ARTICLE

No Exceptions: The New Movement to Abolish Slavery and Involuntary Servitude

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In the twenty-first century, slavery is still alive in the United States, but thankfully, it is increasingly unwell. States across the country, in places both expected and unexpected, have begun to pass amendments to their state constitutions that seek to finish the job started over 150 years ago by the Thirteenth Amendment. Whereas that amendment included an exception, providing for slavery and involuntary servitude as punishment for a crime, these new state amendments contain total prohibitions. But these prohibitions have thus far proven unable to end the blight of prison slavery merely through their text. This Article asks why and attempts to provide answers to this problem.

This Article describes the history of prison slavery and then, relying on the stories of incarcerated and formerly incarcerated people, describes that institution's current state. It then builds on existing literature on this phenomenon to survey the state constitutional amendments, litigation, and legislative enactments that are attempting to end that institution. Finally, it interrogates why these amendments have thus far not realized their potential for change and suggests ways that judges should interpret the new language they create, and how organizers, politicians, and litigants might both use the text of these amendments and move beyond their text to accomplish their liberatory goals. It argues that to enact and sustain a prohibition on prison slavery, constitutional text must work in tandem with individual litigation, reforms to government structure, and the inevitable political battles that will shape our criminal legal system.

Despite its ambitious scope, this Article ultimately recognizes that it is but one drop in the ocean of history. The state constitutional amendments sweeping the country are only the latest salvo in the four-hundred-year-long battle against slavery

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in this nation. Knowing this, this Article acknowledges that it does not stand at the beginning, nor at the end, of this fight. It instead is an attempt to push us just a little further toward the day when we will finally be a society with no slavery and no involuntary servitude. No exceptions.

INTRODUCTION

March 11, 2020, is a date that few of us will forget in our lifetimes. On that day, Dr. Anthony Fauci testified before Congress that the coronavirus outbreak, then limited to a few hundred cases, would get worse in the United States; the World Health Organization declared COVID-19 a global pandemic; and in perhaps the greatest sign of what was to come, the National Basketball Association canceled the remainder of its season indefinitely. Over the next several years, the world would grapple with living through a once-in-a-century pandemic. But few institutions would face the brunt of COVID-19 like prisons. It almost seemed like U.S. jails and prisons were designed to optimally spread the coronavirus. Their (over)crowded[1] confines and enclosed spaces made many of the common pieces of mitigation advice—stay six feet apart, be outside or in well-ventilated areas as much as possible, isolate and quarantine when you feel sick—impracticable at best and impossible at worst. It was not surprising then, though still disturbing, when people in prison contracted COVID-19 at more than triple the rate of the general population and died at more than double the rate.[2]

But one, perhaps underappreciated, aspect of the pandemic for incarcerated people was the continuing necessity of work. Infamously, some incarcerated people were forced to manufacture hand sanitizer that they, with dark irony, were not allowed to possess themselves.[3] But the more common, mundane reality was that lots of incarcerated people were essential workers for an entirely different reason: they performed work that was necessary to keep the prison system in which they were incarcerated running. While some imprisoned people work to create goods or provide services for outside of the prison, most prison labor today is intraprison work.[4]

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[1] *COVID-19 in Prisons and Jails*, PRISON POL'Y INITIATIVE (July 2024), https://perma.cc/3755-C9KN ("At the end of 2020, 1 in 5 state prison systems were at or above their design or rated capacity.").

[2] Neal Marquez, Julie A. Ward, Kalind Parish, Brendan Saloner & Sharon Dolovich, *COVID-19 Incidence and Mortality in Federal and State Prisons Compared with the U.S. Population, April 5, 2020, to April 3, 2021*, 326 J. AM. MED. 1865, 1866 (2021).

[3] Casey Tolan, *Hand Sanitizer Is Still Considered Contraband in Some Prisons Around the Country*, CNN (May 5, 2020), https://perma.cc/KQE3-SH9B.

[4] ACLU & UNIVERSITY OF CHICAGO LAW SCHOOL GLOBAL HUMAN RIGHTS CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 27–36 (2022) [hereinafter

Such was the fate of plaintiffs Harold Mortis and Richard Lilgerose. Both men were incarcerated in Colorado, and in October 2020, both unfortunately contracted COVID-19 during an outbreak at their prison.[5] Shortly after, they were assigned to work in the kitchen, cooking for all of the incarcerated people, at least in part in order to address staff shortages.[6] Like many workers at this time, they resisted the mandate to work in person.[7] Both men suffered from preexisting conditions, and COVID-19 took a further toll on their health.[8] But unlike free workers, who could simply quit their jobs and try to find another that better suited their preferences, Lilgerose and Mortis had no other options. If they did not work, they would be punished. They could receive disciplinary violations, they would be required to stay in prison longer (both by losing the earned time credits they had already accrued and being prevented from earning more), they could be moved to more restrictive housing, and they might even be physically restrained and sent to solitary confinement.[9] Both men initially refused to work and lost earned time as a result.[10] Facing the threat of additional punishments, they ultimately relented.[11]

From one perspective, that of federal constitutional law, this was an expected sequence of events. The Thirteenth Amendment's Except Clause, which creates an exception to the prohibition on slavery and involuntary servitude for those duly convicted of crimes, has long been interpreted to mean that incarcerated people can be forced to work and be punished, harshly, if they refuse.[12]

But from another perspective, that of *state* constitutional law, this was surprising, to say the least. That is because, in 2018, Colorado voters passed an amendment to their state constitution in order to ban slavery and involuntary servitude entirely.

ACLU & GLOBAL HUMAN RIGHTS CLINIC] (finding that approximately 80% of prison labor is "maintenance labor").

5 Amended Complaint at 11–13, Lilgerose v. Polis, No. 2022CV30421 (D. Colo. Apr. 29, 2022) (Trellis).

6 *Id.*

7 *Id.* at 12–13.

8 *Id.* at 11–13.

9 *Id.* at 11–14.

10 Amended Complaint at 11–14, *Lilgerose* (Trellis) (No 2022CV30421).

11 *Id.*

12 Adam Davidson, *Administrative Enslavement*, 124 COLUM. L. REV. 633, 653–65 (2024) [hereinafter Davidson, *Administrative Enslavement*].

No exceptions. Article II, § 26 of the Colorado Constitution went from a near duplicate of the Thirteenth Amendment—containing the clause "except as a punishment for crime, whereof the party shall have been duly convicted"[13]—to stating simply, "There shall never be in this state either slavery or involuntary servitude."[14] This was the first in a growing line of popular state constitutional amendments that successfully removed Except Clauses as a matter of state law.[15]

While it was not clear what removing the exception might mean—there are, after all, consequences for refusing to work whether one is incarcerated or not—one would seemingly expect *something* to change in the Colorado prisons as a result of this constitutional amendment. But according to Lilgerose and Mortis, nothing did. Just as before the amendment, they were required to work in a job not of their choosing, for pay they could not negotiate, and subject to punishment by their jailer/employer if they refused. All of these would be prohibited by the Thirteenth Amendment for workers outside of jails and prisons.

This Article seeks to answer two questions, one immediate and one existential. The immediate question is how the state constitutional amendments like Colorado's that have swept the country should be interpreted and how the organizers behind them might shape their eventual interpretation by the courts or other legal actors. These organizers have chosen the battlefield of the law and, more specifically, of state constitutional law to make the change they want to see in the world. That field, while steeped in social and political considerations, is ultimately shaped by legal structure. This means that even if those social or political motivations control the eventual outcome of many cases, it is through legal frameworks that those outcomes are reached. Far from being merely a problem of process, however, law provides constraints that, even if they can be overcome with sufficiently strong political will, make certain outcomes more or less likely. Sometimes, an opinion just "won't write,"[16] or a legislative goal cannot

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13 H.R. Con. Res. 18-1002, 68th Leg., 2d Reg. Sess. (Colo. 2018).

14 COLO. CONST. art. II, § 26.

15 Davidson, *Administrative Enslavement*, *supra* note 12, at 640–41 (recounting successful measures in Utah, Nebraska, Alabama, Vermont, Oregon, and Tennessee).

16 Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1284 n.2, 1303 (2008).

be fulfilled consistent with constitutional strictures, no matter how creative the drafters.[17]

This analysis comes at a pivotal moment. While a number of states have passed constitutional amendments, many more have not. And even in those states with new amendments, there has been little or no interpretation of them.[18] More than this, there has been sparse scholarly work on these amendments because commentators thus far have focused on limited interpretative issues instead of a comprehensive overview of their history and functioning within past and present carceral systems.[19] This lack of scholarly attention is compounded by the absence of legal organizations at the root of this movement. While some notable civil rights organizations have recently brought or supported suits under these provisions,[20] the overwhelming bulk of this organizing work has been done by nonlegal actors.[21] Organizers, litigators,

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[17] *See* Cooper v. Aaron, 358 U.S. 1, 17 (1958) (declaring that constitutional rights "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously'" (quoting Smith v. Texas, 311 U.S. 128, 132 (1940))).

[18] *See infra* Part II.B.1.

[19] Two recent pieces have begun to address the issue of state attempts to end slavery and involuntary servitude. *See generally* Michael L. Smith, *State Constitutional Prohibitions of Slavery and Involuntary Servitude*, 99 WASH. L. REV. 523 (2024); Ryanne Bamieh, Note, *The New Abolition: The Legal Consequences of Ending All Slavery and Involuntary Servitude*, 59 HARV. C.R.-C.L. L. REV. 245 (2024). Assistant Professor Michael Smith's article was the first to descriptively discuss the recent attempts to ban slavery and involuntary servitude in depth, and then–law student Ryanne Bamieh built on the descriptive account to argue that these amendments would entitle incarcerated workers to minimum wage protections. While these excellent works provide some descriptive and theoretical accounts of the passed amendments from which this Article draws, this Article attempts to go further both descriptively and normatively. Descriptively, it adds to Smith's and Bamieh's works by discussing many of the proposed changes to state law on this issue, which sheds light on the motivations of those enacting the changes, as well as other possibilities for solving this issue. It also discusses significant shifts in the field that occurred after their works were published. Normatively, this Article goes beyond analyzing the text of the amendments or the application of existing labor protections to further situate them within the history of slavery and involuntary servitude so as to suggest structural legal and political solutions, as well as additional litigation-based solutions and interpretations that differ from Smith's and Bamieh's, and it builds on Bamieh's discussion of prison labor organizing by incorporating the theory of interest convergence.

[20] *See, e.g.*, *Imprisoned Workers in Alabama Continue Legal Fight to Abolish Prison Slavery*, CTR. FOR CONST. RTS. (Nov. 20, 2024) [hereinafter *Imprisoned Workers in Alabama Continue Legal Fight*], https://perma.cc/CQ65-3RHK (detailing the Center for Constitutional Rights' litigation under the Alabama constitution); *Lilgerose v. Polis, et al.*, MACARTHUR JUST. CTR., https://perma.cc/Q5V4-9NPL (explaining the MacArthur Justice Center's involvement in a Colorado suit).

[21] ANDREW ROSS, TOMMASO BARDELLI & AIYUBA THOMAS, ABOLITION LABOR: THE FIGHT TO END PRISON SLAVERY 25–68 (2024).

and courts are thus faced with a potentially massive legal change and a paucity of guidance on how to interpret the text at that change's heart. A major goal of this Article is to begin to fill that gap.

But the broader underlying question that motivates this Article is how we might use the law to build and sustain a world with no slavery, no involuntary servitude, and no exceptions to those prohibitions. To answer these questions, this Article examines in depth those states that have banned slavery and involuntary servitude—with no exceptions—as a matter of state law, as well as other states that are attempting to do so. It begins with a disappointing, if not surprising, answer: changing the text of the law, even at the constitutional level, does not guarantee changes in people's lived experiences. Even if we assume that the reach of these laws affects only prison labor,[22] because prison is the ultimate company town, exerting a level of state-backed control over its incarcerated employees that industrialist George Pullman could only dream of,[23] breaking the status quo of forced labor will likely require an assault from many directions. Building on this insight, this Article highlights four categories that interact to build or undermine enduring changes to the status quo. These categories are the text of the amendment, litigation, government structure, and political changes.

The text of the amendment may seem like an obvious place to begin, but the diversity in states' language suggests the issue is undertheorized. While some state constitutional amendments simply remove the Except Clause from their state's version of the Thirteenth Amendment, others take more complicated routes. Utah, for example, includes a caveat that this ban "does not apply to the otherwise lawful administration of the criminal justice system."[24] In part, these differences likely arise because different constituencies are hoping to achieve different outcomes. While some hope to radically alter the labor power and working lives of incarcerated people, others seem to hope that the change is merely symbolic.[25] Beyond the amendments' text, the history of

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22 *But see infra* Part IV.

23 *See* Elizabeth Nix, *5 Famous Company Towns*, HISTORY (Oct. 7, 2014), https://perma.cc/2J78-C6PR (discussing the creation of Pullman, Illinois).

24 UTAH CONST. art. I, § 21(2).

25 This is not to suggest that symbolic wins are worthless. Organizers have regularly noted that even the symbolic prohibition on slavery can be an important, dignity-affirming win. The Abolish Slavery National Network, which has led the charge in getting state

these amendments is likely to be used to determine their scope. Indeed, legislative history in Colorado has already served to defeat some claims by incarcerated people.[26] Organizers, activists, and politicians promoting these amendments should consider whether language and history that is sufficiently specific (but perhaps narrower) or language that is sweeping (but nonspecific) would better suit their goals.

Focusing on the text of these amendments is a vital starting point because of the second line of change that this Article analyzes: litigation. Litigation over these newly passed amendments seems inevitable, but because interpretations of the Thirteenth Amendment and its statutory analogues have always been shaded by the presence of that Amendment's Except Clause, organizers, litigators, and courts have few, if any, truly analogous legal precedents to work from. This Article thus proposes two suites of suggestions. The first is related to the structure of litigation. It argues that instead of taking a defensive posture, proponents of these amendments should see litigation as an opportunity to empower incarcerated individuals to stand on and bolster their newly recognized rights. Most obviously, this would involve allowing individuals forced to work to seek damages and injunctive relief. But more broadly, this means thinking early and often about the many nonsubstantive tools that the law uses to avoid upholding rights. The second is about the adjudication of the right itself. While Thirteenth Amendment jurisprudence provides some insight, it is ultimately the protections provided by that jurisprudence that these state amendments find inadequate.[27] Its use as an analogue is thus, at best, imperfect. For this reason, litigants and courts should look to other areas of law beyond that amendment—this Article discusses one, the unconstitutional conditions doctrine—that seek to solve similar problems. Prison labor is not, after all, the only situation in which people

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constitutional amendments passed, states that "[i]t would be worth abolishing slavery and involuntary servitude even if it were primarily symbolic, as a healing symbol in divided times, and as a protection for the future." *See Frequently Asked Questions*, ABOLISH SLAVERY NAT'L NETWORK, https://perma.cc/9G9Z-BY72.

[26] Lamar v. Williams, 2022 WL 22924244, at *3 (Colo. App. Aug. 18, 2022) (holding that because statements in Colorado's legislative history "Blue Book" stated that "the voters did not intend to abolish the DOC inmate work program . . . . Lamar's complaint did not state a claim for relief").

[27] *See infra* Part I.C.

can be forced into contracts or government-imposed conditions that would violate their underlying rights.

Going to court, however, is not the only way to make legal change, and constitutions are not the only laws that matter. To highlight the possibility of structural change, this Article turns to a state statute. Structural changes might be best exemplified by New York's proposed law regulating the work done in its jails and prisons.[28] Those changes include the creation of a prison labor board with policymaking authority that incorporates a diverse slate of voices, including multiple formerly incarcerated members and members working in nonprofits on behalf of incarcerated people. They also include tying the rights of incarcerated labor to labor more broadly, such as by including incarcerated workers under the coverage of the minimum wage and occupational health and safety laws.[29]

Finally, organizers, activists, scholars, and politicians need to recognize the inherently political nature of this fight. The battle to kill slavery and involuntary servitude has raged in this country for centuries. The peculiar institution has morphed from chattel slavery, to debt peonage and convict leasing, to the intraprison maintenance that dominates forced labor in prisons today. This evolution has not primarily been the result of activist courts interpreting the federal or state constitutions but of political battles that have shaped the contours of allowable incarcerated forced labor. There is little reason to think that these latest legal attacks on slavery will be the institution's death knell. Instead, in addition to seeking formal legal change, proponents of these amendments should seek to politically empower the people affected by them. This might be done directly, such as by working to enable incarcerated and formerly incarcerated people to vote, or indirectly, perhaps by harnessing the power of organized labor by intertwining the political fates of incarcerated and nonincarcerated labor.

The rest of the Article proceeds in four parts. Part I details the current state of the world. It briefly explains how we got to

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[28] S. 416-A, 2021–2022 Leg., Reg. Sess. (N.Y. 2021). This, to be clear, is separate from New York's bill seeking to amend the state constitution to ban slavery and involuntary servitude. *See* State Assemb. 3412-B, 2023–2024 Leg., Reg. Sess. (N.Y. 2023) (proposing to amend the state constitution to say that "[n]either slavery nor involuntary servitude shall exist in the state of New York for persons convicted of crimes").

[29] N.Y. S. 416-A §§ 5–9.

where we are by telling the history of the development of slavery and involuntary servitude from chattel slavery to today's intra-prison labor focused work regime. It then explains the legal landscape that has enabled this regime and draws on descriptions from incarcerated people to explain the reality of current-day forced prison labor.

Part II turns to the amendments to state law, primarily constitutional but also legislative, that are seeking to ban slavery and involuntary servitude with no exceptions. It provides the most comprehensive cataloguing and categorization of both the amendments that have passed and those that have been proposed across the country in the legal literature. It also explores who is working to pass these amendments and their stated goals.

Parts III and IV theorize the various ways that organizers might shape, litigators might use, and courts might respond to the law of these amendments. It does this in search of a road that leads to achieving and sustaining a true and total prohibition on slavery and involuntary servitude. These Parts suggest four dimensions as promising, and potentially necessary, sites of change. Part III discusses three of them: the text of the amendments themselves, litigation over the meaning of these amendments, and changing the structures of government.

Part IV then turns to the final, and perhaps most important site: the interaction of law and society. It discusses the problem raised by recent pushback against these amendments and by the unwritten exceptions courts have found in the Thirteenth Amendment (i.e., a society that is willing to tolerate, for some, what for most it would call slavery). In doing so, it recognizes that the terms involuntary servitude and slavery are themselves deeply contested, and it offers several, at times competing, definitions. Ultimately, it recognizes that this Article, and indeed these laws, seem unlikely to be the final word on this issue. As a result, it argues that a key line of analysis for both organizers seeking to pass constitutional amendments and litigators working to interpret them should be how their work shapes the playing field for future political battles. As one example of how to do this, this Article suggests possibilities for using law to create interest convergence.

This analysis's ultimate aim is to set the field for continued engagement in the battle to end slavery and involuntary servitude in this country permanently. While this Article mostly analyzes them separately, in fact, the goal of working along all of

these fronts is to design a new legal and political economy that, contrary to the one that has existed thus far, makes slavery and involuntary servitude of all types unsustainable as a matter of both law and policy. Ultimately, this Article takes this tactic out of recognition that the movement to amend state constitutions is only the latest salvo in the four-hundred-year-long fight to fully eradicate what Frederick Douglass called "a system as barbarous and dreadful, as ever stained the character of a nation."[30] This is unlikely to be the final fight, so the goal of this Article is not to win the war against slavery once and for all, but to theorize how we might create as favorable a battlefield as possible for the future.

I. FROM CHATTEL SLAVERY TO SLAVES OF THE STATE

This Part explores how the practice of modern prison slavery has come to be. It briefly describes the history of forced prison labor from the Black Codes immediately after the Civil War to the current era of mass incarceration and intraprison work. It explains the legal rulings and statutory regime that undergird this system. Finally, this Part combines the many writings of incarcerated people describing their experiences with commentators' analyses to describe the system of prison slavery as it exists today.[31]

A. The History

With the Civil War won, Congress set out to amend the Constitution to ensure that the evil of slavery would never again occur in this nation. To effectuate this goal, they passed the Thirteenth Amendment.[32] The congressmen who passed it seemed to believe that they had succeeded. Senator Lyman Trumbull, for example, stated that unlike the subconstitutional actions taken through military or executive orders, the Thirteenth Amendment would mean that "not only does slavery cease, but it can never be reestablished

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[30] Frederick Douglass, *What to the Slave Is the Fourth of July?* (July 5, 1852), *originally printed in* FREDERICK DOUGLASS' PAPER, July 9, 1852, at 3 (available at https://www.loc.gov/resource/sn84026366/1852-07-09/ed-1/?sp=3&st=image&r=-0.834,-0.08,2.668,1.593,0).

[31] *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 524 (2021) (noting the importance of "foreground[ing] prisoners' narratives" because "[t]oo often, legal academic writing marginalizes the voices of those subject to the law" and highlighting the need to "amplify prisoners' voices and place prisoners alongside sources of authority more familiar to the pages of law reviews").

[32] U.S. CONST. amend. XIII.

by State authority."[33] Likewise, Senator Henry Wilson stated that "[t]he incorporation of this amendment into the organic law of the nation will make impossible forevermore the reappearing of the discarded slave system, and the returning of the despotism of the slavemasters' domination."[34]

But within that amendment was a ticking time bomb that would soon explode. Section 1 of the Thirteenth Amendment, based on language from the Northwest Ordinance,[35] states in full, "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."[36] That exception would soon take on a life of its own, and its vitality would continue into the present day.

Almost immediately after the Civil War, the South realized that the Thirteenth Amendment's Except Clause could allow for something close to the reinstantiation of the defunct chattel slavery system.[37] Its first attempts involved explicit Black Codes.[38] These laws explicitly targeted people by race and criminalized the most basic incidents of life.

Mississippi's code serves as an exemplar. It punished by fine or imprisonment "keep[ing] or carry[ing] firearms of any kind, or any ammunition, dirk, or Bowie knife" and provided the same for:

> [A]ny freedman, free Negro, or mulatto committing riots, routs, affrays, trespasses, malicious mischief, cruel treatment to animals, seditious speeches, insulting gestures, language, or acts, or assaults on any person, disturbance of the peace, exercising the function of a minister of the Gospel

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33 CONG. GLOBE, 38th Cong., 1st Sess. 1314 (1864); *see also* James Oakes, *"The Only Effectual Way": The Congressional Origins of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 115, 126 (2017).

34 CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

35 *See* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1474–75, 1497–1500 (2019) [hereinafter Pope, *Mass Incarceration]*; Oakes, *supra* note 33, at 124–26.

36 U.S. CONST. amend. XIII, § 1 (emphasis added). Section 2 empowers Congress to enforce the amendment "by appropriate legislation." *Id.* § 2.

37 Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 933–41 (2019) [hereinafter Goodwin, *Modern Slavery*].

38 *Id.*

> without a license from some regularly organized church, [or] vending spirituous or intoxicating liquors . . . .[39]

As Mississippi's code shows, when a Black person was convicted under these laws, their punishment included a fine or imprisonment. Often, they would be unable to pay the fine, so all roads truly led to incarceration. But instead of being confined to a cell, the convicted person would be forced to work, possibly for the state but often for a private party.[40]

The combination of the Civil Rights Act of 1866[41] and the Fourteenth Amendment[42] put an end to this sort of explicit racial targeting, but "[e]ven as Congress debated the Act, state legislators were already beginning to legislate in race-neutral language, leaving discrimination to the discretion of individual law enforcement officers and judges."[43] This created a now familiar sight: a system that was explicitly race neutral, but which practically created racially disproportionate results.[44]

Like under the more explicit Black Codes, when someone was convicted, they were punished with a fine or with imprisonment at hard labor.[45] These fines were not small. As Professor Michele Goodwin described, the $50 fine imposed by some laws was the equivalent of over $1,000 in 2017 dollars.[46] When a formerly enslaved person could not pay, the market was ready and willing to take on their service. After all, there was an easy business case for the practice: "[C]onvict labor 'cost less than free labor.'"[47]

To fully describe the scope of this system would take numerous volumes. Though I have described it simply, the all-encompassing

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[39] *Mississippi Black Codes (1865)*, HISTORY IS A WEAPON, https://perma.cc/CE2N-7A23 (Penal Code §§ 1, 2). White people were similarly prohibited from providing these things to Black people. *Id.* (Penal Code § 3).

[40] *See* William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 57 (1976).

[41] Ch. 31, 14 Stat. 27 (1866).

[42] U.S. CONST. amend. XIV.

[43] Pope, *Mass Incarceration*, *supra* note 35, at 1503.

[44] *Id.* at 1503–04, 1504 n.206 (citing sources which found white people often made up less than 16% of those subjected to convict leasing). Nevertheless, as Professor James Gray Pope noted, "white Southerners proved unexpectedly willing to sacrifice members of their own race in order to sustain the supply of unfree labor." *Id.* at 1503.

[45] Goodwin, *Modern Slavery*, *supra* note 37, at 937–38.

