawsuits designed to end the practice of disciplining incarcerated individuals for their refusal to labor. Similarly, in Utah, the text accompanying the Amendment indicated that it "does not impact . . . the ability of prisoners to participate in prison work programs."<sup>238</sup> Again, these lawsuits would not seek to prohibit prisoners from engaging in work programs and would not hinder their ability to do so. Instead, lawsuits seeking an end to compulsory labor in prisons only ensure that the participation in prison work programs is voluntary. Thus, these lawsuits fit well within the written explanations of the amendments as given to voters.

While the passage of these amendments does not guarantee that current prison-labor regimes will be found unconstitutional, it does indicate that incarcerated workers have a strong legal case that their labor is contrary to the text and original public meaning of these amendments.

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<sup>237</sup> LEGISLATIVE COUNCIL OF THE COLORADO GENERAL ASSEMBLY, *supra* note 129.

<sup>238</sup> VOTEINFO.UTAH.GOV, *supra* note 133.

## B. *Minimum Wage*

Colorado has been the location of the first challenges to the payment of incarcerated laborers based on changes to the state constitution. In 2020, three Colorado inmates filed a lawsuit against Governor Jared Polis, the state prison system, and a private prison operator, arguing inmates should (1) be paid minimum wage; (2) be considered state employees; and (3) receive the same benefits as state workers such as paid holidays, vacations, paid sick leave, and medical benefits.<sup>239</sup>

While the Colorado litigation is ongoing, and its future uncertain, this Section argues that amending state constitutions to ban all forms of involuntary servitude will likely allow incarcerated individuals—in Colorado or in other states with similar constitutional amendments—to demand minimum wage, either through litigation in the courts, or through inmate organizing on the ground.

### 1. *Seeking Minimum Wage Through the Courts*

#### i. *The History of the Fair Labor Standards Act and Prison Labor*

Unfortunately, with respect to prison labor, not much has changed since the Civil War. While prisoners have consistently fought for minimum wage—using both the courts and their ability to organize and protest—none of these efforts have been successful. This subsection chronicles such efforts and explains why they have yet to succeed.

While most incarcerated individuals receive abysmal wages, a small proportion of incarcerated people are paid minimum wage for their work. Some prison workers are hired out into industry jobs, instead of working for the prison itself. Prison industry jobs are highly regulated by the Ashurst-Sumners Act, a piece of federal legislation.<sup>240</sup> Originally passed in the New Deal era because of unionized workers fearing unfair competition from the prison workforce, the Ashurst-Sumners Act prohibits the sale of most inmate-produced goods in interstate commerce.<sup>241</sup>

In the late 1970s, as the idea of making prisons into “factories with fences” gained prominence, Congress created an exception to the Ashurst-Sumners Act through the Prison Industry Enhancement Certification Program (PIECP),<sup>242</sup> which requires that companies pay inmates the “local

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<sup>239</sup> See CBS DENVER, *Colorado Inmates Sue Over ‘Slave Labor,’ Demand Minimum Wage, Paid Vacations, Paid Sick Leave*, (July 27, 2020 at 11:59 pm), <https://www.cbsnews.com/colorado/news/slave-labor-prison-lawsuit-minimum-wage/> [<https://perma.cc/F48C-3XD4>].

<sup>240</sup> Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 868-69 (2008).

<sup>241</sup> See 18 U.S.C. § 1761 (Supp. II 2002).

<sup>242</sup> Prison Industry Enhancement Certification Program Guideline, 64 Fed. Reg. 17,000–01 (Apr. 7, 1999). The Crime Control Act of 1990 (Public Law 101-647) authorizes continuation of the PIECP indefinitely.

prevailing wage for similar work” since the goal of this system was to create “employment opportunities for prisoners that approximate private sector work opportunities” in “realistic” working environments.<sup>243</sup> Under PIECP, corrections departments must apply for a certificate, and must demonstrate they meet a federally-mandated list of criteria, including proof of consultation with organized labor in the area to assure that the program “will not result in the displacement” of non-incarcerated workers, and “assurances that inmate participation is voluntary.”<sup>244</sup> State prisons contract with private companies to provide incarcerated laborers in exchange for the company paying the prisoners.<sup>245</sup> Notably, participation in the program is voluntary for inmates.<sup>246</sup>

PIECP is far from perfect—since only a total of 50 jurisdictions may be certified under PIECP,<sup>247</sup> the program itself only employs a small number of the total incarcerated population. In 2021, the program reported 4,860 total workers<sup>248</sup> out of more than 800,000 incarcerated workers.<sup>249</sup> Moreover, corrections departments may take a series of deductions—including room and board, taxes, family support, and crime victim compensation—from the wages earned by prisoners.<sup>250</sup> These deductions can total up to 80% of the prisoners’ wages, leaving the prisoner with a take home pay far below minimum wage.<sup>251</sup> In addition, some companies have attempted to circumvent the wage requirements through the creation of “training programs” in which

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<sup>243</sup> Nancy E. Gist, *Prison Industry Enhancement Certification Program*, BUREAU OF JUSTICE ASSISTANCE FACT SHEET (Nov. 1995), <https://www.ojp.gov/pdffiles/pie.pdf> [<https://perma.cc/9BK6-WQPS>].

<sup>244</sup> NAT. INSTITUTE OF JUSTICE, Program Profile: Prison Industry Enhancement Certificate Program (PIECP), (March 28, 2016), <https://crimesolutions.ojp.gov/ratedprograms/463#pd> [<https://perma.cc/32WB-HPAY>].

<sup>245</sup> Gist, *supra* note 243.

<sup>246</sup> NAT. INSTITUTE OF JUSTICE, *supra* note 244.

<sup>247</sup> NAT. CORRECTIONAL INDUSTRY ASS’N, ABOUT *PIECP*, <https://www.nationalcia.org/about-piecp> [<https://perma.cc/7BD2-6A27>]. Specifically, in 1990, the Crime Control Act of 1990, Public Law 101-647 Sec. 2906, 104 Stat. 4789,4914, raised to 50 the number of PIECP projects that may be excepted by the Bureau of Justice Assistance (BJA) from certain federal restrictions on the marketability of prisoner-made goods, including the Ashurst-Sumners Act (18 U.S.C. 1761(a)) and the Walsh-Healey Act (41 U.S.C. 35).

<sup>248</sup> NATIONAL CORRECTIONAL INDUSTRIES ASSOCIATION, *Prison Industry Enhancement Certification Program Certification & Cost Accounting Center List*, (Sept. 30, 2021), [https://www.nationalcia.org/\\_files/ugd/569cf7\\_0ab8d011f21b4127b18d15c77d104f45.pdf](https://www.nationalcia.org/_files/ugd/569cf7_0ab8d011f21b4127b18d15c77d104f45.pdf) [<https://perma.cc/T2DJ-KL7D>].

<sup>249</sup> UCHICAGO NEWS, *U.S. prison labor programs violate fundamental human rights, new report finds*, (June 16, 2022), [https://news.uchicago.edu/story/us-prison-labor-programs-violate-fundamental-human-rights-new-report-finds#:~:text=Nearly%20two%2Dthirds%20\(65%25,800%2C000%20workers%20incarcerated%20in%20prisons](https://news.uchicago.edu/story/us-prison-labor-programs-violate-fundamental-human-rights-new-report-finds#:~:text=Nearly%20two%2Dthirds%20(65%25,800%2C000%20workers%20incarcerated%20in%20prisons) [<https://perma.cc/4ANP-4DWG>].

<sup>250</sup> Gist, *supra* note 243.

