ADMINISTRATIVE ENSLAVEMENT

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There are currently over a million people enslaved in the United States. Under threat of horrendous punishment, they cook, clean, and even fight fires. They do this not in the shadow of the law but with the express blessing of the Thirteenth Amendment's Except Clause, which permits enslavement and involuntary servitude as punishment for a crime.

Despite discussions of this exception in law reviews, news reports, and Netflix documentaries, few commentators have recognized that this enslavement happens silently. No prosecutor, judge, or defense attorney tells convicted people that they will be enslaved as punishment for their crime. It is only once they are incarcerated that a prison administrator informs them they will be forced to work.

This Article uncovers how this state of the world has come to be. It argues that our current regime is one of administrative enslavement: a constellation of judicial and legislative choices that places the punishment of enslavement outside the scope and processes of our traditional criminal punishment structure and into the hands of prison administrators. This Article is the first to provide a taxonomy of the administrative-enslavement regime. It uncovers the weak jurisprudential underpinnings of that regime, and it surveys all fifty states' and the federal government's legislative implementation of the Except Clause. It concludes by utilizing this taxonomy to analyze administrative enslavement's legal weaknesses as well as how the status quo might evolve in the face of growing attacks from states removing Except Clauses from their state constitutions.

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INTRODUCTION

In 2020, there were at least 600,000 slaves in the United States.[1] They cooked.[2] They cleaned.[3] They did building maintenance and repair work.[4] Some fought fires.[5] And others, harking back to an age most thought long past, even picked cotton.[6]

These slaves, unlike many of their forebears, were not stolen from the coast of Africa or marked for this fate purely by dint of their birth. These people were enslaved by our criminal legal system: by prosecutors and judges empowered by our cities, counties, states, and nation. What's more, they were almost uniformly enslaved by these carceral actors without a word that they were about to suffer this fate.[7] Indeed, it seems that even their advocates—their defense attorneys—made no mention that slavery was in their future.

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1. See ACLU & Univ. of Chi. L. Sch. Glob. Hum. Rts. Clinic, Captive Labor: Exploitation of Incarcerated Workers 5, 24, 47 (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf [https://perma.cc/6MAU-G8N3] [hereinafter Captive Labor] (estimating that, based on data from 2020, "at least 791,500 people incarcerated in U.S. prisons perform work as part of their incarceration" and 76.7% of those workers "are *required* to work" or "face additional punishment" (emphasis added)); see also id. at 112 n.170 (explaining the report's methodology to arrive at the number of incarcerated people with work assignments). This 600,000 figure represents a minimum based on the number of incarcerated people forced to work under threat of punishment. More capacious definitions of slavery may more accurately capture the comparison between chattel enslavement and Except Clause enslavement. See infra text accompanying notes 38–40.

2. Captive Labor, supra note 1, at 27–36 (categorizing types of prison labor).

3. Id.

4. Id.

5. Id. at 30–31 (describing programs in thirteen states through which "[i]ncarcerated firefighters also fight wildfires").

6. Daniele Selby, How the 13th Amendment Kept Slavery Alive: Perspectives From the Prison Where Slavery Never Ended, Innocence Project (Sept. 17, 2021), https://innocenceproject.org/how-the-13th-amendment-kept-slavery-alive-perspectives-from-the-prison-where-slavery-never-ended [https://perma.cc/J5VT-8DSY].

7. Some states have statutes that allow for an explicit sentence of hard labor, but these seem rarely used. See, e.g., Ohio Rev. Code Ann. § 5147.17 (2024) (allowing for sentences of hard labor alongside "the punishment of . . . imprisonment in the county jail or workhouse"); infra section II.A (overviewing the statutory placement and language of state provisions discussing prison enslavement).

This refers, of course, to the Thirteenth Amendment and its now infamous[8] "Except Clause."[9] Despite being billed as a wide-ranging prohibition on slavery, the Thirteenth Amendment states that "[n]either 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."[10]

The puzzle and the problem at the heart of this Article, though, is not the existence of prison slavery or involuntary servitude; that practice is clearly contemplated by the Thirteenth Amendment itself. Instead, what motivates this Article is the silent enslavement of hundreds of thousands of incarcerated persons in the country. One might think that the decision to enslave someone—particularly given this country's history of violent and purportedly successful resistance to the institution of slavery, and within a criminal legal system that disproportionately ensnares the descendants of those whom the country historically enslaved—would be a somber one, made with deep thought and reflection. But instead, prosecutors, judges, and even defense attorneys seem to give this potentially momentous punishment no thought at all, despite its near-constant imposition.

Why is this? In a system in which defense attorneys and prosecutors litigate every arcane issue affecting the sentence a judge can impose,[11] judges fiercely guard their discretion to impose individualized sentences,[12]

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8. Criticisms of the Thirteenth Amendment's "Except Clause" have come from all corners, including popular media—see, e.g., 13th (Netflix 2016)—the legal academy—see, e.g., Michele Goodwin, The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration, 104 Cornell L. Rev. 899 (2019) [hereinafter Goodwin, Modern Slavery]; Alvaro Hasani, 'You Are Hereby Sentenced to A Term of . . . Enslavement?': Why Prisoners Cannot Be Exempt From Thirteenth Amendment Protection, 18 Barry L. Rev. 273 (2013); James Gray Pope, Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account, 94 N.Y.U. L. Rev. 1465 (2019) [hereinafter Pope, Mass Incarceration]; Raja Raghunath, A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?, 18 Wm. & Mary Bill Rts. J. 395 (2009); Wafa Junaid, Note, Forced Prison Labor: Punishment for a Crime?, 116 Nw. U. L. Rev. 1099 (2022)—and public interest groups—see, e.g., Captive Labor, supra note 1; Selby, supra note 6.

9. Other commentators have called this portion of the Thirteenth Amendment the "Punishment Clause." See, e.g., Goodwin, Modern Slavery, supra note 8, at 933; Pope, Mass Incarceration, supra note 8, at 1470. This Article uses the term "Except Clause" because it better encapsulates the current state of the world. The slavery and involuntary servitude discussed here is an "exception" to the norm, but it seems increasingly disconnected from the idea of "punishment."

10. U.S. Const. amend. XIII, § 1 (emphasis added). The entire remainder of the Thirteenth Amendment states, "Congress shall have power to enforce this article by appropriate legislation." Id. § 2.

11. See, e.g., Descamps v. United States, 570 U.S. 254, 257 (2013) (citing Armed Career Criminal Act, 18 U.S.C. § 924(e) (2018)) (explaining the categorical and modified categorical approaches to determining whether a past conviction qualifies to enhance a current sentence under the Armed Career Criminal Act).

12. See, e.g., Rachel Martin, A Federal Judge Says Mandatory Minimum Sentences Often Don't Fit the Crime, NPR (June 1, 2017), https://www.npr.org/2017/06/01/

and something as miniscule as a five-dollar special assessment is mentioned in the pronouncement of a sentence,[13] why does the fact that so many convicted defendants are about to be enslaved go unmentioned?

Past commentators have suggested that broader societal forces have pushed us here. Maybe capitalism is to blame, or racism, or the other systems that create the hierarchies within our society.[14]

Or maybe we should look to the personal instead of, or in addition to, the societal. Perhaps there are psychological and social reasons for this phenomenon. All of these people—legislators, prosecutors, defense attorneys, judges—may simply want to think of themselves as good people,[15] and focusing on their role in enslavement makes that more difficult.[16] After all, even without considering enslavement, judges routinely remark that sentencing is the hardest part of their job.[17]

531004316/a-federal-judge-says-mandatory-minimum-sentences-often-dont-fit-the-crime [https://perma.cc/K5FX-UCXV] (interviewing Judge Mark Bennett on his opposition to "mandatory minimum charging and sentencing guidelines for nonviolent drug offenses"); see also Kimbrough v. United States, 552 U.S. 85, 91 (2007) (holding that judges may depart from the guidelines based solely on a policy disagreement with them); United States v. Booker, 543 U.S. 220, 227 (2005) (holding unconstitutional the mandatory imposition of the United States Sentencing Guidelines).

13. See 18 U.S.C. § 3013(a)(1)(A)(i) (2018) ("The court shall assess on any person convicted of an offense against the United States . . . the amount of $5 in the case of an infraction or a class C misdemeanor . . . .").

14. See, e.g., Michele Goodwin, The Thirteenth Amendment's Punishment Clause: A Spectacle of Slavery Unwilling to Die, 57 Harv. C.R.-C.L. L. Rev. 47, 50–53 (2022) [hereinafter Goodwin, A Spectacle of Slavery] (arguing that prison slavery authorized by the Except Clause is an example of "the stunning insistence in law itself on the subordination of Black Americans" and suggesting ways to end it (citing Jones v. Mayer Co., 392 U.S. 409, 445 (1968) (Douglas, J., concurring))).

15. See Carolyn Kaufman, Why Bad Guys Think They're Good Guys, Psych. Today (Aug. 12, 2012), https://www.psychologytoday.com/us/blog/psychology-writers/201208/why-bad-guys-think-theyre-good-guys (on file with the *Columbia Law Review*) ("By convincing themselves their behavior is moral . . . people can separate and disengage themselves from immoral behavior and its consequences.").

16. Indeed, ignoring or distorting the full consequences of one's actions is far from a novel phenomenon in the context of American slavery. See, e.g., David Pilgrim, The Mammy Caricature, Ferris St. Univ. Jim Crow Museum (Oct. 2000), https://www.ferris.edu/HTMLS/news/jimcrow/mammies/homepage.htm [https://perma.cc/FXC9-TWFZ] (last updated 2023) ("From slavery through the Jim Crow era, the mammy image served the political, social, and economic interests of mainstream white America. . . . Her wide grin, hearty laugher, and loyal servitude were offered as evidence of the supposed humanity of the institution of slavery.").

17. See, e.g., Mark Scarcella, The Hardest Thing About Being a Judge? What Courts Say About Sentencing., Conn. L. Trib. (Feb. 19, 2020), https://www.law.com/nationallawjournal/2020/02/19/the-hardest-thing-about-being-a-judge-what-courts-say-about-sentencing (on file with the *Columbia Law Review*) (last updated Feb. 20, 2020) ("As judges are often quick to say, sentencing defendants ranks near or at the top of the most challenging parts of serving on the bench."); Benjamin Weiser, A Judge's Education, a Sentence at a Time, N.Y. Times (Oct. 7, 2011), https://www.nytimes.com/2011/10/09/nyregion/judge-denny-chin-of-federal-court-discusses-sentencing.html (on file with the *Columbia Law Review*) (discussing Judge Denny Chin's sentencing approaches and decisions).

But this Article is not about broader societal forces or carceral actors' unspoken psychological motivations. It is about the legal regime that has enabled enslavement as default. Presumably, if the law said that at each sentencing the judge must announce whether a defendant was to be enslaved and explain the reasons for that decision, that is what judges would do. But our current legal interpretations require no such thing. This Article seeks to uncover what the law does require and to tell a thus-far unappreciated story of how it came to be that way.

What this analysis finds is not a bombshell or a smoking gun. Instead, it shows that our current system of prison slavery is built on the sorts of mundane processes and decisions that seem small and unimportant individually but, in the aggregate, create a regime that this Article calls *administrative enslavement*.

For nearly a century, the federal courts have almost uniformly stated that the only trigger necessary for the Thirteenth Amendment's Except Clause is a conviction.[18] The standard processes that apply to the taking of a plea or pronouncement of a sentence have no purchase here.[19] There is no requirement, for example, that a defendant be told that a conviction carries with it the loss of Thirteenth Amendment rights as part of the punishment or that a sentencing judge (or legislature) offer any reason for why that punishment is appropriate.[20] Indeed, there may not even need to be a statute on the books imposing the punishment.

This permissive interpretation of the Except Clause did not come about through any sort of grand doctrinal innovation but through the slow march of common law decisionmaking. In cases across the federal courts, judges faced primarily with zealous—indeed, relentless—pro se and imprisoned litigants made broad, unreasoned pronouncements about the Except Clause.[21] Those pronouncements then became the basis for courts throughout the country to dismiss challenges to enslavement-as-punishment, even when facing novel arguments.[22] Narrower readings of the Except Clause occurred almost entirely in cases in which the plaintiffs were represented.[23] The common law, when combined with the realities of

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18. See infra section I.B (tracing the development of this broad Except Clause reading).

19. See infra section III.A.

20. Cf. 18 U.S.C. § 3553(c) (2018) (requiring the court to "state in open court the reasons for its imposition of the particular sentence").

21. See, e.g., Draper v. Rhay, 315 F.2d 193, 197–98 (9th Cir. 1963) ("The Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute." (citing Blass v. Weigel, 85 F. Supp. 775, 785 (D.N.J. 1949))).

22. See, e.g., Murray v. Miss. Dep't of Corr., 911 F.2d 1167, 1168 (5th Cir. 1990) (per curiam) (finding no rights-based distinction between forced prison labor on public and private property).

23. See Davis v. Hudson, No. 00-6115, 2000 WL 1089510, at *3 (10th Cir. Aug. 4, 2000) (unpublished table decision) ("[T]here might be circumstances in which the opportunity for private exploitation and/or lack of adequate state safeguards could take a case outside the ambit of the Thirteenth Amendment's state imprisonment exception or give rise to Eighth Amendment concerns . . . ."); Watson v. Graves, 909 F.2d 1549, 1552 (5th Cir. 1990)

pro se and prison litigation, became a one-way ratchet to restrict the rights of imprisoned people.

This one-way ratchet has, in turn, allowed states and the federal government to create statutes and regulations that require all incarcerated people to be enslaved, most visibly through their forced labor.[24] Though the Except Clause explicitly states that slavery and involuntary servitude are only allowed as "punishment," nearly every federal and state provision regulating prison enslavement is contained within the portion of the code dedicated to prison administration.[25] Functionally, what results is that none of the preconviction process usually attached to criminal punishment occurs for the punishment of slavery, and it is instead controlled almost entirely by prison administrators.[26]

Administrative enslavement is this systemic, broad jurisprudential reading of the Except Clause combined with legislation transferring prison-slavery decisions into the hands of prison bureaucrats. Contrary to the usual notions of criminal punishment, the administrative-enslavement regime requires no notice that this punishment will be imposed, no explanation of why it is appropriate, and no decision by a judge or jury.

The rest of this Article proceeds in three parts. Part I introduces the Thirteenth Amendment, the Except Clause within it, and the commentary that has analyzed its role in our law and society. It does this with an eye toward the question: How have we gotten to where we are today? While most commentators focus on "big issues" to answer this question—race, capitalism, and maintaining the hierarchies of social and economic control those systems entail—this Article suggests that it is through small, mundane, and rarely noticed decisions that courts and legislatures have built the administrative-enslavement legal regime that allows these "big issues" to flourish. To highlight these decisions, Part I traces modern Except Clause cases to their origins. In doing so, it uncovers how the previous story told about these cases was incorrect and how the real story is much more troubling. Starting with bare statements and citations to largely inapposite precedent, the courts developed an Except Clause

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("We agree that a prisoner who is not sentenced to hard labor retains his thirteenth amendment rights . . . ."); Craine v. Alexander, 756 F.2d 1070, 1075 (5th Cir. 1985) (suggesting, in the context of a 42 U.S.C. § 1994 (2018) anti-peonage suit, that an imprisoned person might state a claim "by virtue of labor forced upon him by a custom or usage of the state that is, at the same time, outside the scope of a corrective penal regimen").

24. To be clear, this Article does not mean to suggest a causal story about how the courts' jurisprudence led to these statutes (or vice versa). Instead, it simply means that this jurisprudence and these statutes coexist in a way that allows for this particular structure to flourish.

25. This Article distinguishes provisions that call for a sentence of "hard labor" because while almost every imprisoned person can be forced to labor under the general prison slavery regimes on which this Article focuses, conviction under a statute calling for a specific sentence of hard labor is comparatively rare and so not relevant for the vast majority of imprisoned people. See infra section II.A.

26. See infra sections I.B.2, II.A.2, III.A.

jurisprudence that slowly but surely constricted the rights of imprisoned people, typically in response to the pro se imprisoned litigants who brought challenges to their enslavement. The courts did so with little reasoning, often waving away novel pro se arguments in the process.

Part II shifts from the courts to the statute books. It reviews how prison labor has been enacted and regulated in all fifty states and in the federal code, and creates a taxonomy of those laws. What it finds is striking: Statutes in almost every jurisdiction in the United States treat prison slavery as a piece of prison administration as opposed to a criminal punishment. Prison-slavery statutes are located in parts of the code distinct from those that set out criminal punishments. What's more, they do not empower the judiciary to impose this punishment; instead, they almost uniformly empower prison administrators. To the extent that the statutes mention punishment at all, it is through the lens of rehabilitation. Often, however, they state that incarcerated people should work for idleness-prevention and cost-saving reasons. Part II also discusses other statutory design features that, while currently dormant, will likely become relevant if the administrative-enslavement regime comes under attack. These are whether a prison-labor statute imposes labor through mandatory or permissive language and the (for now) rare statutes explicitly stating that some or all prison labor must be voluntary.

While Parts I and II merely illuminate the current state of the world, Part III seeks to change it. To that end, it sketches a number of arguments that might end, or at least contract, the administrative-enslavement regime. It argues that administrative enslavement is constitutionally suspect on numerous grounds from both living constitutionalist and originalist frames. Turning to practice, Part III suggests how prosecutors and defense attorneys might use plea bargaining to disrupt administrative enslavement by allowing accused people to bargain to retain their Thirteenth Amendment rights. Finally, Part III looks toward the future to analyze how the courts, legislatures, and prison administrators who have created the status quo might seek to maintain it as administrative enslavement comes under attack.

This Article comes at a particular moment in history. After well over a century of constitutional stasis, we have allowed the peculiar institution[27]—which most imagined dead and gone—to instead evolve and recapture hundreds of thousands of people in its grasp.[28] But change is fomenting. In 2018, Colorado voted to amend its state constitution to prohibit slavery

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27. Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South (1956).

28. See supra note 1 and accompanying text (showing that more than 600,000 people working in state and federal prisons must work or be punished); see also Captive Labor, supra note 1, at 5 (explaining that, for those workers required to work, the alternative is "fac[ing] additional punishment such as solitary confinement, denial of opportunities to reduce their sentence, and loss of family visitation, or the inability to pay for basic life necessities like bath soap").

and involuntary servitude totally.[29] In 2020, Utah and Nebraska joined in this movement.[30] And in 2022, Alabama, Vermont, Oregon, and Tennessee did, too.[31] In many of these states, the votes to entirely abolish slavery and involuntary servitude were overwhelming. Tennessee's measure passed with nearly eighty percent of the vote,[32] and Vermont's passed with nearly ninety percent.[33] Now is a time when the possibility of truly ending slavery and involuntary servitude is not only imaginable but seemingly likely.[34] Attacking, and ending, administrative enslavement is one important step toward that goal.

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Before continuing, a note on terminology is warranted. This Article uses the terms administrative *enslavement* and prison *slavery*[35] while also

29. Bill Chappell, Colorado Votes to Abolish Slavery, 2 Years After Similar Amendment Failed, NPR (Nov. 7, 2018), https://www.npr.org/2018/11/07/665295736/colorado-votes-to-abolish-slavery-2-years-after-similar-amendment-failed [https://perma.cc/L7CM-CFLG].

30. Nikki McCann Ramirez, Four States Banned Slavery on Tuesday. One Voted to Keep It . . . Sort Of, Rolling Stone (Nov. 9, 2022), https://www.rollingstone.com/politics/politics-news/slavery-banned-states-louisiana-voted-keep-it-1234627635 (on file with the *Columbia Law Review*).

31. Id.

32. See Tennessee Amendment 3 Election Results: Remove Constitutional Language Allowing Slavery as Punishment, N.Y. Times, https://www.nytimes.com/interactive/2022/11/08/us/elections/results-tennessee-amendment-3-remove-constitutional-language-allowing-slavery-as-punishment.html (on file with the *Columbia Law Review*) (last updated Dec. 13, 2022).

33. See Vermont Proposal 2 Election Results: Prohibit Slavery in State Constitution, N.Y. Times, https://www.nytimes.com/interactive/2022/11/08/us/elections/results-vermont-proposal-2-prohibit-slavery-in-state-constitution.html (on file with the *Columbia Law Review*) (last updated Nov. 17, 2022).

34. Several members of Congress, to no avail thus far, have also pushed to alter the Thirteenth Amendment. See Scottie Andrew, Democratic Lawmakers Introduce a Resolution to Amend the 13th Amendment to End Forced Prison Labor, CNN (Dec. 3, 2020), https://www.cnn.com/2020/12/03/politics/13th-amendment-prison-labor-trnd/index.html [https://perma.cc/TM58-LTKT]; Elizabeth Crisp, Lawmakers on Juneteenth Push for Change to 13th Amendment, The Hill (June 6, 2022), https://thehill.com/homenews/3529850-lawmakers-on-juneteenth-push-for-change-to-13th-amendment (on file with the *Columbia Law Review*).

35. The majority of this piece uses people-first language. Cf. Erica Bryant, Words Matter: Don't Call People Felons, Convicts, or Inmates, Vera Inst. Just. (Mar. 31, 2021), https://www.vera.org/news/words-matter-dont-call-people-felons-convicts-or-inmates [https://perma.cc/B8J2-4R55] ("[P]oliticians, media outlets, and more . . . still use harmful and outdated language like 'convict,' 'inmate,' 'felon,' 'prisoner,' and 'illegal immigrant.' There are better alternatives—alternatives that center a person's humanity first and foremost."). But occasionally, as in this introduction, it uses the term "slave." This language highlights that, like chattel slavery before it, our current enslavement regime does create a status distinction between those people who fall within the Except Clause's ambit and those who do not. Cf. Justin Driver & Emma Kaufman, The Incoherence of Prison Law, 135 Harv. L. Rev. 515, 525 (2021) (explaining the article's choice of the term "prisoner" in part because "the term prisoner rejects the government's appellations while underscoring that prisons are degrading spaces, where numbers replace names and humans live in barren

occasionally mentioning involuntary servitude. The choice to name this phenomenon "slavery" is intentional, as it accurately describes the system that is this Article's subject. Nevertheless, there are several serious objections to this choice. Grappling with them explicitly will illuminate the relatively limited scope of this Article and the broad scope of the problems and systems it describes.

Objections to calling the current regime "slavery" might come from two directions. First, one might argue that the Thirteenth Amendment's Except Clause in fact only authorizes involuntary servitude, not slavery, thereby making the Amendment's prohibition on slavery total.[36] That this potentially major interpretative question has gone largely uninterrogated by the courts for over 150 years is one example of the lack of thought, here in the form of doctrinal stagnation, that this Article suggests administrative enslavement has enabled. Ultimately, there are reasonable arguments on both sides,[37] and the answer to this question—while potentially momentous for the lives of imprisoned people—does not alter the analysis of *administrative* enslavement.

And while fully clarifying the distinction between involuntary servitude and slavery in this context is beyond the scope of this Article, it is worth briefly highlighting that the Article's focus on forced labor is, in some ways, artificial. While forced labor for the benefit of another has always been at the core of American slavery, the institution included other pathologies that our current carceral system replicates.[38] For that reason,

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cells"). While forced labor is perhaps the most obvious mark of this distinction, it is not the only one. See infra notes 43–46 and accompanying text.