[46] *Id.* at 938.

[47] *Id.* at 944 (quoting William Warren Rogers & Robert David Ward, *The Convict Lease System in Alabama*, *in* THE ROLE OF CONVICT LABOR IN THE INDUSTRIAL DEVELOPMENT OF BIRMINGHAM 1, 1 (1998)).

nature of the system was as impressive as it was devious. Not only did it criminalize regular behaviors by Black folks, it worked to ensure that white and powerful people did not defect from the racialized labor project. Enticement acts, for example, made it illegal to convince someone to leave their current employer, including "by offering higher wages,"[48] and emigrant agent statutes punished those who helped move labor from one state to another.[49] Children were "'apprenticed' to their former masters" when they were orphaned or their now-free parents were deemed "inadequate."[50]

And debt peonage created an "everturning wheel of servitude" by criminalizing the failure to fulfill labor contracts, usually in the form of not repaying a salary advance.[51] Once convicted, the indebted person would be required to either pay a fine (that they could not afford) or be sentenced to imprisonment at hard labor. Hard labor for the state was horrifically deadly.[52] Death was so common that the phrase "one dies, get another" described the philosophy of some lessors.[53] So suretors would step in to allow convicted people to "choose" to pay the fine in exchange for a term of labor for them.[54] These surety contracts would lead to the convicted person working for significantly longer than they would have for the state.[55] And if the now-further-indebted laborer stopped working for their suretor, they could be convicted for violating the surety contract, and the cycle would begin anew.[56]

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48 Cohen, *supra* note 40, at 35.

49 *Id.*

50 Tiffany Yang, *Public Profiteering of Prison Labor*, 101 N.C. L. REV. 313, 330 (2023) (quoting DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE REENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53 (2008)); *see also* Goodwin, *Modern Slavery*, *supra* note 37, at 949–50.

51 United States v. Reynolds, 235 U.S. 133, 146–47 (1914).

52 *See, e.g.*, Cohen, *supra* note 40, at 56 (finding that 44.9% of convicted people sent to work on South Carolina's Greenwood and Augusta Railroad between 1877 and 1880 died).

53 Peter Wallenstein, *Slavery Under the Thirteenth Amendment: Race and the Law of Crime and Punishment in the Post-Civil War South*, 77 LA. L. REV. 1, 16–18 (2016). *See generally* MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928 (1996).

54 Cohen, *supra* note 40, at 53–55. As historian William Cohen noted, this was a process that operated both within and outside of the courts because there existed a variant of surety contract in which the suretor bailed someone out before trial and "[t]he authorities then dropped the matter" as a result. *Id.* at 53.

55 *Id.* at 54.

56 *Reynolds*, 235 U.S. at 150 (Holmes, J., concurring) ("The successive contracts, each for a longer term than the last, are the inevitable, and must be taken to have been the contemplated outcome of the Alabama laws.").

The decline of surety contracts and convict leasing did not spell the end of prison slavery. Instead, it evolved. This evolution had two strands which created the state of prison labor we find today, in which the majority of work done occurs within the prison and is done for the benefit of the state. First, the successful popular, political, and legal battle against convict leasing made the horrors of that system well-known,[57] and if for no other reason than its unpopularity, both states and private companies sought to avoid falling back into its depths.[58] Second is the role of free labor.[59]

The labor movement has long recognized that incarcerated people could serve as a reserve force of workers that would undermine its attempts to secure advances for free labor. Strikes can only be so effective when thousands, and now millions, of convicted people might be forced to take a striking worker's place under the threat of grievous punishment. To prevent this, free labor has fought to limit the possibilities of incarcerated labor.[60] This opposition began as an entreaty to "preserve the dignity of free labor," but "[b]y 1900 . . . the economic threat of prison labor became more prominent."[61] After decades of organizing, the combination of the horror of the convict lease system and the

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57 *See, e.g.*, BUREAU OF LAB. STAT., CONVICT LABOR IN 1923, at 18 (1925) (available at https://perma.cc/95ZV-A7NX) (describing that the state of convicted labor in 1923 said that the then-dying "lease system is now looked back upon as little more than legalized and ofttimes barbaric slavery"); DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 63–84 (1996); *Reynolds*, 235 U.S. at 150 (striking down the surety system in Alabama); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2:* The Peonage Cases, 82 COLUM. L. REV. 646, 660–702 (1982); Wallenstein, *supra* note 53, at 15 (describing the book and film *I Am a Fugitive from a Georgia Chain Gang!*).

58 *See, e.g.*, Ward M. McAfee, *A History of Convict Labor in California*, 72 S. CAL. Q. 19, 28 (1990) (noting that some options for what incarcerated laborers could do were off the table because "the public would not tolerate chain-gang or gun-guard methods" of roadwork); Robin McDowell & Margie Mason, *Prisoners in the US are Part of a Hidden Workforce Linked to Hundreds of Popular Food Brands*, AP NEWS (Jan. 29, 2024), https://apnews.com/article/prison-to-plate-inmate-labor-investigation-c6f0eb4747963283316e494eadf08c4e (quoting Whole Foods as saying "Whole Foods Market does not allow the use of prison labor in products sold at our stores").

59 *See* Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 358–70 (1998) (describing organized labor's role in closing off the market to goods and labor from incarcerated people).

60 *Id.*

61 *Id.* at 359.

Great Depression forced political actors to limit prison labor legislatively.[62] In 1940, this culminated in a federal ban on the interstate transportation and sale of goods made by imprisoned people.[63] This has created a world in which free labor is meant to be productive but incarcerated labor's productivity is cabined and primarily for the benefit of the state. For example, although incarcerated people continue to make goods (license plates being one infamous example), many jurisdictions limit to whom those goods can be sold.[64] Usually, the buyers of these goods are other government entities.[65] Of course, this is not an entirely state-focused system, as numerous private companies have used and continue to use incarcerated labor.[66]

But the work done in modern prison slavery overwhelmingly benefits the state. Although prison slavery has always benefited the state in some way, what is different today is that, unlike in the era of convict leasing when private entities paid the state to use imprisoned people's labor, the state does not benefit because of the revenue that incarcerated people produce. Instead, the state benefits because prison slavery leads to cost savings.[67] As the American Civil Liberties Union (ACLU) and the University of Chicago Law School Global Human Rights Clinic recently found, approximately 80% of prison labor today is "maintenance labor," like cooking and cleaning, that allows the state to avoid paying market wages for work necessary to the running of a prison.[68]

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62 *Id.* at 361–70.

63 *Id.* at 367; *see also* 18 U.S.C. § 1761.

64 *See, e.g.*, 18 U.S.C. § 1761 (banning interstate transportation of prison-made goods).

65 *See, e.g.*, *id.* § 1761(b) (excepting from the ban on prison-made goods in interstate commerce "commodities manufactured in a Federal, District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State or not-for-profit organizations").

66 *See* Goodwin, *Modern Slavery*, *supra* note 37, at 960–63 (noting that "the companies that purchase prison labor or the products developed in whole or in part from the prison system include elite brands and Fortune 500 companies").

67 This is, of course, a generalization. Because incarcerated people continue to produce goods that states sell, states can and do take in revenue based on incarcerated people's labor. *See, e.g.*, ROSS ET AL., *supra* note 21, at 47 (noting that California's "prison industry program . . . generat[es] $60 million in gross profits from more than 1400 goods and services produced by 7000 prisoners in 45 adult facilities").

68 *See* ACLU & GLOBAL HUMAN RIGHTS CLINIC, *supra* note 4, at 27–36.

B. The Law

It is difficult to overstate how important the law has been and remains to the functioning of slavery. Law enabled the regime of convict leasing and the surety system, and law also played a role in bringing those regimes to a close.[69] So too today. Modern prison slavery exists within the context of a legal system that I have previously called administrative enslavement.[70]

As I have defined the term, "[a]dministrative enslavement is [the] systemic, broad jurisprudential reading of the Except Clause combined with legislation transferring prison-slavery decisions into the hands of prison bureaucrats."[71] As this definition suggests, administrative enslavement involves the intersection of both judicial and legislative choices. First, in a series of cases throughout the twentieth century, the federal courts read the Thirteenth Amendment narrowly and the Except Clause broadly, so that every incarcerated person—whether convicted or not—could be forced to do at least some work.[72]

While it is unclear where the proposition originated,[73] from at least the 1940s onward, courts have nearly universally held that, once a person is convicted, they fall within the ambit of the Except Clause and have no Thirteenth Amendment protection.[74] This is true even if their conviction remains on appeal.[75] And the Except Clause takes full effect even when someone is not told that slavery or involuntary servitude is part of the punishment they are receiving for their conviction.[76] Indeed, a state does not even have to have a statute on the books saying "that labor is part of the punishment for any given conviction (or all convictions)."[77] Despite the lessons purportedly learned from convict leasing, the

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69 *See generally, e.g.*, Bailey v. State of Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207 (1905); *Reynolds*, 235 U.S. 133 (1914).

70 Davidson, *Administrative Enslavement*, *supra* note 12, at 639.

71 *Id.*

72 *See id.* at 651–71.

73 *See id.* at 653–55.

74 *See* Ali v. Johnson, 259 F.3d 317, 318 (5th Cir. 2001) (calling one of the few opinions to depart from this holding "an anomaly in federal jurisprudence").

75 *See* Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963).

76 *See Ali*, 259 F.3d at 318; Reno v. Garcia, 713 F. App'x 355, 356 (5th Cir. 2018) ("This court has held that an inmate sentenced to imprisonment, even when the prisoner is not explicitly sentenced to hard labor, cannot state a viable Thirteenth Amendment claim if the prison system requires him to work.").

77 Davidson, *Administrative Enslavement*, *supra* note 12, at 664 (citing *Ali*, 259 F.3d at 318 n.2).

courts have approved not only labor for the benefit of the state, but for private parties too.[78]

This is, as my earlier work has noted, not how our system usually treats punishment.[79] Instead of providing robust ex ante protections before someone is punished to slavery and involuntary servitude, people are left to discover this aspect of their punishment once they are already incarcerated. Unlike the other punishments attached to a criminal conviction, from arrest to sentencing, neither a judge nor a lawyer is required to mention the loss of a person's Thirteenth Amendment rights upon conviction.[80]

This broad reading of the Except Clause combines with a narrow reading of the rest of the Thirteenth Amendment to ensure maximum availability of incarcerated labor to the state. The courts have recognized several "exceptional" practices that might appear to be involuntary servitude but nevertheless fall outside the scope of the Thirteenth Amendment.[81] These include "military conscription during wartime, forced labor on the public roads, mandatory jury service, contracts of sailors, parents controlling their children, and the provision of evidence."[82]

But more relevant here is what has come to be called the "housekeeping" exception, which allows the state to force not-convicted-but-imprisoned people to work without pay under threat of punishment.[83] So long as the work involves "personally related housekeeping chores"[84] or is "therapeutic," mandating it does not violate the Thirteenth Amendment.[85] Narrowly construed, this exception might seem inoffensive. After all, it would seem near ridiculous if incarcerated people did not have to, for

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78 *See, e.g.*, Murray v. Miss. Dep't of Corr., 911 F.2d 1167, 1168 (5th Cir. 1990) (per curiam) ("[W]e can find no basis from which to conclude that working an inmate on private property is any more violative of constitutional or civil rights than working inmates on public property.").

79 *See* Davidson, *Administrative Enslavement*, *supra* note 12 , at 685–96 (explaining how treating forced prison labor as punishment, as the Thirteenth Amendment suggests, would require the application of numerous constitutional doctrines like separation of powers and due process).

80 *See id.*

81 *See id.* at 665; *see also* Butler v. Perry, 240 U.S. 328, 333 (1916).

82 Davidson, *Administrative Enslavement*, *supra* note 12, at 665.

83 *See id.* at 668–71. *See generally* Andrea C. Armstrong, *Unconvicted Incarcerated Labor*, 57 HARV. C.R.-C.L. L. REV. 1 (2022) [hereinafter Armstrong, *Unconvicted Incarcerated Labor*].

84 McGarry v. Pallito, 687 F.3d 505, 514 (2d Cir. 2012).

85 Davidson, *Administrative Enslavement*, *supra* note 12, at 669.

example, throw away their trash.[86] But courts have been surprisingly permissive in deciding what counts as a "personally related housekeeping chore." They have rebuffed claims when incarcerated plaintiffs were forced "to clean the jail's windows," to work at a food cart during meal service, to clean a mess made by someone else in a cell they had just moved into, to provide translation services, to work on a jail employee's personal automobile restoration project, and even to complete an "eight-hour shift in the Food Services Department."[87]

These judicial doctrines are bolstered by a suite of legislative choices that shift slavery and involuntary servitude away from the realm of punishment and into the world of prison administration. States and the federal government almost uniformly place those parts of their code dealing with prison labor into sections different from those detailing criminal punishments.[88] Only Alabama and Wisconsin "mention hard labor as being required in conjunction with [at least some] prison sentences."[89] Instead, these jurisdictions relegate their regulation of prison labor to those sections of the code addressing prison regulation.[90]

While the placement of an issue within a jurisdiction's code may seem ministerial, here that placement mimics the allocation of power. Jurisdictions empower prison administrators to impose and control the punishments of slavery and involuntary servitude at the same time that they require judges to impose other criminal punishments.[91] Some states go as far as allowing prison administrators to determine whether to have forced work programs *at all*.[92]

As this discussion suggests, despite their commonalities, there is some diversity within jurisdictions' statutory regimes.

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86 *Cf.* Bijeol v. Nelson, 579 F.2d 423, 424 (7th Cir. 1978) ("A pretrial detainee has no constitutional right to order from a menu or have maid service.").

87 Armstrong, *Unconvicted Incarcerated Labor*, *supra* note 83, at 38–43. As Professor Andrea Armstrong noted, the courts have not been universally expansionary in this area. Instead, they have occasionally restricted the availability of the housekeeping exception when a private entity is gaining the benefit of the imprisoned person's labor or when the plaintiffs are unusually sympathetic. *See id.* at 42–43.

88 Davidson, *Administrative Enslavement*, *supra* note 12, at 673–76.

89 *Id.* at 673 n.230 (citing Ala. Code § 13A-5-6 (2024) (felonies); *id.* § 13A-5-7 (misdemeanors); Wis. Stat. & Ann. § 973.013(1)(b) (2024) (indeterminate sentences to Wisconsin state prisons)).

90 *Id.* at 676–80.

91 *See id.*

92 *Id.* at 677 (discussing Delaware, Arizona, and Georgia).

Some states say, for example, that labor should be voluntary, while others say that work is mandatory for every incarcerated person, and still others say that the jurisdiction has a policy that imprisoned people should work without mandating that each person does.[93] But perhaps the greatest unifier among these legislative regimes is the absence of punishment. "Indeed, only Vermont's constitutional provision providing for hard labor explicitly mentions the word 'punishment.'"[94] Statutes instead give four reasons for requiring incarcerated people to work: "providing restitution, preventing idleness, encouraging rehabilitation, and saving the jurisdiction money."[95]

C. Commentary

Given the unanimity with which every branch of government has spoken on this issue, one might expect that commentators too would be aligned. But commentators have pushed back at nearly every turn. Perhaps most prominent is the group of scholars who seek to force the Thirteenth Amendment to live up to its full liberatory promise. Numerous scholars have analyzed the Thirteenth Amendment within the perhaps obvious context of labor generally.[96] But others have suggested that the Thirteenth Amendment has a role to play in reproductive rights,[97]

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[93] Davidson, *Administrative Enslavement*, *supra* note 12, at 683–85. As the discussion in *Administrative Enslavement* suggests, however, these variations may in practice operate similarly.

[94] *Id.* at 680 (quoting VT. CONST. ch. II, § 64).

[95] *Id.* at 680–81 (footnotes omitted).

[96] *See, e.g.*, Ifeoma Ajunwa & Angela Onwuachi-Willig, *Combating Discrimination Against the Formerly Incarcerated in the Labor Market*, 112 NW. U. L. REV. 1385, 1407–14 (2018) (arguing "that, to finally jettison prison labor practices as a particular remnant of racial slavery in the United States, prison labor cannot exist alongside private firm policies that compound the exclusion of the formerly incarcerated from the labor market"); Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 872 (2012) (examining penal plantation labor); Mary Rose Whitehouse, *Modern Prison Labor: A Reemergence of Convict Leasing Under the Guise of Rehabilitation and Private Enterprises*, 18 LOY. J. PUB. INT. L. 89, 109–12 (2017) (advocating for a presumption that all prison laborers are covered under the Fair Labor Standards Act); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 861 (2008) (considering prison labor as a "window onto the much larger field of employment's economic character"); Amy L. Riederer, Note, *Working 9 to 5: Embracing the Eighth Amendment Through an Integrated Model of Prison Labor*, 43 VALPARAISO U. L. REV. 1425, 1461 (2009) (discussing convict leasing).

[97] 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, 123–24 (2013) (connecting the lack of abortion rights for imprisoned

in preventing sexual assault in prison,[98] in racial equality and policing,[99] and in other issues.[100] As Professor Jamal Greene once suggested, this Thirteenth Amendment optimism has seemingly pervaded the academy, despite courts' unwillingness to adopt these ideas.[101]

Most relevant here, however, are those commentators who address the Except Clause, and the regime of forced labor it enables, directly. Professor Raja Raghunath argued that the courts' interpretation of the Thirteenth Amendment and Except Clause were part of a broader regime of deference to prison officials and that this coincided with differing treatments of the word "punishment" in the courts' interpretation of the Thirteenth versus the Fifth and Eighth Amendments.[102] Then–law student Wafa Junaid has argued that reading these three amendments together suggests that convicted people must be explicitly sentenced to labor in order to fall within the scope of the Except Clause.[103]

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women to "chattel breeding" in slavery); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1245 (2012) (connecting the shackling of incarcerated pregnant people to "Black women's subjugation during slavery" and other past eras of punishment).

98 I. India Thusi, *Girls, Assaulted*, 116 NW. U. L. REV. 911, 954–57 (2022).

99 Donald C. Hancock, *The Thirteenth Amendment and the Juvenile Justice System*, 83 J. CRIM. L. & CRIMINOLOGY 614, 615–16 (1992) (discussing the Thirteenth Amendment's role in punishing juveniles); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1111 (2020) (arguing that "Congress must exercise its broad powers under the Thirteenth Amendment and propose several legislative measures that effectively abolish the current institution of policing while reimagining public safety"); Fareed Nassor Hayat, *Abolish Gang Statutes with the Power of the Thirteenth Amendment: Reparations for the People*, 70 UCLA L. REV. 1120, 1130–31 (2023) (discussing antigang statutes within the context of badges and incidents of slavery); Michael A. Lawrence, *The Thirteenth Amendment as Basis for Racial Truth & Reconciliation*, 62 ARIZ. L. REV. 637, 669–73 (2020) (arguing for a racial truth and reconciliation law through a Thirteenth Amendment lens).

100 *See, e.g.*, Zoë Elizabeth Lees, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 63, 90–95 (2012) (arguing that payday lending perpetuates the badges and incidents of slavery); Jeffrey S. Kerr, Martina Bernstein, Amanda Schwoerke, Matthew D. Strugar & Jared S. Goodman, *A Slave by Any Other Name Is Still a Slave: The* Tilikum *Case and Application of the Thirteenth Amendment to Nonhuman Animals*, 19 ANIMAL L. 221, 225–28 (2013) (examining the question whether the Thirteenth Amendment protects "nonhuman animals").

101 Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1733–34 (2012) (collecting further examples of this optimism).

102 Raja Raghunath, Note, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 427–34 (2009).

103 Wafa Junaid, Note, *Forced Prison Labor: Punishment for a Crime?*, 116 NW. U. L. REV. 1099, 1115 (2022).

Goodwin has argued that "the Thirteenth Amendment [forbade] one form of slavery while legitimating and preserving others," and as a result, today "not only is the prison slave system vibrant, it produces profits and wealth for those who exploit prison labor."[104] And Professor Cortney Lollar has explored how criminal financial obligations have allowed for the reintroduction of chattel-like slavery through the Except Clause.[105]

Others have taken a different tactic, attacking the current state of Thirteenth Amendment jurisprudence as a matter of history. Professor James Gray Pope, for example, has argued that the current interpretation of the Amendment is akin to that pushed by former Confederates instead of the one presumed by the Republican framers who adopted it after the Civil War.[106] And Professor Scott Howe has argued that the Except Clause, both in terms of its original public meaning and as it has been interpreted, in fact allows for many of the horrors of chattel slavery that many people, including President Abraham Lincoln, believed were forever banned.[107]

Recent work has also explored more fully the Except Clause's doctrinal underpinnings. My article *Administrative Enslavement* seeks to excavate the doctrine's origins and catalogue its implementation by legislatures[108] while Professor Andrea Armstrong's *Unconvicted Incarcerated Labor* sheds light on the underappreciated phenomenon of forced labor by those incarcerated people who had not been convicted of a crime.[109]

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[104] Goodwin, *Modern Slavery*, *supra* note 37, at 908–09; *see* Michele Goodwin, *The Thirteenth Amendment's Punishment Clause: A Spectacle of Slavery Unwilling to Die*, 57 HARV. C.R.-C.L. L. REV. 47, 83 (2022).

[105] Cortney E. Lollar, *The Costs of the Punishment Clause*, 106 MINN. L. REV. 1827, 1850–52 (2022).

[106] Pope, *Mass Incarceration*, *supra* note 35, at 1533–38.

[107] 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, 987–88 (2009).

[108] *See generally* Davidson, *Administrative Enslavement*, *supra* note 12. I have also made similar arguments to the United States Sentencing Commission. *See* Adam Davidson, *United States Sentencing Commission, 2024-2025 Amendment Cycle, Public Comment on Proposed Priorities*, 89 Fed. Reg. 48,029, at 904–13 (July 15, 2024) (available at https://perma.cc/G9WU-Z4VZ).

[109] *See generally* Armstrong, *Unconvicted Incarcerated Labor*, *supra* note 83.

As this Section's discussion of doctrine suggests, this commentary has rarely been adopted by the courts.[110] But recent history suggests it has been more than academics tilting at windmills. As Parts II and III discuss, activists, the people, and now state legislatures have become motivated to end the practice of prison slavery, and this robust commentary may serve as a guide forward.

D. Slavery and Involuntary Servitude Today

"When people say this is modern day slavery—this ain't no modern day slavery. This shit *is* slavery."[111]

The scope of prison labor in the modern United States is surprisingly vast. There are over 1.2 million people incarcerated in state and federal prisons, and the ACLU and the University of Chicago Global Human Rights Clinic has estimated that about 800,000 incarcerated people work.[112] Of these 800,000 incarcerated workers, over three-quarters of them must work or suffer punishment.[113] A recent cost-benefit analysis of this system found that paying incarcerated workers fair wages would lead to paying them between $11.6 and $18.8 billion per year.[114] It also found that "the fiscal and social benefits of ending slavery and involuntary servitude" would "far outstrip" the fiscal costs, leading to an expected return of between $2.40 and $3.16 on every dollar spent

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[110] In a similar vein, this Article leaves largely unexplored the role of international law in regulating (or, more accurately, failing to regulate) prison slavery in the United States. Though the United States has taken several steps to end forced prison labor in the international arena, *see, e.g.*, *The National Action Plan to Combat Human Trafficking*, THE WHITE HOUSE (Dec. 2021), https://perma.cc/BZ5V-4YLE, it has not used those international commitments to motivate domestic reform. The ability to do so is a ripe area for future research and organizing. *See, e.g.*, Miriam Berger, *U.S. Among 17 Countries that Practice Forced Labor, a Form of "Modern Slavery," Report Finds*, WASH. POST (May 25, 2023), https://www.washingtonpost.com/world/2023/05/25/slavery-united-states-forced-prison-labor/; Walk Free, *Guardians & Offenders: Examining State-Imposed Forced Labour*, https://perma.cc/FCL5-2DR6 (noting "that state-imposed forced labour occurs in public and private prisons around the world, including . . . [in] the United States").

[111] Daniele Selby, *How a Wrongly Incarcerated Person Became the "Most Brilliant Legal Mind" in "America's Bloodiest Prison"*, INNOCENCE PROJECT (Sept. 17, 2021) [hereinafter Selby, *Most Brilliant Legal Mind*] (emphasis in original), https://perma.cc/8KXE-7QY8 (quoting Calvin Duncan, who was exonerated after twenty-eight years of incarceration).

[112] ACLU & GLOBAL HUMAN RIGHTS CLINIC, *supra* note 4, at 5, 24, 47.

[113] *Id.* at 5.