<sup>251</sup> *Id.*; see also NAT’L. CORREC. INDUS. ASS’N., PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM: CUMULATIVE DATA STATISTICS FOR THE QUARTER ENDING SEPTEMBER 30, 2021, (2021), [https://www.nationalcia.org/\\_files/ugd/569cf7\\_750034de60054963b-b429464e3c345558.pdf](https://www.nationalcia.org/_files/ugd/569cf7_750034de60054963b-b429464e3c345558.pdf) [<https://perma.cc/9HK4-MCM3>].

workers are paid below minimum wage.<sup>252</sup> Thus, despite the PIECP program, most incarcerated workers make far below minimum wage for their work while in prison—with some workers making no money at all.

Incarcerated workers have attempted to obtain minimum wage protections by invoking federal minimum wage legislation. Passed in 1938, the Fair Labor Standards Act (“FLSA”) was the first federal government effort to require that businesses pay minimum wages to most employees.<sup>253</sup> A piece of New Deal legislation, the FLSA was meant to help equalize the imbalance of power between employees and employers during wage negotiations.<sup>254</sup> The clear and stated purpose of the Act was to allow workers a “minimum standard of living necessary for health, efficiency, and general well-being.”<sup>255</sup> The 1966 and 1974 amendments to the Act extended FLSA coverage to state and local-government employees.<sup>256</sup>

Today, who is an “employee” or “employer” for purposes of the FLSA is governed by 29 U.S.C.A. § 203, which states, rather simply: “the term ‘employee’ means any individual employed by an employer” (including state employers)—with specified exceptions.<sup>257</sup> These exceptions include certain employees of “organized camp[s], or religious or non-profit educational conference center[s],” any employee employed in agriculture, small newspaper employees, babysitters, and certain baseball players, among other things.<sup>258</sup> Notably, prisoners are not on that list of excluded categories of workers.<sup>259</sup>

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<sup>252</sup> Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should be Concerned*, PRISON LEGAL NEWS (Mar. 15, 2010), <https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/> [https://perma.cc/UDU9-ZM58] (“In Florida, for example, Prison Rehabilitative Industries and Diversified Enterprises (PRIDE) uses a ‘training program’ to limit the wages paid to PIECP workers.”).

<sup>253</sup> 29 U.S.C. § 206 (2018); Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 Cornell L. Rev. 558, 559 (2019).

<sup>254</sup> Griffith, *supra* note 253, at 558.

<sup>255</sup> 29 U.S.C. § 202(a); *see also* *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981) (“The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, ‘labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general wellbeing of workers.’”) (quoting 29 U.S.C. § 202(a)).

<sup>256</sup> 29 U.S.C.A. § 203(d) (1964 ed., Supp. II); 29 U.S.C.A. § 203(d) (1970 ed., Supp. IV). However, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Supreme Court held that application of FLSA minimum wage provisions to state and local governments violated the 10th Amendment. Almost ten years later, the Court reversed course in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and ultimately held that state and local governments are covered by FLSA.

<sup>257</sup> 29 U.S.C.A. § 203 (e)(1) (West 2018).

<sup>258</sup> 29 U.S.C.A. § 213 (West 2018).

<sup>259</sup> *See* *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13 (2d Cir. 1984) (“[I]n § 13 of the FLSA, 29 U.S.C. § 213 (1982), Congress has set forth an extensive list of workers who are exempted expressly from FLSA coverage. The category of prisoners is not on that list.”), holding modified by *Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996), and holding modified by *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003).



There has been little guidance from Congress and the Supreme Court regarding whether the FLSA covers working prisoners.<sup>260</sup> In 1950, the Supreme Court suggested that prisoners fall within FLSA coverage.<sup>261</sup> In *Powell v. United States Cartridge Co.*, the Court dealt with employees engaged in the production of munitions for the United States war effort.<sup>262</sup> In discussing the FLSA, the Court reasoned that Congressional “specificity in stating exemptions strengthens the implication that employees not thus exempted. . . remain within the Act.”<sup>263</sup> Accordingly, since prison workers are not specifically exempted from the Act, it may seem that they should be covered by the FLSA as employees.

However, lower courts have been reluctant to adopt this relatively clear reading of the FLSA. Instead—in a variety of cases with a variety of conflicting reasons—courts found that prisoners are not required to be paid minimum wage and do not qualify as “employees” for purposes of the FLSA.<sup>264</sup>

During the 20th century, many courts struck down inmates’ complaints alleging violations of FLSA’s minimum wage mandate by private employers operating on prison grounds through focusing on the issue of “control”—finding since the private corporations did not truly “control” the incarcerated workers (since the prison retained ultimate control), the private corporations were not the prisoners’ employers.<sup>265</sup> In 1961, the Supreme Court—in litigation surrounding the application of the FLSA to a workers’ cooperative—held that “economic reality . . . is to be the test of employment” for purposes of the FLSA, suggesting that courts should examine all the factors to determine if the “economic reality” was one of employment or something else.<sup>266</sup> Lower courts started to apply various “economic reality” tests, which often focused on who “controlled” the individual’s labor. For example, in *Sims v. Parke Davis & Co.*, the court, in determining whether to apply the FLSA protections against both the Michigan Department of Corrections and the private corporations that employed the incarcerated workers, applied an “economic reality” test to find that the plaintiffs were outside the gambit of the FLSA as they were controlled by the prison, not by their private employers:

[t]he economic reality is that plaintiffs are convicted criminals incarcerated in a state penitentiary. As state prisoners, they have been

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<sup>260</sup> Matthew J. Lang, *The Search for A Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191 (2002).

<sup>261</sup> *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950).

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

<sup>263</sup> *Id.* at 517 (applying FLSA protections to employees engaged in the production of munitions for the United States war effort).

<sup>264</sup> Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 41 (2019) (“Judicial opinions on this issue have been mixed and muddled.”).

<sup>265</sup> *Id.*

<sup>266</sup> *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961).

assigned by prison officials to work on the penitentiary premises for private corporations at rates established and paid by the State. In return for the use of this convict labor, the private corporations have relinquished their normal rights. . . . To find . . . that an employment relationship exists between the prisoners and private corporations is contrary to the economic reality of their relationship.<sup>267</sup>

Moreover, the court asserted Congress likely did not “intend[] the Fair Labor Standards Act to cover the present situation” as incarcerated workers are a unique context and it is unlikely “Congress considered any of [the] variables [related to prisons] at the time it adopted general legislation designed to give employees the right to a subsistence wage.”<sup>268</sup> Thus, the court also declined to find that the Michigan Department of Corrections itself owed the prisoners minimum wage.

Prisoners won a brief victory in 1984, when for the first time, a court found FLSA protections to apply to the work of an incarcerated person.<sup>269</sup> In *Carter v. Dutchess Community College*, the plaintiff was a prisoner who worked at a local community college as a teaching assistant.<sup>270</sup> The Second Circuit applied the economic reality analysis by way of a four-factor balancing test, known as the *Bonnette* test, that was originally developed to assess whether individuals who provided in-home care to disabled public assistance recipients were employees entitled to FLSA benefits.<sup>271</sup> This test involved analyzing “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”<sup>272</sup> However, the *Carter* court broke with prevailing precedent and cautioned that “power to control a worker” was not the only factor to be considered.<sup>273</sup> The court specifically critiqued previous courts that had found that “an entity’s control over a worker must be ‘ultimate’ in order to justify a finding of an employer-employee relationship”—thereby, ruling out private corporations who contracted for prison labor, because those corporations were not the “ultimate” controllers of the prisoners (as the state was).<sup>274</sup> The Second Circuit noted that the FLSA was a “remedial” statute that was “written in the broadest possible

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<sup>267</sup> *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 787 (E.D. Mich.), *aff’d*, 453 F.2d 1259 (6th Cir. 1971).

<sup>268</sup> *Id.* at 787.