36. For further discussion of the distinction between involuntary servitude and slavery, see, e.g., Andrea C. Armstrong, Slavery Revisited in Penal Plantation Labor, 35 Seattle U. L. Rev. 869, 882–86 (2012) [hereinafter Armstrong, Slavery Revisited] ("Whereas in cases of involuntary servitude the servant must justifiably believe there is no alternative other than service, in slavery there simply is no other alternative, as the law stands ready to enforce the obligation.").

37. For arguments that the Except Clause permits slavery, see 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, 989–90 (2009) ("The actual language purports to allow both [slavery and involuntary servitude], however, and there were no voices in Congress that proclaimed for it during the promulgation period any other meaning."), and compare the language of the Except Clause to similar language in Iowa's constitution. Iowa Const. art. I, § 23 ("There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime."). By contrast, James Gray Pope has found that Senator Charles Sumner had shifting views on the Clause. While Sumner at one time believed that it might countenance slavery, he "later opined that the Senators had 'supposed that the [Clause] was simply applicable to ordinary imprisonment.'" Pope, Mass Incarceration, supra note 8, at 1476 (quoting Cong. Globe, 39th Cong., 2d Sess. 238 (1867) (statement of Sen. Sumner)).

38. See, e.g., Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. Pa. L. Rev. 1789, 1790–93 (2012) (discussing how collateral consequences of a conviction create a new civil death); 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

this Article does not identify a precise number of people that our carceral system has enslaved. At a minimum, the hundreds of thousands of people currently forced to work while incarcerated seem clearly within the Except Clause's ambit.[39] But a more capacious comparison between chattel enslavement and Except Clause enslavement might suggest that everyone who is incarcerated, or perhaps everyone who is on parole or probation, or has been convicted of a crime, has experienced the sort of status-based degradation of their place in civil society that previously marked those who were chattelly enslaved.

Second, one could argue that referring to the current regime of forced prison labor as enslavement belittles the experience of those who suffered through chattel slavery. I am particularly sensitive to this possibility, but I believe that referring to our current system as slavery is correct for three reasons. First, while chattel slavery may have been a particularly evil and extreme incarnation of slavery, it is not the only practice that warrants that label.[40] Slavery in various forms has existed in

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lack of abortion rights for imprisoned 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); Dorothy E. Roberts, The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism, 133 Harv. L. Rev. 1, 34 (2019) [hereinafter Roberts, Abolition Constitutionalism] (describing how "[a] large body of social science literature explains criminal punishment as a form of social control of marginalized people").

39. See supra note 1 and accompanying text (showing that more than 600,000 people working in state and federal prisons must work or face punishment). Briefly comparing incarcerated people's experiences to how the Thirteenth Amendment protects people who have not been convicted of a crime illuminates why this figure appears to be an appropriate minimum. The Thirteenth Amendment's protection against slavery and involuntary servitude, though containing other labor protections, most prominently takes the form of an ever-present option to quit. 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."); James Gray Pope, Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude", 119 Yale L.J. 1474, 1478–79 (2010) [hereinafter Pope, Contract, Race, and Freedom of Labor] ("One of [the unenumerated Thirteenth Amendment] rights, the inalienable right to quit work, is so prominent in our constitutional consciousness that it tends to overshadow other possibilities."). While there are a few exceptions, see infra section I.C, as a general matter you cannot be punished if you refuse to work for someone. That is not to say you will not face consequences, including dire ones—perhaps you will lose some government benefits that have work requirements, receive a negative reference, or simply no longer have the means to provide for yourself—but you cannot be forced to work for any employer by the state or a private entity. By contrast, whether, how, and for whom imprisoned people work is decided overwhelmingly by prison administrators, and if those people refuse to do their assigned work, they will suffer a variety of punishments, often including solitary confinement. See Captive Labor, supra note 1, at 5–6.

40. Indeed, African chattel slavery is not the only form of slavery that has existed on these shores. See, e.g., Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134, 135–36 (1806) (describing how in 1679 "an act passed declaring Indian prisoners taken in war to be slaves").

numerous cultures throughout human history. Even today, individuals, organizations, and governments fight against forced labor practices across the world that are rightly labeled slavery despite contours that differ from chattel enslavement.[41]

Relatedly, this Article uses the term "slavery" here because courts have attempted to use the depth of the evil of chattel enslavement to constrict the Thirteenth Amendment's reach. Because even practices that fit well within the label "involuntary servitude" were not "akin to African slavery," the courts have allowed them to continue.[42]

Finally, and perhaps most importantly, the term slavery is used here because it is a term that numerous imprisoned people have used to describe their experiences,[43] experiences which too often reflect those of chattel enslavement. Indeed, their descriptions, which invoke traumas

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41. See, e.g., Program to End Modern Slavery, U.S. Dep't of State, https://www.state.gov/program-to-end-modern-slavery [https://perma.cc/DFK3-5769] (last visited Nov. 2, 2023); see also Nathan J. Robinson, The Clintons Had Slaves, Current Affs. (June 6, 2017), https://www.currentaffairs.org/2017/06/the-clintons-had-slaves [https://perma.cc/VV4T-TEWG] (noting how in attempting to draw fine distinctions, "'involuntary servitude' immediately begins to sound like little more than a euphemism for slavery, and many of the situations that modern anti-slavery advocates would consider to be slavery . . . do not necessarily include" the total intergenerational domination of chattel slavery).

42. See Butler v. Perry, 240 U.S. 328, 332 (1916); see also infra section I.C (discussing the "exceptional" and housekeeping exceptions to the Thirteenth Amendment).

43. See, e.g., Kevin Rashid Johnson, Opinion, Prison Labor Is Modern Slavery. I've Been Sent to Solitary for Speaking Out, The Guardian (Aug. 23, 2018), https://www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike [https://perma.cc/5WD3-593A] ("I see prison labor as slave labor that still exists in the United States in 2018."); Mitch Smith, Prison Strike Organizers Aim to Improve Conditions and Pay, N.Y. Times (Aug. 26, 2018), https://www.nytimes.com/2018/08/26/us/national-prison-strike-2018.html (on file with the *Columbia Law Review*) ("Much of the recent activism has focused on inmate pay, which can range from nothing at all in states like South Carolina and Texas to, at best, a few dollars for a day of hard labor in other places. Prisoners frequently refer to it as 'slave labor[]' . . . ."); Daniele Selby, How a Wrongly Incarcerated Person Became the 'Most Brilliant Legal Mind' in 'America's Bloodiest Prison', Innocence Project (Sept. 17, 2021), https://innocenceproject.org/how-a-wrongly-incarcerated-person-became-the-most-brilliant-legal-mind-in-americas-bloodiest-prison-2 [https://perma.cc/4EU6-QAVP] (quoting Calvin Duncan, who was exonerated after twenty-eight years of incarceration, as saying: "When people say this is modern day slavery—this ain't no modern day slavery" and "[t]his shit *is* slavery"); 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://innocenceproject.org/a-mistaken-identification-sent-him-to-prison-for-38-years-but-he-never-gave-up-fighting-for-freedom [https://perma.cc/7R63-F9TB] [hereinafter Selby, A Mistaken Identification] (describing Malcom Alexander's experiences at Angola prison in Louisiana, stating that "[i]t was like you see in old pictures of slavery" and that "[w]e even had a quota we had to meet at the end of the day" (quoting Malcom Alexander)); Jailhouse Lawyers Speak, @JailLawSpeak, Twitter (Apr. 24, 2018), https://x.com/JailLawSpeak/status/988771668670799872 [https://perma.cc/N8W3-7L46] (demanding "[a]n immediate end to prison slavery" as a condition of ending a prison strike).

beyond merely being forced to work,[44] accord with the conception of slavery put forward by Professors Jack Balkin and Sanford Levinson as "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."[45] Though this Article focuses overwhelmingly on forced labor, it should not be lost that labor is only one way that the ever-present threat of domination manifests for convicted people.[46]

I. THE THIRTEENTH AMENDMENT'S EXCEPT CLAUSE

Despite its core role in continuing the "peculiar institution"[47] into the twenty-first century, few scholars discussed the Thirteenth Amendment's Except Clause until recently. And even with renewed scholarly and popular attention to it, the surrounding jurisprudence is sparse. This Part discusses the commentary about the Thirteenth Amendment and its Except Clause with an eye to figuring out why this state of the world has come to be. It then traces the development of Except Clause jurisprudence and in doing so uncovers an uncomfortable truth about those cases: They are an example of the common law at its worst. Beginning with a not-clearly-on-point and uncontroversial statement that an exception existed within the

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44. For example, one seemingly large difference between prison slavery and chattel slavery is its effect on families of those enslaved. But these may be differences of degree, not of kind. While chattel slavery was fiercely intergenerational, empirical studies have consistently found that having a parent imprisoned increases the likelihood that a child will also be imprisoned at some point in their life. See Albert M. Kopak & Dorothy Smith-Ruiz, Criminal Justice Involvement, Drug Use, and Depression Among African American Children of Incarcerated Parents, 6 Race & Just. 89, 92 (2016) (reviewing studies describing the notable impact parental incarceration has on their children's criminal justice involvement). But perhaps more drastically, the two systems have similar family separation dynamics. Professor Dorothy Roberts has explained how the criminal legal and child welfare systems intersect and overlap to remove children from the care of incarcerated, disproportionately Black mothers and to place them into state-run and state-sponsored foster care. See Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. Rev. 1474, 1491–99 (2012).

45. Jack M. Balkin & Sanford Levinson, The Dangerous Thirteenth Amendment, 112 Colum. L. Rev. 1459, 1484 (2012).

46. See, e.g., Chin, supra note 38, at 1790–93 ("A person convicted of a crime, whether misdemeanor or felony, may be subject to disenfranchisement (or deportation if a noncitizen), criminal registration and community notification requirements, and the ineligibility to live, work, or be present in a particular location." (footnotes omitted)); Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 891 (2009) (arguing that "[t]he state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection" and so creates "cruel" prison conditions when it violates its "ongoing duty to provide for prisoners' basic human needs"); Sharon Dolovich, Exclusion and Control in the Carceral State, 16 Berkeley J. Crim. L. 259, 261 (2011) (using the rise of life without parole sentences and supermax confinement to explain how "exclusion and control has emerged . . . as the animating mission of the carceral project" (footnote omitted)).

47. Stampp, supra note 27.

Thirteenth Amendment, the courts have—across time and geography, with little or no reasoning—expanded the jurisprudence of the Except Clause. In cases brought overwhelmingly by pro se, incarcerated people, the federal courts have said not only that there is an exception within the Amendment but that *everyone* "duly convicted" is also subject to the punishment of enslavement and involuntary servitude.[48]

A. *Commentary on the Thirteenth Amendment*

The state and federal governments have almost uniformly decided to site the decisionmaking power for implementing prison slavery in the hands of prison administrators.[49] As Part II will discuss further, this choice is odd. To pass constitutional muster, after all, prison slavery must be punishment for a crime. And in virtually every other facet of the criminal law, the responsibility for doling out punishment—even if not the exact implementation of that punishment—is placed in the hands of the judiciary.[50] Indeed, the judiciary has proven fiercely protective of this responsibility, criticizing legislative efforts to undermine its role through tactics like mandatory minimum sentences.[51] But even in the case of mandatory minimums or other required parts of a criminal punishment, the judiciary at least announces the mandatory part of a sentence.[52] In the regime of administrative enslavement, however, not only has the judiciary not fought against this derogation of their traditional power—they do not even pronounce enslavement as part of the punishment.

The looming question is: Why? Scholars have offered numerous reasons for this and related problems arising under the Thirteenth Amendment. The following discussion catalogues many of these explanations, as they both engage the radical promise of the Thirteenth Amendment and grapple with reasons the courts have stifled that promise.

In his prior professorial writings, Judge Raja Raghunath[53] argues persuasively that the courts' broad reading of the Except Clause and narrow reading of the rest of the Thirteenth Amendment is part of a broader regime of judicial deference to prison officials.[54] Raghunath reviews the histories of the Thirteenth Amendment and prison labor as well as the courts' differential treatment of the word "punishment" in the

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48. See U.S. Const. amend. XIII, § 1.

49. See infra Part II.

50. See, e.g., People v. Davis, 442 N.E.2d 855, 857 (Ill. 1982) ("It is, of course, indisputable that the power to impose sentence is exclusively a function of the judiciary." (citations omitted)).

51. See, e.g., Martin, supra note 12 ("Mandatory minimums support unwarranted uniformity by treating everyone alike even though their situations are dramatically different." (quoting Judge Mark Bennett)).

52. See, e.g., 18 U.S.C. § 3553(c) (2018) (requiring the court to "state in open court the reasons for its imposition of the particular sentence").

53. Raghunath is now an administrative law judge.

54. See Raghunath, supra note 8, at 399–404.

Fifth and Eighth Amendments—where it is interpreted narrowly—and the Thirteenth Amendment—where it is interpreted broadly.[55] He then suggests returning to the "Hard Road" of explicitly sentencing people convicted of crimes to hard labor.[56] In returning to explicit sentencing, he argues, both courts and broader society may rethink the Thirteenth Amendment.[57] Wafa Junaid also argues that an intratextual analysis of the Eighth and Thirteenth Amendments' use of the word "punishment" finds that "incarcerated individuals must be explicitly sentenced to labor in order to be excluded from Thirteenth Amendment protections."[58]

There may also be historical reasons for this development. Professor Scott Howe, for example, suggests that the broad power to enslave after conviction was confirmed shortly after the Thirteenth Amendment's passage with the rise of convict leasing and similar systems, particularly in the South.[59] These interpretations gave rise to abhorrent practices and, as Howe notes, "were almost never legally challenged or condemned, except on rare occasions under nonconstitutional state law."[60]

But as Professor James Gray Pope carefully catalogues, this historical acquiescence is part of much broader circumstances. The lack of constitutional challenge was due in part to the political economy of both the South and the country more broadly.[61] As Pope recounts, "With African Americans disenfranchised and excluded not only from juries, but also from positions in law enforcement, the legal profession, and the bench, this network [of people benefitting from convict leasing] could . . . block would-be challengers from gathering the facts and establishing the contacts necessary to bring a case."[62] To pursue the case that eventually

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55. See id. at 409–35.

56. See id. at 435–44 ("The return of The Hard Road that is called for in this Article would provide an opportunity for us to once again measure the extent of an individual's rights that we wish to withdraw upon his or her conviction for crime.").

57. See id. at 442–43. While Raghunath's work is foundational, his argument is distinct from that made in this Article. Although this Article agrees that Except Clause punishments should return to being explicitly pronounced parts of a sentence, it disagrees that a return to the "hard road" is necessary. Instead, as Part III argues, sentencing is only one manifestation of how paying deeper attention to the problem of slavery and involuntary servitude before a sentence is imposed might animate Except Clause jurisprudence, societal awareness and consideration of prison slavery, and on-the-ground changes to the lives of imprisoned people.

58. Junaid, supra note 8, at 1102.

59. See Howe, supra note 37, at 1008–19. Convict leasing was a common practice in southern states after the Civil War that allowed nongovernment parties to "lease" the labor of disproportionately Black incarcerated persons—giving nearly unfettered control to the leasing parties and resulting in widespread corporal abuse, torture, and prisoner killings. Id. at 1009–14.

60. Id. at 988.

61. See Pope, Mass Incarceration, supra note 8, at 1521–25 ("Forward-looking capitalists, including Northern corporations, depended upon convict labor.").

62. Id. at 1522.

became *Bailey v. Alabama*,[63] for example, Bailey not only had to find a lawyer in a different city but also recruited Booker T. Washington, "a group of reform-minded whites in Montgomery," and even President Theodore Roosevelt to his cause.[64]

Pope's discussion of *Bailey* sits within a larger historical project. Like Howe, Pope takes his analysis back to the time immediately after the passage of the Thirteenth Amendment. But there he finds not only the horrors Howe describes but also the Amendment's Republican framers consistently attempting to fight back against them. He describes several attempts, some successful and part of our law today—like the Civil Rights Act of 1866[65]—and some lost to time—like the Kasson Resolution[66]—that suggest the broad reading of the Except Clause that has taken hold today would be anathema to the Amendment's Republican framers. Instead, this broad reading, which "strip[s] all Thirteenth Amendment protection from any person who had been convicted of a crime," is more akin to that put forward by "the former slave masters and their Democratic allies."[67]

Professor Michele Goodwin, by contrast, traces the historical developments and transformations of post–Civil War slavery in service of a broader point: The broad reading of the Except Clause enables the latest incarnation of systems of free or cheap labor that control and profit from disproportionately Black people.[68] Borrowing a phrase from Professor Paul Butler, Goodwin "exposes the persistence of slavery through the criminal justice system as the penultimate chokehold" that helps to maintain the country's racial and economic stratifications.[69]

Professor Cortney Lollar also links the continued existence of prison slavery and involuntary servitude to the broader racial and economic systems that define our country. The failure to define the words "slavery" and "involuntary servitude" in the Constitution, she argues, has allowed courts to narrowly define them to refer only "to possession of people as tangible personal property and the forced labor of those individuals," thereby removing "coercive labor practices backed by the threat of incarceration . . . [from] the definitional ambit."[70] Because of this jurisprudential move, there is now a "loophole to permit sheriffs, jails, and even private parties to require work from those convicted of committing a

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63. 219 U.S. 219 (1911) (striking down an Alabama statute that effectively criminalized quitting a job under the Thirteenth Amendment and Anti-Peonage Statute).

64. Pope, Mass Incarceration, supra note 8, at 1523–24.

65. Id. at 1478–85.

66. Id. at 1485–90.

67. Id. at 1490–92.

68. See Goodwin, Modern Slavery, supra note 8, at 975–80.

69. Id. at 980; see also id. at 953–56 (discussing Paul Butler, Chokehold: Policing Black Men (2017)).

70. Cortney E. Lollar, The Costs of the Punishment Clause, 106 Minn. L. Rev. 1827, 1830 (2022).

crime."[71] By tracing the Except Clause's life from the Black Codes to convict leasing to hard labor chain gangs and finally to the prison slavery of today, Lollar explains how "[c]riminal financial obligations are [used] to conscript the physical bodies of those convicted of crimes into revenue-generating labor that would be impermissible but for the presence of the Punishment Clause."[72]

This latter work, while examining the Except Clause in depth, relates to literature on the broader Thirteenth Amendment. That literature excavates the reasons for the Amendment's narrow interpretation despite its broad potential as an instrument for change. For example, Professors Balkin and Levinson argue that the courts have been reticent to interpret the Thirteenth Amendment broadly because to do so "calls into question too many different aspects of public and private power, ranging from political governance to market practices to the family itself."[73] And Professor Pope has written that the potentially expansive interpretation of the "badges and incidents" of slavery advanced by the Amendment's Republican proponents was "interred" by the Supreme Court in *Plessy v. Ferguson* and *Hodges v. United States*.[74]

Numerous scholars have also explored the Thirteenth Amendment's relevance and untapped potential for advancing society across a range of issues. Perhaps most relatedly, scholars have written about the labor implications of the Thirteenth Amendment.[75] But other work has addressed the Thirteenth Amendment's (potential) role in preventing

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71. Id.

72. Id.; see also id. at 1850–78 (detailing this history).

73. Balkin & Levinson, supra note 45, at 1462.

74. James Gray Pope, Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery, 65 UCLA L. Rev. 426, 433–48, 455–57 (2018); see also Hodges v. United States, 203 U.S. 1 (1906); Plessy v. Ferguson, 163 U.S. 537 (1896).

75. 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"); Armstrong, Slavery Revisited, supra note 36, at 872 (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, 90–91 (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 Val. U. L. Rev. 1425, 1461 (2009) (discussing variations of convict leasing).

sexual abuse of women in prisons,[76] payday lending,[77] animal rights,[78] private-prison contracts,[79] fair housing,[80] and numerous other areas.[81]

These various explanations—doctrinal, historical, critical, social, racial, and economic—almost certainly played a significant role in the development of the broad reading of the Except Clause that remains in place today. But this Article contributes an additional and previously unacknowledged reason: seemingly mundane structural choices within the law that guide its substantive direction.

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76. See Brenda V. Smith, Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery, 33 Fordham Urb. L.J. 101, 114–118 (2006) ("The Thirteenth Amendment applies both in letter and spirit to the protection of slaves and prohibits slavery-like conditions or treatment, even if the 'slave' is a woman prisoner subjected to sexual abuse by the state and its agents . . . ."); I. India Thusi, Girls, Assaulted, 116 Nw. U. L. Rev. 911, 954–57 (2022) ("[T]he Thirteenth Amendment aims to address the 'badges and incidents of slavery,' and the continued acts of dominion over incarcerated girls' bodies implicate its prohibitions." (footnote omitted)).

77. See 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 "[t]he Thirteenth Amendment is the vehicle that Congress should use to regulate payday lenders," as "[t]he terms of these loans, the coercive nature of the lenders, and the demoralizing and destructive consequences for the borrowers reflect exactly what the framers of the Thirteenth Amendment sought to eliminate").

78. See 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, 223–24 (2013) ("The Amendment contains no limiting language defining particular classes or types of slaves; instead, it uses broad language outlawing the conditions and practices of slavery and involuntary servitude imposed by humans.").

79. See Ryan S. Marion, Note, Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts, 18 Wm. & Mary Bill Rts. J. 213, 215 (2009) ("[T]he Supreme Court would be justified in rendering the current private prison industry unconstitutional under the Thirteenth Amendment's prohibition against 'slavery [and] involuntary servitude.'" (second alteration in original) (quoting Akhil Reed Amar, America's Constitution: A Biography 360 (2005))).

80. See George Lipsitz, "In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights, 59 UCLA L. Rev. 1746, 1803–08 (2012) (arguing that collective political action is necessary to secure fair housing in light of the broken promises of, among other legal tools, the Thirteenth Amendment's prohibition on the badges and incidents of slavery).

81. See, e.g., 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) (arguing that antigang statutes are an impermissible badge or incident of slavery); Michael A. Lawrence, The Thirteenth Amendment as Basis for Racial Truth & Reconciliation, 62 Ariz. L. Rev. 637, 669–73 (2020) (arguing that the Thirteenth Amendment could serve as the constitutional hook for a racial truth and reconciliation law).

Reviewing the cases and statutes that undergird this regime brings two such legal features to the fore. They are, first, the combination of the common law with courts' treatment of certain disfavored[82] types of litigation—particularly pro se litigation and litigation by and affecting imprisoned people—and, second, legislative judgments.

To be clear, this story is not necessarily causal. These sorts of structural decisions and issues may not be the but-for cause of our current regime of administrative enslavement. Indeed, the history of the Except Clause suggests that the desire to implement something like the labor system we have today has been—and remains—strong enough to suvive direct attack. Elements of both the Black Codes and convict leasing were, after all, held unconstitutional by the Supreme Court and further dismantled by state and federal legislation.[83]

Instead, these seemingly small, structural, and rarely disputed choices help courts and legislatures enact, develop, and sustain a regime like administrative enslavement while rarely garnering the sort of attention that a politically charged issue like slavery would naturally attract.[84] Likewise, these same sorts of structures and choices can help administrative enslavement, and regimes like it, survive and evolve even in the face of massive legal changes. Here, as discussed in Part III, it is entirely possible that even an amendment to the Constitution—or the amendments to state constitutions gaining ground throughout the country—would not alter the working lives of many imprisoned people.

The remainder of Part I describes the modern jurisprudence of slavery and involuntary servitude and traces that jurisprudence to its origins.