[114] EDGEWORTH ECONOMICS, A COST-BENEFIT ANALYSIS: THE IMPACT OF ENDING SLAVERY AND INVOLUNTARY SERVITUDE AS CRIMINAL PUNISHMENT AND PAYING INCARCERATED WORKERS FAIR WAGES 2 (2024) (available at https://perma.cc/M8GN-AD8N).

of payroll costs.[115] Given the high proportion of incarcerated people who do work, and who are forced to work, "the incarcerated labor force is undoubtedly disproportionately made up of people who are Black, relative to their overall representation in the general population."[116]

This work is severely underpaid, if it is paid at all. In 2017, the Prison Policy Initiative found that average wages for prison work ranged from $0.14 to $1.41 per hour for work in state-owned businesses.[117] But "regular prison jobs [were] still unpaid in Alabama, Arkansas, Florida, Georgia, and Texas."[118] These wages were also calculated before "any deductions, which in reality often leave incarcerated workers with less than half of their gross pay."[119] They also do not account for the expenses that incarcerated people face as they attempt to have something remotely resembling a fulfilling life. Prisons have long charged exorbitant rates for common items bought at the prison commissary.[120] And it was only in 2023 that legislation passed to curb the high rates charged for incarcerated people to make phone calls.[121]

As the prior Section discussed, the work incarcerated people do overwhelmingly benefits the state, not private industry. About 1% of incarcerated people work for private companies through the federal program that allows such placements, and about 6% of incarcerated people in state prisons "work for state-owned 'correctional industries.'"[122]

Thus far, this Article has described the history that led to modern prison labor, explained the law that undergirds it, and added some context to provide a sense of the system's scope.

But it has not said much at all about what the practice actually entails. For that task, this Section turns in large part to the

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115 *Id.*

116 ACLU & GLOBAL HUMAN RIGHTS CLINIC, *supra* note 4, at 25.

117 Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://perma.cc/RK22-52FS.

118 *Id.*

119 *Id.*

120 *See, e.g.*, Elizabeth Weill-Greenberg & Ethan Corey, *Locked In, Priced Out: How Prison Commissary Price-Gouging Preys on the Incarcerated*, THE APPEAL (Apr. 17, 2024), https://perma.cc/LW92-W49R.

121 *See* Juliana Kim, *Biden Signs a Bill to Fight Expensive Prison Phone Call Costs*, NPR (Jan. 6, 2023), https://perma.cc/UA7A-AP2Z (describing the Federal Communications Commission's attempts to cap prison phone call rates).

122 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://perma.cc/H5V2-3KWG.

words of those who have lived, and who continue to live, within the system.

The quote that opened this Section is how Calvin Duncan, who spent over twenty-eight years in prison after being wrongfully convicted, described Angola, the Louisiana State Penitentiary.[123] The description was apt. Angola the penitentiary used to be Angola the plantation. Named for the country "from which most of the people enslaved on the plantation originated," much of the work done there—and who does that work—has not changed since the nineteenth century.[124] From then until today, men—mostly Black—have picked cotton, corn, and other crops while armed men on horseback—mostly white—oversaw their work.[125] Through degrading heat and blistering cold, these men would fill sacks of cotton that weighed up to seventy pounds, and would be punished if they did not pick enough.[126] This was a usual sight at Angola, as "[a]lmost all incarcerated people . . . at Angola spend their first 90 days working in the fields."[127] But as Henry James found while he was incarcerated there, that ninety-day clock could be reset whenever you had discipline issues—or when a guard said that you had discipline issues.[128] Then you could be "sent to 'the dungeon'—otherwise known as solitary confinement," where incarcerated people did not have access to necessities like pen, paper, or the law library.[129]

For those who escaped the fields, other less physically grueling work awaited. Harkening back to the invidious distinction between those enslaved people who worked in the house and the

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123 Selby, *Most Brilliant Legal Mind*, *supra* note 111.

124 Daniele Selby, *A Mistaken Identification Sent Him to Prison for 38 Years, but He Never Gave Up Fighting for Freedom*, INNOCENCE PROJECT (Sept. 17, 2021), https://perma.cc/Q3RJ-V6EZ [hereinafter Selby, *Mistaken Identification*] (relaying the story of Malcolm Alexander, who spent almost forty years wrongfully convicted at Angola).

125 *Id.*; *see also* Nick Chrastil, *As Summer Nears, Angola Farm Line Workers Again Demand More Protections Against Heat*, WWNO (Apr. 10, 2025), https://perma.cc/YD5G-JLVJ (describing work on Angola's "Farm Line" and litigation to protect incarcerated workers on it from the Louisiana heat).

126 Selby, *Mistaken Identification*, *supra* note 124.

127 Daniele Selby, *"The Dungeon Was the Last Place I Wanted to Go": An Exoneree's Story of Survival at Angola Prison*, INNOCENCE PROJECT (Sept. 17, 2021), https://perma.cc/EAH8-KPZ9 [hereinafter Selby, *Story of Survival*] (telling the story of Henry James, who was wrongfully sentenced to life at Angola).

128 *Id.*

129 *Id.*

field, some people incarcerated at Angola were "tasked with fishing, cooking, and doing repair work for the 'free men'—as people imprisoned at Angola call the prison staff."[130]

One might imagine Angola as a place that is sui generis. Rarely is the claimed connection between chattel slavery and the current system of mass incarceration laid so bare as the former plantation turned state-operated prison. But Angola has only one of the more than six hundred agriculture programs in state-operated facilities.[131] These programs are concentrated in the South but can be found in every state in the union.[132] Unsurprisingly, given the commonplace nature of these programs, crops grown with prison labor regularly make their way throughout our food system.[133] Former incarcerated workers in Texas, who likewise almost always had their first job working in the "hoe squad," described being "bent over for four to six hours picking weeds, or planting, or weeding, or stepping in pig shit, cutting down trees, baling hay."[134] This work was done whether it was a hundred-degree summer day or in the below-freezing winter months.[135] It was so grueling that people would injure themselves to escape it.[136]

While field work is surprisingly common throughout the country, it is not quite as universal as maintenance work, like cooking, serving food, or working as a porter doing custodial work.

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[130] Daniele Selby, *How the 13th Amendment Kept Slavery Alive: Perspectives From the Prison Where Slavery Never Ended*, INNOCENCE PROJECT (Sept. 17, 2021), https://perma.cc/3YQ8-DM4C.

[131] Carrie Chennault & Joshua Sbicca, *Prison Agriculture in the United States: Racial Capitalism and the Disciplinary Matrix of Exploitation and Rehabilitation*, 40 AGRIC. & HUM. VALUES 175, 176 (2023). The Department of Justice, which uses a narrower definition of agriculture programs, counted 294 public and private facilities with such programs in 2019. Laura M. Maruschak & Emily D. Buehler, *Census of State and Federal Adult Correctional Facilities, 2019—Statistical Tables*, U.S. DEP'T OF JUST. 13 (Nov. 2021), https://perma.cc/6YH9-YW5Z.

[132] Chennault & Sbicca, *supra* note 131, at 180.

[133] *See Convicted: How Corporations Exploit the Thirteenth Amendment's Loophole for Profit*, CORP. ACCOUNTABILITY LAB 24–28 (Nov. 2022), https://perma.cc/L9WB-H3HA (describing Hickman's Family Farms, a supplier to numerous national grocery stores that uses prison labor); Leah Butz, *Prison Labor Is Remarkably Common Within the Food System*, N.Y.C. FOOD POL'Y CTR. (Sept. 15, 2021), https://perma.cc/339F-7TSE (describing how companies like Whole Foods, Russel Stover, and Starbucks had utilized prison labor in their supply chains).

[134] ROSS ET AL., *supra* note 21, at 134–35 (quoting Simone Washington, who "worked in the fields around Lane Murray Unit between 2012 and 2013").

[135] *Id.* at 134.

[136] *Id.* at 139.

These jobs have their own benefits and drawbacks, and those benefits and drawbacks will likely sound familiar to anyone who has spent time working for a wage. Porters in New York prisons, for example, are among the lowest paid incarcerated workers, starting out making about ten cents per hour.[137] But it is, all in all, an easy job. Dylan Cameron, who served fourteen years in New York's prisons, had no desire to work at all while incarcerated. He had financial support from his family outside of the prison and sufficient ties to prison gangs inside, so he "saw no reason why he should work for the system for a few dollars per week."[138] But he was informed by a counselor that the work as a porter was easy, and sometimes nonexistent, and his life would be better than if he refused to work, which could lead to him being sent to solitary confinement.[139] The counselor was right, and Cameron described only doing actual work, like mopping, for about one hour of each five-hour shift.[140]

But being a porter also came with increased freedom of movement. He could do things like "take a shower every day, [ ] pass things along," or "get cool with the other officers [in different parts of the prison], which in turn allows you to do more things."[141]

Being a porter, or attempting to find a similarly easy but low paying job, was not for everyone because the low wages even by prison labor standards meant being unable to buy minimal necessities from the commissary. Theresa Morrison, who found herself taking home $14 every two weeks after her wages as a New York prison dishwasher were garnished to pay court fees, could barely "buy a bar of soap, toothpaste, and some oatmeal."[142] Another man who is incarcerated in California, Brandon B., explained that he makes $5.00 per month, while "a case of Top Ramen (24 soup) is $6.00."[143] Extra food was not his only expense

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[137] *Incarcerated Pay*, N.Y. DEP'T OF CORR. SERVS. 1, 5 (July 13, 2023), https://doccs.ny.gov/system/files/documents/2023/11/wage-documents.pdf.pdf (stating that porters start out at Title Grade 1, and Grade 1, Step 1 is $0.10 per hour); *see also* Matthew Saleh, Timothy McNutt & Alex Herazy, *Subminimum Wages in New York State Prisons*, ILR CAROW (May 14, 2024), https://perma.cc/U2EJ-9Y3K.

[138] ROSS ET AL., *supra* note 21, at 116.

[139] *Id.* at 116, 125.

[140] *Id.* at 117.

[141] *Id.* (quoting Dylan Cameron).

[142] *Id.* at 118–19.

[143] Brandon B., *Letter to End the Exception*, END THE EXCEPTION, https://perma.cc/XB7M-95ZX.

because he had to procure hygiene items too. "Deodorant - $2.85, toothpaste - $3.65, Body wash - $3.00, soap - $.90, laundry detergent - $1.95, and shampoo - $1.65, needless to say my work isn't providing for my livelihood."[144] For people who do not have outside funding or a side hustle within the prison, the extra money—as well as the potential access to additional resources—that work provides helps to sustain their survival.[145]

Attempting to obtain "higher"-paying jobs is not without downside. Those increased wages are still incredibly small, and they come at the cost of stricter oversight, discipline, and, for some jobs, dangerous workplace conditions.[146] While porters can get away with just attempting to look busy, working in the kitchens or doing other work critical to the running of the facility is a different story. "Those on assignment to the mess hall reported doing twelve-hour shifts with little time to rest."[147] Correctional officers were harder on these workers because failing to keep an area clean was one thing but "much bigger trouble could be in store if a meal was not served on time."[148] Beyond the stringent discipline are the risks to health and safety. One woman described how working in the dish room meant being inside a closed room "with two big, huge, industrial dishwashers" and "no air conditioning" in the Texas summer.[149] Another explained that on-the-job injuries had to be buried, not reported. When she injured her ankle attempting to unload a pallet of goods for the commissary and reported it to a correctional officer, she was written up for performing an "unsafe act."[150] Her lesson was learned: "[W]hen you get cut, or you fall down . . . [y]ou don't report it, don't go to medical. You eat it."[151]

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144 *Id.*

145 *See* ROSS ET AL., *supra* note 21, at 120 (describing how Julio Suarez, who was incarcerated in New York prisons, used his jobs working in the prison's kitchens to get extra food both to sustain himself in the face of the "unhealthy, when not altogether inedible" assigned food, and to create a side hustle selling food items he managed to smuggle out of the kitchens).

146 *Id.* at 120–21.

147 *Id.* at 121.

148 *Id.*

149 *Id.* at 140.

150 ROSS ET AL., *supra* note 21, at 141.

151 *Id.* (quoting Simone Washington, who "served more than 10 years in Texas state prisons," *id.* at 134).

This trend continued with industry work. Although that work would often be the highest paying, it could also be the most physically and spiritually taxing. People described working for Corcraft, New York's correctional industries program, as long hours of constant labor that was much harder than the work done to maintain the prison.[152] For this labor, they might make up to $1 per hour, or about $100 per month.[153] But the additional money came with additional danger. One Corcraft job, for example, involved making mattresses. But the process to make those mattresses required using "a hot wire cutter to cut foam."[154] Seemingly to cut costs, Corcraft would provide inadequate respiration for the smoke the machines produced and failed to "provide the right gloves, cut-proof gloves, safety glasses, or steel-toe boots."[155]

But as the authors of *Abolition Labor* found, what made the industrial jobs so damning is how they "encapsulated the exploitation of prison labor best while also evoking the historical and moral ties with slavery."[156] The exploitation is less obvious in intraprison jobs, which ultimately save the state money by lowering labor costs. But jobs in Corcraft, or other private-sector-oriented work, lay the exploitation bare. Even for someone making a comparatively "good" wage for prison, it is clear that someone is making a large profit from your labor and that the someone is not you.[157]

This criticism may sound similar to one that has been made against wage labor generally, and indeed, the comparison between the two systems is not a new one.[158] But two things make prison slavery different: First, there is the obviousness of the exploitation in comparison to a free worker doing the same job.[159] Second, there is the ever-present threat of violence for anyone

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[152] *Id.* at 121–23.

[153] *Id.* at 121–22.

[154] ROSS ET AL., *supra* note 21, at 123 (quoting Nate Blakely, "who had worked as a porter, a clerk, and in lawn maintenance during his five years" in a New York prison, *id.* at 122).

[155] *Id.* at 123 (quoting Blakely).

[156] *Id.* at 124.

[157] *See id.* at 122 ("But then just look at how much money New York State makes off license plates. So even though they are paying one schmuck $200, if he is lucky, they are making thousands.").

[158] *See generally* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474 (2010) [hereinafter Pope, *Contract, Race, and Freedom of Labor*].

[159] *See* ROSS ET AL., *supra* note 21, at 142 (describing someone who made $2 per hour assembling circuit boards but then could not get an interview with the company he worked for while incarcerated).

who refuses to work in their assigned job. While refusing to work might initially be met with a disciplinary ticket or loss of commissary access, repeated refusals could lead to solitary confinement, perhaps for a day, but perhaps for months.[160] But more than this, "some guards like to demonstrate their authority in different ways" and so would assault incarcerated people who did not fall in line.[161]

This violence is accompanied by degradation. Correctional officers exercise total control over incarcerated people, and their power is not always justly exercised, to say the least. One woman described seeing a coworker being forced to go to work the day after her mother died, even though someone else had agreed to cover the grieving woman's shift.[162] Women who worked in the field described being strip-searched twice a day, in ways that made little sense in terms of security but perfect sense from the perspective of subjugation.[163] Using the bathroom while working in the fields "was seen by officers as a privilege" and not one that everyone working would get access to.[164] Christian B., who was incarcerated in Texas, explained that while working in the fields, "We barely got one water/bathroom break. And even that it was the first 10 to be called on. You're yelled out and degraded."[165]

Officers overseeing people working in the fields would incite fights and then punish people for fighting.[166] Another person, Aiyuba Thomas, who was incarcerated in a New York prison, described being called a racial slur and threatened when he did not laugh at a correctional officer's joke during his commissary training, and seeing someone handcuffed, thrown down stairs, and then sent to solitary for refusing to work.[167] Henry James, who was incarcerated at Angola, described attempting to get water while working in the prison's fields:

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160 *Id.* at 125–26.

161 *Id.* at 126–27 (quoting "Elijah Trudeau, who had served twelve years in New York prisons before coming home to Brooklyn in the spring of 2022").

162 *Id.* at 127.

163 *Id.* at 138.

164 ROSS ET AL., *supra* note 21, at 133–34 (describing how "four or five people" would be selected to use porta potties because officers did not want "to waste the time of everybody not working for everyone to get a chance to go in the restroom").

165 Christian B., *Letter to End the Exception*, END THE EXCEPTION (Sept. 21, 2021), https://perma.cc/3BXA-DEV9.

166 ROSS ET AL., *supra* note 21, at 136–37.

167 *Id.* at 229–30.

> When you would finally get to the water bucket—which was at the other end of the field—they would move it farther away. And if you stopped working to walk closer, you'd be written up for a work offense . . . . At the end of the day, they'd dump out the water bucket as you were getting there, and, if you say something, you get punished.[168]

Reading these descriptions likely makes one search for an easy, maximalist solution: ban prison work. But what makes this problem difficult is that it is obvious that is not what incarcerated people want. While prison administrators speak about idleness out of concerns based in security, incarcerated people too view idleness as an evil to be avoided. Far from being a relaxing break, extended forced idleness can be torturous. Indeed, research shows that the deprivation of "access to positive environmental stimulation, meaningful recreation, [and] programming" is part of what makes solitary confinement so deeply harmful.[169] But beyond this research, prisoners have repeatedly spoken on this issue. In 2018, in what may have been the largest prison strike in this country's history, the strikers called not for the elimination of all prison labor, but for an "end to prison slavery."[170] They envisioned being paid market wages for their work and having greater access to rehabilitative opportunities.[171] And incarcerated men at Attica demanded access to jobs that would "employ inmates to work eight hours a day and fit into the category of working men for scale wages" and that "all institutions using inmate labor be made to conform with the state and federal minimum wage laws."[172] Men at Folsom Prison in California made similar demands.[173]

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168 Selby, *Story of Survival*, *supra* note 127.

169 *Consensus Statement From the Santa Cruz Summit on Solitary Confinement and Health*, 115 NW. U. L. REV. 335, 337 (2020).

170 *See* Note, *Striking the Right Balance: Toward a Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1490–91 (2019).

171 *See* Aisha Davis, *19-Day Nationwide Prison Strike Begins with 10 Demands*, LOEVY & LOEVY (Aug. 27, 2018), https://perma.cc/5KQJ-E54D; *see also* Alice Speri, *The Largest Prison Strike in U.S. History Enters Its Second Week*, THE INTERCEPT (Sept. 16, 2016), https://perma.cc/M7JQ-WSKM (noting that one of the strikers' demands was the repeal of the Except Clause).

172 *The Attica Liberation Faction Manifesto of Demands and Anti-Depression Platform*, THE FREEDOM ARCHIVES ¶¶ 7, 11 (1971), https://perma.cc/N42D-P8H4.

173 *See The Folsom Prisoners Manifesto of Demands* (1970), ABOLITION NOTES, https://perma.cc/K73B-2KKZ.

Both groups made these demands in part out of a desire to uphold "the right to support their own families."[174]

The experiences of incarcerated firefighters in California shed similar light on this problem. The experience of fighting fires while in prison can be horrific. Incarcerated firefighters have been forced to work when free laborers could, or would, not. And they suffer more than other firefighters. Incarcerated firefighters in California were "four times as likely, per capita, to incur object-induced injuries" and "more than eight times as likely to be injured after inhaling smoke and particulates compared with other firefighters."[175] Moreover, they "face lifelong health issues as a direct result of their work" with no help from the state to pay for these ongoing healthcare costs.[176] When there is an active fire, they end up "working 24-hour shifts."[177] These long, dangerous shifts provide a marginal benefit because on top of the few dollars per day they usually make, during an active fire, firefighters make an additional dollar per hour.[178] Ramon Leija, who worked at a juvenile fire camp in California, said about the camp, "[Some are] comparing it to modern-day slavery, and I do see that . . . . But at the moment, it's the best place to be."[179]

Leija's quote lays bare the flipside of the horror of incarcerated firefighting: some of the people who do it have found great value in the experience. Mathew Trattner said the program helped to develop his work ethic, causing "[a]ny job out here [to] seem[ ] so little" in comparison.[180] Leija said that the experience made it so that his "whole goal was to give back to [his] community."[181] Adam Azevedo, another formerly incarcerated firefighter, said, "I don't want to be hyperbolic here, but I would say that going to camp the first time gave me a sense of value for myself."[182] Doing the lifesaving work "started at least a belief in myself that

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174 *Id.* ¶ 13.

175 Abby Vesoulis, *Inmates Fighting California Wildfires Are More Likely to Get Hurt, Records Show*, TIME (Nov. 16, 2018), https://perma.cc/8EA6-NQNL.

176 Francine Uenuma, *The History of California's Inmate Firefighter Program*, SMITHSONIAN MAG. (Sept. 1, 2022), https://www.smithsonianmag.com/history/the-history-of-californias-inmate-firefighter-program-180980662/.

177 Vesoulis, *supra* note 175.

178 *Id.*

179 *Id.* (alteration in original).

180 *Id.*

181 *Id.*

182 Uenuma, *supra* note 176.

I could be good at something good, good at the right thing."[183] And this appreciation is not merely a modern phenomenon. In 1961, the inmate council at San Quentin Prison penned a letter objecting to a *San Francisco Examiner* article that described incarcerated firefighters as "really scrap[ing] . . . the bottom of the barrel."[184] The inmate council made clear their position. Incarcerated firefighters had sacrificed life and limb in order to help the state. They did not want "publicity making them heroes. Only that they be allowed to be given just credit when due, and be allowed to live down the failings that sent them to prison."[185]

It seems appropriate to end this Section with the man with whom it began. Calvin Duncan, who began his time in prison working in Angola's fields, eventually was able to work as inmate counsel.[186] In that role, he helped numerous fellow incarcerated people with their cases, including several people who were ultimately freed because of his work. Over the course of his labors while incarcerated, he also inspired the creation of the Innocence Project New Orleans. He was, in the words of award-winning journalist Wilbert Rideau, "the most brilliant legal mind in Angola."[187]

Rideau spoke from personal experience because Duncan "did the legal research" and "put together the case" that would lead to his receiving a new trial and ultimate release.[188] But more than simply helping his fellow incarcerated people with their individual cases, Duncan helped to craft the litigation strategy that culminated in the Supreme Court striking down nonunanimous juries as unconstitutional.[189] While a private defense attorney with this type of success record might expect to make millions, Duncan was paid only twenty cents an hour for his legal services.[190] Despite this injustice, it is perhaps no surprise that Duncan's work while incarcerated has continued to inspire him now that he is free. He graduated from Tulane University in 2018 and headed

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183 *Id.*

184 Letter from David Vorce, Chairman of the Inmate Council, to Mr. F.R. Dickson, Warden (Sept. 11, 1961) (quotation marks omitted) (available at https://perma.cc/LEZ3-2MR8).

185 *Id.*

186 Selby, *Most Brilliant Legal Mind*, *supra* note 111.

187 Adam Liptak, *A Relentless Jailhouse Lawyer Propels a Case to the Supreme Court*, N.Y. TIMES (Aug. 5, 2019), https://www.nytimes.com/2019/08/05/us/politics/supreme-court-nonunanimous-juries.html.

188 *Id.*

189 *Id.*; Ramos v. Louisiana, 590 U.S. 83 (2020).

190 Liptak, *supra* note 187.

to law school in 2020, not long after the Supreme Court struck down nonunanimous juries at his urging.[191]

II. THE MOVEMENT TOWARD NO EXCEPTIONS

The movement to abolish prison slavery is long and complex, arguably stretching back to the movement to abolish chattel slavery.[192] But the success of the current push to achieve abolition through state constitutions can arguably be traced to an unlikely piece of popular media: filmmaker and screenwriter Ava Duvernay's documentary, *13th*.[193] Of course, Duvernay's work was not singularly responsible for this modern movement to end prison slavery. Colorado's first attempt to remove its Except Clause, called Amendment T, occurred in 2016 and was on the ballot before *13th* was released in October of that year.[194] If *13th* were the sole cause of these amendments' success, we might have expected this 2016 amendment to pass while the documentary was most salient near its release. But news stories in Colorado do not mention *13th* and instead blame the amendment's failure on a problem that recurs today: confusing ballot language.[195] *13th*'s effect instead seems to have been to galvanize organizers, leading them to usher in the conditions necessary for then-unimaginable political wins.[196] Indeed, one activist in New Jersey became involved only after he showed the film to his incarcerated students, who in turn urged him to push for change.[197]

But instead of focusing on this Hollywood lightning strike, this Part focuses on what the organizations working in this area have used *13th*'s attention to accomplish. It discusses the passed and pending constitutional amendments and legislative proposals that organizers are pushing through the states.[198]

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191 Selby, *Most Brilliant Legal Mind*, *supra* note 111.

192 *See, e.g.*, Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 30–31 (2019) (citing W.E.B. DU BOIS, BLACK RECONSTRUCTION 166–80 (Atheneum Publishers 1976) (1935)).

193 *See* ROSS ET AL., *supra* note 21, at 27.

194 *See, e.g.*, *Take Out Slavery—Vote Yes on Amendment T*, ACLU COLO. (Oct. 11, 2016), https://perma.cc/BCT2-JP2W.

195 *See, e.g.*, Brian Eason, *Amendment T Defeated; Slavery Reference Will Stay in Colorado Constitution*, DENVER POST (Nov. 22, 2016), https://perma.cc/75S6-4K87; *cf. infra* notes 234–44 and accompanying text (discussing Louisiana's failed ballot measure).

196 *See* ROSS ET AL., *supra* note 21, at 27.

197 *See id.* at 27–28.

198 For an excellent recounting of the twists and turns in this movement's history, see ROSS ET AL., *supra* note 21, at 25–68.