<sup>269</sup> *Zatz*, *supra* note 240, at 873 (noting that *Carter* was “the first reported federal ruling in favor of an inmate worker”); *see also* *Carter*, 735 F.2d at 12.

<sup>270</sup> 735 F.2d 8 (2d Cir. 1984).

<sup>271</sup> *Carter*, 735 F.2d at 12 (citing *Bonette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

terms so that the minimum wage provisions would have the widest possible impact in the national economy.”<sup>275</sup> Thus, construing that statute narrowly to exclude all incarcerated workers was contrary to the statute’s goals. The Second Circuit also rejected the arguments of previous courts that since “FLSA was enacted to improve the living conditions, bargaining strength vis-a-vis employers, and general well-being of the American worker,” it should not apply to imprisoned individuals whose “living conditions are determined as a matter of state policy, and who have no need for bargaining strength since their right to work in the first place is a matter of legislative grace.”<sup>276</sup> Instead, the Second Circuit noted that allowing for minimum wage in prisons supports other purposes of the statute, such as “the elimination of unfair competition,” and that prisoners were not on the list of exemptions from FLSA coverage.<sup>277</sup>

The reasoning of *Carter* led to one more victory for prison workers: *Watson v. Graves*.<sup>278</sup> In *Watson*, the court held that the plaintiffs, who worked for a construction company outside the prison under a work release program, were “employees” of the company for purposes of FLSA coverage and were entitled to the federal minimum wage.<sup>279</sup> In doing so, the court specifically noted the plaintiffs were “not *required* to work as a part of their respective sentences.”<sup>280</sup> Thus, “their labor did not ‘belong’” to the jail.<sup>281</sup>

However, decisions since *Carter* and *Watson* have “universally denied FLSA wages to prisoners.”<sup>282</sup> Indeed, courts “have rather uniformly declined to use the four-part *Bonnette* test” used in *Carter* because “the *Bonnette* test . . . has little relevance to the unique status of a prisoner,”<sup>283</sup> since prisoners can be compelled to work for the institution and have no bargaining power.<sup>284</sup> Courts’ logic for excluding all prison work—compelled and voluntary—from FLSA protections proceeds in two parts. First, “forced prison labor for the prison is not subject to the FLSA,” since such

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 13.

<sup>277</sup> *Id.*

<sup>278</sup> 909 F.2d 1549 (5th Cir. 1990).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 1556 (emphasis in original).

<sup>281</sup> *Id.*

<sup>282</sup> *Danneskjold v. Hausrath*, 82 F.3d 37, 42 (2d Cir. 1996); *see also* *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters. Inc.*, 112 F.3d 1119 (11th Cir. 1997); *Reimonenq v. Foti*, 72 F.3d 472, 475 (5th Cir. 1996); *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 684–87 (D.C. Cir. 1994); *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994); *Franks v. Okla. State Indus.*, 7 F.3d 971, 972 (10th Cir. 1993); *Miller v. Dukakis*, 961 F.2d 7, 8–9 (1st Cir. 1992).

<sup>283</sup> *Danneskjold*, 82 F.3d at 42.

<sup>284</sup> Mike Elk, *The Next Step for Organized Labor? People in Prison*, *NATION* (July 11, 2016), <https://www.thenation.com/article/archive/the-next-step-for-organized-labor-people-in-prison/> [<https://perma.cc/N4W8-U4VY>] (noting “[p]risoners have no power to resist being employed as scab labor”).

labor contains no bargained agreement whatsoever.<sup>285</sup> Second, since forced labor is not subject to FLSA, then voluntary labor, at present, cannot be subject to the FLSA since “the prison could order the labor if it chose” and “to hold otherwise would lead to a perverse incentive on the part of prison officials to order the performance of labor instead of giving some choice to inmates.”<sup>286</sup>

Thus, despite nearly 100 years of litigation and brief moments of optimism, at present no court has mandated minimum wages to incarcerated workers working for the prison itself because of FLSA.

ii. *The Future of the Fair Labor Standards Act and Prison Labor*

Ending compulsory labor in prisons should result in courts finding FLSA minimum wage protections apply to incarcerated workers. Currently, the leading FLSA-prison case is *Vanskike v. Peters*.<sup>287</sup> In *Vanskike*, the plaintiff sued under FLSA for compensation for work he performed for the prison—alleging that he had done “forced labor” as a “janitor, kitchen worker, gallery worker and ‘knit shop piece-line worker.’”<sup>288</sup> The Seventh Circuit began by noting that “[t]he Supreme Court has instructed the courts to construe the terms ‘employee’ and ‘employer’ expansively under the FLSA.”<sup>289</sup> Despite that, the court held that the plaintiff was not an “employee” for purposes of FLSA.<sup>290</sup> In this case, the plaintiff was working directly for the prison itself, and as the Seventh Circuit noted, no court had “extended the FLSA’s definition of ‘employee’ to cover prisoners who are assigned to work within the prison walls for the prison.”<sup>291</sup> The court noted that “the DOC’s ‘control’ over Vanskike does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself,” thus the incarcerated individual was not an employee, but rather, merely an inmate being punished through labor.<sup>292</sup>

In so holding, the Seventh Circuit’s ruling in *Vanskike* appears to be conditional on the Thirteenth Amendment’s except clause—meaning the logic of the holding breaks down if that exception no longer exists. The Seventh Circuit reasoned that “inmate labor belongs to the institution,” because “[t]he Thirteenth Amendment excludes convicted criminals from the prohibition

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<sup>285</sup> *Danneskjold*, 82 F.3d at 42.

<sup>286</sup> *Id.* at 43.

<sup>287</sup> 974 F.2d 806, 806 (7th Cir. 1992); see MARGO SCHLANGER, SHEILA BEDI, DAVID M. SHAPIRO, & LYNN S. BRANHAM, *INCARCERATION AND THE LAW: CASES AND MATERIALS* 268 (10th Ed., West, 2020).

<sup>288</sup> *Vanskike*, 974 F.2d at 806.

<sup>289</sup> *Id.* at 807 (citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

<sup>290</sup> *Id.* at 808 (“We also decline to apply *Bonnette*’s four-factor standard in this situation.”).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

of involuntary servitude, so prisoners may be required to work.”<sup>293</sup> Indeed, the *Vanskike* court noted “the Thirteenth Amendment’s specific exclusion of prisoner labor supports the idea that a prisoner performing required work for the prison is actually engaged in involuntary servitude, not employment.”<sup>294</sup> As state constitutions make it clear that prisoners are constitutionally barred from engaging in “involuntary servitude,” then the logic for excluding prisoners’ from the FLSA’s definition of “employee” no longer holds water. Indeed, since any work by prisoners will be constitutionally mandated to be voluntary, it is hard to imagine how courts can conceptualize such work as anything other than an employer-employee relationship.

Unfortunately, there are signs that courts may attempt to expand their imaginations in exactly that way to continue excluding incarcerated people from labor protections. Since *Vanskike*, most courts have found that prisoners are not categorically exempt from all FLSA protections.<sup>295</sup> However, no court has found FLSA protections to mandate that prisoners, conducting work for the prison system itself, are employees who require minimum wage. Some of these courts have gone even further than *Vanskike*, suggesting even voluntary prison labor should be excluded from FLSA protections. In *Danneskjold v. Hausrath*, the Second Circuit, relying on *Vanskike*, first stated:

[F]orced prison labor for the prison is not subject to the FLSA. The relationship is not one of employment; prisoners are taken out of the national economy; prison work is often designed to train and rehabilitate; prisoners’ living standards are determined by what the prison provides; and most such labor does not compete with private employers. . . . Moreover, for reasons stated in *Vanskike*, Congress most certainly did not intend the FLSA to apply to forced prison labor.<sup>296</sup>

Then, the Second Circuit went even further, concluding that “so long as the labor produces goods or services for the use of the prison, voluntary labor by the prisoner . . . is also not subject to the FLSA.”<sup>297</sup> The court reasoned that “[v]oluntary work” in the prison “serves all of the penal functions of forced labor discussed above and, therefore, should not have a different legal status under the FLSA,” especially since “the prison could order the labor if it chose.”<sup>298</sup> Thus, the court noted that to require FLSA protection for voluntary, but not involuntary labor, “would lead to a perverse incentive on the part of prison officials to order the performance of labor instead

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

<sup>294</sup> *Id.*

<sup>295</sup> SCHLANGER ET AL., *supra* note 287, at 275.