B. *The Jurisprudence of the Except Clause*

1. *Pro Se and Incarcerated Litigants.* — It will quickly become clear that it is impossible to discuss the jurisprudence of the Except Clause without first addressing the pro se elephant in the room. A full accounting of the difficulties of pro se litigation by imprisoned persons is beyond the scope of this Article. But as several of the cases next discussed show, the

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82. This Article uses the term "disfavored" not to connote that courts are substantively hostile to these types of cases, litigants, or claims (although that may be at play too) but to highlight that these cases are often structurally disfavored because of the prison setting. See, e.g., 42 U.S.C. § 1997e(c)(1) (2018) (requiring a court to dismiss an imprisoned person's suit on its own motion "if the court is satisfied that the action," among other possibilities, "fails to state a claim upon which relief can be granted"); Greyer v. Ill. Dep't of Corr., 933 F.3d 871, 874–75 (7th Cir. 2019) (discussing forms requiring imprisoned people to provide extensive detail of their litigation history, often from memory, under penalty of having their current case dismissed).

83. See Lollar, supra note 70, at 1831.

84. See, e.g., Kimberlee Kruesi, Slavery Is on the Ballot for Voters in 5 US States, Associated Press (Oct. 22, 2022), https://apnews.com/article/2022-midterms-13th-amendment-slavery-4a0341cf82fa33942bda6a5d17ac4348 [https://perma.cc/W2JJ-368X].

frustration caused by this process is obvious. Indeed, in several of those cases, the court writes its frustration onto the pages of the Federal Reporter. But that frustration is, in some ways, understandable from everyone involved.

Pro se imprisoned litigants navigate the court system with little-to-no legal training and only the sparsest materials. Their filings often must be handwritten.[85] And the combination of incredibly high personal stakes and lack of legal training can make imprisoned litigants detrimentally zealous.[86]

Apart from anything pro se litigants do themselves, their cases may be treated differently because of both a court's structure and applicable statutory provisions.[87] Pro se cases, for example, may be handled by different law clerks than those hired to work in a judge's chambers in the federal system.[88] And litigation by imprisoned people is subject to the

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85. See Rebecca Wise, Note and Comment, Five Proposals to Reduce Taxation of Judicial Resources and Expedite Justice in Pro Se Prisoner Civil Rights Litigation, 52 U. Tol. L. Rev. 671, 684–85 (2021) (discussing nonsubstantive barriers to deciding pro se cases brought by imprisoned people, including that "a large percentage of *pro se* prisoner civil rights complaints are handwritten" because incarcerated people "are often not permitted to use word processing" software).

86. See, e.g., Appellate Brief of Pro Se, Informa Pauperis, Inmate Benjamin F. Shipley, Jr. Per Appellate Court's Rebriefing Order at 1 n.2, Shipley v. Woolrich, 428 Fed. App'x 4 (D.C. Cir. 2011) (No. 09-5063), 2010 WL 5324964 (arguing that court-appointed amicus counsel "fail[ed] to comprehend" the "distinctly different issues underlying" Shipley's claims, including his "thirty-nine(39) [sic] non-Fair Labor Standards Act (FLSA) claims"). Of course, courts must not let this frustration get in the way of fairly evaluating imprisoned litigants' claims. At times, that zealotry is warranted, and we are all the better for it. See, e.g., 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 (on file with the *Columbia Law Review*) (reporting how Calvin Duncan, once a prison lawyer incarcerated in the Louisiana State Penitentiary in Angola, used the legal skills he developed while incarcerated to "help free several inmates" and developed the strategy that eventually led the Court to take up Ramos v. Louisiana, 140 S. Ct. 1390 (2020)).

87. See Aaron Littman, Managing Pro Se Prisoner Litigation, 43 Rev. Litig. 43, 48–60 (2023) (reviewing fraught court tactics for managing high numbers of pro se incarcerated litigants).

88. See Katherine A. Macfarlane, Shadow Judges: Staff Attorney Adjudication of Prisoner Claims, 95 Or. L. Rev. 97, 105–13 (2016) (describing the role of pro se staff clerks in deciding litigation by pro se incarcerated persons and the differences between pro se and "elbow" law clerks); see also, e.g., Notice of Position Vacancy, U.S. Dist. Ct. N.D. Ill. (Sept. 23, 2021), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/Human_Resources/Jobs/Pro%20Se%20Law%20Clerk%20(Temporary)%202021-21.pdf [https://perma.cc/9VF5-ZJU7] (advertising for a "Temporary Pro Se Law Clerk" in the Northern District of Illinois); Overview of Judicial Clerkships, Univ. Ill. Chi. L., https://law.uic.edu/student-support/career-services/judicial-clerkship-overview [https://perma.cc/J5NY-ERNP] (last visited Jan. 26, 2024) (describing "staff attorneys or court law clerks" as "responsible for such matters as *pro se* appeals, appeals to be decided summarily, substantive motions, jurisdictional issues, and other matters on the non-argument calendar").

numerous requirements of the Prison Litigation Reform Act (PLRA).[89] But beyond these explicit structural differences, pro se litigation by imprisoned people is more difficult than most other litigation for both the imprisoned person and the judge deciding the issue, through no fault of either party. The limitations people face by nature of imprisonment—such as limited legal training, sparse attorney representation, and lack of access to research and writing materials—virtually ensure that a case brought by an imprisoned person will have more hurdles to overcome than a similar one brought by a free, and especially a counseled, party.[90] Empirical research confirms that these structural differences almost certainly lead to different substantive outcomes.[91]

Despite these complexities marking most Except Clause cases, Except Clause jurisprudence can be summed up in a single word: everyone. Everyone who is convicted of a crime falls within the Thirteenth Amendment's exception.[92]

2. *The Except Clause's Reach.* — Except Clause jurisprudence might be best stated as the sort of if–then statement familiar to every lawyer: If you have been duly convicted of a crime, then you can be forced into involuntary servitude. While this statement may seem uncontroversial given the Thirteenth Amendment's text, what makes it so broad is that the usual limitations and protections that apply to punishments do not apply here. Judges rarely need to think about whether the punishment is appropriate for you; that decision is left up to prison administrators.[93] Case law offers no limits on which crimes warrant involuntary servitude. Thus,

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89. See, e.g., Wise, supra note 85, at 678–81 (discussing barriers raised by the PLRA, including limits on attorney's fees, exhaustion requirements, three-strikes rules, and the ability for judges to dismiss the suit without requiring the other side to answer).

90. See Greyer v. Ill. Dep't of Corr., 933 F.3d 871, 875–77 (7th Cir. 2019) (noting various barriers that imprisoned litigants face even to something as simple as relaying their own litigation histories).

91. See Littman, supra note 87, 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, benefit plaintiffs); see generally Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555 (2003) (analyzing the reasons for the volume and success of litigation by incarcerated people and the PLRA's effects on the prisoner litigation docket).

92. See, e.g., Ali v. Johnson, 259 F.3d 317, 317 (5th Cir. 2001) ("This appeal leads us to reiterate that inmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work."); Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (calling "thoroughly frivolous" a Thirteenth Amendment claim arguing that an imprisoned person in a private prison could not be forced to work); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963) ("Where a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises."); Howerton v. Mississippi County, 361 F. Supp. 356, 364 (E.D. Ark. 1973) ("Courts have long held that reasonable work requirements may be imposed on one convicted of a crime, whether misdemeanor or felony, without running afoul of the Thirteenth or Eighth Amendments.").

93. See infra section II.A.2.

it is a punishment for *any* crime, whether homicide or failing to pay a fine.[94] And while the cases discussed here deal with incarcerated individuals, neither their logic nor the Constitution's text suggest that involuntary servitude as punishment is limited solely to incarceration.

This, to be clear, is not a jurisprudential choice that is mandated by the Constitution's text. To the contrary, the Thirteenth Amendment's Except Clause simply retains the option for slavery or involuntary servitude to be a punishment for a crime. It does not say that either slavery or involuntary servitude *must* be the punishment for any crime, and it certainly does not say that they must be the punishment for *every* crime.

But the face of the text does admit the possibility that every crime ("whereof the party shall have been duly convicted") *could* lead to a punishment of enslavement. In other words, nothing about the text of the Amendment places an obvious limit on what crimes can lead to enslavement as punishment. The courts have uniformly (with one brief and quickly corrected deviation) taken this ambiguity to give the Clause the broadest interpretation possible.

Perhaps the strangest part of this broad interpretation of the Except Clause is that while there is certainly a consensus among the federal courts now, it is unclear where it came from. Several commentators have traced this broad interpretation to *Ex parte Karstendick*.[95] That conclusion seems right on one count and deeply dissatisfying on another.

In *Karstendick*, a case about federal sentencing statutes, the Supreme Court held that when imprisonment at hard labor is part of the punishment called for by a statute, "it is imperative upon the court to include that in its sentence."[96] There is no such imperative, however, "where the statute requires imprisonment alone."[97] According to that case, the sentencing judge has discretion to impose "a wider range of punishment."[98] The judge can send a defendant to serve their sentence in a prison where hard labor is required or to a less demanding institution.[99] As Judge Raghunath recognizes, *Karstendick* likely "expressed the common law rule of the era" because this combination of imprisonment and assumed hard labor had been common over the past century, even if it was not quite universal.[100] *In re Mills* subsequently quoted that holding at

94. See Topher Sanders, A Lawsuit Over Ferguson's "Debtors Prison" Drags On, ProPublica (May 31, 2019), https://www.propublica.org/article/a-lawsuit-over-ferguson-debtors-prison-drags-on [https://perma.cc/8QXK-89JR] (describing how residents of Ferguson, Missouri, were incarcerated for not paying fines).

95. 93 U.S. 396 (1876); see also Pope, Mass Incarceration, supra note 8, at 1534 (calling *Karstendick* "[t]he jurisprudential roots of this approach"); Raghunath, supra note 8, at 411 (highlighting *Karstendick* in a discussion of the origins of "inmate labor").

96. 93 U.S. at 399.

97. Id.

98. Id.

99. Id.

100. Raghunath, supra note 8, at 411–12 & nn.94–99.

length.[101] As the Ninth Circuit once recognized, "by 1835 confinement and hard labor were the most common punishments for all but the relatively few capital crimes in most states."[102]

Karstendick and *Mills* thus represent an obvious beginning for judicial interpretation of the Except Clause. They solidified the longstanding practice of assuming that a sufficiently long term of incarceration necessarily includes performing hard labor as a potential punishment.[103] On this point, past commentators seem correct. And because of their relevance, it is possible that courts in the early- to mid-twentieth century had these cases in mind as they faced challenges to forced prison labor.

But within this rosy picture, there are two glaringly large thorns. The first is that neither *Karstendick* nor *Mills* even mentions the Thirteenth Amendment.[104] Given that they do not mention the Amendment, it is unsurprising that neither purports to provide an interpretation of that Amendment or the Except Clause within it.

This first problem is exacerbated by a second issue that commentators have not noticed: None of the cases establishing the broad reading of the Except Clause in force today cite either *Karstendick* or *Mills*. Instead, they trace back to three origins. To the extent these cases rely on Supreme Court precedent at all, they stem from the *Slaughter-House Cases* or *Butler v. Perry*—neither of which purported to deal with incarcerated forced labor.[105] Alternately, they trace back to an unsupported statement in *Lindsey v. Leavy*, a 1945 Ninth Circuit case with a pro se plaintiff.[106]

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101. 135 U.S. 263, 265–66 (1890).

102. United States v. Ramirez, 556 F.2d 909, 911 n.4 (9th Cir. 1976) (citing Blake McKelvey, American Prisons: A Study in American Social History Prior to 1915, at 7, 16 (1936)).

103. *Karstendick* dealt with a statute requiring imprisonment longer than one year. See 93 U.S. at 398–99.

104. Professor Pope first recognized this fact in *Karstendick*. See Pope, Mass Incarceration, supra note 8, at 1534.

105. See Butler v. Perry, 240 U.S. 328, 329–33 (1916) (upholding a state law permitting county officials to require certain residents to work on the roads on threat of fine or imprisonment); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 59, 80–81 (1873) (upholding "[a]n act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company" (internal quotation marks omitted)).

106. The *Lindsey* court concluded that the court below properly granted appellees' motions for summary judgment:

> The record respecting appellees who were public officers and officials plainly shows that, aside from acting in their official capacities in the discharge of duties imposed on them by law when dealing with cases in which appellant was a party, these appellees did not come in contact with him and there is no evidence which sustains or tends to sustain appellant's charge that appellees intimidated, or threatened him or denied him freedom from involuntary servitude and slavery. On the contrary, the record compels the conviction that appellant was the sole author of his

To see how this game of common law "telephone" happened, this Article begins at the beginning, with *Lindsey* and the *Slaughter-House Cases*. It ends with the "trio of frequently cited Fifth Circuit cases" identified by Professor Pope[107] that continue to serve as the linchpin for the broad reading of the Except Clause today.[108]

Start with the progenitors of this case line, *Lindsey v. Leavy* and the *Slaughter-House Cases*. *Lindsey v. Leavy* was the end of a long series of cases in which Mr. E. R. Lindsey attempted to challenge his conviction and sentence for grand larceny and forgery.[109] Lindsey did, in fact, successfully challenge part of his sentence before the Supreme Court.[110] Unfortunately for him, his win in the Supreme Court was short-lived, and at resentencing, he received functionally the same sentence.[111] After that defeat, Lindsey continued winding his way through the courts unsuccessfully until he found himself appearing pro se before the Ninth Circuit.[112]

As is sometimes the case with repeated pro se plaintiffs, the opinion in *Lindsey v. Leavy* is dripping with exasperation. At one point, the court lists Lindsey's procedural journey: one successful appeal to the Supreme Court, a (in Lindsey's view, unsuccessful) resentencing before the Washington Supreme Court, five separate failed attempts to get back before the Supreme Court, and two failed writs of habeas corpus in the United States District Court for the Eastern District of Washington.[113] After all that, in this current case before the Ninth Circuit, Lindsey had sued forty-five defendants and alleged a conspiracy "to deprive him of the right to the free exercise and enjoyment of freedom from involuntary servitude and slavery secured to him by the 13th Amendment and by the laws of the United States."[114]

It is in this context that the Ninth Circuit stated that the appellees did not violate Lindsey's Thirteenth Amendment rights because he was "duly

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> own misfortunes; *that he was duly tried, convicted, sentenced and imprisoned as a punishment for crime in accordance with law.*

Lindsey v. Leavy, 149 F.2d 899, 901–02 (9th Cir. 1945) (emphasis added).

107. Pope, Mass Incarceration, supra note 8, at 1535–38 (citing Wendt v. Lynaugh, 841 F.2d 619, 619–20 (5th Cir. 1988); then citing Ali v. Johnson, 259 F.3d 317, 317–18 (5th Cir. 2001); and Murray v. Miss. Dep't of Corr., 911 F.2d 1167, 1167–68 (5th Cir. 1990) (per curiam)).

108. See, e.g., Jordan v. Coffman, No. 4:21-CV-1456-JCH, 2022 WL 1165825, at *8 (E.D. Mo. Apr. 20, 2022) (citing *Ali*, 259 F.3d at 318; *Murray*, 911 F.2d at 1168).

109. 149 F.2d at 900 (describing Lindsey's past convictions, his appeal to the Supreme Court, his resentencing in state court, and his pursuit of the writ of habeas corpus, all of which occurred prior to the case before the court).

110. See Lindsey v. Washington, 301 U.S. 397, 402 (1937) (reversing Lindsey's grand larceny conviction).

111. See State v. Lindsey, 77 P.2d 596, 597–98 (Wash. 1938) (affirming Lindsey's sentence of between two and the statutory maximum of fifteen years' imprisonment).

112. *Lindsey*, 149 F.2d at 900.

113. Id. at 900.

114. Id. at 900–01 (internal quotation marks omitted).

tried, convicted, sentenced and imprisoned as a punishment for crime in accordance with law."[115] And given this context, it is perhaps unsurprising that the court felt no need to provide a citation or additional reasoning for the proposition.

Unlike *Lindsey*, which provides clear, if unreasoned, fodder for the broad reading of the Except Clause, the *Slaughter-House Cases* hardly discuss that Clause at all. While the *Slaughter-House Cases* certainly discussed the Thirteenth Amendment, their only mention of the Except Clause was a single sentence: "The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant."[116] This statement largely served as an example to reinforce the general point that the Thirteenth Amendment, like the Fourteenth and Fifteenth, had as its core purpose the elimination of the institution of chattel slavery and other *human* bondages and not the sort of prohibition on state-created monopolies for which the plaintiff slaughterhouses had argued.[117]

From *Lindsey* and the *Slaughter-House Cases*, we wend our way to the United States District Court for the District of New Jersey. There, in *Blass v. Weigel*, a case rejecting naturopathic medical practitioners' challenge to New Jersey's medical regulatory scheme, the court relied on *Lindsey* and the *Slaughter-House Cases* to state that "[t]he Thirteenth Amendment has no application to a situation where a person is held to answer for violations of a penal statute."[118] This blunt and unreasoned statement, seemingly dicta given the nonpenal issue at hand, would serve as a stepping stone to the next case solidifying the broad Except Clause we have today.

Blass and *Lindsey* bring us to the next major player in this story, *Draper v. Rhay*.[119] Robert Draper, like many plaintiffs in this story, appeared pro se before the Ninth Circuit to raise his thirty-four "Questions Presented."[120] To these thirty-four questions, the court responded: "No answer we could give . . . would, we are certain, satisfy the appellant."[121] Though Draper had thirty-four questions, some more general than others,[122] the core of his complaint was that he was imprisoned and forced

115. Id. at 901–02.

116. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873).

117. See id. at 67–69 ("To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves . . . requires an effort, to say the least of it.").

118. See Blass v. Weigel, 85 F. Supp. 775, 781 (D.N.J. 1949).

119. 315 F.2d 193 (9th Cir. 1963).

120. Id. at 195.

121. Id. at 197.

122. See, e.g., id. at 195 ("Is a citizen entitled to seek a determination of his Civil Rights in a United States Court, by right." (quoting Draper's Questions Presented)).

to work while his criminal case was still on appeal. When he refused to labor, he was thrown in the "hole"—that is, solitary confinement.[123]

It is here that we start to see the game of common law telephone taking shape. To dismiss Draper's claim, the Ninth Circuit cited three cases. Two of those, *Lindsey* and *Blass*, were cited for broad propositions about the inapplicability of the Thirteenth Amendment to someone convicted of a crime. For the proposition that "[w]here a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises," it cited *Lindsey*.[124] Likewise, to support the idea that "[t]he Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute," it cited *Blass*.[125]

The third case, *Butler v. Perry*, is part of a series of cases wherein the Supreme Court recognized nonpenal, unstated exceptions to the Thirteenth Amendment.[126] Like *Lindsey* and *Blass*, the Ninth Circuit cited *Butler* to explain the inapplicability of the Thirteenth Amendment. Except now we received our first bit of reasoning: The *Butler* Court stated that the Thirteenth Amendment was concerned with "those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."[127] Therefore, *Butler* held that the long history of requiring people to participate in public-works projects (road maintenance, in that case) was not the sort of involuntary servitude the Thirteenth Amendment intended to upset.[128] For that same reason, the Ninth Circuit said, requiring Draper to work was "not the sort of involuntary servitude which violates Thirteenth Amendment rights."[129]

This, to be clear, is the sort of analogical reasoning on which the common law operates. Yet in the arena of slavery, these analogies overwhelmingly *expand* the possibility of slavery, not contract it. Here, the Ninth Circuit both shifted the Supreme Court's reasoning from the exceptional example of public works to the Except Clause's core concern of prisons and extended that reasoning to imprisoned people whose

123. Id. at 197. Draper also seemingly complained that he was not given adequate access to legal materials to prepare his case. See id. at 196 ("When a poor person, a layman, is forced to represent himself before the Courts of this Nation, is it not a denial of due process and/or his Civil Rights, to deny him access to the reference material (books) he needs to litigate . . . or help to establish his case." (quoting Draper's Questions Presented)). The court interpreted this as "being denied his right to contact the courts or correspond with attorneys" and quickly batted it away by noting the "voluminous record before" them. See id. at 197.

124. Id. at 197.

125. Id.

126. See 240 U.S. 328 (1916); supra section I.A.

127. *Butler*, 240 U.S. at 332.

128. Id. at 332–33.

129. *Draper*, 315 F.2d at 197.

convictions are still being appealed.[130] While it seems that the Ninth Circuit may not have intended to make new law, *Draper* became one of the go-to citations for courts denying Thirteenth Amendment claims. Indeed, every circuit that has addressed these Except Clause issues can trace their analyses back to *Draper*.[131]

While *Draper* may be a cornerstone of this area of law, a quartet of Fifth Circuit cases illuminates how far the modern Except Clause has stretched. In *Wendt v. Lynaugh*,[132] the Fifth Circuit found itself at the core of the Except Clause, and its ruling was exactly what one might expect. Wendt, proceeding pro se, argued that his Thirteenth Amendment rights were violated when he was forced to work in prison without pay.[133] The court easily rejected this claim, affirming the district court's conclusion that it "obviously [was] frivolous."[134] Citing a litany of cases to support its conclusion, the court said that Wendt "had been duly convicted of a crime and was serving sentence in the Texas prison as punishment for that crime."[135] For that reason, he "in precise words [was] exempted from the application of the Thirteenth Amendment."[136] And like the *Draper* Court before it, the Fifth Circuit noted that the Supreme Court had also long excepted other "forced labor for a public purpose without pay."[137]

While *Wendt* followed the blueprint of most Except Clause cases, *Craine v. Alexander* was decidedly different.[138] First, it was technically not a

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130. Id. ("There is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though that conviction is being appealed.").

131. See, e.g., Rinaldi v. Doe #1, 708 F. App'x 748, 749 (3d Cir. 2018) (per curiam) (citing Ali v. Johnson, 259 F.3d 317, 317–18 (5th Cir. 2001)); *Ali*, 259 F.3d at 318 (citing Wendt v. Lynaugh, 841 F.2d 619, 620–21 (5th Cir. 1988); *Draper*, 315 F.2d at 197; and Craine v. Alexander, 756 F.2d 1070, 1075 (5th Cir. 1985); among other cases); Henthorn v. Dep't of Navy, 29 F.3d 682, 686 (D.C. Cir. 1994) (quoting Hale v. Arizona, 993 F.2d 1387, 1394 (9th Cir. 1993)); Williams v. Williams, 993 F.2d 1552, 1993 WL 147476, at *1 (10th Cir. 1993) (unpublished table decision) (citing *Wendt*, 841 F.2d 619); *Hale*, 993 F.2d at 1394 (citing *Draper*, 315 F.2d at 197); Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992) (citing *Draper*, 315 F.2d at 197); Cavender v. Kentucky, 887 F.2d 265, 1989 WL 120791, at *1 (6th Cir. 1989) (unpublished table decision) (citing *Wendt*, 841 F.2d at 621; Sigler v. Lowrie, 404 F.2d 659, 661 (8th Cir. 1968)); *Wendt*, 841 F.2d at 620 ("Perhaps the most commonly quoted case to follow the obvious literal intent of the Thirteenth Amendment is *Draper v. Rhay* . . . ."); *Craine*, 756 F.2d at 1075 (citing *Draper*, 315 F.2d at 197); Omasta v. Wainwright, 696 F.2d 1304, 1305 (11th Cir. 1983) (per curiam) (quoting *Draper*, 315 F.2d at 197); Newell v. Davis, 563 F.2d 123, 124 (4th Cir. 1977) (per curiam) (citing Borror v. White, 377 F. Supp. 181, 183 (W.D. Va. 1974) (citing *Sigler*, 404 F.2d at 661)); Goodwin v. Oswald, 462 F.2d 1237, 1249 n.2 (2d Cir. 1972) (Friendly, C.J., dissenting) (citing *Draper*, 315 F.2d at 193, for the proposition that "it goes without saying" that prisoners have no right to strike); *Sigler*, 404 F.2d at 661 (citing *Draper*, 315 F.2d 193).