A. (Mostly) Successful State Constitutional Amendments

Thus far, eleven states have voted on implementing complete bans on slavery and involuntary servitude in their constitutions.[199] Nine have ratified amendments purporting to ban slavery and involuntary servitude with no exceptions,[200] while two have declined to do so. These amendments largely fit into three categories. Rhode Island is sui generis. It has had a total ban on slavery in its state constitution since before the Civil War.[201] Foreshadowing the other exceptionless states, however, this has not prevented it from relying on forced prison labor.[202] The other amendments fit within two textual buckets. One group of states has amended their constitutions to enact a version of the Thirteenth Amendment that simply removes the Except Clause. The other group takes a more complex route. These states have an initial clause banning slavery and involuntary servitude with no exceptions, and then a second clause stating that this ban does not apply to some portion of the criminal justice system. Because of varying legislative and organizing history, as well as the possibility of judicial interpretation, the difference between these textual choices is not necessarily as large as it first appears.

1. Total bans.

After Rhode Island's 1843 amendment totally banning slavery, state constitutions did not attempt to expand on the Thirteenth Amendment's protections. That changed in 2018, when Colorado voters approved an amendment to their constitution stating, "There shall never be in this state either slavery or involuntary servitude."[203] After an earlier version of this amendment failed in 2016 by 0.3% of the vote, one might have expected

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[199] *See infra* Part II.A.1–2, II.B.2. As Professor Laura Appleman has noted, several states not discussed in more detail here—including Minnesota, New Jersey, and Texas—have proposed amendments to their state constitutions that have begun to percolate in their state legislatures but have not made it to a ratification vote. *See* Laura I. Appleman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WIS. L. REV. 619, 682–84 (2022).

[200] *See infra* Part II.A.1–2.

[201] *See* Fred Zilian, *In 1843, Slavery Was Banned in Rhode Island*, NEWPORT DAILY NEWS (May 28, 2018), https://perma.cc/W5E3-7V6L; R.I. CONST. art. I, § 4.

[202] *See* Davidson, *Administrative Enslavement*, *supra* note 12, at 684 (noting that despite its constitutional provision, Rhode Island states that all incarcerated people "shall be let or kept at labor" (quoting 42 R.I. GEN. LAWS § 42-56-21(a) (2024))).

[203] COLO. CONST. art. 2, § 26.

this amendment to squeak by.[204] But instead the 2018 amendment sailed through with over 64% voting in favor.[205]

This was a recurring theme in the votes on these amendments. Of the amendments that passed, the closest vote was in Oregon, where the amendment received 56% of votes in favor.[206] Other states had similarly high passage rates, including some amendments passing with over 80% of voters approving.[207]

Like Colorado and Rhode Island, four of the other states passing amendments—Alabama, Nebraska, Vermont, and most recently Nevada—created a prohibition on slavery and involuntary servitude with no exceptions. The exact language each state employed differed slightly, based largely on the text it was replacing. Alabama's amended constitution now says, "That no form of slavery shall exist in this state; and there shall not be any involuntary servitude."[208] The amendment simply deleted the clause that had followed this language: "[O]therwise than for the punishment of crime, of which the party shall have been duly convicted."[209]

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[204] *See Official Certified Results November 8, 2016 General Election*, COLO. ELECTION RESULTS, https://results.enr.clarityelections.com/CO/63746/184388/Web01/en/summary.html (reporting that Amendment T failed with 50.3% opposed).

[205] *See 2018 General Election Results*, COLO. SEC'Y OF STATE, https://perma.cc/AAB5-6MDJ (reporting 66.21% in favor of Amendment A).

[206] *Oregon Election Results*, N.Y. TIMES (Dec. 15, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-oregon.html.

[207] *See Vermont Proposal 2 Election Results: Prohibit Slavery in State Constitution*, N.Y. TIMES (Nov. 17, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-vermont-proposal-2-prohibit-slavery-in-state-constitution.html (showing passage with 88.7% approval); *Nebraska Election Results*, N.Y. TIMES (last updated Jan. 19, 2021), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-nebraska.html (showing passage with 68% approval); *Utah Election Results*, N.Y. TIMES (Jan. 27, 2021), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-utah.html (showing passage with 81% approval); *Tennessee Amendment 3 Election Results: Remove Constitutional Language Allowing Slavery as Punishment*, N.Y. TIMES (Dec. 13, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-tennessee-amendment-3-remove-constitutional-language-allowing-slavery-as-punishment.html (showing passage with 79.5% approval). While Alabama also had a high passage rate, that rate is less indicative of approval for this specific amendment because this amendment was bundled with a number of other changes meant to remove outdated language from the state's constitution. *Alabama Election Results*, N.Y. TIMES (Nov. 28, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-alabama.html (showing passage with 76% approval); The Associated Press, *Alabama 1 of 5 States to Decide on Slavery Loopholes for Prison Labor in Upcoming Election*, AL.COM (Oct. 20, 2022), https://perma.cc/T8VU-VT2X ("Alabama is asking voters to delete all racist language from its constitution and to remove and replace a section on convict labor that's similar to what Tennessee has had in its constitution.").

[208] ALA. CONST. art. I, § 32.

[209] *Id.*

Nebraska is similar, now stating that "[t]here shall be neither slavery nor involuntary servitude in this state," having deleted an otherwise clause virtually identical to Alabama's.[210] Nevada's recently approved amendment likewise removes the phrase "unless for the punishment of crimes," to now read: "Neither Slavery nor involuntary servitude shall ever be tolerated in this State."[211]

Vermont ties its prohibition to the inherent rights of human beings, now stating, "That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore slavery and indentured servitude in any form are prohibited."[212] It deleted a passage that limited involuntary servitude for people over the age of twenty-one or bound for reasons like debts.[213]

There is beauty and power in the textual simplicity of these amendments. They ring with a moral clarity that the more complex amendments discussed in the next Section obscure. But that does not mean these amendments are simple. Instead, they merely push the complexity of the issue to other fora.

Because Colorado was a first mover in this space, it gives us a glimpse into how these "simple" amendments might operate in practice. The Colorado amendment's text was accompanied by an explanation of its purpose and intended effects in what Colorado calls its Blue Book.[214] That additional context from the Legislative Council of the Colorado General Assembly explained that, in its view, removing the Except Clause from the state constitution might be "redundant,"[215] presumably because of the belief that

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[210] NEB. CONST. art. I, § 2 (amended 2020).

[211] *Compare* NEV. CONST. art. 1, § 17 (amended 2024), *with* Assemb. J. Res. 10, 81st Leg., Reg. Sess. (Nev. 2021) (available at https://perma.cc/STP8-6X9F) (proposing the amendment).

[212] VT. CONST. ch. 1, art. 1. (amended 2022).

[213] *See* VT. CONST. ch. 1 art. 1 (2002):

> [N]o person born in this country, or brought from over sea, ought to be holden by law, to serve any person as a servant, slave or apprentice, after arriving to the age of twenty-one years, unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.

[214] *See* Legislative Council of the Colorado General Assembly, *2018 State Ballot Information Booklet*, COLO. GEN. ASSEMB. 39–40 (Sept. 11, 2018), https://perma.cc/9KRY-7AJZ.

[215] *Id.* at 39.

Colorado prisons were not currently utilizing slavery or involuntary servitude. This interpretation was backed by the expected fiscal impact, which was limited to the possibility that "court filings [could] increase due to offenders filing additional lawsuits."[216] The text of the proposition submitted to voters likewise lauded the benefits of work, both generally and for incarcerated people specifically, while at the same time clarifying that "[t]he state should not have the power to compel individuals to labor against their will."[217] Unsurprisingly, when faced with sweeping constitutional text, judges interpreting the Colorado Constitution have turned to these underlying explanations for guidance.[218]

2. Exceptions and clarifications.

Four other states have voted on what one commentator has called a "qualified" ban.[219] This Article uses the term "complex" amendments because not all of the additional language in them qualifies the ban. The three other states to pass amendments removing Except Clauses from their state constitutions—Oregon, Tennessee, and Utah—have used complex language that does not necessarily create any exceptions to their new bans on slavery and involuntary servitude. Two out of three seek to clarify the reach of their prohibitions in ways that are decarceratory, if not outright liberating. The third state, Utah, has language that facially appears like a qualification. But its reach is unclear, and the explanation of the language provided to voters suggests that it has similar concerns. The lone state to not pass a ban, Louisiana, had limiting language that created sufficiently large concerns that its original proponents turned on the measure.

Oregon's language is the most complex but is also the best example of what these states seem to be trying to accomplish. Oregon, like Tennessee and Utah, begins its amendment with a total ban on slavery and involuntary servitude. Article 1, § 34, clause 1 of the Oregon Constitution now reads: "There shall be

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216 *Id.*

217 *Id.* at 40.

218 *See* Lamar v. Williams, 2022 WL 22924244, at *2–3 (Colo. Ct. App. Aug. 18, 2022); *see also infra* Part II.B.1. *See generally* Lilgerose v. Polis, No. 2022CV30421 (Colo. Dist. Ct. Oct. 27, 2022) (Trellis).

219 *See* Smith, *supra* note 19, at 549–52.

neither slavery nor involuntary servitude in this state."[220] But the recently passed amendment added a clause 2, which reads in full:

> Upon conviction of a crime, an Oregon court or a probation or parole agency may order the convicted person to engage in education, counseling, treatment, community service or other alternatives to incarceration, as part of sentencing for the crime, in accordance with programs that have been in place historically or that may be developed in the future, to provide accountability, reformation, protection of society or rehabilitation.[221]

What seems clear from this text is that, contrary to attempting to create a caveat that preserves some amount of slavery or involuntary servitude in its prisons, Oregon wanted to ensure that its prohibition on slavery and involuntary servitude was not interpreted to remove the less carceral, more rehabilitative "alternatives to incarceration" that exist within its criminal legal system.[222] That interpretation seems bolstered by the reasons Oregon gives for the imposition of these sentences, none of which mentions punishment.[223]

Unlike Oregon, which seems concerned with its amendment's effect outside of prisons, Tennessee and Utah are very much concerned with what the amendment will do behind bars. But neither seems designed to create an opening for the sort of forced labor that evokes the term prison slavery as we currently think of it. Instead, Tennessee's language seems to concern incarcerated people working generally, while Utah's addresses that, as well as the continued existence of prison *at all*.

Both Utah and Tennessee begin their amendments like Oregon. Tennessee states that "[s]lavery and involuntary servitude are forever prohibited,"[224] while Utah says that "[n]either slavery nor involuntary servitude shall exist within this State."[225] But after this they diverge. Tennessee adds the caveat that "[n]othing in this section shall prohibit an inmate from working

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220 OR. CONST. art. 1, § 34, cl. 1.
221 *Id.* cl. 2.
222 *Id.*
223 *Id.*
224 TENN. CONST. art. 1, § 33.
225 UTAH CONST. art. 1, § 21(1).

when the inmate has been duly convicted of a crime."[226] Utah, by contrast, adds what appears to be even broader language: "Subsection (1) does not apply to the otherwise lawful administration of the criminal justice system."[227]

Tennessee's language seems easily explainable by drawing on the explanation Colorado offered in its Blue Book.[228] Even in prison, there is a difference between slavery and working. While this amendment prohibits the former, it does not prohibit the latter. Incarcerated people can continue to work, they simply cannot be forced to do so.

Utah's language is less clear, and its history only adds to the opacity. Originally, Utah legislators proposed a total prohibition akin to Colorado's, but when they received pushback, the second subsection was added to clarify that this would not have an immediate effect on the state's criminal legal system.[229] That would seem an odd statement, except that even before this amendment, Utah required all labor in its prisons to be voluntary by statute.[230] If anything, then, the amendment to the constitution would seem to double down by making involuntary labor in Utah's prisons both a statutory and a constitutional violation.[231] But the analysis of the amendment provided to voters by the Utah Secretary of State did not say this. Instead, it explained the second clause by saying that it "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."[232] While the second half of this statement fits within the general conception of the

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226 TENN. CONST. art. 1, § 33.

227 UTAH CONST. art. 1, § 21(2).

228 *See* Legislative Council of the Colorado General Assembly, *supra* note 214, at 39–40.

229 *Constitutional Amendments*, KUER 90.1 (Oct. 13, 2020), https://perma.cc/J66F-QRBU ("Some lawmakers had questions during the 2019 legislative session about whether this would have any implications in the current criminal justice system. The language of the bill was amended to clarify that it will not, and the measure passed unanimously in the Utah House and Senate.").

230 *See* UTAH CODE § 64-9b-4 (2018) ("Rehabilitative and job opportunities at the Utah state prison and participating county jails shall not be forced upon any inmate contrary to the Utah Constitution, Article XVI, Section 3 (2), but instead shall be on a completely voluntary basis.").

231 This could still have substantive meaning because Utah has an implied constitutional cause of action for damages, albeit a difficult to satisfy one. *See Utah*, INST. FOR JUST., https://ij.org/report/50-shades-of-government-immunity/state-profile/utah/#:~:text=Utah%20%2D%20Institute%20for%20Justice,No. (citing Spackman v. Bd. of Educ., 16 P.3d 533, 538 (Utah 2000)).

232 *Statewide Ballot Measures*, BALLOTPEDIA (2020), https://perma.cc/27LY-H4WK.

Except Clause as being about prison labor, the first half, discussing sentencing someone to prison generally, is either nonsensical (though perhaps reassuring to voters who know little about the criminal legal system) or the reviving of a largely abandoned radical reading of the Thirteenth Amendment and the role of prisoners as "slaves of the State."[233]

Between the passage of Colorado's amendment in 2018 and California's recent rejection of their proposed amendment in 2024, Louisiana was the lone state to vote on a total prohibition on slavery and involuntary servitude that did not pass its amendment. But that does not appear to be because Louisiana voters are somehow backwards and in favor of slavery. Instead, many of the largest proponents of the amendment turned against it when language similar to Utah's was added to the amendment.[234] While Representative Edmund Jordan's original proposal would have caused the Louisiana constitution to read "Slavery and involuntary servitude are prohibited," an amendment was made to this bill to add, "Subparagraph (1) of this Paragraph does not apply to the otherwise lawful administration of criminal justice."[235]

This change created a raft of concerns, not least of which being that the phrasing might actually *expand* the availability of slavery in Louisiana's criminal system because its current constitutional language bans slavery entirely while allowing for involuntary servitude as punishment.[236] In the end, Jordan was joined by the Council for a Better Louisiana,[237] the Louisiana Black Caucus, the

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[233] *See* Ruffin v. Commonwealth, 62 Va. 790, 796 (1871):

> The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land.

See also infra Part III (discussing this radical interpretation).

[234] *See* Lester Duhe, *State Rep. Now Asking Louisiana Residents to Vote "No" on His Slavery Amendment This Year*, KSLA (Oct. 24, 2022), https://perma.cc/K86C-2P7D.

[235] *Compare* H.R. 298, 2022 Leg., Reg. Sess. (La. 2022) (HLS 22RS-890) (available at https://perma.cc/SW2K-VSB3), *with* H.R. 298, 2022 Leg., Reg. Sess. (La. 2022) (enacted) (available at https://perma.cc/AZ9Y-VD6T).

[236] *See* Duhe, *supra* note 234; LA. CONST. art. 1, § 3 ("Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.").

[237] *What's Up with the Amendments? A Close Look at Constitutional Amendment #7*, COUNCIL FOR A BETTER LA. (Oct. 21, 2022), https://perma.cc/JGB6-DGYS.

state's House Democrats,[238] and even famously activist ice cream makers Ben & Jerry's in opposing the rewritten amendment.[239]

But not everyone opposed the rewritten bill. Some organizers and advocates continued to support the change.[240] They did so not believing it was perfect, but believing that it did create new opportunities that might not arise again.[241] One advocate said that "[t]he chances of it getting back on the ballot is nearly impossible," while another pointed out that by changing the language, "you give people a chance to argue something in court."[242]

These advocates proved prescient. A rewritten version of the prohibition was making its way through Louisiana's legislature but most recently failed to pass by the supermajority needed in the state senate.[243] The new proposed language would seemingly have more explicitly allowed forced incarcerated labor. It would have amended the state constitution to read, "Slavery and involuntary servitude are forever prohibited. The prohibition of involuntary servitude shall not prohibit an inmate from being required to work when the inmate has been duly convicted of a crime."[244]

B. What's Next: Litigation, Potential Backlash, and Legislative Action

Despite some setbacks, the movement to remove legal protections for slavery and involuntary servitude has largely been a rousing success. After more than a century of constitutional stasis, organizers have convinced voters in nine states to amend their constitutions to provide additional protections against slavery and involuntary servitude. But that fight is far from over. This Section explores some of the potential roadblocks that have begun to appear in this otherwise straightforward story of

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238 *See* Christina Carrega, *Five States Are Voting Whether to Outlaw Slavery (Yep, You Read that Right)*, CAP. B NEWS (Oct. 20, 2022), https://perma.cc/GQC2-RH9R.

239 *See* Lorena O'Neil, *The Story Behind Why Louisiana Voted Against a Ban on Slavery*, LA. ILLUMINATOR (Nov. 17, 2022), https://lailluminator.com/2022/11/17/the-story-behind-why-louisiana-voted-against-a-ban-on-slavery/.

240 *See id.*; *Vote YES on 7 Coalition Gives Statement on Amendment to Abolish Slavery in Louisiana*, THE VOTE YES ON 7 COALITION (Sept. 20, 2022), https://perma.cc/24GM-DMTM.

241 *See* O'Neil, *supra* note 239.

242 *Id.*

243 *See* H.R. 211, 2023 Leg., Reg. Sess. (La. 2023) (available at https://perma.cc/65QG-KVAT).

244 H.R. 211, 2023 Leg., Reg. Sess. (La. 2023) (HLS 23RS-525) (available at https://perma.cc/C6XS-S8MY).

change. It focuses on the litigation that has attempted to enforce these constitutional changes, the rise of potential backlash as represented in California's rejection of the amendment to its constitution in the 2024 election, and proposed legislative action that would bolster (or perhaps supplant) constitutional protections.

1. Litigation.

If only states passing these amendments were the end, and not the beginning, of this story. While one might hope that legislatures and prison administrators would rush to remake their prisons to comply with these potentially monumental changes to their state constitutions, that is, unfortunately, not the story this history holds. Instead, the changes thus far are overwhelmingly the result of litigation. If the past continues to hold the key to our future, then it seems clear that litigation will play a necessary role in developing and effectuating these nascent constitutional rights. But just as has occurred with the Thirteenth Amendment, the litigation surrounding these state constitutional amendments has operated in fits and starts.

Two pieces of litigation have begun to percolate through the state courts. In *Stanley v. Ivey*,[245] the Center for Constitutional Rights has, thus far unsuccessfully, argued that several Alabama statutes and regulations violate Alabama's newly passed constitutional prohibition on slavery and involuntary servitude.[246] The trial court, in a brief order, dismissed the suit because of a lack of standing and because of state sovereign immunity.[247] It did not reach an interpretation of the constitutional provision. While the vagaries of Alabama standing and sovereign immunity law are beyond the scope of this Article, the court's decision does highlight how the battle over these provisions will not be limited only to their substance.

Litigation over Colorado's amendment at first took the same path, as nonsubstantive hurdles kept pro se litigants from having their claims fully adjudicated. For example, several of these cases were dismissed because they were litigated in the wrong courts

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[245] 03-CV-2024-900649.00 (Cir. Ct. Montgomery Cnty, Ala. Aug. 1, 2024) (available at https://perma.cc/V69G-5CAK).

[246] *See Imprisoned Workers in Alabama Continue Legal Fight*, *supra* note 20.

[247] *Stanley*, 03-CV-2024-900649.00.

under the wrong causes of action. In *Fletcher v. Williams*,[248] for example, plaintiff John Patrick Fletcher attempted to rely on the Colorado Constitution to sue under an unrelated federal statute in federal court.[249]

Plaintiff Andrew Mark Lamar's challenge, however, received a substantive response from the Colorado courts. Lamar challenged the Colorado Department of Correction's (CDOC's) work program as newly unconstitutional. His claim was dismissed for failure to state a claim, and the appellate court affirmed.[250] It was clear that this failure, though, was as much, if not more, a litigation strategy failure as a substantive one. Relying on the Blue Book interpretation of the amendment and the U.S. Supreme Court's standard for what constitutes involuntary servitude, the court held that Lamar did not allege that the CDOC forced him to "work through the use or threat of physical restraint or physical injury or the use or threat of coercion through law or the legal process."[251] Instead, Lamar had objected only to the low pay and loss of privileges.[252] The court did not address Lamar's claims that not working could result in sanctions or physical violence because they were raised for the first time on appeal.[253]

By far the most prominent and advanced suit is *Lilgerose v. Polis*.[254] Far from being an improperly litigated pro se complaint, *Lilgerose* has drawn national attention. The plaintiffs are represented by the nonprofit organization Towards Justice.[255] The MacArthur Justice Center and the ACLU of Colorado filed an

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[248] 2023 WL 6307494 (10th Cir. Sept. 28, 2023).

[249] *See id.* at *3 (concluding that Fletcher "never explains how the defendants' alleged violations of the Colorado constitution constitute illegal conduct under the federal statutes he cited in his complaint"); *see also* Griffin v. Polis, 2022 WL 22856829, at *2 (D. Colo. May 6, 2022), *report and recommendation adopted*, 2022 WL 22856828 (D. Colo. June 17, 2022) (denying for lack of standing a claim that several Colorado officials had not upheld their oaths of office because they allowed slavery in the prisons).

[250] *See Lamar*, 2022 WL 22924244, at *1.

[251] *Id.* at *2–3 (citing United States v. Kozminski, 487 U.S. 931, 952 (1988)).

[252] *Id.* at *3.

[253] *Id.*

[254] No. 2022CV3042 (Colo. Dist. Ct. Oct. 27, 2022) (Trellis).

[255] *See Lawsuit Filed Challenging Alleged Violations of CO State Constitutional Amendment Prohibiting Involuntary Servitude*, TOWARDS JUST. (Feb. 15, 2022), https://perma.cc/LJA5-85KM.

amicus brief in support of Lilgerose.[256] And national news organizations including Bolts Magazine and Law360 have taken notice.[257]

Lilgerose's allegations hit at the core of prison slavery, and the litigation made clear that, even after Colorado's amendment, prison slavery was alive and well in the state. Valerie Collins of Towards Justice said that discovery produced "over 3,000 incident reports of prisoners being punished for 'failure to work' of one kind or another in the disciplinary record for six months in 2022."[258] Lilgerose alleged that refusing to work led to being sent to solitary confinement and that people would be physically assaulted if they did not work.[259] He also alleged that not working would lead to losing earned time off of one's sentence. And he alleged that incarcerated people were punished for not working by losing access to phone calls, visitation, keeping certain property, and receiving less recreation time.[260]

The court's response was mixed. Initially, the court upheld the CDOC's labor statutes and regulations against a facial challenge, finding that they could be implemented without crossing the line into involuntary servitude.[261] Lilgerose's as-applied challenges saw more success. The court found that Lilgerose had stated a claim for a violation of Colorado's new constitutional amendment by alleging that a refusal to work would be met with solitary confinement, prolonged confinement in one's cell, and the threat of physical violence.[262] But the court also held that the loss of "privileges"—like "being permitted less time in the day room, being allowed fewer phone calls, being prohibited from cell visits, receiving less time for meals, not being permitted to keep certain property, and being permitted less visitor contact from family,

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[256] *See generally* Brief of the MacArthur Justice Center and ACLU of Colorado as Amici Curiae in Support of Plaintiffs, *Lilgerose* (Trellis) (No 2022CV30421).

[257] Moe Clark, *Forced Labor Continues in Colorado, Years After Vote to End Prison Slavery*, BOLTS (Sept. 19, 2023), https://perma.cc/UJ5N-HMSW; Daniel Ducassi, *Colo. Prisoners Seek Class Cert. in Slave Labor Suit*, LAW360 (July 12, 2024), https://perma.cc/CW6K-6DCW.

[258] ROSS ET AL., *supra* note 21, at 54.

[259] *See* Order Re: Motion to Dismiss at 11, *Lilgerose* (Trellis) (No 2022CV30421).

[260] *See* Amended Complaint at 9, *Lilgerose* (Trellis) (No 2022CV30421).

[261] Order Re: Motion to Dismiss at 7, *Lilgerose* (Trellis) (No 2022CV30421).