<sup>296</sup> *Danneskjold*, 82 F.3d at 42.

<sup>297</sup> *Id.* at 43.

<sup>298</sup> *Id.*

of giving some choice to inmates.”<sup>299</sup> In short, even as the Second Circuit was arguing that voluntary prison labor should be excepted from FLSA protections, the court was relying on the prisons’ ability to compel prison labor from the inmates to support the logic of that conclusion. Without that bargaining chip, the voluntary labor of prisoners looks a lot more like the labor of any other market employee, and the case for excepting prison labor from FLSA provisions is a lot weaker.

## 2. *On the Ground: Organizing for Minimum Wage in Prisons*

### i. *The History of Prison Labor Organizing*

Even if prisoners are unable to convince courts that the FLSA should apply to incarcerated laborers in states that entirely ban involuntary labor, those workers may still be able to win minimum wage, or something much closer to minimum wage, through collective action.

While we know labor organizing inside prisons has occurred since the origins of prisons in the United States,<sup>300</sup> there is little written records of such organizing prior to the late 20th century.<sup>301</sup> Yet, from what record remains, evidence indicates wages and work conditions have been central to incarcerated workers’ resistance and organizing. For example, in the early days of the American Republic, prisoners in Philadelphia’s Walnut Street Prison reportedly engaged in strikes known as “Blue Monday[s],” laying down tools and stopping work.<sup>302</sup> Similarly, in Newgate, the early New York penitentiary, incarcerated workers regularly “sabotaged machinery and materials, refused to labor, staged slow-downs, and, upon occasion, napped at their worktables.”<sup>303</sup> During the Antebellum period, incarcerated workers continued to protest prison conditions by “instigat[ing] riots,” “destroy[ing] tools and set[ting] fire to workshops.”<sup>304</sup> Such dispersed striking behavior—without formal unions or leaders—mirrors much of the prison activism of today.

In many ways, the late 1960s and early 1970s is seen as the high watermark of prison organizing. During this period, many strikes specifically sought higher wages for incarcerated workers.<sup>305</sup> In 1971, the Attica prison

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<sup>299</sup> *Id.*

<sup>300</sup> See REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE 1776-1941*, at 43 (2008) (“Prisoners made it clear, through a series of riots, arsons, and multiple, small acts of defiance, that they intended to carry many of the rights of the free-born republican into jail with them.”).

<sup>301</sup> Note, *Striking the Right Balance: Toward A Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1492 (2019).

<sup>302</sup> MCLENNAN, *supra* note 300, at 44.

<sup>303</sup> *Id.* at 45.

<sup>304</sup> Jennifer Graber, *Engaging the Trope of Redemptive Suffering: Inmate Voices in the Antebellum Prison Debates*, 79 PENN. HIST. 209, 227 (2012).

<sup>305</sup> Note, *Striking the Right Balance: Toward A Better Understanding of Prison Strikes*, 132

uprising became the most widely publicized prison riot in American history, when thirty-nine people died during incarcerated people's struggle to overtake the institution and the government's military response.<sup>306</sup> But the Attica uprising was not alone: in 1978, one commentator noted that the "wave of prison disturbances initiated by the Attica State Prison uprising stimulated concern with political mobilization among confined criminals."<sup>307</sup> Indeed, during the early 1970s, incarcerated individuals across the country, generally inspired by the Black Power organizing in the free world,<sup>308</sup> began to form unions.<sup>309</sup>

However, in 1977, the Supreme Court dealt prison organizing a major setback. In *Jones v. North Carolina Prisoners' Labor Union*, the Supreme Court held that prisoners could be denied their First Amendment right to assemble if a warden feels a gathering is a threat to prison security.<sup>310</sup> As a result, today, prison administrators are able to block most prisoners' union meetings.<sup>311</sup>

Despite these hurdles, incarcerated workers continue to organize—mostly through unauthorized prison strikes. The Incarcerated Workers Organizing Committee ("IWOC") is a prisoner-led section of the Industrial Workers of the World.<sup>312</sup> Due to fears of retaliation by guards, IWOC has no official membership,<sup>313</sup> though the IWOC asserts it has "hundreds of members in over fifteen prisons" and that their membership "continues to grow."<sup>314</sup> IWOC was also part of the coalition that launched the largest prison strike in U.S. history in 2016—a strike with the explicit goal of "abolish[ing] prison

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HARV. L. REV. 1490, 1498 (2019) (noting that, in the 1960s and 70s, "many of these strikes were labor protests" and citing the example of "nearly a thousand inmates [who] went on strike at a Virginia state prison in 1968 for higher wage").

<sup>306</sup> For more context on the Attica prison riot, see Andrew B. Mamo, "The Dignity and Justice That Is Due to Us by Right of Our Birth": Violence and Rights in the 1971 Attica Riot, 49 HARV. C.R.-C.L. L. REV. 531 (2014).

<sup>307</sup> Stephen Woolpert, *Prisoners Unions, and Inmate Militancy, and Correctional Policymaking*, 42 FED. PROBATION 40, 40 (1978).

<sup>308</sup> See generally DONALD F. TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF JONES V. NORTH CAROLINA PRISONERS' LABOR UNION (2012).

<sup>309</sup> See Frank Browning, *Organizing Behind Bars, Ramparts* (Feb. 1972), at 40–45 (discussing California United Prisoners Union); C. Ronald Huff, *Unionization Behind the Walls*, 12 *Criminology* 175, 178–85 (1974) (discussing the emergence and goals of prisoners' unions in California, New York, Massachusetts, North Carolina, Michigan, Maine, Vermont, Rhode Island, New Hampshire, Georgia, Washington, DC, Kansas, Minnesota, and Washington); Sarah M. Singleton, *Unionizing America's Prisons—Arbitration and State-Use*, 48 *Ind. L. J.* 493, 501–02 (1973) (citing inmate union organizing in California, New York, Michigan, Delaware, Ohio, and Pennsylvania).

<sup>310</sup> 433 U.S. 119 (1977).

<sup>311</sup> Elk, *supra* note 284.

<sup>312</sup> INCARCERATED WORKERS ORGANIZING COMMITTEE, *About*, <https://incarceratedworkers.org/about> [<https://perma.cc/J9UB-F77N>].

<sup>313</sup> IT'S GOING DOWN, *Organizing the Prison Class: An Interview with IWOC*, (April 30, 2016) <https://itsgoingdown.org/organizing-prisoner-class-interview-iwoc/> [<https://perma.cc/TJ6F-LY6T>].