132. 841 F.2d 619.

133. Id. at 619.

134. Id.

135. Id. at 620.

136. Id.

137. Id.

138. 756 F.2d 1070 (5th Cir. 1985).

Thirteenth Amendment case at all, as the claim before the court arose under the Anti-Peonage Act, which Congress passed as another bulwark against involuntary servitude.[139] Further, unlike most of these cases, *Craine* did not involve a pro se litigant. Indeed, with the help of his attorney, Ralph Craine won over $80,000 in compensatory and punitive damages on one of his § 1983 claims.[140] But the district court directed a verdict against him on his Anti-Peonage Act claim.[141] It was in reviewing that claim that the Fifth Circuit made the by-then-uncontroversial observation that "Craine does not complain of the labor imposed upon him as an aspect of the corrective regimen to which he was subject; nor could he do so with any hope of success."[142] At the same time, however, the court noted several "more difficult" issues that it was not reaching, those being whether an imprisoned person might have their rights violated under either the Anti-Peonage Act or the Thirteenth Amendment "by virtue of labor forced upon him by a custom or usage of the state that is, at the same time, outside the scope of a corrective penal regimen."[143]

Craine was the rare case to recognize the possibility that the Thirteenth Amendment's Except Clause may not be as straightforward as courts have read it to be for convicted people.[144] It may be possible, the court realized, for an incarcerated person to be forced to perform work for reasons *other than* punishment.[145] In a way, the *Craine* court acknowledging this wrinkle should be unsurprising. Courts have long struggled with how to handle Thirteenth Amendment claims of people forced to work who were not traditionally "duly convicted" of a "crime" but were instead involved in pseudocriminal civil commitment or juvenile

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139. See id. at 1075 ("[W]e do not reach the issue of whether Craine established a violation of his rights under the Thirteenth Amendment since this issue was not raised in his complaint."); see also Anti-Peonage Act, 42 U.S.C. § 1994 (2018). While this was formally not a Thirteenth Amendment case, cases under the Anti-Peonage Act tend to be decided with the (at times explicitly stated) recognition that it and the Amendment often do similar work. See, e.g., Bailey v. Alabama, 219 U.S. 219, 245 (1911) (finding a violation of both the Thirteenth Amendment and the Act).

140. See *Craine*, 756 F.2d at 1072. Craine was incarcerated but permitted to leave the jail for work. His case arose after he was beaten and shot by a deputy who was escorting him back to the jail when he instead left it to go to a pool hall. Id. at 1071–72.

141. Id. at 1071–72 (citing 42 U.S.C. § 1994 (1982)).

142. Id. at 1075 (citing, among other cases, *Draper*, 315 F.2d at 197).

143. Id.

144. Id.; see also Davis v. Hudson, No. 00-6115, 2000 WL 1089510, at *3 (10th Cir. Aug. 4, 2000) (unpublished table decision) (suggesting that forced labor in a private prison or other private facility might give rise to a Thirteenth Amendment claim provided "circumstances in which the opportunity for private exploitation and/or lack of adequate state safeguards could take a case outside the ambit of the Thirteenth Amendment's state imprisonment exception").

145. See *Craine*, 756 F.2d at 1075 ("[W]e express no opinion on the more difficult question whether a prisoner can establish a § 1994 deprivation by virtue of labor forced upon him by a custom or usage of the state that is, at the same time, outside the scope of a corrective penal regimen.").

detention.[146] In the same way courts struggle with finding the boundaries of a "crime," it should not shock that they struggle with the boundaries of "punishment."

While *Craine* recognized a potentially narrower Except Clause, *Watson v. Graves*[147] was among the few cases to do something about it. Like Ralph Craine, Kevin Watson and Raymond Wayne Thrash were not pro se prisoners at the time of their lawsuit. And like Craine, part of their suit (their FLSA claim) was successful. But *Watson* is exceptional because it is one of the few cases reading a limitation into the Except Clause. There, the Fifth Circuit stated that "a prisoner who is not sentenced to hard labor retains his [T]hirteenth [A]mendment rights."[148]

Unlike many cases with incarcerated litigants, wherein the court expresses some frustration with an imprisoned litigant, the facts of *Watson* drew the court's ire in the other direction. The Fifth Circuit began:

> Up to now this court believed, apparently naively, that in the last decade of the twentieth century scenarios such as the one now before us no longer occurred in county or parish jails of the rural south except in the imaginations of movie or television script writers. The egregious nature of this misanthropic situation in the instant case, however, disabuses us of that innocent misconception.[149]

Watson and Thrash were imprisoned at the Livingston Parish Jail in Louisiana for nonviolent crimes.[150] Importantly, neither of their sentences expressly contemplated hard labor, "nor did the state demand work as part of their respective sentences."[151] At the jail, the sheriff and warden ran a work program that allowed certain imprisoned people to be lent out to private businesses in exchange for $20-per-day pay to the imprisoned person.[152] Shifts could sometimes last twelve hours.[153]

None of this would be particularly shocking in the prison-slavery context except for two wrinkles. First, the company that Watson and Thrash worked for—Darryl Jarreau Builders—was owned by, and only formally employed, the sheriff's daughter and son-in-law.[154] All of the

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146. See, e.g., Jobson v. Henne, 355 F.2d 129, 132 (2d Cir. 1966) (finding that an individual forced to work in a mental health institution could state a Thirteenth Amendment claim); Santiago v. City of Philadelphia, 435 F. Supp. 136, 156–57 (E.D. Pa. 1977) (holding that juveniles at a Pennsylvania institution could state a Thirteenth Amendment claim depending on "the justification for confining" them); King v. Carey, 405 F. Supp. 41, 43 (W.D.N.Y. 1975) (same for minors who were "adjudicated juvenile delinquents . . . or persons in need of supervision").

147. 909 F.2d 1549 (5th Cir. 1990).

148. Id. at 1552.

149. Id. at 1550.

150. Id. at 1551.

151. Id. at 1552.

152. Id. at 1551.

153. Id.

154. Id. at 1554.

company's other "employees" were imprisoned people at the sheriff's jail, like Watson and Thrash, or subcontractors.[155] Second, the sheriff's work program quite obviously violated Louisiana law.[156] And so, amid obvious and abusive self-dealing, the Fifth Circuit decided that imprisoned people retained their Thirteenth Amendment rights unless explicitly sentenced to hard labor.[157]

But as the saying goes, bad facts make bad law. While this holding could have been a watershed moment in Thirteenth Amendment litigation, instead *Watson* has mainly come to be cited as a way to dismiss Thirteenth Amendment claims.[158] That is because, despite recognizing the possibility that an imprisoned person may retain their Thirteenth Amendment rights if they are not explicitly sentenced to labor, *Watson* declared there was no Thirteenth Amendment violation because Watson and Thrash both engaged in the sheriff's labor program voluntarily.[159] Despite being subjected to the "painful" choice of either remaining in jail or working for the sheriff's family, the court found that these facts were insufficient to show the compulsion necessary to constitute involuntary servitude.[160] Instead, "both [men] testified that they requested work outside the jail and took work release whenever possible," and there was no evidence that they could not have stopped participating in the program if they wished.[161] In reaching this conclusion, *Watson* too helped to solidify the broad reading of the Except Clause, as courts began to cite it for the

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155. See id. at 1551.

156. See id. at 1551 n.2 ("The Sheriff offered no justification for not following the wage mandate contained in [the statute], but stated that he simply created his own program based in part on the one used in Jefferson Davis Parish, although that program is only authorized for that one parish."); id. at 1552 n.6 ("Appellants claim the Livingston Parish work release program is illegal because it violates [a statute] which requires inmates to be paid wages similar to those paid to other workers doing similar work.").

157. Id. at 1552.

158. See, e.g., Brooks v. George County, 84 F.3d 157, 162–63 (5th Cir. 1996) (relying on *Watson* to hold that Robert Brooks's "choice between staying in jail or working when he was [legally] not supposed to be in jail" was sufficient choice to defeat his Thirteenth Amendment claim); Polk v. Castillo, No. 3:22-CV-1814-S-BN, 2023 WL 5810059, at *2–3 (N.D. Tex. June 14, 2023), report and recommendation adopted, No. 3:22-CV-1814-S-BN, 2023 WL 5807846 (N.D. Tex. Sept. 7, 2023) ("[So, 'w]hen the employee has a choice, even though it is a painful one, there is no involuntary servitude.'" (alteration in original) (quoting *Brooks*, 84 F.3d at 162)); Donald v. Benson Motor Co., No. CIV. A. 97-1734, 1997 WL 436254, at *2 (E.D. La. Aug. 1, 1997) (ruling on motions to strike and dismiss) ("While the Court is sympathetic to Donald's situation and his need to feed his family, he was under no compulsion to remain at Benson.").

159. *Watson*, 909 F.2d at 1552–53.

160. Id.

161. Id. This baseline voluntariness problem—that we can and have made incarceration so horrific that people would rationally perform free (or near free) hard labor rather than endure it—will be discussed in more depth in Part III because it is the most likely way that courts could maintain the status quo in the face of a constitutional amendment to the Thirteenth Amendment or its state-law analogues.

proposition that *any* availability of choice invalidated a Thirteenth Amendment claim.[162]

That, however, is not the only reason that *Watson*'s limitation on the Except Clause never gained purchase. The other reason is *Ali v. Johnson*.[163] Ahmad Ali, proceeding pro se like many before him, argued that he could not have been sentenced to hard labor because, in addition to not being told as much during his sentencing, at the time he was sentenced in 1994, Texas had no law on the books stating that imprisoned people must work.[164] Therefore, relying on *Watson*, he claimed that the labor he was forced to do violated his Thirteenth Amendment rights.[165]

The Fifth Circuit's response, taking up fewer than four pages of the Federal Reporter, was swift and clear. It was not required to, nor did it desire to, follow *Watson*. That language in *Watson*, the court noted, was dicta because *Watson* ultimately found no Thirteenth Amendment violation. Separate from the sometimes murky line between holdings and dicta, *Watson* was "an anomaly in federal jurisprudence."[166] Both the Fifth Circuit and other federal courts had essentially uniformly found that any convicted and imprisoned person could be forced into involuntary servitude, period.[167] The vagaries of state law and the explicitness of sentencing were simply, in the Fifth Circuit's view, not questions of constitutional import.[168]

Ali helps to illuminate just how broadly the courts have read the Except Clause. It does not matter where, for whom, or how you are forced to work. You can work for the government's benefit in the prison or outside of it. Or you might be forced to work for a private employer inside or outside of the prison.[169] You can be forced to work long hours doing dangerous labor.[170] State law does not matter at all. Indeed, a state *does not even*

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162. See, e.g., *Donald*, 1997 WL 436254, at *2 (citing *Watson* for the proposition that "a showing of compulsion is a prerequisite to proof of involuntary servitude" and concluding that "when the employee has a choice, even if it is a painful one, there is no involuntary servitude").

163. 259 F.3d 317 (5th Cir. 2001).

164. See id. at 318 & n.1.

165. Id. at 318.

166. Id.

167. Id.

168. Id. at 318 n.2 ("For Thirteenth Amendment purposes, however, the precise terms of state law are irrelevant. The Constitution does not forbid an inmate's being required to work. Whether that requirement violates state law is a separate, non-constitutional issue . . . .").

169. 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.").

170. Here, there are at least some limits imposed by the Eighth Amendment. See, e.g., Calhoun v. Hargrove, 312 F.3d 730, 732, 734–35 (5th Cir. 2002) (holding that a prison

need a statute on the books stating that labor is part of the punishment for any given conviction (or all convictions).[171] Nor is there any requirement that you be informed that part of your punishment will be enslavement or involuntary servitude at any point before you show up to prison.[172]

But more than this, these cases illuminate how the common law can go wrong. The courts addressing Except Clause cases almost uniformly dealt with cases brought by people from an unpopular group (people convicted of crimes) who were acting without lawyers and attempting to upset pro-carceral-state status quo. In addressing these challenges, the courts removed *any* possible substantive or procedural guardrails from the Except Clause. And they did so with little, if any, reasoning beyond reliance on cases that are themselves either lightly reasoned or not clearly on point.

Contrary to the portrait of federal courts as countermajoritarian protectors of the downtrodden,[173] here they have uniformly served only to constrict the rights of an already unpopular and vulnerable group. And contrary to the idyllic picture of the common law as reasoning by analogy in new situations across time, here the common law has operated more like a game of schoolyard telephone, expanding the reach of the Except Clause to its maximum ambit through bare and conclusory reasoning.

In doing so, the courts have further empowered the carceral state. But not, as it turns out, the *state* within the carceral state. This is not a federalism story in which federal courts defer to the state's will. Instead, as *Ali*'s refusal to engage with state law suggests, the courts' Except Clause jurisprudence seems to have *disempowered* state governments, which might pass laws restricting how prison slavery operates in their states.[174] In their stead, current Except Clause jurisprudence empowers *prison administrators*. As Part II will show, this has thus far been unproblematic, as the states have also overwhelmingly implemented the Except Clause through legislation that grants discretion to prison administrators.

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official forcing an incarcerated person to work much longer than a known physician-mandated restriction stated a viable Eighth Amendment claim).

171. See *Ali*, 259 F.3d at 318 n.2.

172. See id.; see also 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.").

173. See Corinna Barrett Lain, Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution, 152 U. Pa. L. Rev. 1361, 1361 (2004) ("When we think about judicial review, we tend to envision the Supreme Court as a 'countermajoritarian hero,' protector of minorities from tyrannical majority rule." (footnote omitted) (quoting Michael J. Klarman, *Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881, 1933–34 (1995))).

174. This is not the only area within the criminal legal system in which the courts have chosen to undermine, rather than support, state attempts to be less carceral. See, e.g., Virginia v. Moore, 553 U.S. 164, 171 (2008) (holding that an arrest based on probable cause does not violate the Fourth Amendment even when the state prohibits arresting an individual for that offense).

But even without more radical interventions, this unity of purpose is shifting as more states ban slavery and involuntary servitude in all forms through state constitutional referenda.[175] The clash between prison administrators, empowered and protected by federal courts, and state law restrictions seems increasingly inevitable.

C. *The Other Exceptions: Housekeeping and "Exceptional" Involuntary Servitude*

There are two other categories of involuntary servitude[176] not covered by the Thirteenth Amendment.[177] The first of these is what the Court in *Butler v. Perry* called "exceptional" involuntary labor for certain historical practices.[178] The Supreme Court has approved such involuntary servitude for military conscription during wartime,[179] forced labor on the public roads,[180] mandatory jury service,[181] contracts of sailors,[182] parents controlling their children,[183] and the provision of evidence.[184] The second

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175. See Ramirez, supra note 30 (reporting that Alabama, Tennessee, Vermont, and Oregon "approv[ed] constitutional amendments to abolish . . . involuntary labor as a form of punishment" while Louisiana failed to do so only "after the Democratic state lawmaker who proposed it . . . t[old] voters to oppose it over an issue with the wording on the ballot").

176. This Article uses the phrase "involuntary servitude" here to connote the sort of labor relationship generally forbidden by both the Thirteenth Amendment and federal statute, in which, but for the Court's alternative holding, a refusal to work would be met by "force, . . . physical restraint, . . . serious harm[,] . . . abuse of law or legal process[,]" or threats of these. 18 U.S.C. § 1589(a) (2018).

177. For a more fulsome discussion of these cases within the specific context of unconvicted-but-incarcerated labor, see generally Andrea C. Armstrong, Unconvicted Incarcerated Labor, 57 Harv. C.R.-C.L. L. Rev. 1 (2022).

178. 240 U.S. 328, 333 (1916) ("[The Thirteenth Amendment] introduced no novel doctrine with respect of services always treated as *exceptional*, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc." (emphasis added)); see also Robertson v. Baldwin, 165 U.S. 275, 282 (1897) ("It is clear, however, that the [Thirteenth] [A]mendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional . . . .").

179. Arver v. United States, 245 U.S. 366, 390 (1918). There are good reasons to consider military conscription as something other than involuntary servitude. See James Gray Pope, The Thirteenth Amendment at the Intersection of Class and Gender: *Robertson v. Baldwin*'s Exclusion of Infants, Lunatics, Women, and Seamen, 39 Seattle U. L. Rev. 901, 910 (2016) [hereinafter Pope, Intersection of Class and Gender] (opposing the public-oriented nature of wartime military conscription with the private nature of private servitude). This Article, however, classifies it as an exception because from the perspective of an individual who does not want to join the military, they are faced with the same choice of working against their will or suffering legal punishment that unites other examples of involuntary servitude.

180. *Butler*, 240 U.S. at 333.

181. Id.

182. *Robertson*, 165 U.S. at 283.

183. Id. at 282; see also Pope, Intersection of Class and Gender, supra note 179, at 914–25 (arguing for a renewed examination of the Thirteenth Amendment's applicability to domestic settings).

184. Hurtado v. United States, 410 U.S. 578, 588–89 & n.11 (1973).

is "housekeeping" work forced onto not-convicted-but-imprisoned people.[185] The exceptional cases illuminate an alternative road not taken in the Except Clause's past, while the housekeeping exception offers a road—and a warning—for the future.

1. *The "Exceptional" Historical Exceptions.* — The unwritten historical exceptions to the Thirteenth Amendment serve as examples of a particular oddity within Except Clause jurisprudence. The Except Clause's text has been sufficient for courts deciding to strip imprisoned people of the Thirteenth Amendment's protections. But courts have not always viewed that amendment's text as the only consideration relevant to their decisions. Instead, these extratextual justifications have primarily arisen when *expanding* the possibility of involuntary servitude.[186]

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185. See, e.g., Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993) (holding that "'[d]aily general housekeeping responsibilities' are not inherently punitive and do not violate either the Due Process Clause or the Thirteenth Amendment's ban on involuntary servitude" (alteration in original) (quoting Bijeol v. Nelson, 579 F.2d 423, 424 (7th Cir. 1978) (per curiam))); Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) ("Requiring a pretrial detainee to perform general housekeeping chores, on the other hand, is not [punishment]." (citing *Bijeol*, 579 F.2d at 425)); *Bijeol*, 579 F.2d at 424 (finding that requiring a pretrial detainee to perform "housekeeping chores" for "between 45 and 120 minutes" daily without pay did not violate the Thirteenth Amendment); Jobson v. Henne, 355 F.2d 129, 131–32 & n.3 (2d Cir. 1966) ("[T]he states are not thereby foreclosed from requiring that a lawfully committed inmate perform without compensation certain chores designed to reduce the financial burden placed on a state by its program of treatment for [those with intellectual disabilities] . . . [or] chores of a normal housekeeping type and kind."); see also 26 C.F.R. § 545.23(b) (2023) ("A pretrial inmate may not be required to work in any assignment or area other than housekeeping tasks in the inmate's own cell and in the community living area, unless the pretrial inmate has signed a waiver of his or her right not to work . . . .").

186. Modern Thirteenth Amendment scholarship has amply demonstrated that this did not have to be the case. The Court's early recognition that the Thirteenth Amendment also meant to eliminate the "badges and incidents" of slavery has given rise to numerous articles arguing that this more expansive view of the Thirteenth Amendment should have large ramifications for both the law and society writ large. See, e.g., Balkin & Levinson, supra note 45, at 1461–62 ("If the Thirteenth Amendment were taken as seriously as the Fourteenth has been taken, one would expect considerable political and legal efforts to make sense of its underlying purposes and apply its terms (and purposes) to new situations."); William M. Carter, Jr., The Thirteenth Amendment and Pro-Equality Speech, 112 Colum. L. Rev. 1855, 1856 (2012) (arguing that "[t]he Thirteenth Amendment . . . protects the freedom to speak for equality under the shelter of law"); Risa L. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L.J. 1609, 1614 (2001) (recounting how "Civil Rights Section lawyers [in the mid-twentieth century] came to use the Thirteenth Amendment as a vehicle for instituting 'free labor,' broadly defined, and for prohibiting various kinds of legal and economic coercion"); Goodwin, Modern Slavery, supra note 8, at 975–89 (2019) (arguing that the Thirteenth Amendment's Except Clause leaves open a form of slavery within the prison system and that constitutional amendment is unlikely but worth the attention of lawmakers and scholars who are "concerned about human rights and the continued racialized exploitation of labor"); Pope, Contract, Race, and Freedom of Labor, supra note 39, at 1525 (arguing that "Congress may be empowered to enact legislation protecting various rights under its Section 2 enforcement power even though the Court would not, on its own, hold those rights to be protected under Section 1"); Lea S.

Instead of relying on the Amendment's text, these decisions addressing "exceptional" historical relics often rely on the long history of the expected service[187] as well as the Court's belief about the intent of the Thirteenth Amendment—specifically, that while it intended to end "compulsory labor akin to African slavery," the Amendment did not mean to upset other forced-labor traditions.[188] To explain why a man could be forced to provide free labor for the state on the public roads, for example, the Court noted that such labor had been expected at least as far back as eleventh-century England, and "[f]rom Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads."[189] This historic practice had survived the Northwest Ordinance's prohibition on involuntary servitude, and it was the language of that ordinance that the Court believed had found its way into the Thirteenth Amendment.[190]

To explain why sailors could not abandon their contracts, the Court began by noting that sailors' contracts were exceptional "[e]ven by the maritime law of the ancient Rhodians, which is supposed to antedate the birth of Christ by about 900 years."[191] It then traced centuries of European and United States law before concluding

> [i]n the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than 60 years before the Thirteenth Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to [sailors'] contracts.[192]

Given that these histories were enough to overcome the Thirteenth Amendment's seemingly clear text, perhaps it is unsurprising that military conscription likewise survived a Thirteenth Amendment challenge in *Arver v. United States*.[193] Indeed, the idea that compulsory military labor could constitute involuntary servitude seems to have beggared belief for the *Arver* Court. Instead, being conscripted into the military was simply being required to perform one's "supreme and noble duty of contributing

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VanderVelde, The Labor Vision of the Thirteenth Amendment, 138 U. Pa. L. Rev. 437, 498 (1989) ("As we have contemplated removing the badges of slavery that persist in race relations, the labor vision invites us to begin stripping away the vestiges of slavery and involuntary servitude that have remained in employment relations law and that continue to influence legal opinions and popular expectations." (footnote omitted)).

187. See Butler v. Perry, 240 U.S. 328, 329–33 (1916) (discussing the history of compulsory roadwork laws and their continuation both before and after the Northwest Ordinance's prohibition on slavery and involuntary servitude).

188. Id. at 332.

189. Id. at 331.

190. Id. at 331–32.

191. Robertson v. Baldwin, 165 U.S. 275, 283 (1897).

192. Id. at 283–88.

193. 245 U.S. 366, 390 (1918).

to the defense of the rights and honor of the nation."[194] The Court was "unable to conceive upon what theory" the performance of this "duty . . . can be said to be the imposition of involuntary servitude" and so was "constrained to the conclusion that the contention to that effect is refuted by its mere statement."[195]

But of course, the reason these cases resorted to history or to grand statements of principle about the role of a citizen was because the text of the Thirteenth Amendment flatly opposes their conclusion.[196] The Thirteenth Amendment's text is broad, permitting a lone exception to an otherwise-total prohibition on slavery and involuntary servitude. While nearly every other provision of the Constitution attempts to regulate government behavior, the Thirteenth Amendment goes further and regulates all of American society by prohibiting slavery and involuntary servitude wherever it may be found (unless the enslaved was convicted of a crime).[197] The Court could have reasonably concluded, for reasons of history and policy, that the Amendment "introduced no novel doctrine with respect of services always treated as exceptional."[198] Particularly when considering public-oriented forced service like drafting people to war, the Court might have believed it both sound legal reasoning and good policy that the Amendment was intended to ensure "liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."[199] But the Court did not have to go down this path. Instead of ignoring the breadth—and uniqueness—of the Amendment's text, courts could have embraced it.