[262] *Id.* at 11.

and" others listed in a relevant statute—did not trigger the prohibition on slavery and involuntary servitude.[263] More than this, being denied or losing "earned time" also was not something that turned the choice between laboring and not into involuntary servitude.[264] The court reached these latter holdings in large part because incarcerated people expressly had no right to any privileges or earned time as a matter of Colorado, or any other, law.[265]

This victory was partial, but perhaps greater than it first appears. On the way to reaching these holdings, the court made a number of conclusions that rejected the CDOC's proposed interpretations of the new involuntary servitude prohibition, including in some ways that explicitly extended the new clause to provide protections that do not exist under the Thirteenth Amendment. The court both recognized that sufficient coercion to constitute involuntary servitude might exist outside of the limited contexts of physical or legal threats that were identified by the Supreme Court,[266] and it explicitly refused to read a "housekeeping" exception into the state's new amendment.[267] As the court recognized, "The purpose of Amendment A was to remove all exceptions to Colorado's prohibition on involuntary servitude . . . In the face of this clear legislative mandate from Colorado's citizens, it would be improper for this Court to impose an exception on the ban against involuntary servitude."[268]

This analysis is all preliminary because it occurred at the trial court level. The *Lilgerose* litigation is still in its early stages, though the plaintiffs have continued to advance. *Lilgerose* recently received class certification.[269] The court granted a broad class of "all people incarcerated by the state of Colorado who are now, or will in the future be subjected to mandatory work policies and practices of the Colorado Department of Corrections."[270] It found that despite "some variation in the individual harm [the class representatives] have allegedly suffered to date, the class all suffers the same threat of harm as a result of CDOC's policies and

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263 *Id.* at 14; *see also* COLO. REV. STAT. § 17-20-114.5(1).

264 Order Re: Motion to Dismiss at 14–15, *Lilgerose* (Trellis) (No 2022CV30421).

265 *Id.* at 13–15.

266 *Id.* at 9.

267 *Id.* at 12.

268 *Id.*

269 *See generally* Order Re: Motion for Class Certification, *Lilgerose* (Trellis) (No. 2022CV30421).

270 *Id.* at 32.

practices."[271] As a result, successful litigation could change the working lives of each of the over seventeen thousand people incarcerated in Colorado.[272]

Lilgerose and the other pieces of litigation discussed in this Section seem unlikely to solve all of the problems with our system of prison labor. But if the *Lilgerose* trial court's restrictions on the coercive tools available to prison administrators stand up on appeal and spread to other states, it is difficult to overstate the size of the impact that holding would have. To be blunt, the *Lilgerose* court's restrictions on the use of solitary confinement, physical violence, and disciplinary procedures to compel labor could be the largest constitutionally based gains in incarcerated workers' rights since the end of debt peonage. At this moment, however, these gains are deeply insecure. These cases display how those who favor the forced labor status quo intend to fight the possibility that these amendments will be interpreted to have a tangible effect inside of prisons. Those who want more than symbolic change therefore need to be aware of the battleground these cases create and prepared to fight on it.

2. 2024: backlash and moving forward.

The movement to ban prison slavery through state constitutional amendments has not yet reached stasis, but the story about it has become more complicated. In November 2024, two more states, Nevada and California, voted on amendments to their state constitutions.

Nevada was another step down the simple, hopeful path that advocates for these amendments thought they had begun to walk. That path was one of seemingly snowballing progress. Since Colorado passed its total prohibition in 2018, the only vote against these slavery and involuntary servitude bans happened in Louisiana under the atypical conditions I have described above, in which many of the original proponents of the ban came out against it shortly before the election.

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[271] *Id.* at 24.

[272] *See* Heather Willard, *Colorado's Inmate Population Has Grown for the First Year Since COVID*, FOX31 (Mar. 1, 2024), https://kdvr.com/news/data/colorados-inmate-population-has-grown-for-the-first-year-since-covid/ (reporting that "Colorado had about 17,168 prisoners in 2022").

In November 2024, Nevada voted on a proposition that used simple language. It changed its constitution to read: "[T]here shall be in this state neither slavery nor involuntary servitude."[273] That initiative passed with a clear majority, with 61% voting in favor.[274] At the same time, in two close races, Republican candidate Donald Trump took the state's presidential electors with less than 51% of the vote,[275] and Democrat Jacky Rosen was reelected to the Senate with about 48% of voters supporting her.[276]

California's ballot initiative, by contrast, contained perhaps the most complex language yet proposed. Proposition 6 would amend Article I, § 6 of the California Constitution[277] to read:

> (a) Slavery and involuntary servitude are prohibited. (b) The Department of Corrections and Rehabilitation shall not discipline any incarcerated person for refusing a work assignment. (c) Nothing in this section shall prohibit the Department of Corrections and Rehabilitation from awarding credits to an incarcerated person who voluntarily accepts a work assignment. (d) Amendments made to this section by the measure adding this subdivision shall become operative on January 1, 2025.[278]

As with many other amendments with complex language, California's mostly seems to clarify what the amendment is reaching (prohibiting discipline for refusing to work) while preserving positive aspects of work for incarcerated people (rewarding voluntary work).

This proposition failed with 53% of Californians voting against it.[279] This was, to say the least, a surprise. Indeed, until

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[273] *See* Assemb. J. Res. 10, 2021 Leg., Reg. Sess. (Nev. 2021) (available at https://perma.cc/KT39-NET7).

[274] *Nevada Question 4 Election Results: Remove Slavery Exception*, N.Y. TIMES (Dec. 2, 2024), https://www.nytimes.com/interactive/2024/11/05/us/elections/results-nevada-question-4-remove-slavery-exception.html.

[275] *See Silver State 2024 General Election Results*, NEV. SEC'Y OF STATE, https://silverstateelection.nv.gov/USPresidential/.

[276] *Nevada U.S. Senate Election Results*, N.Y. TIMES (Dec. 2, 2024), https://www.nytimes.com/interactive/2024/11/05/us/elections/results-nevada-us-senate.html.

[277] CAL. CONST. art. I, § 6.

[278] *California Proposition 6*, CAL. OFF. VOTER INFO. GUIDE art 1, § 6 (2024), https://perma.cc/2MJA-QBRB.

[279] *California Proposition 6 Election Results: End Involuntary Labor by the Incarcerated*, N.Y. TIMES (Dec. 16, 2024), https://www.nytimes.com/interactive/2024/11/05/us/elections/results-california-proposition-6-end-involuntary-labor-by-the-incarcerated.html.

polling began to show voters opposed to the measure, it seemed like the major hurdle was getting the proposition on the ballot at all. California requires a two-thirds vote of both legislative houses to get a constitutional amendment on the ballot, and a previous attempt to pass a total slavery and involuntary servitude ban was scuttled in 2022, when the California Department of Finance opposed it for potentially costing the state approximately $1.5 billion annually to pay incarcerated people minimum wage.[280] This time, as I discuss in the next Section, legislators addressed those fiscal concerns. When the legislature moved to add this measure to the ballot, it also passed several laws that would create the regulatory apparatus to implement it, including allowing prison regulators, instead of state minimum wage laws, to set pay rates.[281] But these legislative measures were contingent on Proposition 6 passing. When this amendment came to the legislature this second time, it sailed through. Every voting Democrat in both the California House of Representatives and Senate voted to advance it to the ballot.[282]

Once it passed the legislature, the proposition had no funded opposition[283] and about $1.9 million in funding supporting it.[284] Beyond this, "no argument against the measure was actually submitted to the official state voter guide."[285] Major figures in California politics, including the *Los Angeles Times* Editorial Board, "the American Civil Liberties Union of California, the League of Women Voters of California, the California Labor Federation, and Los Angeles Mayor Karen Bass," all supported the measure.[286]

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[280] Byrhonda Lyons, *California Lawmakers Reject Ballot Proposal that Aimed to End Forced Prison Labor*, CAL MATTERS (June 30, 2022), https://perma.cc/QT3A-3NFY.

[281] Seemingly as a result of these changes, the fiscal impact statement from the California Legislative Analyst's Office declared that Proposition 6's costs "likely would not exceed the tens of millions of dollars annually." *Proposition 6*, CAL. LEGIS. ANALYST'S OFF. 3, https://perma.cc/U7Y3-F5WM.

[282] *ACA-8 Slavery Votes*, CAL. LEGIS. INFO., https://perma.cc/A8YN-6ZY5.

[283] Cayla Mihalovich, *Anti-Slavery Measure Prop. 6 Fails, Allowing Forced Labor to Continue in California Prisons*, CAL MATTERS (Nov. 10, 2024), https://perma.cc/8PQ2-ESCG.

[284] Jonathan Lloyd, *California Voters Reject Prop 6 Ban on Forced Prison Labor*, NBC L.A. (Nov. 11, 2024), https://www.nbclosangeles.com/decision-2024/ballot-prop-6-forced-prison-labor/3558200/.

[285] Naomi Lachance, *California May Have Voted to Keep Slavery in Prisons*, ROLLING STONE (Nov. 6, 2024) (emphasis omitted), https://www.rollingstone.com/politics/politics-news/california-slavery-prison-vote-election-2024-1235155591/.

[286] *Id.*

That is not to say that there was no opposition at all. The Bay Area News Group, which publishes papers like the *Marin Independent Journal* and the *Mercury News*, published editorials opposing Proposition 6, arguing that it effectively allows incarcerated people "to refuse to do chores in prison" and could "entitl[e] inmates to minimum wage pay, costing the state potentially billions of dollars for work that essentially maintains their own living facility."[287] Similarly, the Howard Jarvis Taxpayer's Association, which has a long history of opposing propositions that could increase California taxes, argued that "[i]t doesn't seem fair to further increase the burden on taxpayers by creating the conditions to negotiate higher wages for inmates who are paying off their debt to society by serving their sentences in state prison."[288]

Ultimately, proponents of Proposition 6 have coalesced around three compounding reasons for its failure: the general pro-carceral sentiment of California voters in the 2024 election, voter confusion over what the proposition actually did, and too little money raised to ameliorate that voter confusion.[289] At the same time they voted against Proposition 6, California voters, joining the conservative "tough on crime" push that swept much of the country, also voted for a proposition "to toughen penalties for drug- and theft-related crimes" and ousted several reform-minded prosecutors.[290] Issac Bryan, the vice chair of the California Legislative Black Caucus, told the *New York Times*: "I think the narrative around Prop. 6 got swept into the fear politics that are driving the return to mass incarceration and the tough-on-crime era."[291]

But noting that Nevada, despite passing their total ban on slavery and involuntary servitude by a wide margin, voted more

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[287] *See* Bay Area News Group Editorial Board, *Editorial: No, California Inmates Should Not Be Entitled to Refuse to Do Chores in Prison*, MARIN INDEP. J. (Oct. 3, 2024), https://www.marinij.com/2024/10/03/california-proposition-6-editorial-slavery-involuntary-servitude/.

[288] Editorial, *Howard Jarvis Taxpayers Association Takes Positions on Statewide November Ballot Measures*, CONTRA COSTA HERALD (Oct. 2, 2024), https://perma.cc/DYR2-NQ5Z.

[289] Paul Blest, *Did Ballot Referendum Language Doom an Anti-Slavery Measure?*, MORE PERFECT UNION (Nov. 15, 2024), https://perma.cc/R9M7-9GLW; Orlando Mayorquin, *A California Ballot Measure to Ban Forced Prison Labor Is Failing*, N.Y. TIMES, (Nov. 6, 2024), https://www.nytimes.com/2024/11/06/us/politics/california-prop-6-measure-forced-prison-labor.html; Elize Manoukian, *Californians Voted Against Outlawing Slavery, Why Did Proposition 6 Fail?*, KQED (Nov. 11, 2024), https://perma.cc/EB9Y-8QJU.

[290] Abdallah Fayyad, *Tough-on-Crime Laws Are Winning at the Ballot Box*, VOX (Nov. 6, 2024), https://perma.cc/3PWT-M7V6; *see also* Blest, *supra* note 289.

[291] Mayorquin, *supra* note 289.

conservatively than California in the general election, organizers point to the two ballot measures' language as the primary driving difference. While Nevada's measure used simple language that mentioned slavery, Proposition 6's text was more complex and mentioned only involuntary servitude. This was a problem because, as "Lawrence Cox, a formerly incarcerated organizer with the group Legal Services for Prisoners with Children," said, "A lot of people don't even know what involuntary servitude is."[292] The connection between slavery and involuntary servitude is, Cox believes, opaque, and so voters could think, "Okay, it's just a work program, or it's just work people need to work in order to be rehabilitated."[293] With less than $2 million in funding supporting the proposition, the combination of this educational hurdle and the procarceral mood of the electorate was apparently insurmountable.[294]

Of course, that defeat did not mean this fight was over in California. Organizers and legislators in favor of the proposition have vowed to continue to push to ban the exception in their state.[295] This is unsurprising because, in addition to the national organizing around this issue, Proposition 6 was one piece of the legislative slate prioritized by the California Legislative Black Caucus that came out of the California Reparations Task Force.[296] Indeed, less than a month after the election, the *Los Angeles Times* Editorial Board called on California government officials to take action and do what voters did not.[297] The Editorial Board pushed for statutory changes to remove mandatory work from the California penal code, for Governor Gavin Newsom to explore what was possible by executive order, and for the legislature to again put the issue on the ballot "given the possibility that the language of Proposition 6 could have been clearer."[298]

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[292] Blest, *supra* note 289.

[293] *Id.*

[294] *See* Mayorquin, *supra* note 289; Tyler Katzenberger, Lindsey Holden & Emily Schultheis, *California Deals Criminal Justice Reform a Punishing Blow*, POLITICO (Nov. 6, 2024), https://www.politico.com/news/2024/11/06/california-deals-criminal-justice-reform-big-losses-00187973.

[295] Blest, *supra* note 289.

[296] *See* Manoukian, *supra* note 289; *see also* Guy Marzorati & Annelise Finney, *Centerpiece Reparations Bill Derailed by Newsom's Late Request. Here's Why*, KQED (Sept. 4, 2024), https://perma.cc/FP59-Z3RJ.

[297] The Times Editorial Board, *Editorial: California Voters Rejected an Anti-Slavery Measure to End Forced Prison Labor. Now What?*, L.A. TIMES (Nov. 20, 2024), https://perma.cc/4UVY-4MCH.

[298] *Id.*

California's failure to pass Proposition 6 was the clearest sign of a potential backlash, but it was not the first. Both New Hampshire and New York seemed poised to have ballot initiatives in 2024 before stalling.

The New Hampshire House passed a bill that would put a simple amendment on the ballot stating, "All persons have the right to be free from slavery and involuntary servitude."[299] But when the bill was sent to the Senate, the Republican majority altered the text to mirror the Thirteenth Amendment exactly.[300] When the amended bill was sent back to the House, it failed.[301]

New York likewise had a bill that appeared ready to add an amendment to its constitution. While its language was complex, it was so in a way that was clearly intended to be more explicitly protective of incarcerated people than simple text might have been.[302] The bill passed the Senate but stalled in committee in the Assembly.[303] Organizers blamed this on "Albany's notoriously compressed window for legislating" alongside delays caused by other unrelated political battles.[304]

These are not the only attempts to ban slavery and involuntary servitude with no exceptions. The Abolish Slavery National Network noted that "Maine, New Hampshire, New Jersey,

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[299] *See* H.R. CACR 13, 2024 Leg., Reg. Sess. (N.H. 2024) (available at https://perma.cc/N48A-5SXW).

[300] *See* S. CACR 13, 2024 Leg., Reg. Sess. (N.H. 2024) (available at https://perma.cc/5X44-7L82) (resolving to create Article 2-c of the first part of the state constitution: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within New Hampshire, or any place subject to its jurisdiction"); *see also* Jeremy Margolis, *State Senate Approves Constitutional Amendment Banning Involuntary Servitude—Except for Prisoners*, CONCORD MONITOR (May 15, 2024), https://perma.cc/Z7LG-Z3BC.

[301] *See Docket of CACR13*, GEN. CT. OF N.H., https://gc.nh.gov/bill_status/legacy/bs2016/Bill_docket.aspx?lsr=2312&sy=2024&sortoption=&txtsessionyear=2024&txtbillnumber=CACR13 (noting that the House nonconcurred with the Senate amendment on May 31, 2024).

[302] *See* S. Con. Res. 225-C, 2023–2024 Leg., Reg. Sess. (N.Y. 2023) (available at https://perma.cc/5H6B-FRZ6):

> Neither slavery nor involuntary servitude shall be permitted to exist in the State of New York, including for persons convicted of a crime. No incarcerated individual in any state or local prison, penitentiary, jail or reformatory shall be compelled or induced to provide labor against their will by force or other adverse action against the incarcerated individual or against another person, or by any reasonably feared threat thereof.

[303] *See id.* (tracking the bill's progress).

[304] *See* ROSS ET AL., *supra* note 21, at 62.

New Mexico, New York, Texas, and Virginia Abolitionists are currently advocating for legislation that adopts anti-slavery language into their state constitutions."[305]

Finally, though it is still in its nascent stages, no discussion of attempts to create a total ban on slavery and involuntary servitude would be complete without mentioning the Abolition Amendment proposed by Senator Jeff Merkley and Congresswoman Nikema Williams in 2021.[306] That amendment would remove the Except Clause from the Thirteenth Amendment. Obviously, securing an amendment to the federal constitution is a tall task, requiring not only passing Congress but acquiring the assent of a supermajority of the states. Merkley and Williams's proposed amendment, despite gaining some attention, has not yet even passed the Senate.[307] Nevertheless, the amendment now has over a dozen cosponsors in the Senate, and Merkley and Williams continue to push on, aided by a number of public interest groups focused on the issue.[308]

3. Legislative action.

While legislative action is not the core of this Article's focus, two legislative proposals bear mentioning: California's because it attempted to proactively restrict its (failed) amendment's potential, and New York's because it is an example of the type of structural change that may be necessary to fully protect against backsliding toward the current involuntary servitude-allowing status quo.[309]

When California seemed poised to pass an amendment to its constitution prohibiting slavery and involuntary servitude, the legislature had already passed a legislative limit on its effect. AB-628,[310] which would take effect only if the voters approved the

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[305] *Frequently Asked Questions*, *supra* note 25.

[306] *See Ahead of Juneteenth, Merkley, Williams Propose Constitutional Amendment to Close Slavery Loophole in 13th Amendment*, OFF. OF SEN. JEFF MERKLEY (June 18, 2021), https://perma.cc/Y4Q6-RTPY [hereinafter *Ahead of Juneteenth*].

[307] *See Merkley, Williams Joint Statement on Momentum for Abolition Amendment Ahead of Juneteenth*, OFF. OF SEN. JEFF MERKLEY (June 18, 2024), https://perma.cc/7FW9-QZT8.

[308] *See id.*; *Ahead of Juneteenth*, *supra* note 306 (noting that the amendment is supported by groups including the Abolish Slavery National Network, the Brennan Center for Justice, the ACLU, Human Rights Watch, and dozens of others).

[309] This Part merely describes these legislative enactments, while Part III digs further into how they might, or might not, further the goal of sustaining a prison system that has neither slavery nor involuntary servitude.

[310] Assemb. 628, 2023–2024 Leg., Reg. Sess. (Cal, 2024) (available at https://perma.cc/D5SE-4C35).

slavery amendment, states that the Department of Corrections and Rehabilitation must establish a voluntary work program.[311] It also makes explicit that incarcerated workers are not covered by any state or local minimum wage laws, regardless of those laws' texts.[312] Instead, wages are to be set by the Secretary of the Department of Corrections and Rehabilitation at the state level and by local ordinance for work done in county and city jails.[313] This was a concession that the amendment's organizers felt they had to make, although it seems that they managed to add the more explicit protections for incarcerated people that the proposed amendment contains in the midst of bargaining.[314] Of course, in the end this bargain may have backfired because the more complex language of Proposition 6 may have led to its rejection.

Finally, given the organizing in the state, it is unsurprising that New York has ambitious proposals on the table.[315] Still, it is difficult to fully describe how extensively New York's proposed Fairness and Opportunity for Incarcerated Workers Act[316] would remake prison labor in the state.[317] The headline of the bill's page on the state senate website says that it "[e]stablishes a New York state prison labor board," but in truth that is only the beginning.[318]

Start with the board itself. It requires the appointment of a variety of stakeholders including multiple former and currently incarcerated individuals, two people representing organized labor, designees of a variety of government officials including the commissioners of the Division of Human Rights, the Department of Labor, and the Department of Corrections, and representatives from nonprofit reentry programs.[319] Some of these members would be appointed by other government officials, but others would be selected, for example, by the inmate liaison committees in their respective jail or prison facilities.[320] The board would be tasked

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311 *Id.*

312 *Id.*

313 *Id.*

314 *See* Anabel Sosa, *California Lawmakers Add Measure to End Forced Prison Labor to the November Ballot*, L.A. TIMES (June 27, 2024), https://perma.cc/H6TR-GJNQ.

315 *See* ROSS ET AL., *supra* note 21, at 58–68 (describing the bill, the organizing surrounding it, and the proposal to amend New York's constitution).

316 S. 6747-A, 2023–2024 Leg., Reg. Sess. (N.Y. 2023) (available at https://perma.cc/T4WA-CP4X).

317 *See id.*

318 *Id.*

319 *Id.* § 200-a(2).

320 *See id.*

with creating numerous regulations of New York's prison labor system, but its overarching goal would be "to ensure that all labor programs are for the purpose of rehabilitation and community reentry and reintegration, and not for the purpose of creating profits or cost-savings which inure to the benefit of the state" or other private or nonprofit entities and individuals.[321]

These mandates are not mere puffery. New York's proposed act sets a significant baseline below which the labor board may not regulate. It sets maximum hours,[322] requires all work to be voluntary with wages at the state minimum wage, applies federal and state health and safety protections, guarantees "the right to organize and collectively bargain,"[323] and requires institutions to "make all efforts to ensure that [work] assignments are distributed equitably and work is provided to all who request it."[324] The money that incarcerated workers make would be protected from excessive garnishment and instead go only toward ensuring the thriving of themselves and their communities.[325]

Further, it attempts to put an end to the historic conflict between incarcerated and free labor. One provision prohibits incarcerated labor from being used "in an establishment which has a labor dispute,"[326] while another requires the Department of Labor to supervise the employment conditions of incarcerated people just as it does nonincarcerated people.[327]

And the Act has real teeth. It creates a cause of action that draws on the full breadth of past civil rights statutes.[328] With a ten-year statute of limitations, the proposed Act allows litigants to sue for violations of its primary labor condition provisions and receive injunctive relief, damages, punitive damages, attorney's fees and costs, "and such other remedies as may be appropriate."[329] Additionally, it reduces the availability of governmental

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[321] N.Y. S. 6747-A § 200-a(12)(a).

[322] *Id.* § 171.

[323] *Id.* § 171(3)(d).

[324] *Id.* § 171(3)(e).

[325] *See id.* § 189.

[326] N.Y. S. 6747-A § 171(6).

[327] *Id.* § 171(7).

[328] *See* Adam Davidson, *The Shadow of the Law of the Police*, 122 MICH. L. REV. 1029, 1039–42 (2024) [hereinafter Davidson, *Shadow of the Law*] (discussing the fee-shifting provision in 42 U.S.C. § 1988).

[329] N.Y. S. 6747-A § 171(9).

immunity for those who violate the statute and makes violations of the statute cause for termination.[330]

This is only a brief summary, and indeed it does not touch on all that the Act would do.[331] But the point of this Section is not to engage in a close statutory analysis of this early-stage New York legislation; it is to preview exactly how far remaking the regulations surrounding prison labor could, and perhaps must, go to create a truly voluntary, and potentially liberatory, work experience in the carceral environment.

III. SOLIDIFYING SLAVERY'S END THROUGH LAW

This Part turns to the various concerns that are likely to arise in crafting and interpreting these amendments, focusing on three prominent axes: (1) the text of the amendments themselves, (2) how that text is likely to be received in litigation, and (3) how structural changes might be used to bolster the rights secured by the amendments. Before turning to these issues, two more general problems should be addressed.

First, as the discussion of additional structural support suggests, there is the question whether a focus on the creation of a constitutional right, or a right more generally, is the most prudent course of action. While the critique of rights as indeterminate, individualistic, and serving to narrow political imagination has some force in this area,[332] there are significant countervailing arguments here. The most important response is a practical one. Whatever force the critique has, organizers have decided to make this one of their battlefields. They have created these rights, other states seem likely to push for variations of them too, and now the question is how best to interpret them to effectuate their intended purposes. But beyond this, as scholars like Professor Kimberlé Crenshaw have noted, rights discourse has historically been a successful, if imperfect, tool in the civil rights toolbox, and that is the case here too.[333] While these state

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330 *Id.* § 171(10)–(11).

331 *See, e.g.*, *id.* §§ 23–26 (regulating procurement).

332 *See* Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2188 (2013) (describing the critique of rights).