<sup>314</sup> INCARCERATED WORKERS ORGANIZING COMMITTEE, *supra* note 312.

slavery.”<sup>315</sup> In 2018, a similar coalition launched another nationwide strike seeking “the end of modern day slavery.”<sup>316</sup>

In 2021 and 2022, IWOC collaborated with Jail House Lawyers Speak—another prisoner-led organization<sup>317</sup>—to encourage “Shut ‘Em Down 2022” demonstrations.<sup>318</sup> These demonstrations hoped to bring awareness to the prison abolition movement, with the goal of repealing the Thirteenth Amendment’s exception to slavery.<sup>319</sup> The organizations encouraged demonstrations outside prisons, and also engaged in protests inside designed to “disrupt the system” through participating in “[w]ork refusals,” a “[c]ommissary boycott,” a “[p]hone boycott,” and “[f]ood refusals.”<sup>320</sup>

### ii. *The Future of Prison Labor Organizing*

The history of prison labor organizing is particularly impressive because, throughout American history, incarcerated individuals faced remarkable risks and punishments for striking. Punishments for refusing to work are draconian, including placement in solitary or a loss of good time credits.<sup>321</sup> With such threats, it is only logical that most incarcerated individuals comply with orders and continue to work to maintain the prison system. However, if prisons could no longer impose such punishments on incarcerated workers, the logical calculus changes. In refusing to work, incarcerated

<sup>315</sup> *Id.*

<sup>316</sup> INCARCERATED WORKERS ORGANIZING COMMITTEE, *Prison Strike 2018*, <https://incarceratedworkers.org/campaigns/prison-strike-2018> [<https://perma.cc/U78D-KQ4R>].

<sup>317</sup> JAILHOUSE LAWYERS SPEAK, <https://www.jailhouselawyerspeak.com/> [<https://perma.cc/D8UV-FFLB>] (last visited Oct. 1, 2023).

<sup>318</sup> Elise Brehod, *Incarcerated Workers Organizing Committee Prepares for Nationwide Demonstrations*, INDUSTRIAL WORKER (Oct. 13, 2023), <https://industrialworker.org/incarcerated-workers-organizing-committee-prepares-for-nationwide-demonstrations/> [<https://perma.cc/85KK-GM3F>].

<sup>319</sup> Hunter Southall, *From Behind Bars, Incarcerated Workers are Unionizing, Striking*, ONLABOR (Dec. 28, 2022) <https://onlabor.org/from-behind-bars-incarcerated-workers-are-unionizing-striking/> [<https://perma.cc/6RPP-258T>].

<sup>320</sup> JAILHOUSE LAWYERS SPEAK, *Call For National 2022 Shut ‘Em Down Demonstrations*, (May 22, 2022), <https://itsgoingdown.org/call-for-shut-em-down-demos-2022/> [<https://perma.cc/LLR9-AKKM>].

<sup>321</sup> See Meg Anderson, *Prisoners are suing Alabama over forced labor, calling it a ‘form of slavery’*, NPR (Dec. 14, 2023), <https://www.npr.org/2023/12/14/1219187249/prisoners-are-suing-alabama-over-forced-labor-calling-it-a-form-of-slavery> [<https://perma.cc/QYS7-NAEW>] (explaining, “Alabama prisoners . . . allege that if they refuse to work, they risk punishment, including solitary confinement, food deprivation, physical punishment, and the loss of ‘good time’ credits that can reduce a person’s time in prison”); ACLU & U. CHICAGO L. SCH. GLOBAL HUMAN RTS. CLINIC, *Captive Labor: Exploitation of Incarcerated Worker* 47 (2022), [https://www.aclu.org/sites/default/files/field\\_document/2022-06-15-captivelaborresearchreport.pdf](https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf) [<https://perma.cc/8HQR-YL5Q>] (“The coercion applied through the threat of further punishment has the backing of state and federal courts, which have upheld the practice of using prison-specific sanctions, like solitary confinement, for refusing to work or instigating others to refuse work. . . . Some states . . . use subtler but still coercive methods, such as the promise of earning ‘good time’ (a reduction in sentence), if the individual engages in good behavior, studying, and work.”).



workers would only be forfeiting their pay—which, given current prison wages, may total less than a dollar a day. If prison workers were able to strike—without fear of the administrative or legal repercussions for refusing to work—it is likely that future efforts by prison organizers would draw significantly more individuals and be significantly more successful.

Such action has the potential to be truly disruptive: more than 80% of prison workers perform low-skilled maintenance work for the prison facilities in which they live.<sup>322</sup> Due to the dramatic increase in the prison population throughout the latter half of the 20th century, prisons rely on incarcerated laborers to perform essential tasks, like cleaning, cooking, and servicing police cars, to make up for budget shortfalls due to overcrowding.<sup>323</sup> If incarcerated workers simply refused to work, prisons would become an immediate crisis. Prison officials would be unable to perform required daily upkeep and functions.

Moreover, basic supply and demand principles indicate that if prisoners are no longer required to work—thereby lowering the supply of guaranteed workers—prisons will have to raise wages to maintain the same total number of workers. Commentators have acknowledged if prisoners had the “right to choose what wages were worth their time,” then prisons may “be forced to raise wages to what prisoners see as a fair exchange.”<sup>324</sup>

In sum, if prisons are required to end compulsory labor practices, then it is likely prison organizers will have increased success in building support for strikes and collective action. Based on the history of prison activism, incarcerated workers appear to consider obtaining minimum wage to be one of their primary concerns—suggesting increasing wages will likely be a goal for striking workers.<sup>325</sup> Thus, even if courts continue to deny FLSA protections to prison workers, prison organizers could have success at obtaining minimum wage through organizing inside the prison itself.

#### IV. CONSEQUENCES

“We just want to be able to take care of ourselves as men and women, in this Department of Corrections . . . Just treat us like humans, and we’ll act like it.”<sup>326</sup>

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<sup>322</sup> Beth Schwartzapfel, *Taking Freedom: Modern-Day Slavery in America’s Prison Workforce*, PAC. STANDARD (May 7, 2018), <https://psmag.com/social-justice/taking-freedom-modern-day-slavery> [<https://perma.cc/L57H-GVY8>].

<sup>323</sup> ACLU & U. CHICAGO L. SCH. GLOBAL HUMAN RTS. CLINIC, *supra* note 322, at 56.

<sup>324</sup> Allen Beaujon, *Let prisoners choose the wages that are worth their time*, DEMOCRAT & CHRONICLE (Feb. 18, 2019, 6:53AM ET), <https://www.democratandchronicle.com/story/opinion/guest-column/2019/02/18/let-prisoners-choose-the-wage-worth-their-time/2860275002/> [<https://perma.cc/N27R-2KPT>].

<sup>325</sup> See, e.g., INCARCERATED WORKERS ORGANIZING COMMITTEE, *supra* note 312. (“We believe that as workers we are guaranteed the same protections and wages as other workers.”).

<sup>326</sup> Daniel A. Gross, *An Inside Account of the National Prisoners’ Strike*, NEW YORKER, (Sept. 6, 2018) <https://www.newyorker.com/news/as-told-to/an-inside-account-of-the-national-prisoners-strike> [<https://perma.cc/Z5FK-JECH>].

Successful lawsuits, challenging compelled labor in prisons, sub-minimum wages in prisons, or both, could have tangible benefits to incarcerated individuals and the wider world. This section begins with a discussion of potential pitfalls to the above-mentioned litigation efforts. Next, I discuss many of the positive developments that could flow from successful litigation efforts—arguing that such efforts would not only benefit the incarcerated workers themselves but could also benefit wider society by promoting rehabilitation and decreasing recidivism.