2. *Housekeeping*. — While the "exceptional" cases reflect a more expansive jurisprudential road not taken, the housekeeping exception is a potential preview of the Thirteenth Amendment's future. It suggests a road that Thirteenth Amendment jurisprudence might take to maintain much of the status quo even in the face of an end to administrative enslavement. Courts have held that while pretrial detainees and people

194. Id.

195. Id.

196. See *Robertson*, 165 U.S. at 288–303 (Harlan, J., dissenting). Justice Harlan, relying overwhelmingly on the text of the Amendment, would have held that seamen serving on a private vessel were not excepted from the Thirteenth Amendment's prohibition on involuntary servitude. See id. at 303. Nevertheless, he believed public involuntary service, like that of a soldier, was outside the Amendment's scope. Id. at 298.

197. See The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("[T]he amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."). Interestingly, the provision of the Constitution that comes closest to the Thirteenth Amendment's attempt at societal regulation failed. The Eighteenth Amendment's prohibition on alcohol was similarly sweeping in that it applied to all manufacture, sale, and transportation of liquors, public and private. See U.S. Const. amend. XVIII, repealed by U.S. Const. amend. XXI, § 1.

198. Butler v. Perry, 240 U.S. 328, 333 (1916).

199. Id.

who are civilly committed—primarily in immigration detention,[200] youth correctional facilities, and facilities for those with mental illness—do not fall within the Except Clause's ambit,[201] they can nevertheless be made to work doing "housekeeping" labor or other labor that is sufficiently "therapeutic."[202]

In some limited fashion, these exceptions seem unobjectionable. It seems almost absurd to think that an imprisoned person could refuse (or would have to be paid) to, for example, make their bed or throw out their trash after they eat. And something similar could be said for civilly committed people. If a task provided some genuine therapeutic benefit for someone struggling with mental illness or in a youth correctional facility, few people would say that task could not be required without forming an employment relationship.

But moving away from these idealized examples quickly reveals how this exception might swallow the Thirteenth Amendment rule. Take *Jobson v. Henne*, one of the most cited cases discussing this exception.[203] Warren Jobson, who had been committed to the New York State Newark State School for Mental Defectives most of his life,[204] alleged that he "was forced to work in the Newark State School's boiler house eight hours a night, six nights a week, while working eight hours a day at assigned jobs in the village of Newark."[205] The Second Circuit found that these onerous requirements *could*, but did not necessarily, state a violation of the Thirteenth Amendment.[206] By contrast, the district court dismissed the claim, and the Second Circuit dissent would have affirmed the lower court's dismissal, because a psychiatrist provided an affidavit that these work requirements benefitted Jobson.[207]

Or, for a less extreme example, take *Bijeol v. Nelson*.[208] There, Paul Bijeol was incarcerated pretrial because he was "unable to afford bond" on a bank robbery charge for ten months before he was acquitted by a

200. See, e.g., Channer v. Hall, 112 F.3d 214, 218–19 (5th Cir. 1997) (applying a Thirteenth Amendment analysis to a person in immigration detention and finding that, absent compulsion, "his labor was not forced because he had been paid").

201. See Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) ("Pretrial detainees are presumed innocent and may not be punished. . . . Requiring a pretrial detainee to work or be placed in administrative segregation is punishment." (citations omitted)).

202. See, e.g., Jobson v. Henne, 355 F.2d 129, 131–32 & n.3 (2d Cir. 1966).

203. Id.

204. Id. at 130.

205. Id. at 132.

206. Id. at 131–32 ("As we cannot say that any such work program would not go beyond the bounds permitted by the Thirteenth Amendment, the complaint states a claim under § 1983.").

207. Id. at 133 n.6; id. at 134–36 (Moore, J., dissenting) ("Only when a course of treatment is prescribed which cannot reasonably be defended as therapeutic should a suit of this type be able to withstand a defense motion for summary judgment. This is not such a case.").

208. 579 F.2d 423 (7th Cir. 1978).

jury.[209] During that time he was forced to perform "general housekeeping duties without pay," which included "keeping [his] own room clean" but also "dusting, vacuuming, or emptying ashtrays in the television area three times daily; setting up and cleaning tables after meals; . . . vacuuming the general purpose area after each meal and prior to retiring"; and "clean[ing] windows, wash[ing] heel marks off the wall, . . . and keep[ing] books in order."[210] Many, if not all, of these requirements likely seem unobjectionable based on the belief shared by many people that, as the Seventh Circuit said, "A pretrial detainee has no constitutional right to order from a menu or have maid service."[211]

But Bijeol's case is emblematic of the reasons that, perhaps, people incarcerated pretrial should be so entitled. While postconviction incarceration might be justified by a desire to impose a retributive deprivation, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[212] Therefore, the more utilitarian goals of assuring presence at trial and community safety justify pretrial detention.[213] But instead of doing the minimal amount to fulfill these nonpunitive goals, current doctrine facilitates grave government-inflicted harms on vulnerable people who are both presumed and, for some, actually innocent.

Bijeol was incarcerated because he was poor. Most likely, had he been a rich man, he would have simply paid his bond and been free until his trial date.[214] And Bijeol, it turns out, was *wrongly* imprisoned. When he finally made it to trial after ten months of incarceration,[215] Bijeol was acquitted.

Beyond the problem of innocence (both presumptive and actual), the lack of "maid service"—as the Seventh Circuit put it—is not due to

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209. Id. at 424.

210. Id. at 424 & n.1 (footnote omitted).

211. Id. at 424. Channer v. Hall, 112 F.3d 214 (5th Cir. 1997), perhaps sits between these two cases. Channer was forced to "work[] in the Food Services Department from 4:30 a.m. to 12:30 p.m. each day" that he was in immigration detention, and this labor was held to be within the housekeeping exception. Id. at 215, 217–19.

212. United States v. Salerno, 481 U.S. 739, 755 (1987).

213. See id. at 742 (discussing the Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (1986), which allows judges to detain persons before trial if other measures would not be sufficient to ensure public safety or the person's appearance at trial).

214. Cf. McGinnis v. Royster, 410 U.S. 263, 277–78, 283 (1973) (Douglas, J., dissenting) (lamenting the Court's decision to allow "invidious discrimination" in calculating good time credits between "those rich or influential enough to get bail or release on personal recognizance and . . . those without the means to buy a bail bond or the influence or prestige that will give release on personal recognizance").

215. Such lengthy pretrial stays are not a thing of the past. See, e.g., Reuven Blau, 10 Years a Detainee: Why Some Spend Years on Rikers, Despite Right to Speedy Trial, The City (Aug. 17, 2022), https://www.thecity.nyc/2022/08/17/why-some-spend-years-rikers [https://perma.cc/D6QD-7WET] ("The average number [of days spent in New York City jails pretrial] was 125 days as of July [2022], up from 105 in 2021, 90 in 2020, and 82 in 2019. Those figures include people who were in and out of custody within one day.").

impossibility. Instead, it saves costs for the state because the alternative would be to hire cleaners. But perhaps most importantly, even if one believes that people incarcerated pretrial should have to do some personal housekeeping work, that seems a far cry from believing that they should be totally unpaid and sent to solitary confinement if they refuse to work. But that, too, is what happened to Bijeol.[216]

Although these cases dealt with people seemingly in a different legal status from someone who has been duly convicted of a crime, they are mentioned here because that difference evaporates under a stricter reading of the Except Clause. If, as Part III argues, courts, prosecutors, defense attorneys, or states place more demanding requirements on the abdication of Thirteenth Amendment rights, these cases provide a possible preview of how imprisoned people who retain their Thirteenth Amendment rights may nevertheless be forced to work under the threat of grave punishment. Particularly if courts remain reluctant participants in other groups' attempts to end the administrative-enslavement regime, one might expect them to begin expanding these sorts of non–Except Clause exceptions at the behest of the prison bureaucrats who make up the defendants in these cases.[217] For example, about eighty percent of current prison labor is intraprison maintenance work that could plausibly be labeled "housekeeping."[218]

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As other scholars have noted, the courts have been highly deferential to prison administrators in a wide range of areas related to running prisons.[219] Given that courts have largely interpreted prison slavery as coterminous with being imprisoned, it is perhaps not surprising that they have similarly deferred to, and so empowered, prison administrators in the Except Clause context as well.

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216. See *Bijeol*, 579 F.2d at 424.

217. Indeed, the *Jobson* dissent makes exactly that move by deferring to a psychiatrist's affidavit that said the sixteen-hour days Jobson worked were for his therapeutic benefit. See Jobson v. Henne, 355 F.2d 129, 132 (2d Cir. 1966) (sixteen-hour days); id. at 135 (Moore, J., dissenting) (therapeutic benefit).

218. See Captive Labor, supra note 1, at 8 ("The vast majority of incarcerated workers perform maintenance work, keeping the facilities that confine them running.").

219. See, e.g., Driver & Kaufman, supra note 35, at 522 (2021) (arguing that the Court has adopted a "strangely transsubstantive approach to prison law" that "encourages courts to make broad, unsupported claims about the nature of prison life"); Raghunath, supra note 8, at 398 (arguing that "the logic of the prison deference doctrine" drives the courts' broad reading of "punishment" in the Thirteenth Amendment and narrow reading in the Eighth Amendment); Margo Schlanger, The Constitutional Law of Incarceration, Reconfigured, 103 Cornell L. Rev. 357, 362 (2018) (arguing for rethinking Eighth Amendment jurisprudence because "our jails and prisons should not be shielded from accountability").

What is surprising, however, is that all fifty states and the federal government have made the same choice. Throughout the Union, governments have empowered prison administrators to implement their prison enslavement regimes to the exclusion of the branch that traditionally doles out criminal punishment: the judiciary. While there is some variation, overwhelmingly these statutes provide prison administrators with broad discretion to fashion involuntary work programs as they see fit. It is to these statutes that Part II turns.

II. ADMINISTRATIVE ENSLAVEMENT'S STATUTORY FRAMEWORK

Every state, the District of Columbia, and the federal government all have at least one statute, regulation, or (in Oregon's case) constitutional provision regulating the labor of the people they imprison.[220] While the prison-labor regimes these statutes create are diverse—some purport to be voluntary,[221] some speak in terms of broad state policies,[222] some mandate work[223] while others merely raise the possibility[224]—there are also astounding similarities.

Chief among these similarities is the siting of these statutes and regulations. Overwhelmingly, the statutes developing states' prison-labor regimes are not placed in the section of their code detailing the punishments for a crime. Instead, they are situated alongside other statutes that deal with the regulation of prisons.[225] This placement decision is not merely ministerial, as these statutes often explicitly empower prison bureaucrats to create and control the prison-labor regime.[226] Beyond this

220. Unless otherwise specified, references to "statutes" throughout this Article should generally be read as a shorthand that encompasses the occasional regulations or constitutional provisions that create a jurisdiction's administrative-enslavement regime in the absence of, or in addition to, a statute. E.g., Or. Const. art. I, § 41; 28 C.F.R. § 545.23 (2023).

221. See, e.g., S.C. Code Ann. § 17-25-70 (2024) ("Notwithstanding another provision of law, a local governing body may authorize the sheriff or other official in charge of a local correctional facility to require any able-bodied convicted person committed to the facility to perform labor in the public interest."); Utah Code § 64-9b-4(1) (2023) ("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.").

222. See, e.g., Alaska Stat. § 33.30.191(a) (2023) ("It is the policy of the state that prisoners be productively employed for as many hours each day as feasible.").

223. See, e.g., Cal. Penal Code § 2700 (2024) ("The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections.").

224. See, e.g., Ariz. Rev. Stat. Ann. § 31-251(A) (2024) ("The director has the authority to require that each able-bodied prisoner under commitment to the state department of corrections engage in hard labor for not less than forty hours per week . . . .").

225. See infra section II.A.1.

226. See, e.g., Ariz. Rev. Stat. Ann. § 31-251 (giving the director "authority" to require labor).

apparent choice of prison administration and administrators as the stewards of prison-labor programs, another aspect of the Except Clause is striking in its absence: punishment. With rare exceptions, these statutes do not mention or even allude to the idea that the forced labor they enable is constitutionally required to be punishment for a crime.[227] Instead, to the extent they discuss it, most suggest that their purpose is either rehabilitative, idleness defraying, or cost saving.[228]

This Part explores how these features form the core of administrative enslavement and then discusses two other dormant parts of this regime—(1) the distinction between mandatory and permissive statutes, and (2) "voluntary" work statutes—that could allow administrative enslavement to survive even a constitutional amendment.[229]

A. *Situating Enslavement Within Prison Administration*

The Thirteenth Amendment limits the ability to impose either slavery or involuntary servitude to only one situation: punishment for a crime. It is surprising, then, that almost no statute across the country situates the infliction of enslavement or involuntary servitude alongside the other punishments laid out in a jurisdiction's criminal code. Instead, these statutes regulating prison labor are placed alongside the various sections and subsections regulating prison administration. This choice reflects more than just how these statutes are cited. Instead, this structural decision mirrors a substantive one. These statutes also place control over prison labor in the hands of prison bureaucrats, even as the judiciary imposes a jurisdiction's other criminal punishments. The rest of this section discusses these choices in more detail.

1. *Placement Within the Code.* — With rare exceptions,[230] neither states nor the federal government treat the punishment of enslavement like they

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227. Compare Ark. Code Ann. § 12-30-202(1) (2023) (alluding to punishment by saying that employment is to be "consistent with proper penal purposes"), with Conn. Gen. Stat. Ann. § 18-90a (West 2023) (explaining that the Commissioner of Correction may allow imprisoned people under their jurisdiction to work without any reference to punishment).

228. See, e.g., Ark. Code Ann. § 12-30-202(2) (stating that prison labor is intended to "further utilize the labor of prisoners for self-maintenance and for reimbursing this state for expenses incurred by reason of their crimes and imprisonment").

229. While this Article occasionally discusses hard labor statutes, it largely brackets statutes that explicitly call for a sentence of hard labor for conviction of a particular crime as well as statutes that call specifically for sentences to a "workhouse" or similar explicitly labor-based penal institution. See, e.g., D.C. Code § 24-201.03 (2024) (providing for employment of prisoners in the "Workhouse"); Me. Rev. Stat. Ann. tit. 15, § 1793 (West 2023) (allowing for a sentence of imprisonment to instead be to a "work-jail"); Ohio Rev. Code Ann. § 5147.17 (2024) (specifically allowing for sentences of hard labor). With few exceptions, see infra note 230, these statutes, while sometimes illuminating, rarely seek to or can justify the near-universal practice of mass prison labor.

230. Alabama and Wisconsin both mention hard labor as being required in conjunction with prison sentences. See Ala. Code § 13A-5-6 (2024) (felonies); id. § 13A-5-7 (misdemeanors); Wis. Stat. & Ann. § 973.013(b) (2024) (indeterminate sentences to Wisconsin

do other criminal punishments within their code. Perhaps the most glaring example is the near-total separation within a jurisdiction's code between those things traditionally viewed as punishment—imprisonment, supervised release (and its equivalents), and fines—and enslavement.

Two variations of this phenomenon arise in state and federal codes. In some codes, both enslavement and other punishments are placed in the criminal law or criminal procedure part of the code, but that occurs because these jurisdictions put *almost all* prison regulation under this heading. And prison labor is invariably placed not under the subsection detailing other criminal punishments but rather alongside those subsections regulating prisons. In other jurisdictions, even this nominal overlap does not occur, and incarcerated labor is totally separate from the jurisdiction's other criminal punishments. Whichever variant a jurisdiction uses, the end product is the same: Enslavement is separated from other punishments. A few examples will illustrate how this phenomenon occurs throughout the country.

Wyoming is an example of the first group. Both its statutes dealing with prison labor and some other aspects of its criminal law are under the same statutory heading, Title 7, which is labeled "Criminal Procedure."[231] Title 7 deals with various sentencing issues like indeterminate sentences[232] and parole.[233] But Title 7 also addresses prison regulation broadly. In separate chapters, it speaks to private correctional facilities,[234] the Western Interstate Corrections Compact,[235] and community corrections programs.[236] Relevantly here, it also has a separate chapter for "Labor by Prisoners."[237]

While it may not seem striking that prison labor is described in a separate subsection of the same title that deals with the regulation of the criminal system generally, what *is* striking is the differential treatment of prison slavery from the other criminal punishments in the state's code. Those punishments are detailed in Wyoming's Title 6, "Crimes and Offenses."[238] That is where Wyoming informs someone of the punishment

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state prisons). But Alabama's law is in flux. While Alabama, Vermont, and Oregon were previously at least nominal exceptions to the structural regime described—Alabama because of its explicit treatment of labor as a punishment, Vermont and Oregon because of the treatment of mandatory labor in their constitutions, see Or. Const. art. I, § 41; Vt. Const. ch. II, § 64—all three states recently voted to amend their state constitutions to forbid slavery and involuntary servitude entirely. See Ramirez, supra note 30.

231. See Wyo. Stat. Ann. § 7 (2023).

232. Id. § 7-13-201.

233. Id. § 7-13-401.

234. Id. §§ 7-22-101 to -115.

235. Id. § 7-3-401.

236. Id. §§ 7-18-101 to -115.

237. Id. §§ 7-16-101 to -206.

238. See Wyo. Stat. Ann. § 6 (2023).

to which the state will subject them for a given crime, and there the only compulsory labor mentioned is in the punishment for littering.[239]

Oklahoma serves as another example of this blend.[240] It sites prison-labor statutes in two places within its code—Title 57, "Prisons and Reformatories," which contains various regulations regarding imprisoned labor,[241] and Title 22, "Criminal Procedure," which lays out the state's general policy that "offenders should work when reasonably possible."[242] Title 57, as its description suggests, deals exclusively with the regulation of prisons. While Title 22 could explain criminal punishments more broadly, it ultimately does not. Instead, the portion of Title 22 that discusses prison labor is contained within a subsection titled "Sentencing Commission," which lays out broad state criminal legal system policies on everything from the purposes of punishment to the "mission of the Department of Corrections."[243] By contrast, if one wanted to discover the punishment for a crime in Oklahoma, they would have to go to Title 21, aptly named "Crimes and Punishments." It is there that they would learn that Oklahoma defaults to punishing felonies with up to two years' imprisonment, a fine of up to $1,000, or both[244]—unless a specific punishment is directed elsewhere in the criminal code.[245] What they will not find, however, is any discussion or requirement of prison labor.[246]

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239. Id. § 6-3-204 ("The court may suspend all or a part of a sentence imposed under this section and require the person convicted of littering to perform up to forty (40) hours of labor in the form of cleaning litter debris from public roads, parks or other public areas or facilities.").

240. Oklahoma also serves as an example of another phenomenon that is beyond the scope of this Article. In several places, its statutes reference a judge explicitly sentencing individuals to hard labor. See, e.g., Okla. Stat. tit. 57, § 6 (2024) ("Any court . . . shall have full power and authority to sentence such convict to hard labor as provided in this article."); id. § 58 ("Wherever any person shall be confined in any jail pursuant to the sentence of any court, if such sentence or any part thereof shall be that he be confined at hard labor . . . ."). But while prison slavery is widespread, these statutes appear to be little used. Section 6, which contains the broad permission for judges to sentence to hard labor, has only been referenced twice—in a 1935 Oklahoma Supreme Court case and in an ALR report summarizing that case. See Savage v. City of Tulsa, 50 P.2d 712, 714 (Okla. 1935); Annotation, Liability for Death or Injury to Prisoner, 61 A.L.R. 569 (1929).

241. See, e.g., Okla. Stat. tit. 57, § 7 (regarding labor in towns); id. § 58 (providing for the employment of imprisoned people in the county jail); id. § 212 (providing for imprisoned labor at eleemosynary institutions); id. §§ 215–228 (Prisoners Public Works Act).

242. Okla. Stat. tit. 22, § 1514 (2024) ("It is the policy of this state that offenders should work when reasonably possible, either at jobs in the private sector . . . , or at community service jobs . . . , or at useful work while in prison or jail, or at educational or treatment endeavors . . . .").

243. Id.

244. Okla. Stat. tit. 21, § 9 (2024).

245. See id. §§ 380–2200 (detailing crimes and punishments for crimes against public justice, the person, public decency and morality, public health and safety, public peace, and property).

246. Interestingly, some Oklahoma statutes used to explicitly call for "imprisonment in the penitentiary at hard labor" but no longer do. See, e.g., id. § 1836 (noting that prior to a 1945 amendment the statute explicitly called for hard labor).

This separation repeats itself around the country. Only ten states and the District of Columbia even have this level of commingling between prison labor and other parts of criminal law and procedure.[247] The other states cabin their prison-labor regimes entirely to sections of the code addressing *only* prison regulation.[248]

To be clear, the placement of these statutes may not be outcome determinative if they are challenged. But courts do consider the structure of the law when interpreting statutes.[249] And the decision to place these statutes alongside others having to do with prison administration instead of criminal punishment may be suggestive of legislative intent.[250]

2. *Empowering Prison Bureaucrats.* — Perhaps more important than where these statutes are situated within the code is with whom they site decisionmaking power. And almost uniformly, these statutes empower prison administrators. In one respect, this is predictable. There are innumerable decisions that *someone* must make to run a prison, and so delegating those decisions to a prison administrator—who presumably has some expertise in the subject—makes sense.

But once again, what makes empowering administrators here odd is the differential treatment of enslavement compared to other criminal

247. See Cal. Penal Code § 2700 (2024) (located within the Penal Code under Title 1, "Imprisonment of Male Prisoners in State Prisons"); Del. Code tit. 11, § 6532 (2024) (located within Title 11, "Crimes and Criminal Procedure," but under the subcategory "Department of Correction"); D.C. Code § 24-201.12 (2024) (located within Division IV, "Criminal Law and Procedure and Prisoners," within Title 24, "Prisoners and Their Treatment"); Fla. Stat. Ann. § 946.002 (West 2023) (located within Title XLVII, "Criminal Procedure and Corrections," but under Chapter 946 "Inmate Labor and Correctional Work Programs"); Iowa Code § 904.701 (2024) (located within Title XVI, "Criminal Law and Procedure," but under Chapter 904, "Department of Corrections"); La. Stat. Ann. § 15:832 (2024) (located within Title 15, "Criminal Procedure," but under Chapter 7, "Prisons and Correctional institutions"); Me. Rev. Stat. tit. 15, § 1793 (West 2023) (located within Title 15, "Court Procedure—Criminal"); N.H. Rev. Stat. Ann. §§ 622:26–622:32 (2024) (located within Title LX, correction and punishment); Okla. Stat. Ann. tit. 22, § 1514 (located in Title 22, criminal procedure); S.C. Code Ann. § 17-25-70, § 17-25-80 (2024) (located within Title 17, criminal procedures); Wyo. Stat. Ann. § 7-16-202 (2023) (located within Title 7, "Criminal Procedure," but separated from Chapter 13, "Sentence and Imprisonment").