333 Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1369 (1988) (explaining "how the use of rights rhetoric has emancipated Blacks from some manifestations of racial domination").

amendments are clear evidence of the Thirteenth Amendment's failure, the Thirteenth Amendment has played a key role in ending some forced labor practices, including of course chattel slavery. Finally, while the critique of rights suggests that rights narrow political imagination, here the focus on a right seems to have expanded the political possibilities organizers and others might consider. As discussed in Parts III.B and III.C, the focus on these rights has led at least one jurist to consider how a prohibition on slavery and involuntary servitude might extend beyond the current protections of the Thirteenth Amendment[334] and has led legislatures to consider what robust structural protections for incarcerated workers might look like.[335]

Second, even if it may be appropriate to focus on rights, one might worry about a focus on *state* constitutional rights. That concern would not be unwarranted, as scholars have long recognized that state constitutions are different from the federal constitution in ways that make them potentially problematic to rely on. Perhaps most relevant here, state courts have often treated parts of their constitutions as merely aspirational norms and not the sort of strong legal requirements that we think of federal constitutional rights being. Here, I think the concern is, while not absent, muted. The differences in state court enforcement of their constitutions' rights seem to take place in those state provisions that create *positive* rights.[336] Here, the right being created (or, perhaps more accurately, expanded) is the sort of negative right that both state and federal courts regularly enforce with substantive teeth.[337] The easiest way to see this may be to look at the Thirteenth Amendment itself. While attempts to use that Amendment as a font of positive rights have faltered,[338] the courts have

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334 *See infra* notes 395–97 and accompanying text (discussing *Lilgerose*).

335 *See infra* Part III.C.

336 *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1136 (1999) (noting that "state court judges . . . have shown reluctance to recognize corresponding state duties" to state constitutional positive rights).

337 States, for example, have regularly interpreted state versions of the Fourth Amendment as having substantive protections, including protections that go beyond the U.S. Constitution. *See, e.g.*, State v. Sum, 511 P.3d 92, 101–05 (2022) (incorporating both the defendant's race and the police's history of racial discrimination into the determination of whether a seizure has occurred under the Washington Constitution).

338 *See* Greene, *supra* note 101, at 1765–68 (describing areas where the Thirteenth Amendment suggests the creation of positive rights that, while not adopted by courts, could be motivated by the Thirteenth Amendment in Congress).

used it to police forced labor practices, including in prisons.[339] This does suggest that attempts to use these state amendments to create positive obligations are perhaps best pitched toward the legislative arena. But even here, advocates and courts should be careful not to totally eschew arguments that the state has particular positive obligations as a result of these amendments. That is because the total control with which the state operates in the prison context has long been recognized to create obligations on it that do not exist outside of the prison. States, for example, must provide for incarcerated people's safety inside the prison in a way the Court has expressly rejected outside of it.[340] Here too, if states would like to encourage incarcerated people to work, it seems plausible that there may be minimum positive requirements—for example, some minimum level of pay—that courts impose to ensure that the labor done is voluntary.

A. The Amendments' Text

The text of the amendments' working their way through state houses and ballot initiatives to become enshrined in state constitutions is the most obvious site of potential change. As Part II discussed, while some states have taken the simplest road of striking the Except Clause from their version of the Thirteenth Amendment, others have adopted more complex language. Usually, this language suggests that there are some parts of the criminal legal system that this amendment is not meant to affect. And indeed, in Louisiana, potentially confusing language like this—there stating that the ban "does not apply to the otherwise lawful administration of criminal justice"—seemingly led to the amendment's defeat.[341] This Section refers to these as the "simple" and "complex" options.

This Section makes three arguments regarding the choice of text for these amendments. First, it discusses how not all

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[339] *See, e.g.*, McGarry v. Pallito, 687 F.3d 505, 511–14 (2d Cir. 2012) (finding that forcing a pretrial detainee to work in the prison laundry under threat of solitary confinement was both a violation of the Thirteenth Amendment and clearly established law so as to deny the defendants qualified immunity).

[340] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198–200 (1989) (rejecting a general constitutional duty of care and protection while recognizing that such a duty exists in incarceratory contexts).

[341] H.R.J. Res. 298, 2022 Leg., Reg. Sess. (La. 2022) (enacted) (available at https://perma.cc/AZ9Y-VD6T).

"complex" text is created equal, and indeed some text that could initially seem most likely to undermine organizers' goals could actually be interpreted to be comparatively harmless. Second, it argues that organizers should choose between simple and complex language based on three factors: (1) whether their goals are primarily symbolic or substantive; (2) the site of change—whether the judiciary, the legislature, the executive, or the people—they believe will be most promising for interpreting that language; and (3) whether the electoral boost provided by the clarity—particularly in terms of the moral stakes of the issue—of a simple text is worth the potential loss in substantive protection if that text is later interpreted to be narrow or symbolic by courts and regulators. Third, this Section highlights the possibility for two categories of language that have thus far been missing from these amendments: (1) language that makes explicit the power to attack the badges and incidents of slavery, and (2) an enforcement clause.

1. The meaning of complex texts.

Begin with the complex text that first caused one of these amendments to fail: Louisiana. Louisiana's proposed language that the amendment "does not apply to the otherwise lawful administration of the criminal justice system" can be interpreted to mean two distinct possibilities: most harmlessly, it is not meant to prevent judges from doing things like offering community service as an option at sentencing, or requiring someone to work a market-rate job as part of their parole or probation.[342] In other words, the amendment is not meant to increase carcerality in the criminal legal system by taking away these less carceral options. The other interpretation of language like this harkens back to a thus far largely forgotten interpretation of the Thirteenth Amendment: that it would end prisons entirely. This was a time when courts openly admitted that incarcerated people were "slaves of the [s]tate."[343] The description was fitting, and understanding why that was helps us to see that, despite disclaiming that incarcerated people have this status now, it is still accurate in unfortunate ways. What made slavery *slavery* was not simply

[342] *Id.*

[343] *See, e.g.*, Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

being forced to work for little or no pay. There were enslaved people who did little or no work, perhaps because they had gotten too old, frail, or injured, or perhaps because the person who enslaved them simply chose for them not to work. The point wasn't the work; it was the domination. It was the total control by one human of another. And this type of total control is an aspect of the penal regime in this country that continues to this day. Indeed, as the Seventh Circuit has recognized, "[t]he control that the [prison] exercises over a prisoner is nearly total, and control over his work is merely incidental to that general control."[344]

Utah seemed to recognize exactly this argument and designed its amendment to be interpreted in the less radical way. Utah had language similar to Louisiana's proposal, stating that the ban on slavery and involuntary servitude "does not apply to the otherwise lawful administration of the criminal justice system."[345] But in passing this language, it provided specificity to voters about what it meant. The ban, Utah told its voters, "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."[346] This type of specificity is something that organizers might wish to push for in order to more clearly secure a tangible victory.

But of course, not all specificity is good. Indeed, even the example above can be criticized as shutting off the true radical, abolitionist potential of these amendments. Adopting simple language preserves the possibility that the amendments will lead to a remaking of the carceral environment that goes beyond labor and more broadly moves away from the domination that has thus far linked it so closely to the historic struggles against slavery. Even ignoring this sort of neutralizing, however, complex language can be problematic. For example, complex language that is more specific—like Tennessee's clause that states "[n]othing in this section shall prohibit an inmate from working when the inmate has been duly convicted of a crime"[347]—might be interpreted to reify the current state of labor in prison, making the removal of the Except Clause a merely symbolic victory.[348] In other words,

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344 Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992).

345 UTAH CONST. art. 1, § 21(2).

346 *Statewide Ballot Measures*, *supra* note 232.

347 TENN. CONST. art. 1, § 33.

348 *Id.*

language like Tennessee's might be read to say that whatever we call the working relationship between the prison and the imprisoned, *it is not slavery or involuntary servitude*.

Of course, Tennessee's language is similar to the last clause of Utah's explanation of the intended effects of its amendment. What these examples show is that complex amendment language is neither inherently good nor inherently bad. Instead, what matters is the specificity with which organizers and legislators are crafting the language and other materials attached to the amendments. Utah's language seems less potentially harmful because it is included along another example that suggests that the amendment is to have some tangible effect, albeit not one as transformational as possible.

Oregon is perhaps the best example of having a complex amendment that is improved by specificity. It states both the type of sentences that the amendment does not affect—"education, counseling, treatment, community service or other alternatives to incarceration"—and the reasons that must underlie those sentences—"to provide accountability, reformation, protection of society or rehabilitation."[349]

Specificity can also turn a simple amendment into a complex one, perhaps to the chagrin of organizers and incarcerated people. That is what happened in Colorado. Colorado has an amendment that states simply, "There shall never be in this state either slavery or involuntary servitude."[350] But within that amendment's legislative history were statements lauding the Department of Corrections' work program "because it 'assists in such individuals' rehabilitations, teaches practical and interpersonal skills that may be useful upon their reintegration with society, and contributes to healthier and safer penal environments.'"[351] Thus, a Colorado appellate court upheld the work program against an incarcerated plaintiff's attack despite both contrasting legislative history saying that the amendment was meant to "prohibit compulsory labor"[352] from incarcerated people and statutory language

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[349] OR. CONST. art. 1, § 34(2).

[350] COLO. CONST. art. 2, § 26.

[351] *See* Lamar v. Williams, 2022 WL 22924244, at *3 (Colo. Ct. App. Aug. 18, 2022) (quoting Legis. Council, Colo. Gen. Assemb., Rsch. Pub. No. 702-2, *2018 State Ballot Information Booklet*, at 40).

[352] *Id.* at *3 (quoting Legis. Council, Colo. Gen. Assemb., Rsch. Pub. No. 702-2, *2018 State Ballot Information Booklet*, at 40).

stating that "[e]very inmate *shall* participate in the work most suitable to the inmate's capacity."[353]

As this discussion and the next Section suggest, while descriptions and analyses in earlier works on this subject and those from this Article converge in many places, it is here where we most differ. Unlike those earlier works, this Article does not believe complex, or what a previous commentator called "qualified,"[354] amendments are something that organizers should definitively avoid. Instead, both simple and complex amendments are open to interpretation and contestation. At least in the short term, it seems possible that a sufficiently specific complex text may lead to greater changes in the lived experience of incarcerated people than a simple text that facially has a blanket ban but in practice might be narrowed through legislative history or judicial interpretation. As the next Section discusses further, what may matter more than the specific text is when, how, and by whom organizers believe that a text's meaning can best be contested and interpreted, and how the text that passes today will shape those future battles.

2. Simple or complex?

While Colorado might seem like an example of courts undermining organizers' hard fought victories, it is in fact an example of this Section's second argument: that organizers should choose between simple and complex texts largely based on the short-term goals they have for the amendment and where they believe the most promising sites of interpretation are in the future.

Colorado organizers faced a problem. If the amendment meant an immediate, radical change in the prison labor environment, it would almost certainly be incredibly expensive for the state because the state might have to, for example, pay incarcerated workers minimum wage. And if that expense was going to come into fruition, a fiscal note would have to be attached to the bill that would put the amendment on the ballot. Organizers believed this might sink the amendment and so argued that "this would have no immediate impact on prison labor."[355]

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353 Colo. Rev. Stat. Ann. § 17-20-117 (2024) (emphasis added).

354 Smith, *supra* note 19, at 558.

355 ROSS ET AL., *supra* note 21, at 44 (quoting organizer Kamau Allen).

Making this argument enabled two opposing realities to exist simultaneously. First, organizers and legislators who were in favor of the more radical implications of the amendment could legitimately say that, at least at the moment, this change was largely symbolic. It was erasing a stain on Colorado's law that left open the possibility for legal slavery and involuntary servitude, but it was not mandating that the Department of Corrections take immediate action. At the same time, both proponents and opponents knew that, once the amendment was passed, litigation would soon follow.[356] And it was those future contests that would determine the amendment's actual fiscal impact.[357]

Colorado organizers combined this strategic move with a textual choice: a simple blanket ban on slavery and involuntary servitude. The choice to use simple language here thus worked on numerous levels. First, on the political level, it enabled coalition building by assuaging fiscal concerns and maintaining the moral clarity of the project for voters by stating its goals clearly and simply: No slavery. No involuntary servitude. Period.

But even more brilliantly, it set the stage for future litigation about as well as an organizer might hope. Organizers correctly predicted that the Colorado courts would not be entirely hostile to the amendment. Indeed, even when an appellate court denied one incarcerated person's claims, it did so in a nonprecedential decision that expressly declined to address late-raised arguments that will likely be (and thus far have been) at the crux of future litigation.[358] And the Colorado trial court that has addressed the issue held that, indeed, subjecting imprisoned people to solitary confinement or other punishments for refusing to work violates the amendment.[359] More than this, it recognized that the amendment's sweeping language might have even broader effects than the Thirteenth did.[360]

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[356] *Id.* at 44–45.

[357] *Id.*

[358] *See Lamar*, 2022 WL 22924244, at *3 (declining to address claims 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" because they were first raised on appeal).

[359] *See Lilgerose*, at *11 (Trellis).

[360] *Id.* at *11–12.

This latter point highlights the other way simple text might best set up future litigation: "We're all textualists now."[361] By utilizing simple, sweeping language, an amendment's text would seem to signal to a textualist judiciary that there should be some sweeping change. Of course, this textualist impulse is no guarantee that the judiciary will follow through on giving the text its plain, potentially radical, meaning.[362]

More than this, because organizers were often justice-involved people,[363] they were aware of the reality of prison slavery and how that reality closely mimicked the slavery and involuntary servitude the Thirteenth Amendment had banned. That reality included obvious punishments (like solitary confinement and other physical restraints) that clearly cross the line from a permissible inducement to work (like a salary) into something that can only be called, at the least, involuntary servitude.[364] Courts faced with an exceptionless ban on slavery and involuntary servitude would thus be hard-pressed to avoid striking down at least these most extreme punishments.

This analysis might suggest that simple language is, as an earlier commentator argued, always (or usually) for the best.[365] But instead, it is important to realize the many different variables that happened to make simple language the best *for Colorado*. Changes to the legal and political economic landscape, or to the goals of amendments' proponents, could radically alter the desirability of simple language.

Imagine, for instance, that the Colorado courts were less textualist and more hostile to the amendment. A judiciary relying on the "values-based canon," against which Justice Elena Kagan later inveighed,[366] could easily have read a simple amendment as an entirely symbolic enterprise. Indeed, context would help it get

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[361] Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE 08:29 (Nov. 25, 2015), https://perma.cc/L65V-9AET.

[362] *See* Kevin Tobia, *We're Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243, 258 (2023) (noting that Justice Elena Kagan retracted her earlier statement in 2022, arguing instead that "now, the textualists ignore text in favor of a new values-based canon"); West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("When [the textualist] method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards.").

[363] *See* ROSS ET AL., *supra* note 21, at 43–44.

[364] *See supra* Part II.B.1.

[365] Smith, *supra* note 19, at 558–59.

[366] *See* Tobia, *supra* note 362, at 258.

there, as the amendment's legislative history supported the state's current prison work programs, and the lack of a fiscal note suggests that sweeping changes to the prison system's operations were not intended.

Alternately, imagine a group of organizers with different goals. Organizers with purely symbolic goals would find their work frustrated by a judiciary wishing to give all language in the state's constitution substantive meaning. Or imagine organizers who—building on the long tradition of incarcerated organizing that attempts to secure productive, dignity-affirming work and educational opportunities—found themselves empowering litigants who wanted to argue the maximalist position that incarceration is such an inherently coercive environment that no work done within it could ever be voluntary. A prison, after all, is the ultimate company town. The employer necessarily controls everything about its employee's lived experiences, and there is, quite literally, no option to leave. While this type of argument does have radical potential because it suggests the need for us to undo and reimagine our entire system of incarceration, it could also undermine the ability for the amendment to empower incarcerated people, whether through gaining access to educational or skill-building opportunities or simply by getting a paycheck that they can use to support themselves and their communities.[367]

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[367] *See* ROSS ET AL., *supra* note 21, at 4 (noting that "some [carceral] abolitionists have questioned the focus on ending the exception and winning worker rights" and responding that "the provision of meaningful jobs on a voluntary basis and the establishment of fair wages would have a transformative impact"). While this Article does not seek to analyze every possibility within the movement to end prison slavery through the lens of nonreformist reforms, this particular example highlights the complexity of operating within that framework. Both options presented here could fit within Professor Amna Akbar's formulation of a nonreformist reform. *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2527 (2023). They might "aim[ ] to undermine the political, economic, and social system or set of relations as it gestures at a fundamentally distinct system or set of relations in relation or toward a particular ideological and material project of world-building" because both seek to undermine the logics of the carceral system and its long-standing reliance on enslaved labor, either by dismantling that system entirely or forcing it to reconfigure itself into a tool of rehabilitation and opportunity for those it has captured (if such a reconfiguration is possible). *Id.* And they could seek to "draw[ ] from and build[ ] the popular strength, consciousness, and organization of revolutionary or agential classes or coalitions" because both seek alternate paths to empowering incarcerated and other system-affected people, whether by freeing them from an inherently coercive environment that stifles their organizing potential, or by aiding them through providing work and training opportunities that create the knowledge and material conditions for further organizing by both incarcerated people and their communities. *Id.*

Finally, as the next Section discusses further, the choice of a simple amendment leaves the interpretation of the text most obviously in the hands of the judiciary. But the judiciary is not the only governmental body that implements the law. Organizers in different political economies may want to empower the legislature or the executive to implement the amendment. Still others might wish to enhance their ability to return to the people to seek further changes, in the event the branches of government are united against them. And some organizers might find themselves in a particularly fruitful political moment that is unlikely to repeat itself. In that situation, proponents might wish to craft as specific an amendment as possible, so as to lock in and protect their win from future attacks.

While many of these strategies have seemingly not been used in the prison slavery context, organizers of state constitutional amendments dealing with other issues have used them aggressively and successfully. Proposition 22[368] in California, for example, essentially rewrote the California statute governing the regulation of rideshare drivers and other gig workers, ensuring that they remained classified as independent contractors instead of employees. Proposition 22 stated that it could be amended only by the legislature "by rollcall vote . . . seven-eighths of the membership concurring, provided that the statute is consistent with, and furthers the purpose of, this chapter."[369] In addition to this seven-eighths requirement, it clarified that any changes to numerous substantive parts of the proposition would "not further the purposes" of it and so were disallowed.[370] The California Supreme Court recently upheld the proposition against an attack led by several unions, among others.[371]

But of course, all of the preceding analysis depends on an assumption about the popularity of these measures that California recently upset. There is now a clear example of an amendment being supported by its proponents, making it to the ballot, and being rejected by the voters. While Louisiana's attempt at a total ban suggested this possibility, it was difficult to draw conclusions from that state given that the measure's proponents ultimately

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368 Protect App-Based Drivers and Services Act (Proposition 22), CAL. BUS. & PROF. CODE § 7465(a) (West 2024).

369 *Id.*

370 *Id.* § 7465(c)(2)–(4).

371 *See* Castellanos v. California, S279622 (S. Ct. Cal. July 25, 2024) (State Court Report).

turned against it. There was no such confusion in California. The voters were given a ballot measure about involuntary servitude, albeit one with not entirely clear language, and they rejected it.

This suggests one final consideration organizers and legislators should consider as they choose an amendment's text: its moral clarity. Indeed, both Louisiana and California seemed to suffer from the problem of a morally opaque amendment.[372] Both amendments failed to communicate that their purpose was to eradicate a vestige of slavery. Louisiana's amendment was unclear because it suggested some form of slavery or involuntary servitude might continue. And California's Proposition 6[373] did not sufficiently connect involuntary servitude and slavery, thereby allowing voters to more easily conflate servitude with voluntary, potentially rehabilitative, labor. By contrast, Nevada's amendment using simple language passed with 60% of the vote even though the state simultaneously voted to elect President Donald Trump.[374]

These differential outcomes suggest that the moral clarity provided by clearly connecting an amendment to slavery causes a significant electoral boost. In times and places in which the political economy is not favorable to these amendments, an amendment with simple language may be all that is politically possible.

While this sounds like a simple analysis, evaluation of a particular political economy is fraught because the ground around organizers can quickly change. In California, for example, only a few months after voters soundly rejected Proposition 6, new attention was brought to the plight of incarcerated workers by the wildfires that raged in Los Angeles. There, as in the past, hundreds of incarcerated firefighters bravely fought to protect the public in twenty-four-hour shifts that earned them not much

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[372] Another lesson for organizers and other proponents of these amendments is that they must be clear about who will control the final language presented to voters. The opacity of Louisiana's and California's texts was not the fault of organizers. In both states, neutral or antagonistic state actors reduced the moral clarity that organizers pushed for. In Louisiana, Republican legislators altered the amendment's language, and in California, the state's Attorney General refused to use the word slavery in the ballot language despite organizers' push for it. *See* Paul Braun, *Why a Constitutional Amendment Banning Slavery Is on November's Ballot in Louisiana*, WRKF (Oct. 17, 2022), https://perma.cc/5G59-RSRM; Blest, *supra* note 289.

[373] *See generally California Proposition 6*, *supra* note 278.

[374] *Nevada U.S. Senate Election Results*, *supra* note 276.

more than $1 per hour.[375] Media noted this disparity—nonincarcerated firefighters are paid at least $3,672 monthly—and connected it explicitly to involuntary servitude.[376] It is not difficult to imagine that, given this attention, voters in January 2025 California might have passed Proposition 6 only a few months after they last rejected it.

3. Badges, incidents, and enforcement.

As this discussion of other amendments suggests, prison slavery abolitionists have only begun to scratch the surface of the possible layers of complexity and specificity they might wish to include in state constitutions or other legal texts. In the spirit of this movement that hopes to make the Thirteenth Amendment live up to its promise, this Section highlights two textual choices that might draw on that amendment's strengths. State constitutional amendments might contain an explicit adoption of the now-long-standing interpretation of the Thirteenth Amendment's banning of the badges and incidents of slavery, and relatedly, they might include an enforcement clause. That clause might explicitly empower (or perhaps require) governmental actors like the legislature or executive to eradicate those badges and incidents, but it might also provide an explicit private right of action for incarcerated people and their allies in order to circumvent the sort of nonsubstantive hurdles that have arisen in cases like *Stanley v. Ivey*.

These two provisions might best help state versions of the Thirteenth Amendment to fulfill their liberatory potential. As discussed in Part I.C, much of the scholarship positing an optimistic view of the Thirteenth Amendment's potential relies on the view that the Amendment also prohibits slavery's badges and incidents. Proponents of ending prison slavery might take this moment to move the prohibition on the badges and incidents of slavery from a judicial interpretation to the constitutional text

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375 *See, e.g.*, Lindsey Holden, *Kim Kardashian Wants Inmate Firefighter Raises. A California Lawmaker Agrees.*, POLITICO (Jan. 14, 2025), https://www.politico.com/news/2025/01/14/inmate-firefighter-pay-00198314.

376 *See* Amy Goodman, *CA Law Allows Low Wages for Incarcerated Firefighters as "Involuntary Servitude"*, TRUTHOUT (Jan. 14, 2025), https://truthout.org/video/ca-law-allows-low-wages-for-incarcerated-firefighters-as-involuntary-servitude/; Mary Walrath-Holdridge, *Inmates Are Fighting California Wildfires: When Did it Start, How Much Do They Get Paid?*, USA TODAY (Jan. 13, 2025), https://perma.cc/4SUJ-2465 (noting the pay rate for "the lowest-level, seasonal firefighters with Cal Fire").

itself.[377] In doing so, they might also provide long-missing guidance as to what these badges and incidents are.[378]

The courts have largely kept this Pandora's Box shut, but here organizers might have an opportunity to finally pry it open.[379] More than just aiding judicial interpretations, they might also shift power to the legislature by adding an enforcement clause to their amendments.

The Thirteenth Amendment's own enforcement clause has arguably been underused, but when it has been relied on, it has created powerful legislation.[380] That legislation's power, however, has often been undercut by the courts.[381] By combining an explicit textual basis for the prohibition on the badges and incidents of slavery with a strong enforcement clause, organizers might both enhance the ability for future organizing in the legislative and executive arenas and create a bulwark to protect legislative victories from judicial pushback. Or, more aggressively, an enforcement clause might be used to make clear that certain plaintiffs have the ability to enforce the constitutional provision in court.[382]

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377 *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883).

378 *See* Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1173–77 (2013) (noting that the *Civil Rights Cases* "presumed that the precise meaning of 'badges and incidents of slavery' was known to its readers" and discussing academic interpretations of the phrase's meaning).

379 *See id.* at 1177–79 (discussing judicial interpretations).

380 *See id.* (discussing the Civil Rights Acts of 1866 and 1875).

381 *See id.*

382 *Cf.* Christin R. Parsons, *Individual Rights—Victim's Rights—Victims Twice: The Supreme Court of Rhode Island Declares the Victims' Rights Amendments to the State Constitution Unenforceable.* Bandoni v. State*, 715 A.2d 580 (R.I. 1998)*, 30 RUTGERS L.J. 1109, 1112 & n.25 (1999) (noting that a proposed amendment to Rhode Island's constitutional protection for victims of crime provided that "[t]hese rights shall be enforceable by the victims of crime and they shall have recourse in the law for any denial thereof"). Of course, because the federal government has different, and greater, limitations on its legislative powers than the states, an enforcement clause in the state constitutional context would necessarily do different work than the Thirteenth Amendment's. States could, for example, seemingly rely on their broad police powers to legislate in this area without an amendment specifically empowering them to do so. The goal of a state enforcement clause, then, might be to shift power toward the state legislature and away from the courts or, more generally, to make explicit the preferred enforcement power or remedy. *See id.* Likewise, an explicit enforcement clause might help to prevent (or support) arguments that a broadly stated amendment either is or is not self-executing. *See, e.g.*, José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 333 (1993) (discussing in the environmental context how "[s]tate courts sometimes rely on the doctrine of self-execution when declining to enforce state constitutional provisions").