### A. *Potential Pitfalls*

Granted, there are certainly opponents to paying prisoners' minimum wage and affording them the choice whether to work. At its core, prison is meant to punish those inside it. If incarcerated workers are treated the same as workers on the outside, the argument goes, then prison is no longer serving as any sort of "punishment." Indeed, some may argue that it is unfair for incarcerated individuals to get their room and board paid for by the state, when those who are not incarcerated and make minimum wage pay for rent, food, and transportation.<sup>327</sup>

Such an argument ignores the basic realities of the prison economy. For example, many prisoners do in fact pay for their room and board while in prison. As of 2015, at least forty-three states have authorized such room and board fees.<sup>328</sup> Moreover, the "room and board" provided by the prison often fails to provide necessities—such as meals with sufficient caloric content

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<sup>327</sup> JEREMY BENTHAM, PANOPTICON OR THE INSPECTION HOUSE 122 (1791) ("Saving the regard due to life, health, and bodily ease, the ordinary condition of a convict doomed to a punishment . . . ought not to be made *more eligible* than that of the poorest class of subjects in a state of innocence and liberty."); Raghunath, *supra* note 108, at 401 ("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.").

<sup>328</sup> Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CENTER FOR JUSTICE 4 (2015), [https://www.brennancenter.org/sites/default/files/blog/Charging\\_Inmates\\_Mass\\_Incarceration.pdf](https://www.brennancenter.org/sites/default/files/blog/Charging_Inmates_Mass_Incarceration.pdf) [<https://perma.cc/7HH5-PQPR>].

for daily sustenance,<sup>329</sup> feminine hygiene products,<sup>330</sup> or enough toilet paper<sup>331</sup>—forcing prisoners to pay for such necessities at the commissary.<sup>332</sup>

But, more fundamentally, the idea that prison workers must be exploited for the punishment to be meaningful is flawed. No matter the pay, working in prison will still involve countless indignities related to the lack of privacy, the separation from one’s home and loved ones, and the constant orders and discipline. There is no evidence to suggest paying prisoners minimum wage will make prison a desirable experience. Indeed, currently, the small subset of prisoners who are paid minimum wage appear to recidivate at a lower degree than the general prison population—suggesting, if anything, paying prisoners minimum wage has a deterrent effect.<sup>333</sup>

Others argue against implementing minimum wage requirements in prison due to the fear it would make prison labor economically infeasible such that fewer prisoners would be able to work. Prison system officials have suggested “large-scale cutbacks in inmate labor as a likely and, in their view, dangerous consequence of having to pay minimum wage.”<sup>334</sup> Prison officials further maintain they “did not believe that they would be able to

<sup>329</sup> Alysia Santo & Lisa Iaboni, *What’s in a Prison Meal?*, MARSHALL PROJECT (July 7, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal> [<https://perma.cc/T4AJ-QKXG>]; Emily Riley, *On the Menu at American Prisons: ‘Rotten’ Food, Inadequate Diet*, THE CRIME REPORT (Dec. 7, 2020), <https://thecrimereport.org/2020/12/07/on-the-menu-at-american-prisons-rotten-food-inadequate-diet/> [<https://perma.cc/6D4F-2KE4>].

<sup>330</sup> Kimberly Haven, *Why I’m Fighting for Menstrual Equity in Prison*, ACLU (Nov. 8, 2019), <https://www.aclu.org/news/prisoners-rights/why-im-fighting-for-menstrual-equity-in-prison> [<https://perma.cc/JE2Z-D8ED>].

<sup>331</sup> PRISON LEGAL NEWS, *Short-term Deprivation of Toilet Paper Does Not Violate Detainee’s Rights*, (Feb. 2014), <https://www.prisonlegalnews.org/news/2014/feb/15/short-term-deprivation-of-toilet-paper-does-not-violate-detainees-rights/> [<https://perma.cc/6Z7N-26MH>].

<sup>332</sup> Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL’Y INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [<https://perma.cc/KJY9-X5T9>] (analyzing “commissary sales reports from state prison systems in Illinois, Massachusetts, and Washington” and concluding that “most of the little money [prisoners] have is spent on basic necessities”—for example, in “2016, people in Massachusetts prisons purchased over 245,000 bars of soap, at a total cost of \$215,057. That means individuals paid an average of \$22 each for soap that year, even though DOC policy supposedly entitles them to one free bar of soap per week”). In addition, commissary prices often are even more expensive than prices in the outside world. *See*, Alex Arriaga, *Why is commissary so expensive? Prices for everyday goods in prison soar amid inflation*, THE USA TODAY (May 2, 2023), <https://www.usatoday.com/story/news/nation/2023/05/02/prison-commissary-prices-soar-amid-inflation/70170625007/>. [<https://perma.cc/9VNR-PDB2>]

<sup>333</sup> Cindy J. Smith, Jennifer Bechtel, Angie Patrick, Richard R. Smith, & Laura Wilson-Gentry, *Correctional Industries Preparing Inmates for Re-entry: Recidivism & Post-release Employment* 8 (May 10, 2006), <https://www.ojp.gov/pdffiles1/nij/grants/214608.pdf> [<https://perma.cc/47J6-NUF2>] (“The primary findings of this research are that inmates who worked in open-market jobs in PIECP were found to be significantly more successful in post-release employment. That is to say, they became tax-paying citizens quicker and remain in that status longer. . . . PIECP releasees had slower and reduced recidivism, as measured by arrest, conviction and incarceration.”).

<sup>334</sup> United States General Accounting Office (GAO), *Prison Labor: Perspectives on Paying the Federal Minimum Wage*, 2 (May 1993).

continue to employ the same number of inmates if they had to pay minimum wage” resulting in “increased inmate idle time and more inmate rule infractions or security problems.”<sup>335</sup> Recently, one Washington state private prison suspended its voluntary work program after a federal court ruled that the detention center had to pay its immigrant detainee workers Washington’s minimum wage of \$13.69 or more.<sup>336</sup> For those who feel that some wage is better than no wage, or that prison work has value in and of itself, such a result may mean winning the battle but losing the war.

Such arguments have merit, as maintaining the current prison workforce while paying prisoners minimum wage would certainly necessitate increasing the funding of prisons. However, the success of the PIECP program demonstrates that it is possible to pay at least some prisoners minimum wage, and for at least some companies to still make a profit while doing so. Moreover, some of the required funding for this proposal could come from saving on other prison-related costs, since paying prisoners minimum wage may result in less recidivism, thereby reducing the costs of overall incarceration.

Leftists may also find drawbacks from removing the except clause from state constitutions and reframing prison labor as employment, rather than involuntary servitude or slavery. It is likely that even if prisoners are given some level of agency over the choice of whether to work, those laboring in prisons will not have the same level of meaningful choice as those of us in the free world. Prisons are inherently coercive environments. Those imprisoned may choose to work simply to avoid the monotony of sitting in a cell,<sup>337</sup> or to make enough money to afford basic hygienic products like sanitary pads,<sup>338</sup> deodorant, or shampoo.<sup>339</sup> While the choice may be less

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<sup>335</sup> *Id.* at 8.

<sup>336</sup> Alex J. Rouhanden, *Private Prison Suspends Work Program, Rather than Pay Detainees Minimum Wage*, NEWSWEEK (Nov. 9, 2021, 1:37 PM), <https://www.newsweek.com/private-prison-suspends-work-program-rather-pay-detainees-minimum-wage-1647559> [<https://perma.cc/2FFK-AAEC>]; OFFICE OF THE ATTORNEY GENERAL: WASHINGTON STATE, *AG Ferguson: Jury finds GEO, for-profit operator of Tacoma ICE detention center, must pay detainee workers minimum wage*, (Oct. 27, 2021) <https://www.atg.wa.gov/news/news-releases/ag-ferguson-jury-finds-geo-profit-operator-tacoma-ice-detention-center-must-pay#:~:text=The%20verdict%20concludes%20the%20first,wage%20of%20%2413.69%20or%20more> [<https://perma.cc/Q7Y5-MCAD>].