248. See, e.g., Tenn. Code Ann. § 41-1-402 (2024) ("Correctional Institutions and Inmates"); Tex. Gov't Code Ann. § 497.099 (West 2023) ("Corrections"); Utah Code § 64-9b-1 (2023) ("State Institutions"); W. Va. Code Ann. § 25-7-1 (LexisNexis 2023) ("Division of Corrections"); Wis. Stat. & Ann. § 303.19 (2024) ("Corrections").

249. See, e.g., United States v. Vogel Fertilizer Co., 455 U.S. 16, 25 (1982) (discussing the structure of the Internal Revenue Code).

250. See, e.g., Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 810 (1986) (noting the importance of legislative intent in interpreting certain statutes); see also Hamer v. City of Trinidad, 441 F. Supp. 3d 1155, 1166 (D. Colo. 2020) (describing the basic principle of statutory interpretation that "the court's 'primary task' is to decipher '[legislative] intent, using traditional tools of statutory interpretation'" including the statute's "structure and context . . . as well as its purpose, history, and relationship to other statutes" (first quoting Izzo v. Wiley, 620 F.3d 1257, 1260 (10th Cir. 2010); then citing In re Mallo, 774 F.3d 1313, 1317 (10th Cir. 2014); and then citing New Mexico v. Dep't of Interior, 854 F.3d 1207, 1223–24 (10th Cir. 2017))).

punishments. While the law expects judges to impose other criminal punishments, here the judiciary is absent. Indeed, in jurisdictions with some permissive administrative-enslavement statutes, prison administrators seemingly have the power to decide whether to impose this punishment at all.[251]

In Delaware, for example, the Department of Correction "*may* establish compulsory programs of employment, work experience and training for all physically able inmates."[252] Likewise, in Arizona, "[t]he director has the authority to require that each able-bodied prisoner under commitment to the state department of corrections engage in hard labor for not less than forty hours per week."[253] Georgia is much the same: "The department or any state correctional institution or county correctional institution operating under jurisdiction of the board shall be authorized to require inmates coming into its custody to labor on the public roads or public works or in such other manner as the board may deem advisable . . . ."[254] Each of these states would seem to give prison administrators the power to decide not only how to implement enslavement as punishment but also whether to impose that punishment at all on individuals and within the jurisdiction generally.

Other jurisdictions do not give prison administrators the ability to decide whether to have enslavement regimes but do entrust them with implementing those regimes. Practically, this seems to mean that prison administrators, although not able to decide wholesale whether to have a forced labor program, are given control over whether any individual prisoner is subjected to that program.

This discretion occurs because of practical limitations that many statutes recognize. Florida may mandate that "[t]he department shall require of every able-bodied prisoner imprisoned in any institution as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules of the department."[255] But that mandate is subjected to the reality that there may simply not be enough work to employ every prisoner.[256] What appears to be a strong mandate, then, is in reality aspirational.

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251. See infra section II.C.1 (discussing the differences between mandatory and permissive statutes).

252. Del. Code tit. 11, § 6532 (emphasis added).

253. Ariz. Rev. Stat. Ann. § 31-251 (2024).

254. Ga. Code Ann. § 42-5-60(e) (2023).

255. Fla. Stat. Ann. § 946.002(1)(a) (West 2023).

256. See id. § 946.002(1)(b) ("A goal of the department shall be for all inmates . . . to work at least 40 hours a week. Until this goal can be accomplished, the department shall maximize the utilization of inmates within existing resources."); see also, e.g., 730 Ill. Comp. Stat. Ann. 5 / 3-12-1 (West 2023) ("The Department [of Corrections] shall, in so far as possible, employ at useful work committed persons confined in institutions and facilities of the Department . . . .").

Of course, not all statutes explicitly recognize these practical limitations. Iowa, for example, states plainly that "[a]n inmate of an institution shall be required to perform hard labor . . . in the industries established in connection with the institution, or at such other places as may be determined by the director."[257] Oregon's constitutional provision is similarly unequivocal.[258]

Despite these differences, what unites almost all of the statutes discussed is the absence of the judiciary. It is rare that states give a judge any role to play, and to the extent the judiciary is mentioned, it is usually in the context of hard labor or "workhouses."[259] But the role these sorts of statutes play in the current system of prison labor appears minimal. For example, Ohio's statute explicitly providing for courts to sentence a person to hard labor has been cited only twice in Westlaw and never by a court.[260] By contrast, Ohio's involuntary manslaughter statute has been cited by over 2,000 cases.[261] This comparison is not perfect—perhaps explicit hard labor sentences are common but rarely litigated and so rarely generate published opinions—but it is not surprising because these sentences operate against the backdrop of an administrative-enslavement regime. There is little need to provide an explicit sentence of hard labor when the unspoken default provides it anyway.

There are, however, a few states that envision a relatively limited role for the judiciary outside of the "workhouse." Tennessee allows judges to

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257. Iowa Code § 904.701(1) (2024).

258. Or. Const. art. I, § 41(2) ("All inmates of state corrections institutions shall be actively engaged full-time in work or on-the-job training.").

259. See, e.g., Me. Rev. Stat. Ann. tit. 15, § 1793 (West 2024) (discussing work-jails); Ohio Rev. Code Ann. § 5147.17 (2024) ("[A] court or magistrate may sentence persons convicted of offenses, the punishment of which is, in whole or in part, imprisonment in the county jail or workhouse, to be imprisoned at hard labor within such county for the same terms or periods as are prescribed for their confinement . . . ."); Wis. Stat. & Ann. § 303.18(1) (2024) (allowing for sentences to "the house of correction . . . at hard labor"). Note, however, that even here the punishment of labor often gets no mention in the states' sentencing regime. See, e.g., Me. Rev. Stat. Ann. tit. 17-A, § 1602 (West 2024) (detailing sentencing procedures); Ohio Rev. Code Ann. § 2929.12 (2024) (explaining factors to consider in felony sentencing); id. § 2929.19 (detailing how felony sentencing hearings are to be conducted). But see Wis. Stat. & Ann. § 973.013(1)(b) (2024) (noting that "the sentence [of an indeterminate prison term] shall have the effect of a sentence at hard labor for the maximum term fixed by the court").

260. A Westlaw search of Ohio Rev. Code Ann. § 5147.17 shows that it has been cited twice as of January 27, 2024: once in another part of the Ohio code, id. § 5147.20, and once by a treatise, Russell J. Davis, 73 Ohio Juris. Penal Institutions § 191 (3d ed. 2024). See Westlaw, https://westlaw.com (last visited Jan. 27, 2024) (first open Ohio Rev. Code Ann. § 5147.17; and then select "Citing References").

261. A Westlaw search of Ohio Rev. Code Ann. § 2903.04 found 2,147 cases cited. See Westlaw, https://westlaw.com (last visited Jan. 27, 2024) (first open Ohio Rev. Code Ann. § 2903.04; then select "Citing References"; and then select "Cases" within the "Content types" tab). Nearly all of these cases are appeals, perhaps reflecting the dearth of Ohio trial court indexing on Westlaw.

declare that an individual is "too dangerous . . . or physically unable" to work.[262] And North Dakota allows the court to prohibit work release.[263]

Four states would seem to allow relatively broad judicial intervention, at least for some defendants. Oklahoma states that someone "may be assigned work duties as ordered or approved by the judge."[264] This is perhaps the most explicit recognition of a judge's ability to shape slavery or involuntary servitude in the same way that they fashion other punishments. But the reach of this statute is limited: It applies only to a person convicted of a nonviolent felony in the county jail.[265]

South Dakota seemingly requires judges to decide whether defendants' confinement will be at hard labor.[266] Unsurprisingly, however, this requirement is not imported into South Dakota's rule listing punishments for felonies,[267] and its rule stating what must be listed in a judgment for felony and certain misdemeanor cases does not mention prison labor.[268]

New Mexico and Colorado, by contrast, are not as explicit, but the role the judiciary might take under these statutes is broad. Both make an exception to their forced labor requirement for those "precluded [from labor] by the terms of the judgment."[269] Presumably, then, judges in both states could take advantage of this statutory exception to the administrative-enslavement regime to reinsert their traditional role in deciding criminal punishment.[270]

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262. Tenn. Code Ann. § 41-1-402 (2024) ("All inmates within the correctional system, except those designated by a judge, warden or medical personnel as being either too dangerous to society or physically unable, shall be required to perform some type of work.").

263. See N.D. Cent. Code § 12-44.1-18.1 (2023) ("A correctional facility may provide for a work release program for inmates unless the court has ordered that an inmate may not receive work release.").

264. Okla. Stat. tit. 22, § 991a-2(C) (2024) ("Any person incarcerated in the county jail pursuant to the provisions of this section may be assigned work duties as ordered or approved by the judge.").

265. Id. § 991a-2(A).

266. See S.D. Codified Laws § 24-11-28 (2024) ("Such court, when passing judgment of imprisonment, shall determine and specify whether such confinement shall be at hard labor or not.").

267. See id. § 22-6-1.

268. See id. § 23A-27-4.

269. Colo. Rev. Stat. § 17-20-115 (2024) ("All persons convicted of any crime and confined in any state correctional facilities under the laws of this state, except such as are precluded by the terms of the judgment of conviction, shall participate in a rehabilitation and work program . . . ."); N.M. Stat. Ann. § 33-8-4 (2024) ("All persons convicted of crime and confined in a facility under the laws of the state except such as are precluded by the terms of the judgment and sentence . . . .").

270. It is unclear how this statute currently functions in Colorado after the recent amendment to its state constitution to abolish slavery and involuntary servitude in totality. See P.R. Lockhart, Colorado Passes Amendment A, Voting to Officially Abolish Prison Slavery, Vox, https://www.vox.com/policy-and-politics/2018/11/6/18056408/colorado-election-results-amendment-a-slavery-forced-prison-labor-passes [https://perma.cc/3B3Q-

These statutes show some holes in the administrative-enslavement regime, but it is important to remember their limited reach. Few reach all sentences a judge might impose, and many states make no mention of the judiciary at all.

B. *The Overwhelming Absence of Punishment*

Thus far, this Article has primarily contrasted administrative-enslavement statutes with other parts of the criminal code to show how they treat enslavement differentially from other criminal punishments. Now it turns to a different question: What do these statutes envision as the purpose of forced labor?

Not every statute explicitly states its purposes, but some do. And conspicuously absent from all of them is the one purpose that is constitutionally required: punishment. Indeed, only Vermont's constitutional provision providing for hard labor explicitly mentions the word "punishment."[271] Instead, those statutes that explicate reasons for requiring imprisoned people to work center four themes: providing

4XT5] (last updated Nov. 7, 2018) (explaining Colorado's vote to remove "except clause" language from its constitution); see also Colo. Const. art. II, § 26 ("There shall never be in this state either slavery or involuntary servitude.").

271. Vt. Const. ch. II, § 64 ("To deter more effectually from the commission of crimes, by continued visible punishments of long duration . . . means ought to be provided for punishing by hard labor . . . ."). It is an open question how Vermont intends to harmonize this provision with its recently passed amendment to prohibit slavery and involuntary servitude entirely. See id. ch. I, art. 1 ("That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights . . . therefore slavery and indentured servitude in any form are prohibited."); PR.2, Vt. Gen. Assembly, https://legislature.vermont.gov/bill/status/2020/PR.2 [https://perma.cc/XP8W-9LTG] (last updated Jan. 23, 2020) (tracking the passage of the amendment).

restitution, preventing idleness, encouraging rehabilitation,[272] and saving the jurisdiction money.[273]

The first three goals seem facially laudable, as they could benefit both the imprisoned person and society more broadly. Minnesota, for instance, seems to require its labor regime to serve rehabilitative ends.[274] And Oklahoma provides multiple work possibilities that could serve different purposes. A convicted person might work "at jobs in the private sector to pay restitution and support their dependents," or they might participate in "educational or treatment endeavors as a part of a rehabilitation program."[275]

But saving the state money seems more problematic. The most obvious way that administrative enslavement allows the state to save money, after all, is by cutting some labor costs near or to zero.[276] California, for instance, recently raised the minimum wage for some nonincarcerated food service employees to twenty dollars per hour.[277] But as Tue Kha, a writer incarcerated in California, explained, "A wage above 50 cents an

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272. There is, of course, some "inherent overlap and . . . difficulty in drawing lines between rehabilitative and punitive or deterrent sanctions." People v. Letterlough, 655 N.E.2d 146, 149 (N.Y. 1995). Recognizing both this overlap and rehabilitation's role as one of the traditional justifications for criminal punishment, this Article draws a distinction between rehabilitation and punishment qua punishment for two reasons. First, the structural choices discussed in these statutes suggest that legislatures thought of rehabilitation as a separate goal from punishing someone convicted of a crime. That belief is bolstered by the presence of reasons for imposing forced labor that are clearly unrelated to punishment, like saving the state money. Given the modern shift to retribution as the primary justification for criminal punishment, this differentiation is perhaps unsurprising. See, e.g., Edward Rubin, Just Say No to Retribution, 7 Buff. Crim. L. Rev. 17, 17–21 (2003) (arguing against a proposal for the Model Penal Code to adopt retribution as the primary justification for criminal punishment). Second, while rehabilitation might serve as a theoretical basis for punishment, it should be differentiated from rehabilitation *as* punishment, which has historically provided a basis for horrific abuses. See Francis A. Allen, Address, The Decline of the Rehabilitative Ideal in American Criminal Justice, 27 Clev. St. L. Rev. 147, 149 (1978) (noting that the "techniques of rehabilitation" have "included the use of the whip and the club" and "drastic therapies like psycho-surgery, behavior modification, and the like" and contrasting those with rehabilitative "efforts to overcome illiteracy and training in job skills").

273. While Vermont's constitution mentions punishment for hard labor, its statute explicating prison labor generally discusses nonpunishment purposes. See, e.g., Vt. Stat. Ann. tit. 28, § 751b(a) (2023) ("To return value to communities, to assist victims of crime, to establish good habits of work and responsibility, to promote . . . vocational training . . . to enhance offender employment opportunities, and to reduce the cost of operation of the Department of Corrections and of other State agencies, offenders may be employed . . . .").

274. Minn. Stat. § 241.20 (2023) (limiting forced labor to "[w]henever the commissioner of corrections deems it conducive to the rehabilitation of inmates").

275. Okla. Stat. tit. 22, § 1514 (2024).

276. See, e.g., S.D. Codified Laws § 24-2-30 (2024) ("Any inmate may be required to work without compensation as a condition of confinement.").

277. See Kelly McCarthy, Fast-Food Workers in California to Earn $20 an Hour in 2024, ABC News (Sept. 29, 2023), https://abcnews.go.com/GMA/Food/fast-food-workers-california-earn-20-hour-highest/story?id=103593696 [https://perma.cc/3ANY-4YFV].

hour is rare" in California's prisons, even as incarcerated people work as "electricians, carpenters, cooks, orderlies, fire crew members, braille transcribers and more."[278] And indeed, some states explicitly say that an imprisoned person's labor is not for their own benefit but for the benefit of the public.[279] That is so even when an imprisoned person does dangerous, emergency labor. New Mexico calls for imprisoned people "to work on natural resource projects on public lands, fire suppression and emergency response activities as directed in an emergency declaration issued by the governor."[280] The fact that this work is for the benefit of the state and not the individual is made devastatingly clear by incarcerated people's inability to perform similar work once free. The City of Albuquerque, for example, disqualifies cadets "convicted of any misdemeanor violation within the last 3 years" and specifies that "[a] felony conviction will automatically disqualify an applicant."[281]

The laudability or problematic nature of each of these justifications for prison enslavement is beside the point. Whether beneficent or predatory, none of them are constitutionally permissible. These programs are not about labor generally. They are about forced labor—slavery. And much to the chagrin of the enslaved, enslavers have long argued that many such benefits purportedly accrue to those held in bondage.[282]

C. *The Future of Administrative Enslavement*

Finally, this Article briefly notes two facets of these statutes that, while seemingly unimportant today, could lead to distinctions in courts' interpretations of them as prison slavery increasingly comes under attack.

1. *Mandatory, Permissive, and "Policy" Statutes.* — First, not all jurisdictions require that every imprisoned person work. Instead, some

278. Tue Kha, Opinion, Working Salary in Prison, Prison Journalism Project (July 30, 2021), https://prisonjournalismproject.org/2021/07/30/working-salary-in-prison [https://perma.cc/LZQ4-KP6G]. Wages for incarcerated people in California prisons have remained stagnant for over four decades. John L. Orr, In 40 Years, Not a Single Raise for California Prisoners, Prison Journalism Project (June 6, 2023), https://prisonjournalismproject.org/2023/06/06/california-prison-wages-stagnant-for-40-years [https://perma.cc/ADL6-EL6V].

279. See, e.g., N.C. Gen. Stat. § 148-26 (2023) ("Work assignments and employment shall be for the public benefit to reduce the cost of maintaining the inmate population while enabling inmates to acquire or retain skills and work habits needed to secure honest employment after their release.").

280. N.M. Stat. Ann. § 33-13-3 (2024).

281. Become a Firefighter, City of Albuquerque, https://www.cabq.gov/fire/become-a-firefighter [https://perma.cc/6XTJ-7Y9A] (last visited Jan. 27, 2024).

282. See, e.g., Nicole Phillip, 'It Was Very Humiliating': Readers Share How They Were Taught About Slavery, N.Y. Times Mag. (Sept. 27, 2019), https://www.nytimes.com/interactive/2019/09/27/magazine/slavery-education-school-1619-project.html (on file with the *Columbia Law Review*) ("In the fifth grade, my textbook said that many enslaved people were 'sad' that slavery ended, because their enslavers took care of them and gave them food and clothing." (quoting the *New York Times Magazine* reader Kian Glenn)).

statutes use mandatory language, and some use permissive language.[283] Within mandatory statutes, there are two variations. There are statutes that use strong mandatory language, stating that each imprisoned person shall work or is required to work.[284] Other states use language that could, but need not, be interpreted as mandatory. Generally, these statutes use some mandatory language but grant a prison bureaucrat the authority to decide whether to actually force prisoners to work. Arizona, for example, states that "[t]he director has the authority to require that each able-bodied prisoner under commitment to the state department of corrections engage in hard labor for not less than forty hours per week."[285]

Permissive statutes, by contrast, either speak about prison-labor regimes in general terms without explicitly saying that all imprisoned people are required to work or imply that not every imprisoned person is required to work. Arkansas is an example of this first category, while the District of Columbia and federal law are examples of the second. Despite extensive regulation of imprisoned people's labor,[286] Arkansas does not describe whether any imprisoned person *must* work. Instead, the closest Arkansas comes is a statement of intent that more imprisoned people should be working.[287] The D.C. Code, meanwhile, frames prison labor as a possibility. It says that "[p]ersons sentenced to imprisonment in the Jail may be employed at such labor and under such regulations as may be prescribed by the Council of the District of Columbia."[288] Digging into the Department of Corrections regulations, however, suggests that this "may" is actually a "will."[289] Permissive statutes can also direct the creation of a

283. Within these categories, states will sometimes couch mandatory language as a "policy of the state." See, e.g., Md. Code Ann., Corr. Servs. § 9-502 (West 2023); N.C. Gen. Stat. § 148-26 (2023).

284. See, e.g., Cal. Penal Code § 2700 (2024) ("The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor . . . prescribed by the rules and regulations . . . ."); Fla. Stat. Ann. § 946.002 (West 2023) ("The department shall require of every able-bodied prisoner imprisoned in any institution as many hours of faithful labor . . . as shall be prescribed by the rules of the department."); Idaho Code § 20-101 (2024) ("All persons . . . sentenced to confinement in the state prison . . . must . . . perform such labor under such rules and regulations as may be prescribed by the state board of correction.").

285. Ariz. Rev. Stat. Ann. § 31-251 (2024); see also Ga. Code Ann. § 42-5-60 (2024) ("The board shall provide rules and regulations governing the hiring out of inmates . . . .").

286. See Ark. Code Ann. §§ 12-30-101 to -503 (2023) (state prisons); id. §§ 12-42-101 to -118 (city and county jails). There is one exception to the statute's silence on voluntariness involving voluntary imprisoned labor by those in certain county jails working in graveyards and on public projects. See id. § 12-42-117.

287. See id. § 12-30-202 ("Whereas, the means now provided for the employment of prison labor are inadequate to furnish a sufficient number of prisoners with diversified employment . . . .").

288. D.C. Code § 24-201.12 (2024).

289. See D.C. Dep't of Corr., Pol'y & Proc. 4210.2I 2 (2017), https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/PP%204210.2I%20Inmate%20Institutional%20Work%20Program%2006202017.pdf [https://perma.cc/WL4E-ADTC] ("It is DOC policy to employ eligible inmates to assist with maintaining day-

labor program without explicitly directing imprisoned people to work. The federal government is perhaps the prototypical example. Section 4001 of the federal criminal code states that "[t]he Attorney General *may* establish and conduct" various work industries.[290] Again, though, the relevant regulation clarifies that, in fact, labor in Bureau of Prison facilities is mandatory.[291] The distinction between statutory and regulatory mandates could prove important, but courts' historical deference to prison administrators suggests that courts will likely uphold administrative decisions like these.[292]

2. *"Voluntary" Labor.* — Second, there are already some regimes that either explicitly or implicitly call for prison labor to be voluntary. Rhode Island, for example, has had a total constitutional prohibition on slavery since 1842.[293] Nevertheless, its current prison-labor statute does not seem to account for this prohibition. Like many other states, Rhode Island says plainly and expansively that "[a]ll persons imprisoned in the adult correctional institutions on account of their conviction of any criminal offense . . . or for not giving the recognizance required of them to keep the peace upon complaint for threats, shall be let or kept at labor."[294] Even before its recent constitutional amendment,[295] a Utah statute added a voluntariness requirement to its prison-labor regime.[296] And both South Carolina and Connecticut explicitly say that participation in at least some prison industries must be voluntary.[297] Finally, Colorado, despite its 2018

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to-day facility operations and to reduce inmate idleness, while allowing the inmate to improve and/or develop useful job skills, work habits, and experiences that will assist in post-release employment.").

290. See 18 U.S.C. § 4001 (2018) (emphasis added).

291. 28 C.F.R. § 545.23 (2024) ("Each sentenced inmate who is physically and mentally able is to be assigned to an institutional, industrial, or commissary work program.").

292. See Raghunath, supra note 8, at 399–404 (describing the prison deference doctrine).

293. R.I. Const. art. I, § 4; see also Simeon Spencer, Emancipation on the Ballot: Why Slavery Is Still Legal in America—And How Voters Can Take Action, NAACP Legal Def. Fund (June 17, 2022), https://www.naacpldf.org/13th-amendment-emancipation [https://perma.cc/E73H-BWA7] (last updated Oct. 18, 2022).

294. 42 R.I. Gen. Laws § 42-56-21(a) (2024).

295. See Edwin Rios, Movement Grows to Abolish US Prison Labor System that Treats Workers as 'Less Than Human', The Guardian (Dec. 24, 2022), https://www.theguardian.com/us-news/2022/dec/24/us-prison-labor-workers-slavery-13th-amendment-constitution [https://perma.cc/N3FD-X3H3] (discussing the Utah constitutional amendment).