B. Litigation

The possibility for litigation to interpret and enforce these constitutional amendments is one that has been recognized, and in some cases hoped for, by the organizers behind these amendments.[383] But at this early stage, litigators and courts have had few opportunities to consider what this changed constitutional language might mean for the operation of our prisons and beyond. This Section intervenes into this constitutional blank slate to provide guidance to both litigators and courts as to how they might shape the procedural and substantive rules that translate this new constitutional text into the lived experience of the people it governs.

1. Procedure.

In discussing a topic as weighty as slavery and involuntary servitude, it is easy to lose sight of the fact that substance is not the only thing that matters. But as the cases attempting to assert these newly passed constitutional rights show, procedural and justiciability doctrines can thwart even the most troubling substantive allegations. Organizers and litigants need to be keenly aware of these limitations in their jurisdiction, and national advocates must keep in mind the variation in procedural and justiciability doctrines across the fifty states. Instead of performing a fifty-state survey of the various rules of procedure and limits on state court jurisdiction that might impact these cases, this Section discusses a more universally applicable problem that these doctrines raise: How do these nonsubstantive rules shape which cases get decided?

This sort of shaping occurs throughout the law. Famously, scholars have long argued that courts shape Fourth Amendment outcomes differently, and in a more government-friendly direction, because they wish to avoid the remedy called for by the exclusionary rule.[384] This interrelation of the right and remedy has been recognized throughout both public and private law.[385]

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[383] *See, e.g.*, O'Neil, *supra* note 239.

[384] *See, e.g.*, William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 883–84 (1991).

[385] *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 895–96 (1999); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98–99 (1999). *See generally* Guido Calabresi & A.

Still others have noted how a change to something like a pleading standard can have a material effect on whether a case goes forward.[386] And even broader than this, rules about who is functionally empowered to sue can shape the law in both explicit and implicit ways.[387]

Here, two dividing lines seem likely to arise. The first concerns the remedy. Assuming there is no clear legislative answer, courts will have to decide whether these amendments provide injunctive relief, damages, or both, and if damages are available, what their scope should be. This latter question is of particular importance because damages could vary widely if, for example, they were limited only to lost wages at intraprison pay rates versus wages at free market rates versus damages that include nonwage, nonphysical harms from being subjected to slavery or involuntary servitude.

Second, organizers, litigators, and courts should be cognizant of how the nonsubstantive rules they craft shape who can successfully bring a suit. At one extreme, one might imagine this as an intragovernmental process, in which an inspector general-like figure polices departments of correction's compliance and the courts are only minimally involved. A step from that might involve something like the Equal Employment Opportunity Commission, which issues Notices of Right to Sue to individuals only after they file a charge with it, and it declines to litigate on their behalf.[388] This problem is especially pertinent here because, as Professor Helen Hershkoff has recognized, state judicial practices can, do,

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Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[386] *See, e.g.*, Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2121 (2015) ("The data presented here strongly support the conclusion that dismissal rates have increased significantly post-*Iqbal*, and in addition suggest many other troubling consequences of the transition to the plausibility standard.").

[387] *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in part) (arguing that Texas's S.B. 8's nonsubstantive rules created a chilling effect that was "near total, depriving pregnant women in Texas of virtually all opportunity to seek abortion care within their home State after their sixth week of pregnancy"); Davidson, *Shadow of the Law*, *supra* note 328, at 1039–42 (explaining how the Court's civil rights attorney fee jurisprudence shaped which civil rights cases are brought).

[388] *See Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/BTT8-PQKL.

and in some cases, should differ from those that occur in federal courts.[389]

While the development of these sorts of administrative procedures is possible, the more pressing issue seems to be the availability of the courts to pro se, incarcerated litigants. This issue is one that is well known.[390] And even at this early stage, the difference in outcomes between pro se and represented litigants is stark. In *Lilgerose*, the only case that has seen any success, the plaintiff is not only represented, but has gained the backing of several national public interest organizations.[391] By contrast, pro se, incarcerated litigants have lost their cases almost entirely because of procedural missteps. Some of these missteps, like filing in federal instead of state court, may not be remediable by the courts. But others, like Lamar's belated addition of facts on appeal that could alter the court's analysis, could be aided by, for example, a liberal willingness to remand by appellate courts and to amend the complaint by trial courts. Particularly given the novel state of this area of law, it may not be obvious to a pro se litigant which facts available to them are relevant. Courts wishing to avoid scattershot, elongated factual descriptions in pro se complaints might therefore wish to view the amendment and appeal process at this early stage as a more iterative process than they usually would. This would encourage courts to be clear in the facts they believe would be relevant and pro se litigants to not fear that a failure to include every possible fact at the outset means the dismissal of their suit.

2. Substance.

There are three paths that judicial interpretations of amendments banning slavery and involuntary servitude are likely to fall into. First, some judges may read the amendments as symbolic statements meant to have no effect on anything within the criminal legal system. These judges will likely rely on either the "complex" language discussed above that seeks to caveat or clarify the prohibition, or on legislative statements about the amendment's

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[389] *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1841–42 (2001).

[390] *See, e.g.*, Davidson, *Administrative Enslavement*, *supra* note 12, at 651–53; Aaron Littman, *Managing Pro Se Prisoner Litigation*, 43 REV. LITIG. 43, 48–60 (2023); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1609–14 (2003).

[391] *See supra* notes 248–57 and accompanying text.

intended effect. If litigants wish to cement this reading, there is likely little more to be said about the necessary analysis to reach this conclusion.

The second option is a middle road, which was taken by the court in *Lilgerose*.[392] That path will likely look to federal interpretations of the Thirteenth Amendment and the Anti-Peonage Act, particularly the Supreme Court's definition of involuntary servitude in *United States v. Kozminski*[393] as requiring either physical or improper legal coercion, to define the scope of the new amendment.[394] This, to be clear, could lead to major changes. Applying *Kozminski* to labor in prisons could eliminate the use of solitary confinement, as well as physical punishments and the write-up process as punishments for refusing to work.

The third path requires a heavier lift, although it is one that the *Lilgerose* court has partially adopted, and it is one well supported by the position of these amendments within our broader governmental structure. That path requires litigants to suggest that their state's constitutional amendment is *broader* than the protections of analogous federal law. The *Lilgerose* court recognized this possibility when addressing claims regarding a possible "housework" exception in the Colorado Constitution.[395] It noted that the state's voters clearly believed that the Thirteenth Amendment had not gone far enough, and it would seem against the popular will to suggest that when they voted for a total prohibition on slavery and involuntary servitude, they actually meant to keep unwritten exceptions established by the federal courts.[396]

Organizers certainly seem to have this third path in mind as a final destination for the end of prison slavery.[397] But more importantly for courts interpreting these provisions, this broader interpretation seems like the most faithful interpretation of many of these constitutional amendments. Every one of these amendments is motivated by the belief that the Thirteenth Amendment was not enough to end slavery and involuntary servitude.

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[392] *See supra* notes 261–68 and accompanying text.

[393] 487 U.S. 931 (1988).

[394] Order Re: Motion to Dismiss at 4–5, *Lilgerose* (Trellis) (No 2022CV30421).

[395] *Id.* at 11–12.

[396] *Id.*

[397] *See, e.g.*, O'Neil, *supra* note 239 ("Advocates said current and formerly incarcerated people had hoped a 'yes' vote could have eventually led to workplace protection, proper training and a higher wage for prison laborers.").

And while there are arguments that some of these amendments could be symbolic,[398] perhaps under a theory that slavery and involuntary servitude do not currently exist in the jurisdiction because of definitions of those terms or statutory protections, it is difficult to imagine that the prohibition is not meant to be enforced when slavery and involuntary servitude are found. Unlike provisions that provide positive rights, like a right to education, the right to be free from slavery and involuntary servitude is exactly the sort of negative protection of liberty that U.S. courts have historically been willing to uphold.

Courts wishing to interpret these amendments as narrower than the Thirteenth Amendment thus face a conundrum that is not easy to escape. The people of their state, for some reason, believed that the Thirteenth Amendment's protections against slavery and involuntary servitude were insufficient to stamp out those practices. Or, at least, people believed the combination of state and federal law was insufficiently clear on whether slavery and involuntary servitude were, in fact, prohibited. They then took the affirmative step to amend the state constitution to add some additional protections, or additional clarity, on top of those provided by federal law. Given this, at the least, these amendments would seem to add a state law protection that extends as far as the federal prohibition. That duplicative protection could prove important, as the effectuation of federal and state rights may have different limits or federal law could change.[399] But as the *Lilgerose* court recognized, and as this Article has detailed, these amendments have been motivated by a belief that the Thirteenth Amendment did not go far enough. In both text and practice, the federal constitution failed to eradicate slavery and involuntary servitude, and so modern advocates found that state law could be used to end it totally. If that historical and political story is true, then these state amendments must do *something* beyond what the Thirteenth Amendment does. The important question becomes: What is that something?

Of course, if these state amendments are unmoored from the most obvious federal analogues, courts and litigators are likely to

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398 *See Frequently Asked Questions*, *supra* note 25.

399 *Cf.* Adam A. Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. 1459, 1483 (2022) [hereinafter Davidson, *Pyrrhic Victory*] (noting how some states purported to remove the defense of qualified immunity).

struggle to find the bounds of their protections. The remainder of this Section suggests several ways that litigants and courts might develop justiciable standards that effectuate this broader vision.

First, because of the differences between the prison and free market labor contexts, litigants and courts should shift their view to the full potential labor protections of the Thirteenth Amendment. While the right to quit working for a given employer is at the core of the Thirteenth Amendment's labor protections,[400] that right only seems to extend so far in the prison context, in which there is one "employer" who controls access to all work. But workers have claimed numerous other Thirteenth Amendment labor rights, with courts recognizing some of them.[401] These include:

> [T]he right to change employers, the right to set wages (as opposed, for example, to wage setting by the state or an employer cartel), the right to refrain from working altogether (in challenges to vagrancy laws) . . . the right to receive fair wages, and the rights to organize and strike for higher wages and better conditions.[402]

While courts have not recognized all of these rights, the long history of the Thirteenth Amendment as a tool for securing labor freedom, combined with the new expanded text of state constitutional amendments, may present a new opportunity for these rights to be asserted as a matter of state law.

Indeed, these claims are backed by a large body of scholarship that explores the historical relationship between theories of labor and the prohibition of slavery. The substantial historical and legal analysis of the "free labor" interpretation of the Thirteenth Amendment provides a deep well of scholarship for thinking about what a more robust protection against slavery and involuntary servitude might mean.[403]

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[400] *See* Pollock v. Williams, 322 U.S. 4, 17–18 (1944) ("The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor . . . . [I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers.").

[401] *See* Pope, *Contract, Race, and Freedom of Labor*, *supra* note 158, at 1478.

[402] *Id.*

[403] *See* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 452–54 (1989); *see also* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR, at xxxii–xxxvi (1995); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy,*

Second, litigants and courts will be forced to grapple with the shockingly low baseline of what incarcerated people are legally entitled to. As in *Lilgerose*, courts will attempt to find the line between a punishment, which these amendments disallow, and a privilege that can be permissibly tied to work. Relatedly, courts might frame this inquiry through the lens of voluntariness. Either way,

> [i]f the baseline legal minimum for every imprisoned person is moldy bread, a multivitamin, and enough water to avoid dehydration served to you in permanent solitary confinement to a cell smaller than a parking space, then the Thirteenth Amendment could be amended tomorrow with essentially no change to the operation of prison labor in this country.[404]

This description assumes that the only relevant baseline is the Eighth Amendment's[405] prohibition on cruel and unusual punishment (or the related prohibition on being punished at all that nonconvicted people receive from the Due Process Clause).[406] For those who would find this baseline intolerable either as a matter of policy or because it would turn the state constitutional amendments into nullities, the relevant question becomes what higher baseline should be used.[407]

The most straightforward way to raise these baselines involves pegging them to other statutory and constitutional rights. That could mean pushing for statutory changes.[408] Colorado could simply, for example, change its earned time statute from granting earned time as a privilege to stating that incarcerated people are

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102 COLUM. L. REV. 973, 1030–31 n.229 (2002); Risa L. Goluboff, *The Thirteenth Amendment in Historical Perspective*, 11 U. PA. J. CONST. L. 1451, 1459–64 (2009); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1669–80 (2001); Pope, *Contract, Race, and Freedom of Labor*, *supra* note 158, at 1517–20; Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1702–07 (2012); Pamela Brandwein, *The "Labor Vision" of the Thirteenth Amendment, Revisited*, 15 GEO. J.L. & PUB. POL'Y 13, 20–23 (2017).

404 Davidson, *Administrative Enslavement*, *supra* note 12, at 697–98.

405 U.S. CONST. amend. VIII.

406 U.S. CONST. amend. XIV.

407 For a more in-depth discussion of the problem of baselines in the broader context of involuntary servitude, see generally Adam Davidson, *Solving Baseline Problems from Below* (on file with author).

408 Likewise, organizers, litigants, and courts should think about the interaction of these new state amendments with other pieces of both state and federal constitutional law, keeping in mind that a change in constitutional rights could have a secondary effect on the protection afforded by these amendments.

entitled to it with good behavior.[409] Likewise, states could statutorily create rights to certain amounts of visitation and exercise or to phone and commissary access.

Not all statutory baselines, however, require legislative action. Indeed, the most robust statute-based argument would be that, absent an exception to the prohibition on involuntary servitude, incarcerated people performing work are just that—workers. As a result, they should be governed by the same wage, hour, and safety protections as workers outside of prisons.[410]

Courts and litigants can also create justiciable standards by analogizing this problem to other areas of law. While there might be many possible analogies litigants could draw,[411] this Section discusses one that presents itself as a potential bulwark against the baseline problem described above. That is the unconstitutional conditions doctrine.[412]

"Unconstitutional conditions issues can arise when a government at any level imposes limitations on who can receive its 'largesse.'"[413] The basic idea behind the doctrine is that the government cannot do indirectly what it cannot do directly. If some

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409 *Cf. Lilgerose*, at *14 (Trellis) (noting that "the CDOC has broad statuory discretion to withhold, withdraw, or restore [earned time] credits").

410 *See, e.g.*, 29 U.S.C. §§ 206–207 (providing minimum wage and maximum hour requirements). *See generally* Bamieh, *supra* note 19 (making this argument in the context of minimum wage).

411 Litigants, for example, might look to private law analogues such as the prohibition on unconscionable contract terms. That doctrine might be especially ripe for analysis because it directly addresses the problem of "disparate bargaining power" in the formation of a contract. *See* Robert E. Scott William, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1923 (1992); *see also* Omri Ben-Shahar, *How to Repair Unconscionable Contracts* 5 (John M. Olin Program in Law and Economics, Working Paper No. 417, 2008) (noting that "when the unevenness of bargaining power leads to terms that are intolerable, courts are willing to step in").

412 *See* Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 YALE L.J. 1401, 1415–17 (2024) (describing the Supreme Court's unconstitutional conditions jurisprudence). As Professors Kay Levine, Jonathan Nash, and Robert Schapiro noted, the courts have been reticent to apply the unconstitutional conditions doctrine in the context of the criminal legal system. Nevertheless, the state constitutional amendments discussed in this Article provide another example of why the courts should abandon their prior beliefs. Beyond the arguments raised by Levine, Nash, and Schapiro, the problem of creating a voluntary labor regime inside of prison presents a novel balancing problem that the courts have largely not had to consider because of the Thirteenth Amendment's Except Clause. The unconstitutional conditions doctrine provides a promising tool to achieve that balance between the state control inherent in the incarceratory environment and the personal liberty necessary for a voluntary choice to work.

413 *Id.* at 1415.

action is protected by a preestablished right—in the Supreme Court's cases, usually the First Amendment,[414] the Takings Clause,[415] or the Tenth[416] and Eleventh Amendments'[417] protections for state sovereignty—the government can only go so far in conditioning its largesse on the limitation of that right before violating the unconstitutional conditions doctrine.[418] The government, in other words, cannot use "'coercive pressure' to induce individuals to forgo their constitutional privileges."[419]

This includes when the government is choosing whom to employ.[420] The unconstitutional conditions doctrine in the employment context has dealt with the restriction of the First Amendment rights of employees.[421] The promise in the prison context seems obvious. Incarcerated people have long complained that their organizing and use of the complaint process has been met with retaliation, including through the loss of work opportunities. Applying the unconstitutional conditions doctrine could protect a core of speech activity that enables incarcerated people to band together to exercise their labor power and to stand on their rights to ensure some minimum level of workplace safety.

But perhaps the most relevant unconstitutional conditions arguments stem from the takings and conditional grant contexts.[422] In these contexts, the Court has said that the government's condition must have an "essential nexus" between the condition and the "legitimate state interest," and it must also have a "rough proportionality" between the condition and the impact of the proposed activity.[423] In the state funding context, the Court

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414 U.S. CONST. amend. I.

415 U.S. CONST. amend. V.

416 U.S. CONST. amend. X.

417 U.S. CONST. amend. XI.

418 *See* Levine et al., *supra* note 412, at 1415–27.

419 *Id.* at 1423 (quoting Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 607 (2013)).

420 *Id.* at 1415; *see also* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (noting that the Court had "most often . . . applied the principle [forbidding unconstitutional conditions] to denials of public employment").

421 *See* Levine et al., *supra* note 412, at 1420–22.

422 *See id.* at 1422–28.

423 Dolan v. City of Tigard, 512 U.S. 374, 386, 391 (1994).

has asked whether the grant of funds was "impermissibly coercive."[424] As in the takings context, here the Court looks for a relationship between the condition and the reason for the grant of funds.[425]

The unconstitutional conditions analogy in the prison labor context might go something like this: The government can condition its labor relationship with incarcerated people in numerous ways, but those ways have to have an "essential nexus" to employment, as opposed to some other aspect of the penal relationship, and they cannot be so large as to be "impermissibly coercive." That would seem to mean, for example, that the traditional benefits tied to an employment relationship like wages, employee discounts and perks (such as free food in kitchens or a discount on commissary goods), and even better or cheaper access to medical care (in an analogy to the healthcare plans people choose from outside of prisons) could all be tied to an incarcerated person's employment. But things like being sent to solitary confinement, access to recreation, visits and phone calls, or the granting or taking away of "good time" credits, would lack an essential nexus between the employment relationship and the condition, and so a refusal to work or job performance issues could not lead to the loss of these things. That is because the ability of the prison to take these things—whether you call them rights or privileges—is an incident of the *penal* relationship, not the *employment* relationship. Additionally, for some deprivations like being sent to solitary, being unable to accrue good time (and so being forced to spend more time in prison), or being totally disconnected from one's family and friends outside of prison might be considered so extreme as to violate the proportionality and coerciveness standards as well.

Finally, this Section cannot conclude without mentioning perhaps the most important overriding necessity for litigants to raise and courts to appreciate in this area. They must make what is invisible visible. It is far too easy for judges to be blissfully unaware of what exactly being incarcerated means. It is for that reason that advocates have sought to make it a requirement for

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424 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012).

425 *See id.* ("When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.").

judges to regularly visit prisons.[426] For someone who has not experienced it, it is difficult to comprehend how devastating being denied the ability to have a phone call with a family member might be, or how losing access to the commissary is not just missing out on one's favorite snacks but avoiding malnutrition. Advocates have long done this work, and they continue to do it in this space.[427] But as new opportunities arise to set precedent around the country, it is important to hold the judiciary accountable for both the legal and human consequences of its decisions.

C. Shaping Governmental Structure

New York's Fairness and Opportunity for Incarcerated Workers Act is, in many ways, an ideal statute.[428] It empowers a variety of stakeholders and helps to protect against capture by diffusing their sources of appointment. It ties the minimum entitlements for both wages and workplace safety for incarcerated workers to the protections that their free-world counterparts receive. It even finds several ways to make sure that organized labor is on-board with its proscriptions by protecting against incarcerated workers as strikebreakers and giving labor a voice in the regulatory apparatus. It could, and perhaps should, serve as a model statute for organizers around the country.

This Section argues that the real strength of New York's Act is that it uses structural changes to empower individual litigants and create new potential political alliances. More than this, because of these structural changes, even if the many explicit protections for incarcerated labor do not survive the political or litigation processes, the structures it attempts to create will tend toward implementing those changes as a matter of discretion.

Focus on two aspects of the Act: the composition of the labor board and the creation of a new cause of action. The Act creates a fifteen-member board.[429] That board consists of two people from the corrections space; one government labor regulator; one government human rights regulator; three formerly incarcerated

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426 *See generally, e.g.*, Mordechai Biser, *Public Comment to the U.S. Sentencing Commission's Request for Comment on Proposed Priorities for Amendment Cycle 2023-2024*, 88 Fed. Reg. 39,907 (Aug. 1, 2023). (available at https://perma.cc/N5RH-33BV).

427 *See generally* ROSS ET AL., *supra* note 21.

428 *See* N.Y. S. 6747-A § 200-a(2).

429 *Id.*

people appointed by different governmental entities; four currently incarcerated people, including one person from a woman's facility, selected by inmate liaison committees within their institutions; two people from relevant nonprofits serving different parts of the state; and two representatives of organized labor, to be appointed by the Department of Labor commissioner.[430] Each member of the board has an equal vote.[431]

This composition ensures that the voices of currently and formerly incarcerated people are the loudest in the room while also ensuring that there is buy-in from at least one other constituency for the board's decisions if formerly and currently incarcerated people vote as a block. And in order for the board members who have experienced incarceration to be shut down, a truly diverse coalition would have to rise against them. Organized labor, the nonprofit space, and regulators for corrections, labor, and human rights would have to speak with one voice. This structure does not guarantee that the Act's explicit protections, or more protective ones, would be adopted wholesale by the labor board as a matter of its discretion—incarcerated people, for example, have noted that fighting for the statewide minimum wage may not be worth it because even a subminimum wage would greatly impact their lives[432]—but it certainly seems to tilt the odds in favor of that outcome.

The proposed cause of action similarly alters the structural relationship between incarcerated people and the state. It does this in two ways. It raises the cost of violating someone's rights, and it introduces a powerful third party into the mix: lawyers.

To recap, the cause of action allows suits for damages and injunctive relief for violations of the statute's prohibition on forced labor, its wage and job safety protections, its protections for collective bargaining, its prohibition on discrimination of various types, and its antiretaliation provision.[433] It further removes statutory immunity from the government officials who violate the Act and makes violations cause for termination.[434]

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430 *Id.*

431 *Id.* § 200-a(5).

432 *See* ROSS ET AL., *supra* note 21, at 63–64 (noting that incarcerated people said "even a few dollars more" could have a large impact).

433 *See* N.Y. S. 6747-A § 171(9).

434 *Id.* §§ 171(10)–(11).

The effect of these provisions is to significantly raise the cost of violating incarcerated people's rights. The Act creates in reality the type of fear of violating the law by government officials that the Supreme Court has used as a matter of theory to justify qualified immunity doctrine.[435] Correctional officers and other governmental employees would rationally stay far away from the line—really the cliff—that would lead to a violation of the Act. This, in almost all cases, is a good thing. The Act ultimately provides comparatively minimal protections, requiring at its core that jobs for incarcerated people abide by the same standards as those for non-incarcerated people. And as the descriptions of current prison labor practices suggest, these protections are probably all the more necessary in the carceral environment because the ability for correctional officers to corruptly or sadistically wield their power is higher away from the prying eyes of the public.[436]

But just as importantly, it incentivizes more eyes to be on prison labor, particularly the eyes of lawyers. By providing for attorney's fees, the Act incentivizes members of the bar to pay attention to prison labor issues. More than this, the Act's attempt to involve the bar takes advantage of an unfortunate structural reality of our system: having a lawyer matters. The presence of a lawyer means not only that a case is more likely to be litigated correctly but also that it is more likely to be treated seriously by the judiciary.[437]

This again raises the costs of violating the rights secured by the Act. By raising these costs, the Act incentivizes the various structures of the system—from individual correctional officers to

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[435] *See* Davidson, *Pyrrhic Victory*, *supra* note 399, at 1479 (noting that "preventing over-deterrence" is one of "the core reasons" the Supreme Court has given for qualified immunity); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("[T]here is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" (second alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))).

[436] Perhaps in recognition of this problem, the Act has robust reporting requirements for the labor board. *See* N.Y. S. 6747-A § 200-a(13). Of course, the combination of such extensive reporting requirements and board members whose service on the board is not their full-time job could lead to comparatively inactive policymaking and oversight by the board without a large staff attending to it.