<sup>337</sup> Brittany Hailer, *COVID-19, Rodents, Unpaid Labor: A Year in the Allegheny County Jail Kitchen*, PITTSBURGH CURRENT (May 2, 2021), <https://www.pittsburghcurrent.com/covid-19-rodents-unpaid-labor-a-year-in-the-allegheny-county-jail-kitchen> [<https://perma.cc/29S-J-YM4W>] (“Judith White, 34, works about 12 hours a day without compensation in order to avoid being locked in her cell.”).

<sup>338</sup> Jean Lee, *5 pads for 2 cellmates: Period inequity remains a problem in prisons*, THE 19TH (June 29, 2021), <https://19thnews.org/2021/06/5-pads-for-2-cellmates-period-inequity-remains-a-problem-in-prisons/> [<https://perma.cc/C3CF-8CHE>].

<sup>339</sup> Erica Bryant, *Working for Pennies Just to Buy Overpriced Soap in Prison*, VERA (Apr. 30, 2021), <https://www.vera.org/news/working-for-pennies-just-to-buy-overpriced-soap-in-prison> [<https://perma.cc/4F3H-39WB>] (“Incarcerated people aren’t required to hold jobs behind bars, but desperate conditions compel many to accept any position that can alleviate the misery

coercive than the current regime of disciplinary infractions, it seems inevitable that choosing to labor in prison will be a choice that is meaningfully constrained. Some may feel that calling prison labor “employment” means legitimatizing the practice and further entrenching it. However, given that many organizations made up of incarcerated individuals seem to support calls for a minimum wage for prison workers,<sup>340</sup> I think many on the left will be persuaded to believe that these litigation efforts are a net positive, despite the potential drawbacks.

### B. *Recognizing the Dignity of Prisoners*

Litigation strategies seeking minimum wage for prisoners and protesting compelled labor may have positive effects through better recognizing the dignity of prisoners. Dignity is one component of human flourishing.<sup>341</sup> As social beings, dignity plays an inherent role in our interactions with others and can lead to positive feelings of value and self-esteem.<sup>342</sup> Scholars have recognized that dignity is “crucial” for human “well-being,” since “[o]ur self-respect depends so much on how others treat us.”<sup>343</sup> Given the assault on human well-being caused by the degrading conditions inherent in incarceration, the promotion of dignity in the prison context is particularly important.<sup>344</sup>

Incarcerated workers themselves have centered arguments for minimum wage and employment protections with the goal of achieving dignity in the carceral work setting. Chandra Bozelko, who served more than six years at the York Correctional Institution,<sup>345</sup> has argued the fact that:

any service performed in a penal institution isn’t considered employment . . . is much more dehumanizing than any low wage.

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of their circumstances.”); Beth Schwartzapfel, *Prison Money Diaries: What People Really Make (and Spend) Behind Bars*, THE MARSHALL PROJECT (Aug. 4, 2022), <https://www.themarshall-project.org/2022/08/04/prison-money-diaries-what-people-really-make-and-spend-behind-bars#:~:text=So%2C%20what%20do%20they%20need,have%20little%20to%20no%20money> [<https://perma.cc/H2YU-84CS>].

<sup>340</sup> See, e.g., INCARCERATED WORKERS ORGANIZING COMMITTEE, *supra* note 312; Nat’l Prisoners Strike Aug. 21st – Sept. 9th 2018, *supra* note 3.

<sup>341</sup> John Kleinig & Nicholas G. Evans, *Human Flourishing, Human Dignity, and Human Rights*, 32 L. & PHIL. 539, 556 (2013) (“That is, our human flourishing will manifest and be expressive of the dignity that we have as humans.”).

<sup>342</sup> Kristen Lucas, *Workplace Dignity: Communicating Inherent, Earned, and Remediated Dignity*, 52 J. MANAGEMENT STUDIES 621, 623 (2015).

<sup>343</sup> Andrew Sayer, *Dignity at Work: Broadening the Agenda*, 14 ORGANIZATION 565, 565–66 (2007).

<sup>344</sup> See generally, Alison Liebling, *Moral Performance, Inhuman and Degrading Treatment and Prison Pain*, 13 PUNISHMENT & SOC’Y 530 (2011).

<sup>345</sup> Chandra Bozelko, WOMEN’S MEDIA CENTER, <https://womensmediacenter.com/she-source/expert/chandra-bozelko> [<https://perma.cc/Q5WC-D7RF>].

This law tells an inmate that what she does at her prison job doesn't matter, regardless of what she's paid. It's one thing to be devalued; it's another to be denied outright.<sup>346</sup>

Bozelko asserts “[w]hat inmates are saying when they complain that prison labor is slavery is that they feel undervalued and dehumanized. This most recent prisoner strike was about mattering to others as equals, as people, and not being seen as lifeless targets for exploitation.”<sup>347</sup>

Bozelko's remarks are in line with other scholars, who have long recognized the importance of dignity of work. For example, Randy Hodson, a sociologist, has asserted that “[w]orking with dignity is a foundation for a fully realized life.”<sup>348</sup> The “dignity” of work depends on two things: choice (or specifically, the ability to say no to jobs that the worker dislikes) and recognition for one's work, which, in capitalist America, most often comes in the form of payment.

Having autonomy over one's work is a central component of dignity.<sup>349</sup> Perhaps the most basic level of autonomy involved in work is the ability to say no to work that one dislikes. “Resistance to abuse”—for instance, choosing to quit one's job—is an act by which one takes back one's dignity.<sup>350</sup> Thus, at a fundamental level, allowing prisoners to choose whether to work will contribute to the sense of dignity those prisoners derive from that work. Allowing prisoners to say no to particularly degrading or dehumanizing work will allow them to express personal preferences and better resist such conditions in the future.

Secondly, paying incarcerated workers minimum wage would also tend to better recognize their dignity by acknowledging the value of their work. In our capitalist society, “[p]ay is . . . viewed as a signal of one's contribution to the firm. Low paid workers are given the impression that they are not important or valued.”<sup>351</sup> Reports from incarcerated workers suggest that this is indeed the case. One such worker lamented that “[t]here's no appreciation for what we do in here.”<sup>352</sup> Many of those incarcerated dread work because of “their lack of remuneration, their lack of autonomy in choosing whether to work and in negotiating the terms of their labor, and their

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<sup>346</sup> Chandra Bozelko, *Give Prisoners Dignity—and Decent Wages*, NAT. REV. (Jan. 11, 2017, 9:00AM), <https://www.nationalreview.com/2017/01/prison-labor-laws-wages/> [<https://perma.cc/5YQZ-9V9R>].

<sup>347</sup> *Id.*

<sup>348</sup> RANDY HODSON, *DIGNITY AT WORK* Xiii (2001).

<sup>349</sup> Andrew Sayer, *Dignity at Work: Broadening the Agenda*, 14 ORGANIZATION 565, 568 (2007) (recognizing that autonomy is at the root of one's personal dignity).

<sup>350</sup> HODSON, *supra* note 348, at 4.

<sup>351</sup> Peter Berg & Ann C. Frost, *Dignity at Work for Low Wage, Low Skill Service Workers*, 60 INDUSTRIAL RELATIONS 657, 668 (2005).

<sup>352</sup> Michael Gibson-Light, *Sandpiles of Dignity: Labor Status and Boundary-Making in the Contemporary American Prison*, 6 THE RUSSELL SAGE FOUNDATION J. OF THE SOCIAL SCIENCES, 198, 204 (2020).

mistreatment and degradation on the job.”<sup>353</sup> Paying incarcerated workers minimum wage would express that society does see value in the work that these individuals do.

Thus, ending involuntary labor in prisons and paying prisoners minimum wage for the work that they do may meaningfully contribute to the sense of dignity incarcerated workers have while on the job. Such an increase would have inherent value in terms of promoting the well-being of those workers.