296. See Utah Code § 64-9b-4 (2023) ("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.").

297. See Conn. Gen. Stat. Ann. § 18-90a (West 2023) ("The Commissioner of Correction may permit any inmate of a correctional facility under his jurisdiction to be employed by . . . the state . . . or any private, nonprofit entity which desires to make use of the services of such inmates, provided participation by such inmates shall be voluntary."); S.C. Code Ann. § 24-3-315 (2024) ("The Department of Corrections shall ensure that

constitutional amendment prohibiting slavery and involuntary servitude,[298] requires that "[e]very inmate shall participate in the work most suitable to the inmate's capacity."[299] And a lawsuit filed by incarcerated people in Colorado alleges that they worked under threat of punishment in kitchens despite health concerns during the pandemic, suggesting that Colorado's on-the-ground forced labor practices, much like its statutes, have not changed.[300]

But all of these "voluntary" statutes play into the question raised in *Watson*, which will quickly become vital as more incarcerated people maintain their Thirteenth Amendment (or state-equivalent) rights: voluntary compared to what?[301]

* * *

Except Clause jurisprudence and this constellation of statutes have thus created what this Article calls administrative enslavement. To reiterate, administrative enslavement is the prevailing regime of forced labor in United States jails and prisons that the Thirteenth Amendment's Except Clause enables. While that clause limits enslavement to punishment for a crime, the administrative-enslavement regime instead treats it—both procedurally and substantively—like an aspect of nonpunishment prison administration. Most dramatically, this means that while other criminal punishments are tied to specific criminal offenses and imposed by the judiciary, the punishment of enslavement is separated into distinct parts of a jurisdiction's code and controlled by prison bureaucrats. Having explicated the genesis of administrative enslavement's jurisprudence and created a taxonomy of its statutory framework, this Article now turns to the questions of how and whether administrative enslavement might end.

III. ENDING ADMINISTRATIVE ENSLAVEMENT

Thus far, this Article has engaged in an overwhelmingly descriptive project. Tracing the history of Except Clause jurisprudence and uncovering the taxonomy of administrative enslavement through the nation's statutes does not inherently suggest whether those aspects of our

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inmates participating in any prison industry program pursuant to the Justice Assistance Act of 1984 is on a voluntary basis.").

298. See Lockhart, supra note 270.

299. Colo. Rev. Stat. § 17-20-117 (2024).

300. See Captive Labor, supra note 1, at 16 (citing and discussing Class Action Complaint, Lilgerose v. Polis, No. 2022CV30421 (Colo. Dist. Ct. filed Feb. 15, 2022)); see also Lamar v. Williams, No. 21CA0511, 2022 WL 3639545, at *7 (Colo. App. Aug. 18, 2022) (holding that the Colorado Department of Corrections' work program was not involuntary servitude and so was permissible despite Colorado's removing the Except Clause from its state constitution).

301. See Watson v. Graves, 909 F.2d 1549, 1552–53 (5th Cir. 1990) (finding no Thirteenth Amendment violation because Watson could either labor or remain in his cell).

society are good or bad. Now it shifts to arguments that administrative enslavement is legally unsound. To that end, this Part will suggest several ways that different actors might work to end the administrative-enslavement regime. Finally, it will address several hurdles that attempts to end the administrative-enslavement regime may face and conclude with suggestions for future research.

Before turning to these arguments, I begin with several admissions and caveats. The first admission is about my priors: I, like many but not all people, believe that slavery and involuntary servitude should be eradicated in their totality.[302] Given that, I believe that the first-best solution to the problem of administrative enslavement isn't to make it less administrative but to end enslavement through constitutional amendment. I recognize, however, that currently the federal and most state constitutions allow the legal enslavement of convicted people—even if, as I argue, they do not allow our current system of *administrative* enslavement. What follows, then, are second-best solutions to the broader problem of enslavement and involuntary servitude that instead target the administrative nature of our current regime. They seek to align the process of and thought given to imposing that punishment with how we treat other criminal punishments, while also hopefully shrinking the number of people who are legally enslaved. Finally, each of these arguments likely merits an article (or more) to fully probe them. Because this is the first Article to catalogue the administrative nature of administrative enslavement, this section intends only to introduce some potentially promising arguments against the current system, as opposed to unearthing the full depth of any one of them.

A. *Legal Attacks: Must Administrative Enslavement End?*

There are numerous plausible legal attacks on the administrative-enslavement regime. The courts' decisions to speak in broad strokes, with little analysis and sparse precedent, served to rubber stamp (and expand)

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302. Then-Professor Stephanos Bibas, in *The Machinery of Criminal Justice*, has suggested that forced labor in the carceral context may be a positive good. See Stephanos Bibas, The Machinery of Criminal Justice 133–40 (2012). While he identifies many of the same benefits of imprisoned people working that this Article might—developing skills, fostering discipline, even creating a sense of purpose—he suggests these are the benefits of *forcing* imprisoned people to work. Id. at 137–38. What he does not fully contend with, however, is the possibility that the personal and societal benefits that might accrue from working could be significantly blunted if that work comes not through the typical inducements to work that our society has, but through enslavement. The connections between our current system of mass incarceration and history of chattel enslavement underscore that harm, as does the long history of imprisoned people striking—sometimes employing violent tactics—against forced labor. See Note, Striking the Right Balance: Toward a Better Understanding of Prison Strikes, 132 Harv. L. Rev. 1490, 1491–501 (2019). Regardless of the answer to this empirical, functional question, however, we must also grapple seriously with the moral question of whether we would like to be a society that continues to enslave people either for functional or punitive reasons. Neither Bibas nor this Article grapples with that difficult question with the rigor it deserves, although it is one that I hope to analyze in future research.

the regime. But they have also left the theoretical and jurisprudential underpinnings of administrative enslavement weak and underdeveloped. Here the Article outlines four legal problems and weaknesses within administrative enslavement. The first three are constitutional arguments that might be litigated, while the fourth suggests that prosecutors and defense attorneys use the plea-bargaining process to preserve Thirteenth Amendment rights.

1. *Improper Delegation and Usurpation of the Judicial Role.* — This first argument is the legal version of an oddity noted earlier in the Except Clause context.[303] While judges are often fiercely protective of their sentencing discretion, here they have overwhelmingly supported placing everything about enslavement and involuntary servitude punishment decisions into the hands of prison administrators.

This key aspect of administrative enslavement may be more than just an oddity; it may also be a violation of the separation of powers. This separation of powers problem can be seen through the lens of an improper delegation of the judicial power, or it might be characterized as a usurpation of the judicial power over criminal sentencing.[304]

The first variation of this argument draws on a line of cases dealing with supervised-release conditions. In those cases, defendants successfully argued that certain conditions impermissibly delegated Article III's judicial authority to decide cases or controversies to nonjudicial actors, specifically probation officers.[305] There, cases turned on whether the court "retain[ed] and exercise[d] ultimate responsibility" to decide the case or if it instead delegated to the probation officer final decisionmaking authority.[306] Often, the key to this distinction was whether the probation

303. See supra note 12 and accompanying text.

304. The overlap between the improper delegation and usurpation variants of these arguments can most clearly be seen in the attacks on the creation and use of magistrate and bankruptcy court judges. See Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 683 (2015) ("[Respondent] contends that to the extent litigants may validly consent to adjudication by a bankruptcy court, such consent must be express."); Roell v. Withrow, 538 U.S. 580, 583–84 (2003) (challenging the use of inferences to determine that a prisoner consented to proceedings before a magistrate judge); Peretz v. United States, 501 U.S. 923, 932 (1991) (considering whether magistrate judges can be delegated voir dire duties).

305. See, e.g., United States v. Boles, 914 F.3d 95, 110 (2d Cir. 2019) (striking a requirement that a defendant notify another person when "the probation officer determines that [they] pose a risk to another person"); United States v. Voelker, 489 F.3d 139, 154 (3d Cir. 2007) (striking down a condition prohibiting contact with minors because the court "delegated absolute authority to the Probation Office to allow any such contacts while providing no guidance whatsoever for the exercise of that discretion"). But see United States v. Janis, 995 F.3d 647, 653 (8th Cir. 2021), cert. denied, 142 S. Ct. 483 (2021) (finding the same risk provision from *Boles* not an impermissible delegation because there was no "affirmative indication" that the district court would "not retain ultimate authority over all of the conditions of supervised release" (quoting United States v. Robertson, 948 F.3d 912, 920 (8th Cir. 2020), cert. denied, 141 S. Ct. 298 (2020))).

306. United States v. Kent, 209 F.3d 1073, 1078 (8th Cir. 2000) (quoting United States v. Johnson, 48 F.3d 806, 808–09 (4th Cir. 1995)).

officer could decide not only the administrative details necessary to implement a condition, such as approving a specific drug treatment program, but also whether the condition would be imposed at all.[307]

Taking seriously the idea that enslavement is a punishment and not an administrative matter would seem to place administrative enslavement in this doctrine's crosshairs. The judiciary writ large has delegated to prison administrators not only power over how this punishment will be imposed—for example, through setting an imprisoned person's hours, pay, or assigned task—but in many cases the decision whether to impose this punishment at all. But here, there is an additional wrinkle in that the judiciary has even delegated its traditional role of *informing* defendants that this punishment will be imposed. Instead, that role too has been passed on to prison administrators.

Similar to this argument is one suggesting that administrative enslavement usurps the judicial role.[308] While the delegation argument targets the judiciary's actions, a usurpation argument instead targets the legislature's. Over a century ago, the Court stated that "[i]ndisputably under our constitutional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law, is judicial."[309] And judges ever since have taken their assigned role seriously.

An excellent example of this is the attempt to have mandatory federal sentencing guidelines. While the separation of powers arguments leveled at the Guidelines ultimately proved unsuccessful before the Supreme Court,[310] they gained significant purchase in the lower courts[311] and, perhaps most importantly, represented only the first shot across the bow in sustained and successful judicial resistance to a perceived encroachment on the judicial role.[312] Separation of powers arguments like these may therefore serve two roles: a potential substantive attack on the administrative-enslavement regime and a way to galvanize the judiciary.

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307. See id. at 1079 ("[W]e find that the lower court improperly delegated a judicial function to Kent's probation officer when it allowed the officer to determine whether Kent would undergo counseling.").

308. See U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

309. Ex parte United States, 242 U.S. 27, 41 (1916).

310. See Mistretta v. United States, 488 U.S. 361, 412 (1989) ("The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here.").

311. See United States v. Brown, 690 F. Supp. 1423, 1426 & n.3 (E.D. Pa. 1988) (noting that of almost 200 challenges, "116 district court judges ha[d] declared the [G]uidelines unconstitutional" on a variety of grounds); United States v. Arnold, 678 F. Supp. 1463, 1469–72 (S.D. Cal. 1988) (striking down the Guidelines on separation of powers grounds).

312. See United States v. Booker, 543 U.S. 220, 245–46 (2005) (holding the Guidelines advisory).

Begin with the substantive argument, captured well by the extended discussion of the then-new mandatory Sentencing Guidelines in *United States v. Scott*.[313] There, after striking down the Guidelines as an unconstitutional violation of the separation of powers, Judge Guerrero Burciaga opined at length on a list of "[o]ther [c]oncerns" the Guidelines raised.[314] His "first and fundamental concern with the new sentencing system [was] that the sentencing process usurps and undermines the function of the judiciary in our system of government."[315] The argument against the then-mandatory Guidelines was simple: Congress acted impermissibly when it allowed the Executive Branch,[316] through the Sentencing Commission, to not only implement a sentence decided by the judiciary but also to create rigid, mandatory structures that functionally decided the sentence for each individual defendant.[317] This, as James Madison once wrote, was an example of "subvert[ing]" the Constitution's structures by allowing "the *whole* power of one department [to be] exercised by the same hands which possess the *whole* power of another department."[318] And Judge Burciaga was far from alone in protecting the judiciary's sentencing power from the Guidelines' encroachment. Judge Clarence C. Newcomer noted in his own 1988 decision striking down the Guidelines that out of 194 challenges, "116 district court judges have declared the [G]uidelines unconstitutional."[319] While these bromides against the mandatory Guidelines were ultimately unsuccessful,[320] that does not mean all such attacks have been. In a noncriminal area, the idea of usurping judicial power has motivated the increasingly successful attacks on administrative deference.[321]

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313. 688 F. Supp. 1483 (D.N.M. 1988).

314. Id. at 1493.

315. Id.

316. The Sentencing Commission is an odd creature. It is technically located within the Judicial Branch, but the Executive has the power to both appoint its members (several of whom must be federal judges) and to remove them from the Commission for cause. See Mistretta v. United States, 488 U.S. 361, 408–11 (1989).

317. See *Scott*, 688 F. Supp. at 1493–94.

318. Id. at 1494 (quoting The Federalist No. 47, at 245 (James Madison) (Wills ed., 1982)).

319. United States v. Brown, 690 F. Supp. 1423, 1426 (E.D. Pa. 1988), aff'd sub nom. Appeal of Brown, 869 F.2d 587 (3d Cir. 1989), aff'd, 869 F.2d 592 (3d Cir. 1989).

320. See *Mistretta*, 488 U.S. at 676 (rejecting both separation of powers and improper delegation arguments to the Guidelines). This was not without consequence, as a number of judges retired from the bench instead of acquiescing to the mandatory Guidelines regime. See Ricardo J. Bascuas, The American Inquisition: Sentencing After the Federal Guidelines, 45 Wake Forest L. Rev. 1, 20–21 (2010) ("Over the next several years [after *Mistretta*], judges experienced in the pre-Guidelines sentencing regime would clear the bench and be replaced by judges who were comfortable viewing sentencing as a ministerial, computational chore rather than a judicial act freighted with political and moral responsibility.").

321. See, e.g., Michigan v. Env't Prot. Agency, 576 U.S. 743, 760–62 (2015) (Thomas, J., concurring) ("Such a transfer [of decisionmaking authority in interpreting statutes] is in

The potential usurpation here is, if anything, more extreme. While the mandatory Sentencing Guidelines envisioned a role for the judiciary, albeit a more limited one,[322] administrative-enslavement statutes rarely mention the judiciary. And fewer still imagine any formal role for the judiciary to play. Instead, everything about the imposition of the punishment of enslavement is placed in the hands of departments of corrections and other prison bureaucrats—that is, executive branch officers.

Ultimately, from an advocate's perspective, the exact form of these arguments may matter less than their ability to highlight for the judiciary how administrative enslavement has encroached on this core part of their judicial role. After all, the judicial-usurpation argument failed to undo the mandatory Guidelines. But a significant part of the federal judiciary continued to voice its displeasure until those Guidelines were made advisory in *Booker*.[323]

2. *Constitutional Interpretation.* — Both originalists and living constitutionalists have strong reasons to consider the administrative-enslavement regime suspect. This section sketches the basic contours of both sides.

a. *The Originalist Argument.* — The originalist argument against the broad reading of the Except Clause underpinning administrative enslavement has best been made across several articles by scholars doing excellent historical research,[324] and so this Article only summarizes it briefly here. The thrust of that argument is that the Thirteenth Amendment's Republican framers held a narrow view of what the Except Clause allowed.[325] While forced labor could be used as a punishment, it could not be used for any other purpose, such as raising public or private revenue or subjugating Black labor.[326] Instead, it was Southern Democrats

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tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.").

322. Judges were required to calculate the Guidelines for each individual defendant, which often required deciding which Guidelines applied—and so which sentence was imposed—in each case. See, e.g., United States v. Booker, 543 U.S. 220, 227 (2005) (noting that the judge "held a post-trial sentencing proceeding and concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice").

323. See, e.g., David M. Zlotnick, The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion, 57 SMU L. Rev. 211, 220–24 (2004) (describing judicial attempts to push back against the Guidelines and mandatory minimums through policy changes, media, and arrangements with U.S. Attorney's Offices).

324. See Balkin & Levinson, supra note 45 (using originalist interpretation to argue against a broad interpretation of the Except Clause); Goodwin, A Spectacle of Slavery, supra note 14, at 53–66 (same); Howe, supra note 37, at 987–88 (same); Pope, Mass Incarceration, supra note 8, at 1469 (same); cf. Rebecca E. Zietlow, James Ashley's Thirteenth Amendment, 112 Colum. L. Rev. 1697, 1703–07 (2012) (making an originalist argument for a "broad labor view" of the Thirteenth Amendment aimed at curbing exploitative labor employment).

325. See Pope, Mass Incarceration, supra note 8, at 1491 ("Republicans, on the other hand, held that the clause left intact the Amendment's protection against a variety of practices.").

326. See id.

who put forward the Clause's current interpretation, which allows for convicted people to be forced to labor for the rest of their lives for less-than-clear penal motives.[327] Though Republicans originally fought back against this interpretation,[328] it ultimately took hold when Democrats took back the Deep South, ending Reconstruction through violence.[329]

As Pope recounts, the Republican reading of the Except Clause led these Republican Framers to "appl[y] a version of what we would today call critical or strict scrutiny, looking past the fact of a conviction to probe whether servitude had actually been imposed as a punishment for the particular crime of which the person had been duly convicted."[330] Under this heightened scrutiny, the Republican Framers condemned any number of practices that occur today, such as allowing enslavement for insufficiently serious crimes, allowing "anyone other than the sentencing authority" to impose the punishment, and allowing private control over imprisoned labor.[331] Instead, the Framers read the Except Clause narrowly to allow "only those features of slavery or involuntary servitude that fell within what they conceived as the 'ordinary' or 'usual' operation of a penal system."[332]

b. *The Living Constitutionalist Argument.* — The living constitutionalist argument against administrative enslavement is more ambitious and so is one of the few that might be able to end legal enslavement as we know it. Like the originalist argument, it relies on history. But unlike the originalist argument, that history stretches beyond the Second Founding through the "constitutional moment" of the Civil Rights Movement.[333]

In short, a living constitutionalist might base their argument in our experience with a post–Civil War criminal legal system that evolved from the Black Codes to Jim Crow to mass incarceration. This evolution suggests that just as separate-but-equal proved theoretically possible but practically

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327. See id. at 1478–85 (discussing passage of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30, in response to the South's broad interpretation of the Except Clause and subsequent reenslavement of recently freed Black peoples); id. at 1486–87 (citing Cong. Globe, 39th Cong., 2d Sess. 238–39 (1867)) (discussing statements from Democrats Willard Saulsbury Sr. of Delaware and Reverdy Johnson of Maryland on the permissibility of convict leasing).

328. Id. at 1478–90, 1491–93 (discussing the passage of the 1866 Civil Rights Act and the debate over the unpassed Kasson Resolution).

329. See id. at 1493–94 ("Instead of relying on contemporary debates and congressional actions, the Court sometimes chooses to emphasize opinions expressed after Democratic paramilitaries had terminated Reconstruction by violence . . . .").

330. Id. at 1491.

331. Id. at 1491–92, 1538–50.

332. Id. at 1492 (first quoting Cong. Globe, 39th Cong., 2d Sess. 238 (1867) (statement of Sen. Sumner); and then quoting id. at 324 (Kasson Resolution)).

333. See Bruce Ackerman, We the People: The Civil Rights Revolution 5 (2014) (arguing that the Civil Rights Era served as a constitutional moment); William M. Carter, Jr., The Second Founding and the First Amendment, 99 Tex. L. Rev. 1065, 1065–66 (2021) (discussing the Reconstruction Era as a "Second Founding").

impossible, any broad reading of the Except Clause, while initially appearing theoretically sound, inevitably snowballs toward something akin to the "African slavery" the Thirteenth Amendment sought to eradicate.[334] Instead, courts and Congress should limit the Except Clause to a few, rare situations. Those might include requiring someone to hold a market-rate job to garnish wages for restitution or as a condition of probation or parole.

This line of argument would not be unprecedented. Instead, in true common law constitutionalism fashion, in addition to drawing on the logic of the desegregation cases mentioned above, it could also build off of the Supreme Court's cases striking down aspects of convict leasing.[335] Although those cases did not rely directly on the Thirteenth Amendment, they addressed the same problem the Amendment sought to remedy: the economic and social incentive (and desire) to maintain a system akin to chattel enslavement. Essentially, the Thirteenth Amendment could serve as a check on itself.

Scholars have already produced research supporting this argument's premise. Both Michelle Alexander's *The New Jim Crow* and modern abolitionist scholarship like Dorothy Roberts's *Abolition Constitutionalism* detail how the post–Civil War criminal legal system has evolved into our current mass-incarceration regime, seemingly as a way to maintain longstanding racial, gendered, and economic hierarchies.[336] Professor Goodwin's work likewise focuses on this evolution and does so within the context of the Thirteenth Amendment's Except Clause.[337] And Professor Pope has explained why Thirteenth Amendment arguments should not be dismissed in this space, even though they were not raised in cases challenging convict leasing.[338]

3. *The Problem of Notice: Ineffective Assistance and Due Process.* — Another problem in the administrative-enslavement system is that it may have given rise to widespread ineffective assistance of counsel in the provision of guilty pleas. *Padilla v. Kentucky* explains why.[339] *Padilla* held that failing to

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334. See Butler v. Perry, 240 U.S. 328, 332 (1916) (arguing the Thirteenth Amendment was adopted to extinguish types of involuntary labor similar to the "African Slavery" that dominated much of the pre–Civil War United States).

335. See Pope, Mass Incarceration, supra note 8, at 1515–20 (discussing United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); and Clyatt v. United States, 197 U.S. 207 (1905)); see also United States v. Kozminski, 487 U.S. 931, 942–48 (1988) (discussing these cases as well as statutes prohibiting and criminalizing placing someone into involuntary servitude).

336. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2012); Roberts, Abolition Constitutionalism, supra note 38.

337. See Goodwin, Modern Slavery, supra note 8.

338. See Pope, Mass Incarceration, supra note 8, at 1520–21 (finding that "[m]ore likely, however, the convict lease was 'unquestioned' because the beneficiaries of convict leasing wielded sufficient power to discourage challenges").

339. 559 U.S. 356 (2010). Ineffective assistance claims generally are decided by a two-part test: first, "whether counsel's representation 'fell below an objective standard of

inform a client of sufficiently serious and certain immigration consequences—in that case, deportation—constitutes ineffective assistance of counsel.[340] This was because "deportation is a particularly severe 'penalty'" even if "it is not, in a strict sense, a criminal sanction."[341] The penalty of deportation, moreover, was "nearly an automatic result" of being convicted of certain offenses.[342] And so, at least in instances in which a conviction all but guarantees deportation, counsel is constitutionally deficient for failing to advise their client of this outcome.[343] Indeed, in *Padilla*, "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute."[344]

Padilla is part of the species of cases attempting to find the line between those consequences about which defense attorneys must inform their clients and those consequences sufficiently attenuated that they do not have to be mentioned.[345] Usually, this problem is thought of through the lens of collateral and direct consequences, but as courts and commentators have noted, those are not easily identified categories.[346] *Padilla* did not define this line, but it did make clear that there are some penalties (or at least one penalty) beyond the express criminal sanction that competent defense counsel must advise their client about.[347]

As in *Padilla*, ineffective assistance regarding administrative enslavement likely depends on how clear it was that enslavement or involuntary servitude would be imposed. In states with mandatory statutes, ineffective assistance claims seem strongest. In states that speak in permissive or more

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reasonableness," and second, "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 366 (quoting Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)).

340. Id. at 368–69.

341. Id. at 365 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

342. Id. at 366.

343. Id. at 368–69.

344. Id. at 368.

345. See id. at 369 (noting that defense attorneys face different requirements to inform their clients "[w]hen the law is not succinct and straightforward").

346. See Jenny Roberts, Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 124 (2009) (arguing that "[t]he Court should reject the artificial, ill-conceived divide between collateral and direct consequences" and proposing "a rule of full information about any severe consequences of a criminal conviction"); Jenny Roberts, The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators", 93 Minn. L. Rev. 670, 680, 683–99 (2008) (discussing the pre-*Padilla* jurisprudence that developed around determining whether a consequence was direct or collateral in the due process and ineffective assistance contexts).