[437] *See* Littman, *supra* note 390, at 82 (arguing that "representation—and appointment of counsel—causes success in prisoner civil rights cases" because either "lawyering alone . . . makes for better outcomes" or "the other features that come along with the counseled litigation 'track,'" like heightened attention, have benefits). *See generally* Schlanger, *supra* note 390 (exploring the reasons behind the amount of litigation by incarcerated people, their relative success, and the Prison Litigation Reform Act's effects).

their unions to the corrections department at a policy level—to self-police so as to avoid the potential damages that a violation might bring.[438]

IV. LAW, SOCIETY, AND MANUFACTURING INTEREST CONVERGENCE

"[N]obody wants to be the legislator that voted against abolishing slavery."[439]

While it seems impossible to predict exactly how future political battles will play out, two broad themes have emerged from the history that has led us here. First, free organized labor will almost inevitably play a role in the political fights that shape labor for incarcerated people. The only question is what role it will play. Second, the moral stain of chattel slavery is so great that even obvious opponents of reforming prisons are unwilling to oppose an amendment that would ban any practice that conjures up that peculiar institution.[440] This may be why, when that connection is made, voters have passed amendments with large, and at times overwhelming, margins even in states that are not known as progressive bastions, and why none other than former Speaker of the House Newt Gingrich would appear in Ava Duvernay's documentary on the subject, *13th*.[441]

But as historical and ongoing attempts to abolish slavery and involuntary servitude suggest, there is significant debate over exactly what those terms mean. These definitional battles are complicated by a societal reality. We are a country in which many people are willing to subject others to practices that, in other contexts, we recognize constitute slavery or involuntary servitude. These two realities interact to make more difficult any movement, legal or political, toward implementing a total prohibition on even a narrowly defined slavery and involuntary servitude. While this Part does not attempt to settle these debates, it raises questions

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[438] *Cf.* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1595 (2017) (discussing how liability insurers of police departments have attempted to "regulate police agencies in an effort to reduce misconduct").

[439] ROSS ET AL., *supra* note 21, at 44.

[440] *See generally* KENNETH M. STAMPP, THE PECULIAR INSTITUTION (1956).

[441] *See* 13TH (Netflix 2016); *see also* Todd McCarthy, *"13th": NYFF Review*, HOLLYWOOD REP. (Sept. 29, 2016), https://www.hollywoodreporter.com/news/general-news/13th-review-933922/.

with which future work must engage as it attempts to push us to a world without slavery or involuntary servitude.

A. Definitions

Begin with the definitional problem. A definition of slavery in the constitutional context is likely to circle around one of three ideals. The first, and narrowest, essentially copies the definition that the Supreme Court adopted in *Kozminski*. There, the Court defined involuntary servitude as "a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."[442] This is the definition that was ultimately adopted by the court in *Lilgerose*,[443] even though *Kozminski* did not deal with the Thirteenth Amendment directly but instead interpreted two federal criminal statutes related to that amendment that punished holding someone in involuntary servitude.[444]

Of course, even in that case, other definitions were offered. As Justice William J. Brennan Jr. noted in concurrence, neither the statute nor the Thirteenth Amendment contained "words limiting the prohibition to servitude compelled by particular methods."[445] Instead, "[The Thirteenth] amendment denounces a status or condition, irrespective of the manner or authority by which it is created."[446]

Justice Brennan thus offered the second definition that this Section discusses: slavery and involuntary servitude as domination. As he concluded, "'servitude' generally denotes a relation of complete domination and lack of personal liberty resembling the conditions in which slaves were held prior to the Civil War."[447] To determine whether servitude existed, he suggested looking to the observable conditions of the relationship. "[C]omplete domination over all aspects of the victim's life, oppressive working and living conditions, and lack of pay or personal freedom are the hallmarks of that slavelike condition of servitude."[448]

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442 *Kozminski*, 487 U.S. at 952.

443 Order Re: Motion to Dismiss at 4–5, *Lilgerose* (Trellis) (No. 2022CV30421).

444 *Kozminski*, 487 U.S. at 952.

445 *Id.* at 954 (Brennan, J., concurring in the judgment).

446 *Id.* (quoting Clyatt v. United States, 197 U.S. 207, 216 (1905)).

447 *Id.* at 961.

448 *Id.* at 962–63.

As Professors Jack Balkin and Sanford Levinson have argued, this domination-based definition seems closer to the pre-Civil War understanding of slavery. Slavery, in "[t]he colonial vision that opposed slavery to republican liberty," they said, "meant more than simply being free from compulsion to labor by threats or physical coercion. Rather, the true marker of slavery was that slaves were always potentially subject to domination and to the arbitrary will of another person."[449]

This domination-based definition of slavery is likely to have the broadest effect, but to see why, one must first understand the middle road. That middle road is a labor-based definition. A labor-based definition of slavery or involuntary servitude could draw on the substantial body of work detailing the free labor movement, as well as the efforts of laborers to use the Thirteenth Amendment to further labor protections.[450]

The result of a labor-based definition of slavery or involuntary servitude is that prohibitions on those institutions would create rights for all workers that go far beyond prohibiting the use of legal or physical coercion. For example, Pope argued that they may include guarantees of the right to quit, to change employers, and to set one's wages.[451] Or, should these market-based solutions fail, the government may be required to guarantee either procedural protections to assure worker power, like a strong associational right to organize, or "the government could attempt to prevent harsh domination and unwholesome conditions through direct regulation establishing a baseline of minimum labor standards."[452]

Obviously, these changes could have momentous effects if applied to the carceral context. Even if these state amendments only increased associational rights of incarcerated people, they would push back substantially against the status quo.[453] But requiring incarcerated people to have a right to quit, to set their wages, or to choose their work likewise would be a major deviation.

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[449] Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1484 (2012).

[450] *See supra* notes 400–03 and accompanying text; Pope, *Contract, Race, and Freedom of Labor*, *supra* note 158, at 1527–40 (describing labor rights that may be necessary to prevent employment becoming servitude).

[451] Pope, *Contract, Race, and Freedom of Labor*, *supra* note 158, at 1527–36.

[452] *Id.* at 1539.

[453] *See, e.g.*, Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 130–36 (1977) (allowing restrictions on union speech activities in prisons so long as they are reasonable).

But the labor-based definition of slavery does not reach nearly as far as one based in domination. Importantly, it is only a domination-based definition that captures the true and massive scope of the institution that was chattel slavery.

To see a domination-based definition's expansiveness, one needs only to realize that it would apply to labor-based domination and so could provide the work-based rights that Pope and others have described, and it could also apply to all other relationships of domination within our society. That might mean eliminating, for example, domination within the family,[454] or in the relationship between civilians and law enforcement,[455] or, more relevantly here, in carceral institutions.

While incarcerated people may no longer be formally called "slaves of the state,"[456] it is unquestionable that prisons continue to exert a level of control over them that would be unthinkable in any other context. Indeed, despite the formal recognition of rights held by incarcerated people, the effective ability of prison administrators to exert near total control over the imprisoned population is a well-recognized aspect of prison law.[457] Whatever else it might mean, a domination-based definition of slavery would seem to call for a fundamental reimagining of our carceral institutions.[458] The total control that prison administrators exercise seems anathema to a society that claims to be free of the domination-based slavery that marked the peculiar institution. It could mean instead a total reconfiguration of the way we incapacitate and punish, requiring incapacitation that instead of dominating is dignity affirming.

Ultimately, though a domination-based definition has the broadest application, it is also the one that most encapsulates the institution of chattel slavery. The question is not whether slavery

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454 *See* Akhil Reed Amar & Daniel Widawsky, *Child Abuse As Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1365–66 (1992).

455 *See, e.g.*, Hasbrouck, *supra* note 99, at 1111; Hayat, *supra* note 99, at 1130–31.

456 *See* Ruffin v. Commonwealth, 62 Va. 790, 796 (1871); Sostre v. Preiser, 519 F.2d 763, 764 (2d Cir. 1975) (repudiating this description and saying that the time "when prison inmates had no rights" is past).

457 Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 302 (2022) ("[T]here is an unmistakable consistency in the overall orientation of the field: it is consistently and predictably pro-state, highly deferential to prison officials' decisionmaking, and largely insensitive to the harms people experience while incarcerated.").

458 *Cf.* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 832–43 (2021) (discussing how various scholarly enterprises have suggested we might engage in this sort of reimagining).

was a system of domination. It was.[459] And the breadth of that domination extended far beyond the economic relationship between the enslaved and the enslaver to familial,[460] psychological,[461] sexual,[462] legal,[463] and political relationships[464]—in other words, virtually every relationship one might imagine.[465] It is because of this potential breadth that Balkin and Levinson have called the Thirteenth Amendment a "dangerous" one.[466]

B. Our Desire for Slavery and Involuntary Servitude

But these legal debates would be much less pressing if not for the realization that we live in a society that feels comfortable with forcing people into relationships that the law recognizes in other contexts constitute involuntary servitude. We do that for a variety of reasons. Sometimes, it is because of the "greater good." That public-oriented necessity is why the Court has been willing to condone the military draft and conscription to public works projects.[467] Those cases may be troubling for a variety of reasons, not least of all that history has shown that the risks and downsides of those mandated sacrifices have significant distributional tilts.[468]

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459 *See, e.g.*, State v. Mann, 13 N.C. 263, 266–67 (1829) ("The power of the master must be absolute, to render the submission of the slave perfect.").

460 *See* Zietlow, *supra* note 403, at 1711 (discussing how "[f]emale abolitionists also were notable for their critique of slavery's impact on women, children, and the family").

461 *See generally, e.g.*, Samantha Longman-Mills, Carole Mithcell & Wendel Abel, *The Psychological Trauma of Slavery: The Jamaican Case Study*, 68 SOC. & ECON. STUD. 79 (2021).

462 *See generally, e.g.*, Gutierrez, *supra* note 97; Ocen, *supra* note 97.

463 *See generally, e.g.*, Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1 (1997) (discussing southern courts' attempts to militate against enslavers being either too kind or harsh with the enslaved people, lest enslaved people either revolt or begin to think themselves deserving of a higher station).

464 Balkin & Levinson, *supra* note 449, at 1481–82 (arguing that slavery was recognized as a "political concept" in the antebellum United States); *see also* U.S. CONST. art. 1, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV (proportioning representatives and taxation by including "three fifths of all other Persons").

465 Herman N. Johnson Jr., *From Status to Agency: Abolishing the "Very Spirit of Slavery"*, 7 COLUM. J. RACE & L. 245, 283 (2017) (noting how through a paternalistic frame "slave masters systematically intervened into all aspects of the slaves' existence, not just labor performance").

466 Balkin & Levinson, *supra* note 449, at 1470.

467 *See* Armstrong, *Unconvicted Incarcerated Labor*, *supra* note 83, at 18–23.

468 *See* Michael Useem, *The Draft Is Not the Great Equalizer*, WASH. POST (May 10, 1982), https://www.washingtonpost.com/archive/politics/1982/05/11/the-draft-is-not-the-great-equalizer/b442e8b1-a5f8-4e61-a550-5c8730f41019/.

But in other cases, our society appears willing to tolerate involuntary servitude, even slavery, because we think the enslaved deserve it. This should not be a surprise. Slavery was justified in many ways, but core among them was the idea that people of African descent were being held in their rightful place by the institution.[469] They may have earned that place because of religious doctrine,[470] or perhaps a failure of biology or sociology.[471] But no matter the reason, slavery was where they were meant to be. And there are obvious connections to this past when people offer justifications for forcing incarcerated people to work, even in ways that are nearly one-to-one mirrors of chattel slavery. Of course, as Part I.A suggests, this connection is in some ways unsurprising. The presence of the Except Clause allowed the swift evolution of chattel slavery to various forms of criminal-based slavery after the Civil War. Indeed, throughout this evolution, proponents laid the connections bare, as the same intentions have tracked with almost shocking similarity through the various manifestations of forced, racialized labor. Speaking about the convict lease, "[i]n a striking modernization of the proslavery argument presented before the Southern Sociological Congress in 1913, Georgia legislator Hooper Alexander explained how Progressive penology and modern racial paternalism went hand in hand."[472] Alexander explained how, "in the wake of emancipation, the convict lease was an analogous private means to carry out the public end of coping with the freed slaves' alleged natural criminal tendencies."[473] And even today, people argue that those forced to work are, in essence, getting what they deserve. This is perhaps most easily seen in the fact that California rejected its measure to prohibit slavery and involuntary servitude entirely. The accompanying justifications

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469 *See, e.g.*, John C. Calhoun, Speech on the Reception of Abolition Petitions (Feb. 6, 1837), *in* SPEECHES OF JOHN C. CALHOUN: DELIVERED IN THE CONGRESS OF THE UNITED STATES FROM 1811 TO THE PRESENT TIME 222, 222–26 (New York, Harper & Bros. 1843) (available at https://perma.cc/9RK8-RWK3).

470 *See* John Witte, Jr. & Justin J. Latterell, *Between Martin Luther and Martin Luther King: James Pennington's Struggle for "Sacred Human Rights" Against Slavery*, 31 YALE J.L. & HUMANS. 205, 283–84 (2020).

471 Johnson Jr., *supra* note 465, at 284–85 ("The slaveholders' ideological system maintained that individuals must temper their instincts and passions for the greater good of society, and thus they believed certain categories of individuals (slaves) succumbed more naturally to ignorance, lust, and passion.").

472 Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict is a Slave"*, 59 J.S. HIST. 85, 91 (Feb. 1993).

473 *Id.*

for that defeat make the call explicit.[474] And it can be seen through, for example, actions like a group of Republican legislators urging then–Attorney General Jeff Sessions to support a private prison operator that forced immigrant detainees to work.[475] They argued that "forced labor saves the government money and improves prisoners' morale."[476]

It is telling, of course, that not every person convicted of a crime, even when totally unrepentant, is viewed as deserving of this fate. Infamously, one of the few people to be held in contempt of Congress by Congress was held in a room at the Willard Hotel during much of the pendency of his case.[477] When finally imprisoned after his appeal, he received a work assignment as a clerk that gave him access to more comfortable sleeping quarters and better food.[478] At the same time, the chain gang was alive and well for other incarcerated people, as they worked to build out roads in the South.

The question, ultimately, is not whether this strain of a desire for unfreedom in our society still exists; it plainly does. It sometimes takes explicitly racialized or racist shapes, at other times it is about mandating sacrifice by others, and still other variations seem truly rooted in a desire for vengeance. The question is instead what effect law can have on it. Can law mitigate, or must it exacerbate, the proclivity we have for involuntary servitude, and if so, how? That, ultimately, is a question for a lifetime (or several), not an article. But this Article does suggest that the law can do something to move us forward, even in the face of lingering, or even growing, societal desires. Constitutionalizing the unwillingness to have slavery and involuntary servitude shifts

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474 *See, e.g.*, Letters to the Editor, *No on Prop. 6. Prisoners Can Work Like the Rest of Us*, ORANGE CNTY. REG. (Oct. 16, 2024), https://perma.cc/MZL4-CK73. Indeed, it is a stark reflection on our country that even children have begun to make these arguments. *See, e.g.*, Editorial, *Inmates Should Be Forced to Work*, THE CAMPANILE (Dec. 18, 2024), https://perma.cc/6SYG-UQPL (arguing in a California high school newspaper that "involuntary servitude is a more cost-efficient and effective method of preparing incarcerated individuals for life after prison than rehabilitation efforts").

475 Stef W. Kight, *Republican Lawmakers Support Forced Labor for Imprisoned Immigrants*, AXIOS (Mar. 15, 2018), https://www.axios.com/2018/03/15/republican-lawmakers-support-forced-labor-for-imprisoned-immigrants.

476 *Id.*

477 Ronald G. Shafer, *"Lock Me Up": The Last Man to Be Arrested for Defying Congress During an Investigation*, WASH. POST (Dec. 2, 2019), https://www.washingtonpost.com/history/2019/12/02/lock-me-up-last-man-be-arrested-defying-congress-during-an-investigation/.

478 *Id.*

the issue in many ways from the realm of raw politics to the (at least ostensibly) nonpolitical realm of the courts. Further, a firm legal embrace of a value could lead to the greater acceptance of that value in broader society. But what the remainder of this Part focuses on is the possibility for interest convergence and how the law might manufacture it.

C. Manufacturing Interest Convergence

If the domination-based definition of slavery is, as I and others have argued, the most correct one, but because of its breadth also seems the least likely to be adopted given our societal desire for involuntary servitude, the question arises how the law might move us toward its adoption. One possibility is interest convergence.[479] What seems the most obvious possibility for this convergence is to intertwine the relationships of free and unfree labor.

As Part III.C suggested, one way to ensure buy-in from free organized labor is to shape the structure of government so that both incarcerated and free labor are given a proverbial, or literal, place at the table. This is what New York's proposed prison labor board would hope to accomplish. But organizers might also wish to better set the stage for joint political organizing. This might best be done through carefully crafted amendment text and a litigation strategy that cements the ability for incarcerated people to unionize.

Recognizing incarcerated labor as labor would seem to undermine the logic of cases like *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[480] which restricted the rights of prisoners to effectively form unions.[481] If we are operating in a world where incarcerated workers are categorized alongside traditional labor, many of the rationales for protecting collective bargaining seem, if anything, stronger than they are in the free world. The National Labor Relations Act, for example, seeks to rectify the "inequality of bargaining power" between employers and employees, an inequality that is obviously heightened in the prison context.[482]

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[479] *See generally* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

[480] 433 U.S. 119 (1977).

[481] *Id.* at 130–36 (requiring only that restrictions by prisons on union speech activities be reasonable).

[482] 29 U.S.C. § 151.

Likewise, even under *Jones*, incarcerated people retain some associational rights, and history has suggested that channeling those rights through formalized collective bargaining procedures may help to curtail the more violent or disruptive tactics of both the free and incarcerated labor movements.[483]

This unionization effort would accomplish two goals. First, it would enable incarcerated people to better wield their own labor power, both in the potentially contentious relationships with their jailer/employers and as a political bargaining unit. But second, and perhaps just as importantly, it could enable established labor unions to take in incarcerated populations as members. This would give established unions a formal stake in ensuring the improvement of conditions for incarcerated workers at both the lower bargaining-unit level and the broader political level, where organized labor remains a powerful interest group in the local, state, and national spheres. At the same time, organized free labor benefits by both cutting off the long-standing issue of forced incarcerated labor as a reserve force of potential strike breakers, and by shoring up its numbers after a long period of decline in union membership.

This analysis seeking to align the goals of incarcerated and free labor has largely operated under the assumptions of Professor Derrick Bell's now-famous interest convergence thesis.[484] It has assumed that the way to achieve gains for a subordinated group is to find ways to align their interests with those of a

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[483] *See id.* (declaring it "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce" by labor by instead enshrining collective bargaining rights); Samuel Richter, *Incarcerated Workers Will Be Heard: Protecting the Right to Unionize Prisoners Through Dignity*, 19 NW. J.L. & SOC. POL'Y 334, 348–49 (2024) (arguing that incarcerated unionization could have dignity-enhancing effects and prevent a repeat of the 1970s prison riots).

[484] *See generally* Bell, *supra* note 479. Organized labor is only one potential target for interest convergence. Another, which this Article does not explore, is the same one that helped lead to *Brown v. Board of Education*: foreign relations. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954). While the relationship between *Brown* and the United States' role on the international stage is a complicated one, *see* Gregory Briker & Justin Driver, Brown *and Red: Defending Jim Crow in Cold War America*, 74 STAN. L. REV. 447, 465–95 (2022), the push and pull between the maintenance of Jim Crow and the threat of communism was deeply salient, *see id.* at 452 (arguing that "a broad array of Americans viewed preserving, rather than destroying, Jim Crow as a Cold War imperative"). Recently, the United States has been criticized by China for refusing to sign onto international agreements regarding forced labor and for practicing slave labor in its prisons. *The United States' Practice of Forced Labor at Home and Abroad: Truth and Facts*, CONSULATE-GEN. OF CHINA IN JEDDAH (Aug. 9, 2022), https://perma.cc/KU6P-3J8F. This

more powerful group.[485] But as Bell and others have recognized, though it may be one way to achieve change, interest convergence is neither total nor perfect.[486]

Interest convergence, as Bell noted, can be fickle. The convergence that led to *Brown v. Board of Education*[487] fell apart long before the dream of integration was reached. Here, too, achieving interest convergence between incarcerated and nonincarcerated labor is not a goal with no downsides. Organized labor has shown at best passing interest in organizing with workers behind bars.[488] One formerly incarcerated organizer said that "they will never recognize us as workers," and he relayed that when he tried to broach the issue in free labor spaces, he was shut down.[489] And as the example of police unions shows, "organized labor" is far from a monolith.[490] It is entirely possible for one subset of labor to struggle while another continues to make gains. The interest convergence

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is in part because, at the same time the United States allows its imprisoned people to be forced to work for no or low wages, the Department of Homeland Security enforces 19 U.S.C. § 1307 so as to prevent the importation of Chinese goods made with prison labor. *See DHS Cracks Down on Goods Produced by China's State-Sponsored Forced Labor*, U.S. CUSTOMS & BORDER PROT. (Sept. 14, 2020), https://perma.cc/L8SS-8BL4 (refusing entry of goods because they were made with "prison labor" or "prison and forced labor" in a number of places). The United States has also "signed bilateral agreements with" several countries in order to ensure that certain visa workers are not subjected "to any form of human trafficking or forced, compulsory, bonded, indentured, or prison labor." *The National Action Plan to Combat Human Trafficking*, *supra* note 110. Similarly, another underappreciated possibility that merits future research is the potential for interest convergence between incarcerated people and industry, which is forced to abide by labor protections both domestically and internationally that state and federal governments using forced incarcerated labor are not. *See, e.g.*, *An Examination of Prison Labor in America: Hearing Before the Subcomm. on Crim. Just. & Counterterrorism of the S. Comm. on the Judiciary*, 118th Cong. 91–102 (2024) (statement for the record of Am. Apparel & Footwear Ass'n) (available at https://perma.cc/5RCA-ESWR).

485 *See* Bell, *supra* note 479, at 523 (arguing that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

486 *See id.* at 525 (noting the numerous white people "for whom recognition of the racial equality principle was sufficient motivation"); Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 157 (2011) (criticizing interest convergence theory as being "too often categorical where it should be nuanced and too often focused on continuity where it should acknowledge change").

487 347 U.S. 483 (1954).

488 As Bamieh has noted, even if these amendments lead only to increased organizing power for incarcerated people by themselves, they could cause significant change. *See* Bamieh, *supra* note 19, at 292–93.

489 ROSS ET AL., *supra* note 21, at 66.

490 *See* Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1384–85 (2020).

thesis suggests that, when the rubber hits the road, more subjugated groups like incarcerated workers will be left behind absent sufficient structural and political incentives to help them.

This is why proponents of ending prison slavery must not lose sight of the moral clarity of their position. Even amidst current attempts to reshape, rewrite, and suppress parts of this country's history, there is near universal agreement that slavery in this country was an evil institution to which we should never return.[491] Highlighting the connection between chattel slavery and modern prison slavery creates a powerful argument that tugs at the moral conscience of everyone who genuinely believes that the United States is, or should be, the "land of the free." More than this rhetorical and emotional pull, however, naming the battle to end prison slavery as such helps to clarify the path forward. By recognizing the connections between chattel slavery and prison slavery, we might avoid repeating the mistakes of the past that allowed chattel slavery to evolve into the system we have today.[492]

CONCLUSION

In the twenty-first century, slavery is still alive in the United States, but thankfully, it is increasingly unwell. States across the country, in places both expected and unexpected, have begun to pass amendments to their state constitutions that seek to finish the job started over 150 years ago by the Thirteenth Amendment. Whereas that Amendment included an exception, providing for slavery and involuntary servitude as punishment for a crime, these new state amendments contain total prohibitions.

But these prohibitions have thus far proven unable to end the blight of prison slavery merely through their text. This Article has described the history and current state of prison slavery, as well as the state constitutional amendments and other legislative enactments that are attempting to end that institution. It has interrogated why these amendments have thus far not realized their potential for change. And it has suggested ways that judges

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491 *See, e.g.*, Summer Concepcion, *GOP Candidate Will Hurd Slams Ron DeSantis' Defense of Florida's Slavery Curriculum*, NBC NEWS (July 30, 2023), https://www.nbcnews.com/politics/2024-election/will-hurd-condemns-ron-desantis-defense-floridas-slavery-curriculum-rcna97144 (quoting one Republican hopeful for President as saying that "anybody that is implying that there was an upside [to] slavery is insane").

492 *See, e.g.*, Roberts, *supra* note 192, at 19–43 (discussing connections between pre–Civil War and modern day slavery).

should interpret these amendments, and that organizers, politicians, and litigants might both use the text of these amendments and move beyond that text to accomplish their liberatory goals. It has argued that to enact and sustain a prohibition on prison slavery, constitutional text must work in tandem with individual litigation, reforms to government structure, and the inevitable political battles that will shape our criminal legal system.

Despite its ambitious scope, ultimately, this Article recognizes that it is but one drop in the ocean of history. The state constitutional amendments being passed across the country are only the latest salvo in the four-hundred-year-long battle against slavery in this nation. And with the recent backlash against criminal system reforms of all types, this Article recognizes that it does not stand at the end of this fight. It instead is an attempt to push us just a little further toward the day when we will finally be a society with no slavery and no involuntary servitude. No exceptions.