### C. *Decreasing Recidivism*

Lawsuits related to compelled labor and minimum wage may also have positive externalities on wider society by decreasing rates of recidivism among the population of formerly incarcerated individuals. Many have noted the importance of work in the rehabilitative efforts of prisons. From prison officials,<sup>354</sup> to scholars,<sup>355</sup> to inmates themselves<sup>356</sup>—most seem to agree that work is an important part of the prisons’ mission and functioning.<sup>357</sup> A meta-analysis of prison education, vocation, and work programs found that “the evidence is currently insufficient to conclude that work programs reduce recidivism.”<sup>358</sup> In contrast, PIECP—the voluntary program that pays inmates minimum wage for prison labor—has shown “a statistically significant increase in post-release employment and a decrease in recidivism rates,” even compared to “inmates who worked in traditional prison industries and participated in other activities such as education and

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<sup>353</sup> *Id.* (citing Erin Hatton, *When Work Is Punishment: Penal Subjectivities in Punitive Labor Regimes*, 20 PUNISHMENT AND SOCIETY 174, 174 (2018)).

<sup>354</sup> United States General Accounting Office (GAO), *Prison Labor: Perspectives on Paying the Federal Minimum Wage*, 2 (May 1993) (“[L]ess inmate work means more idle time and increased potential for violence and misconduct.”).

<sup>355</sup> Amy Solomon, Kelly Johnson, Jeremy Travis, & Elizabeth McBride, *From Prison to Work: The Employment Dimensions of Prisoner Reentry: A Report of the Reentry Roundtable*, THE URBAN INSTITUTE 17 (2004), [http://webarchive.urban.org/UploadedPDF/411097\\_From\\_Prison\\_to\\_Work.pdf](http://webarchive.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf) [<https://perma.cc/M37L-DCYH>] (“At the most basic level, allowing inmates to work reduces inmate idleness and fosters a sense of productivity among prisoners.”).

<sup>356</sup> Indeed, inmates have even claimed that denial of work opportunities is cruel and unusual punishment. *See Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (rejecting prisoner’s argument that “limited work hours” amount to cruel and unusual punishment); *Campbell-El v. District of Columbia*, 881 F. Supp. 42, 44 (D.D.C. 1995) (rejecting prisoner’s argument that the denial of work opportunities constitutes cruel and unusual punishment).

<sup>357</sup> Granted, prison abolitionists would contend that prison is not and cannot ever be a true site of rehabilitation. While this author certainly agrees that prisons are not currently sites of rehabilitation, a discussion of prison abolition is outside the scope of this Note. Furthermore, this author hopes that even while aiming towards prison abolition as a goal, that the arguments advocated in this Note can help improve incarcerated individuals’ conditions in the interim.

<sup>358</sup> David B. Wilson, Catherina A. Gallagher, & Doris L. MacKenzie, *A Meta-Analysis of Corrections-Base Education, Vocation, and Work Programs For Adult Offenders*, 37 PUNISHMENT & SOCIETY 347, 361 (2000).

drug treatment.”<sup>359</sup> This suggests that it is not necessarily the practice of working *itself* that makes recidivism less likely, but rather other elements of PIECP—such as the minimum wage or affirmative choice to work such a job.

Litigation efforts that forbid compelled labor in prisons would likely further reduce the rate of recidivism. Such litigation would not eliminate prison labor programs; it would outlaw only “involuntary servitude,” a limit that would likely serve those programs’ rehabilitative purpose.<sup>360</sup> After all, if the goal of such programs is to instill good working habits and a good work ethic, forcing incarcerated individuals to participate in such programs would seem to have the exact opposite effect.<sup>361</sup> Paying incarcerated workers, and allowing them to choose whether to work, may also increase the quality of the work produced by prisons.<sup>362</sup> In the free world, companies recognize the power of incentives, often offering increased wages to motivate the workforce. The very same logic applies to prisons.

Moreover, paying prisoners minimum wage could decrease recidivism by increasing the chances that prisoners have some sort of savings when exiting prison. Some recent programs have begun to explore the effect of offering individuals cash payments when they leave prison.<sup>363</sup> While the effects of such programs remain to be seen, there is broad consensus that those leaving prison often leave with high burdens of debt, and that such debt has “a negative effect on financial well-being, reentry, family structure, and mental health.”<sup>364</sup> Paying prisoners minimum wage may allow individuals leaving prison to leave with a financial safety net that would ease their re-entry into wider society, likely decreasing rates of recidivism and improving the well-being of communities that are highly impacted by the criminal-legal system.

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<sup>359</sup> NAT. INSTITUTE OF JUSTICE, Program Profile: Prison Industry Enhancement Certificate Program (PIECP) (Mar. 28, 2016), <https://crimesolutions.ojp.gov/ratedprograms/463#pd> [<https://perma.cc/5ZP2-3YA4>].

<sup>360</sup> Pope, *supra* note 211 at 1538 (quoting Raghunath, *supra* note 108 at 407).

<sup>361</sup> Gordon Hawkins, *Prison Labor and Prison Industries*, 5 CRIME & JUST. 85, 111 (1983) (“In practice the wages paid to prisoners in America and throughout most of the world . . . serve only to disparage or depreciate any expenditure of energy and effort. Such dole payments do not stimulate industry or self-respect but lead inevitably to indolence and apathy.”).

<sup>362</sup> *Id.*

<sup>363</sup> Kristin Toussant, *This program is testing what happens when you give cash to people leaving prison*, FAST COMPANY (Sept. 28, 2021), <https://www.fastcompany.com/90680420/this-program-is-testing-what-happens-when-you-give-cash-to-people-leaving-prison> [<https://perma.cc/39QF-YLCU>].

<sup>364</sup> Annie Harper, Callie Ginapp, Tommaso Bardelli, Alyssa Grimshaw, Marissa Justen, Alaa Mohamedali, Isaiah Thomas, & Lisa Puglisi, *Debt, Incarceration, and Re-entry: a Scoping Review*, 46 AM. J. CRIM. JUST. 250, 250 (2021).



## CONCLUSION

While the federal Constitution may have enshrined involuntary prison labor in the Thirteenth Amendment, state efforts and innovation provide a promising way forward for incarcerated workers. Based on federal courts' interpretations of the Thirteenth Amendment, state courts in jurisdictions that totally outlaw involuntary labor appear to be poised to strike down their states' carceral labor regimes.

Granted, judges have historically been an unfriendly audience for prisoners' grievances. However, even conservative judges may be persuaded by the clear text and original intent of these modern-day amendments to state constitutions. In recent years, states such as Arizona<sup>365</sup> and New York<sup>366</sup> have considered raising the pay of incarcerated workers. Litigation surrounding the payment of incarcerated workers may serve to highlight their cause and motivate legislators to take the demands of these workers seriously.

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<sup>365</sup> Camaron Stevenson, *Arizona's Proposed \$3 Prisoner Minimum Wage Would Be Highest In The Country*, THE COPPER COURIER (Feb. 10, 2020), <https://coppercourier.com/story/arizonas-proposed-3-prisoner-minimum-wage-would-be-highest-in-the-country/#:~:text=Arizona's%20existing%20law%20is%20currently,established%20at%20%241.50%20per%20hour> [https://perma.cc/JN4X-6ZAL].

<sup>366</sup> METROFOCUS, *New York Lawmaker Proposes Legislation to Ban "Prison Slave Labor."* KCTS9: PBS (March 14, 2023), <https://www.pbs.org/wnet/chasing-the-dream/2023/03/new-york-lawmaker-proposes-legislation-to-ban-prison-slave-labor> [https://perma.cc/R63Z-HDZP] (explaining "a New York State Assembly Member introduced legislation in Albany to . . . require that incarcerated people make at least minimum wage for their work.").