347. *Padilla*, 559 U.S. at 365 ("We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland* . . . . Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation." (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984))).

voluntary terms, the consequences may have been sufficiently indeterminate that not mentioning them was not ineffective assistance. But, as this Article noted while discussing permissive and "policy" statutes, often there is a regulation building on the statute and making clear that involuntary labor will be required in the jurisdiction's prisons and jails.[348]

The weakness in this ineffective assistance argument—and the reason courts need not fear a massive and immediate flood of litigation from people who have already been convicted—is *Strickland*'s second prong. That prong requires a defendant prove prejudice, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[349] While it would not be impossible to prove that an individual would have risked trial instead of accepting a guilty plea to avoid forced labor, it would probably be difficult.[350] Here, the practices of a particular institution and the postconviction actions of incarcerated individuals could shed significant light on the likelihood that an accused person would have risked trial.

The Louisiana State Penitentiary at Angola offers an excellent example. Angola has a decades-long history of requiring imprisoned people to do hard, manual, agricultural labor.[351] And while that is not the only labor an imprisoned person at Angola might be forced to do, "every incarcerated person at Angola, a vast majority of whom are Black, begins their work in the fields."[352] An accused person made aware of this fact might reasonably choose to risk trial to avoid this labor. And ex post protestations that they would have gone to trial could be bolstered if they had, in fact, chosen to be punished instead of doing their mandated labor.[353]

If we take seriously the Except Clause's language, then *Padilla*, while instructive, is not entirely on point. That is because enslavement would not be a collateral consequence or a noncriminal penalty but part of the

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348. See supra notes 288–292 and accompanying text.

349. *Strickland*, 466 U.S. at 694.

350. Cf. Stephen B. Bright, The Future of the Death Penalty in Kentucky and America, 102 Ky. L.J. 739, 748–50 (2014) (describing death penalty representations held effective by the courts that included one lawyer giving his client the number for a bar as contact information and another who did not know his client's name or that he "was brain damaged").

351. See Selby, A Mistaken Identification, supra note 43 ("In his first three years at Angola, Malcolm picked cotton and corn, okra and watermelon, then broccoli, cauliflower, and potatoes, depending on the season. He harvested crops from the same land where, 150 years before, slaves had done the same.").

352. Alex Woodward, Four States Voted to End Slavery as a Form of Criminal Punishment. Here's Why Louisiana Voters Didn't, The Independent (Nov. 9, 2022), https://
www.independent.co.uk/news/world/americas/us-politics/midterm-elections-2022/
louisiana-slavery-amendment-prison-labor-b2221820.html [https://perma.cc/8T6S-KKSE].

353. See, e.g., Johnson, supra note 43 ("I have always refused to perform labor inside prison, ever since I was convicted of murder in 1990 when I was 18 years old. . . . I see prison labor as slave labor that still exists in the United States in 2018.").

"direct" punishment itself.[354] Because of that wrinkle, failure to inform the defendant of this consequence might not only be a problem of ineffective assistance on the part of defense counsel but also a due process violation by the judiciary.[355] Due process requires that guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances and likely consequences*."[356]

The federal courts implement this due process guarantee through Federal Rule of Criminal Procedure 11, which states plainly that federal courts accepting either guilty or nolo contendere pleas "must inform the defendant of, and determine that the defendant understands . . . any maximum possible penalty, including imprisonment, fine, and term of supervised release; [and] any mandatory minimum penalty."[357] While Rule 11 does not perfectly track the requirements of due process, the Court has recognized that it serves as a rough approximation of that doctrine.[358]

While both due process and Rule 11 require less of judges accepting pleas than the Sixth Amendment requires of defense counsel advising them, here too the administrative-enslavement regime seems like an obvious violation with a simple fix going forward. To the extent that either enslavement or involuntary servitude is a punishment for the crime being pled guilty to, judges should inform defendants of, and ensure that defendants understand, that fact before accepting the plea.[359]

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354. See Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), rev'd on other grounds, 356 U.S. 26 (1958)). The logic of this argument suggests that there are some conditions of confinement that should require similar notice. Particularly, those deemed cruel and unusual punishments under the Eighth Amendment might seem ripe for such a challenge. Realistically, however, this seems like an argument with little practical application. What makes this challenge possible in the administrative-enslavement context is the presence of statutes describing the ubiquitous and often mandatory nature of forced labor. By contrast, most of the conditions of confinement challenged would be more ad hoc and so less susceptible to the advanced notice *Padilla* requires.

355. See id.

356. Id. at 748 (emphasis added). Justice Thomas has made a related argument in the context of other restrictions that come as a result of imprisonment. In *Overton v. Bazzetta*, he explained his belief that while a state may make any number of things a part of a criminal punishment, Turner v. Safley, 482 U.S. 78 (1987), should be read as requiring certain procedural safeguards before that deprivation can occur. See 539 U.S. 126, 139–40 (2003) (Thomas, J., concurring in the judgment). While this Article does not endorse Justice Thomas's conclusion that the only limit on the scope of criminal punishment is the Eighth Amendment, it does agree that whatever the scope of a punishment, it should be sufficiently clearly communicated to the person being punished.

357. Fed. R. Crim. P. 11(b)(1)(H)–(I).

358. See Padilla v. Kentucky, 559 U.S. 356, 391 n.1 (2010) (Scalia, J., dissenting) (noting that "we have said [that Rule 11's required colloquy] approximates the due process requirements for a valid plea" (citing Libretti v. United States, 516 U.S. 29, 49–50 (1995))).

359. This is not the only form this due process argument might take. For example, because defendants are entitled to be present for the pronouncement of their sentence, judges may not make the sentence more harsh—such as by adding incarceration or nonmandatory conditions of supervised release—in the written judgment issued after the

4. *Prosecutors and Plea Bargaining*. — One last, and potentially highly promising, possibility bears mentioning. While the previous arguments addressed altering the administrative-enslavement regime through litigation, that regime might also be significantly changed through the discretionary choices available in the plea-bargaining process. Because the Thirteenth Amendment limits enslavement to criminal punishment and few, if any, statutes clearly label their enslavement requirements as a punishment, prosecutors and defense attorneys seemingly have the ability to bargain for the retention of a defendant's Thirteenth Amendment rights. They could do this by formalizing in plea agreements that the agreed-upon punishment does not include being either enslaved or made an involuntary servant. Indeed, a progressive prosecutor's office could include this sort of language in plea agreements for all of its cases. Moreover, these pleas could take advantage of federal and state laws requiring judges to accept the chosen punishment as a condition of accepting the plea.[360] Note that a plea agreement excluding slavery and involuntary servitude as a punishment does not mean that an incarcerated person cannot or would not work. It simply means that they cannot be forced to do so. Not being enslaved as a punishment simply shifts incarcerated labor to the same, or at least a similar, starting point as free labor.

B. *Maintaining the Status Quo: How Administrative Enslavement Might Evolve if Attacked*

This Part concludes with what might be construed as counterarguments to many of the legal issues raised above but are instead best viewed as predictions. These are predictions about how the legal system that has enabled and expanded administrative enslavement might attempt to evolve to maintain that status quo as it is attacked.

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sentencing hearing. See United States v. Rogers, 961 F.3d 291, 296 (4th Cir. 2020) ("The primacy of the oral sentence over the written judgment is well established[] in our circuit and others . . . ."); United States v. Diggles, 957 F.3d 551, 556–59 (5th Cir. 2020) (requiring district courts to announce all discretionary conditions of supervised release at sentencing to comply with both due process and Federal Rule of Criminal Procedure 43). Nevertheless, as with an ineffective assistance claim, the retroactive potential of these due process arguments is constrained—here because of the limitations imposed by both habeas corpus law and plain error review. See 28 U.S.C. §§ 2254–2255 (2018); Fed. R. Civ. P. 51(d), 52(b); Greer v. United States, 141 S. Ct. 2090, 2100 (2021) ("When a defendant advances . . . representation on appeal, the court must determine whether the defendant has carried the burden of showing a 'reasonable probability' that the outcome . . . would have been different. Because [defendants] did not make any such argument or representation on appeal . . . they have not satisfied the plain-error test."). But see Bartone v. United States, 375 U.S. 52, 53 (1963) (per curiam) (holding that it was plain error under Federal Rule of Criminal Procedure 43 to increase a sentence by one day in the written judgment).

360. See, e.g., Fed. R. Crim. P. 11(c)(1)(C); S.D. Codified Laws § 23A-7-8(3) (2024) (allowing prosecutors and defense attorneys to "[a]gree that a specific sentence is the appropriate disposition of the case").

Some of these predictions have already begun to come to pass. In Colorado, which began the recent wave of states removing Except Clauses from their state constitutions, multiple judges have turned back challenges to the status quo prison-labor regime.[361]

1. *"Voluntary" Labor.* — The problem of voluntariness is the most likely next evolution of American enslavement if administrative enslavement (or Except Clause enslavement more generally) continues to come under attack. Indeed, it has already reared its head in past Thirteenth Amendment and involuntary servitude cases. In those cases, the courts have held that a person's labor is "voluntary" so long as they are not threatened with physical or legal punishment for refusing.[362] This means that even if an imprisoned person's only choices are working for free doing hard, manual labor or remaining in a cell, their decision to perform that labor is voluntary.

The voluntariness problem is ultimately a baseline issue.[363] Depending on what we view as the baseline entitlement of imprisoned (or convicted) people, courts can and have characterized as voluntary any labor required that lifts someone above that baseline.[364] Another way to frame this problem is through the lens of incentives and punishments. Anything that lifts someone above the baseline is a permissible incentive, and the only prohibited actions in response to someone refusing to work are punishments that take them below that baseline.

The problem, of course, is deciding what that baseline is. If the baseline legal minimum for every imprisoned person is moldy bread, a multivitamin, and enough water to avoid dehydration served to you in

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361. See Lamar v. Williams, No. 21CA0511, 2022 WL 3639545, at *1 (Colo. Ct. App. Aug. 18, 2022) (affirming the district court's dismissal of an alleged violation of the state prohibition on involuntary servitude by the Colorado Department of Corrections); Lilgerose v. Polis, No. 2022CV30421 (D. Ct. Colo. Oct. 27, 2022) (Trellis) (granting in part and denying in part defendants' motion to dismiss facial and as-applied state constitutional challenges to Colorado's prison-labor statutes).

362. United States v. Kozminski, 487 U.S. 931, 952 (1988) (defining the criminal prohibition on "involuntary servitude" as forcing someone to work "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," including "placing the victim in fear of" such consequences); Burrell v. Staff, 60 F.4th 25, 35–36 (3d Cir. 2023), cert. denied sub nom. Lackawanna Recycling Ctr., Inc. v. Burrell, 143 S. Ct. 2662 (2023) (relying on *Kozminski* to conclude that "using an otherwise legal process for a purpose for which it was not created or intended to be used is not, on its own, sufficient to constitute the threat of legal sanction necessary to find a Thirteenth Amendment violation").

363. Cf. Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 5–13 (1992) (using constitutional law examples to explain how the propriety of various interventions—such as whether something is state action, a case has a neutral principle, or whether rights are positive or negative—depends on the baseline assumptions from which one starts).

364. See, e.g., *Lilgerose*, at *14 (Trellis) (finding that refusal to grant "earned time" to imprisoned people who do not work does not constitute involuntary servitude because "inmates are not entitled to be paroled sooner than their mandatory release date").

permanent solitary confinement to a cell smaller than a parking space,[365] then the Thirteenth Amendment could be amended tomorrow with essentially no change to the operation of prison labor in this country. While this hypothetical may seem hyperbolic, it is not too far off from what the obvious check on this baseline problem—the Eighth Amendment—seems to allow. Courts have long permitted extended, indeed decades-long, stints in solitary confinement,[366] and prison administrators have also used food restrictions in attempts to, for example, break prison strikes.[367]

Many readers will likely find abhorrent the idea that these conditions are all that an imprisoned person is entitled to. The lessons of this Article about the common law development of the Except Clause suggest that those readers are right to be concerned. For courts wishing to maintain the status quo, the shift from a condition being permissible under the Eighth Amendment to not being a punishment under the Thirteenth is the sort of analogical move that is normal in common law development.

Even though this type of jurisprudential move is normal, it is not inevitable. Both courts and legislatures have tools to target this problem, if they wish to use them. Courts could reconsider their Eighth Amendment (or state equivalent) jurisprudence. If the Eighth Amendment did not allow solitary confinement or allowed it only for limited purposes, that could disarm one of the most potent weapons that prison administrators have to force imprisoned people to work. Likewise, the Eighth Amendment might reasonably limit some other common punishments for refusing to work like curtailing visitation rights, prohibiting phone contact

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365. Compare Tiana Herring, The Research Is Clear: Solitary Confinement Causes Long-Lasting Harm, Prison Pol'y Initiative (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium [https://perma.cc/M9D3-PGXW] (noting "that cells generally measure from 6x9 to 8x10 feet" (citing Lisa Dawson, Infographic: How Big Is a Solitary Confinement Cell?, Solitary Watch, https://solitarywatch.org/resources/multimedia/infographics-2/how-big-is-a-solitary-confinement-cell [https://perma.cc/ACL5-TX6X] (last visited Mar. 27, 2024))), with Parking Lot Specifications, Requirements and Guidelines, Vill. of Westmont (Nov. 2018), https://westmont.illinois.gov/DocumentCenter/View/1146/Parking-Lot-Specification—Revised-11-2018?bidId= [https://perma.cc/M358-D7Y8] ("The standard dimensions for an automobile parking space shall be ten (10) feet wide by twenty (20) feet long.").

366. See, e.g., Albert Woodfox, Solitary: Unbroken by Four Decades in Solitary Confinement. My Story of Transformation and Hope 344 (2019) ("If I dwelled on the pain I have endured and stopped to think about how 40 years locked in a cage 23 hours a day affected me, it would give insanity the victory it has sought for 40 years." (internal quotation marks omitted)).

367. See, e.g., John H. Glenn, Incarcerated Individuals Allege ADOC Is Using Starvation to Stop Strike, Ala. Pol. Rep. (Sept. 28, 2022), https://www.alreporter.com/2022/09/28/incarcerated-individuals-allege-adoc-is-using-starvation-to-stop-strike [https://perma.cc/S2CG-AVTC] (reporting that prison officials had begun giving incarcerated people on strike only two meals instead of three "with the first meal being a peanut butter sandwich with a small bowl of stewed prunes and the second meal consisting of a bologna sandwich with canned turnip greens").

with friends and family, or more generally limiting access to activities that occur outside of an imprisoned person's cell.[368]

Courts might also protect an incarcerated person's Thirteenth Amendment rights through an equality principle.[369] This principle might require equal treatment between those imprisoned people who retain their Thirteenth Amendment rights and those who don't. This would ensure that if a prison administrator wanted to lower the baseline from which to judge voluntary labor, they at least must take the costly step of doing it for every imprisoned person under their purview. More likely, though, this equality principle would ensure that imprisoned people who retain their Thirteenth Amendment rights are able to participate in the full slate of rehabilitative programming available to other incarcerated people and do not otherwise have a more punitive experience purely because they cannot be forced to work.

An equality principle like this one would also protect first movers. Without it, prison administrators could respond to a small number of imprisoned people retaining their Thirteenth Amendment rights—for example those sentenced by a single enterprising judge, represented by an aggressive defense attorney, or facing an especially progressive prosecutor—by simply banning them from any positive programming that could be termed labor, or worse, by segregating them in solitary confinement.[370] This would not have to be irrational or vindictive. An

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368. See Captive Labor, supra note 1, at 47 ("Some states threaten the loss of basic 'privileges,' like family visitation and access to the commissary to buy food and other necessities.").

369. Cf. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" (citation omitted) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32–33 n.20 (1973))). The equality principle sketched here is a relatively thin one involving disparate treatment. That is for both practical reasons—disparate treatment is the most uncontroversial method of litigating difference—and because there are likely to be many comparators to make proving disparate treatment relatively easy. A thicker conception of equality based on disparate impact liability or broader antisubordination principles would likely be even more protective. See, e.g., Noah D. Zatz, Disparate Impact and the Unity of Equality Law, 97 B.U. L. Rev. 1357, 1360–65 (2017) (discussing theories of proving discrimination in the employment law context); Rebecca E. Zietlow, Free at Last! Anti-Subordination and the Thirteenth Amendment, 90 B.U. L. Rev. 255, 259 (2010) (using the Thirteenth Amendment "[t]o illustrate the anti-subordination theory of equality").

370. The commonly recognized problem of retaliation by prison officials against jailhouse lawyers suggests that protection, or something like it, is necessary. See, e.g., Jessica Feierman, "The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement, 41 Harv. C.R.-C.L. L. Rev. 369, 373 (2006) ("While it is difficult to quantify the amount of retaliation faced by prisoners engaging in litigation, a 1989 study found that jailhouse lawyers constituted the largest number by far of prisoners confined to control units, and that solitary confinement was the most common disciplining strategy used against jailhouse lawyers." (citing The Prison Discipline Study: Exposing the Myth of Humane Imprisonment in the U.S., *in* Criminal Injustice: Confronting the Prison Crisis 92, 96 tbl.5, 97 tbl.7 (Elihu

imprisoned person who retains their Thirteenth Amendment rights represents more of a litigation risk than a comparable person who does not, and so a prison administrator might believe segregation is the most risk-averse option. The equality principle described above would change this calculus to make unequal treatment a greater perceived risk.

While the solutions described above involved the courts, legislatures might be the most likely and promising avenue to address this voluntariness baseline problem. Legislatures could easily create rights for imprisoned people that raise their baseline treatment above constitutional minima. Indeed, they already have. Courts have long recognized that a statutory provision can create a liberty interest that is protected by the Due Process Clause in addition to whatever other remedy a state might fashion of its own accord.[371] Legislatures[372] could prohibit solitary confinement and require minimum levels of visitor access, nonlockdown hours, and dietary options, among a panoply of other ways to raise the baseline to which imprisoned people's voluntariness is compared.

2. *The Housekeeping Exception.* — As mentioned in Part I, the housekeeping exception to the Thirteenth Amendment is an obvious way that prisons could maintain much, but not all, of the forced labor status quo. To reiterate, that exception states that it does not violate the Thirteenth Amendment to force imprisoned people—whether convicted of a crime or not—to perform "housekeeping" or other sufficiently therapeutic work.[373]

A significant amount of the forced labor within prisons today is intraprison work.[374] While this work is currently justified by the Thirteenth Amendment's Except Clause, it could easily be recharacterized as the sort of personal housekeeping that courts have long approved. This means that even in the increasing number of states that have total bans on slavery and involuntary servitude, the on-the-ground reality of forced labor for many imprisoned people does not have to change. And because this labor is not a "punishment," it does not necessarily suffer from many of the legal faults discussed above and so can remain administratively imposed.

Rosenblatt ed., 1996))); Jhody Polk & Tyler Walton, Legal Empowerment Is Abolition, 98 N.Y.U. L. Rev. Online 282, 284 (2023), https://www.nyulawreview.org/wp-content/uploads/2023/06/NYULawReview98_PolkWalton.pdf [https://perma.cc/QDD6-H6RL] ("In fact, effective jailhouse lawyers are often retaliated against by facilities through removal from law clerk positions in the prison.").

371. See Wolff v. McDonnell, 418 U.S. 539, 555–58 (1974) (holding that Nebraska's good-time-credit statute created such an interest).

372. While this Article discusses legislatures here, it is also worth noting that in many jurisdictions prison administrators could also use their ample discretion to implement these sorts of substantive changes. That wide discretion, however, might also make these prison-administrator-created "rights" difficult to enforce if violated.

373. See supra section I.C.2.

374. See Captive Labor, supra note 1, at 27 (finding that approximately eighty percent of prison labor is "maintenance labor").

Nonetheless, the housekeeping exception does not seem expansive enough to permit the entire administrative-enslavement regime to survive. At a minimum, work to benefit private businesses, produce goods sold by the state, and maintain facilities outside of the prison seems difficult to characterize as "housekeeping." While there may be an economic argument for this—the moneys produced or saved by the labor for these outside parties can be directed to the care and maintenance of the prison and those housed there—that argument seems to stretch the exception beyond its breaking point.

3. *Reading Mandatory Statutes Broadly*. — Finally, courts faced with arguments for a defendant to retain their Thirteenth Amendment rights or plea bargains asserting that neither enslavement nor involuntary servitude is part of the agreed-to punishment might read statutes with mandatory language broadly.[375] The basic argument would be that these statutes are akin to mandatory minimum sentences set by the legislature. Like traditional mandatory minima, then, neither the court nor the prosecutor would have the power to ignore them.

While this interpretation is not farcical, it is nevertheless just one of several reasonable interpretations of these statutes. As this Article has shown, even most mandatory statutes bear few hallmarks of criminal punishment. They are not described as a punishment for any particular crime, they are often separated from other criminal punishments within the code, and they almost always empower prison administrators instead of the judiciary. Indeed, it does not appear that either the judiciary or defense attorneys consider enslavement—whether mandated or potential—as a punishment that a defendant must be given notice of before pleading guilty or that must be described and explained during a sentencing hearing. In short, whatever these statutes are, they do not look like a legislatively imposed mandatory minimum criminal punishment.

CONCLUSION

Over 150 years after the end of the Civil War, the United States remains a slave state. Through the same amendment that sought to end slavery, that institution has continued—only now it continues through our criminal legal processes. The Except Clause of the Thirteenth Amendment calls for slavery and involuntary servitude to be imposed only as a punishment for a crime. But we have failed to live up to this mandate.

Instead of treating enslavement as the criminal punishment it is supposed to be, we have configured a legislative and jurisprudential system of *administrative enslavement*. Administrative enslavement removes the solemnity, thought, and procedural protections that we give to other criminal punishments and instead shunts it into the opaque and near-total control of prison administrators. Statutes requiring and explicating

375. See supra section II.C.

enslavement are separated from other criminal punishments, forced instead into those parts of the code detailing the running of prisons. Judges, prosecutors, and even defense attorneys fail to mention, much less explain, that the accused people before them are about to be enslaved as punishment. And the courts support all of this through loosely reasoned decisions that utilize an amendment often thought to be a beacon of freedom to instead constrict the rights of incarcerated people who too often are the descendants of those the Thirteenth Amendment attempted to free.

Even if this is who we are, it is not who we should be. There is a movement to end this enslavement quickly growing in the states, but doing away with that peculiar institution nationally would seem to require a constitutional amendment beyond our current political imagination. Nevertheless, we can and should at least engage with our decision to impose punishments as dire as slavery and involuntary servitude with the thoughtfulness and gravity that decision deserves.

This Article has described the jurisprudence and statutory landscape of the current administrative-enslavement regime, and it has begun to sketch a way forward. But there is much work, both practical and theoretical, still to do. As courts in states that have already entirely forbidden slavery and involuntary servitude begin to encounter incarcerated people who retain a version of their Thirteenth Amendment rights, litigants will need to help them develop a jurisprudence that does not merely recreate the status quo. And even in jurisdictions where the Except Clause retains its force, courts may face challenges to the administrative-enslavement regime. This will force them—and us—to grapple with not only the more practical line drawing problems discussed in this Article but also the deeper, soul-searching questions that administrative enslavement has thus far allowed our society to avoid: What makes a person deserve to be a slave? And why have we allowed this institution to continue?

While administrative enslavement has allowed the continuation of our shameful institution to hide in the shadows, it is rapidly becoming apparent that this shame will be brought to light. Future work by not only scholars but also lawyers, judges, activists, and American society writ large must begin to ask and find answers to these most difficult questions.