Sufferings Peculiarly Their Own: The Thirteenth Amendment, In Defense of Incarcerated Women's Reproductive Rights

Alexandria Gutierrez[F]

"When they told me my new-born babe was a girl, my heart was heavier than it had ever been before. Slavery is terrible for men; but it is far more terrible for women. Superadded to the burden common to all, they have wrongs, and sufferings, and mortifications peculiarly their own."[1]

ABSTRACT

The Thirteenth Amendment did not end slavery over night. Despite its constitutional command, relics of slavery lived on through social, political, and economic mechanisms. In fact, the most blatant attempt to re-implement slavery occurred under the guise of criminal justice. Even before the newly borne Thirteenth Amendment took its first breath, Southern states introduced oppressive labor practices within their prisons—such as penal plantations, chain gangs, and peonage laws—aimed at circumventing the Amendment's protections. Legal advocates from Reconstruction onward saw through these practices and acted to eradicate all forms of slavery, even those masked as "punishment for crime."

The focus on eliminating slavery in prison, however, has largely eschewed from its purview the question of women—despite the fact that Black women have shared equally in the subordination. In fact, "superadded" to the burdens of physical labor, female slaves were subjected to the gender-specific abuses of sexual and reproductive exploitation. Among the worst conditions of female slavery was forced pregnancy, a violative experience characterized by

---

[F]J.D. Candidate, Boston University School of Law, 2013; B.A., Northwestern University, 2008.

If this Article were a garden, I would thank Professor Laura Beth Nielsen for planting its seeds; Amber M. Charles for shedding light on its soil; and the BJALP staff—especially Akofa Tsiagbe—for cultivating its fruits. With love and gratitude, I would dedicate its harvest to my sisters, Ryan E. Davis and Carmen M. Gutierrez. All errors are my own.

1. HARRIET ANN JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 119 (1861).

insufficient prenatal care, unsafe birthing conditions, and removal of the newborn upon delivery. Although the bodily and dignitary harms of forced pregnancy in the slavery context live on today through our system of criminal punishment, we have yet to deem penal policies that inflict reproductive slavery to be worthy of eradication on Thirteenth Amendment principles. This Article asks why.

Although penal laws prohibiting abortion raise constitutional issues under the Fourteenth and Eighth Amendments, challenges based on these Amendments have produced mixed results, and the Supreme Court has not yet resolved the issue. Thus, this Article asserts an alternative argument in favor of incarcerated women's right to abortion: the Thirteenth Amendment's protection against involuntary servitude and slavery. Although the Amendment makes an exception for "punishment," this exception is a narrow one, permitting only limited forms of prison labor, and is wholly inapplicable to the circumstances of forced child-bearing. Because inmates are not slaves of the state, this Article argues that prison policies may not impose upon incarcerated women a form of reproductive servitude akin to slavery.

On a day when our African-American sisters represent a majority of the women behind bars, I hope this argument serves to oust and eliminate a vestige of our nation's dark past. Against the historical backdrop of a system that forced females to breed against their wills, prison policies that operate to deny women (overwhelmingly women of color) reproductive freedom must be seen for what they are: modern manifestations of reproductive exploitation. To refuse an incarcerated woman the right to an abortion, to force her to labor in prison, is to deprive her of her Thirteenth Amendment right to be free from "slavery"—her criminal conviction notwithstanding.

INTRODUCTION

In early 1865, upon the insistence of President Lincoln, Illinois became the first state to ratify the Thirteenth Amendment.[2] Providing that "[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction,"[3] the Amendment was the final piece in the struggle for formal emancipation.[4] Although Lincoln would not live to see it, the Thirteenth Amendment was formally added to the Constitution by the end of 1865, officially ending slavery in the United States.[5]

Apart from fulfilling the promise of the Emancipation Proclamation,[6] the Thirteenth Amendment was ripe with constitutional potential. Broadly applicable, the Amendment's protections were to be collectively shared by all persons, regardless of "race, color, or estate."[7] Though enacted with an eye at African chattel slavery,[8] the Thirteenth Amendment announced "a charter of universal civil freedom."[9] The drafters of the Thirteenth Amendment employed "ancient words" traceable to the Northwest Ordinance of 1787,[10] the intent of which was to eliminate slavery and involuntary servitude "in every form and degree."[11] This language "expressed a view of personal liberty that extends beyond freedom from legal ownership by another person," and evinced the drafter's intent to proscribe oppressive conditions outside the scope of literal bondage.[12]

---

2. PAUL FINKELMAN, UNDERSTANDING WHO FREED THE SLAVES, THE PROMISE OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 37 (Alexander Tsesis ed., 2010).

3. U.S. CONST. amend. XIII, § 1.

4. Finkelman, *supra* note 2, at 36.

5. *Id.* at 37.

6. Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 376 (1995). The Emancipation Proclamation was President Lincoln's Civil War order that purported to free the slaves. *See id*. Prior to the passage of the Thirteenth Amendment, the Constitution ambiguously addressed slavery by preventing Congress from enacting laws against the slave trade. *See* U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

7. *See Bailey v. Alabama*, 219 U.S. 219, 240 (1911).

8. *Id.*

9. *Id.* at 241.

10. *See Slaughter-House Cases*, 83 U.S. 36, 49 (1872) ("The expressions are ancient ones, and were familiar even before the time when they appeared in the great Ordinance of 1787, for the government of our vast Northwestern Territory; a territory from which great States were to arise.").

11. *Id.* at 49-50.

12. Kares, *supra* note 6, at 374.

The Thirteenth Amendment also constitutionalized the ideals expressed in the Declaration of Independence,[13] providing a formidable platform for the expansion of individual rights.[14] By its terms, the Amendment expansively prohibited the imposition of slavery and involuntary servitude,[15] whether compelled by law[16] or private coercion.[17] While the first section of the Thirteenth Amendment was self-executing,[18] the second section of the Amendment gave Congress "the power to enforce this article by appropriate legislation."[19] Perhaps anticipating pushback from Southern states, this affirmative grant of authority provided Congress unbridled discretion to define, and therefore eliminate, slavery and any conduct that, by extension, permitted the evil institution's retention (its "badges and incidents").[20] Thus, foundationally more than "the bare privilege of not being chained,"[21] the Amendment's prohibition of slavery was understood to have an anti-subordinating thrust.[22]

---

13. ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT'S REVOLUTIONARY AIMS, THE PROMISE OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 2 (2010).

14. *Id.* at 9. The first of the Reconstructionist Amendments, the Thirteenth Amendment was the beginning of a radical shift in our nation's system of federalism. *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 15 (1995).

15. Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 6, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

16. *See U.S. v. Kozminski*, 487 U.S. 931, 942 (1988) (finding the existence of a punishment exception shows that involuntary servitude implicitly includes situations where a person is *legally* compelled to work).

17. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 333 (Foundation Press 2d ed. 1988). Some have argued that it is because the Amendment covers both private and public acts that the Court has been prudent in its Thirteenth Amendment decisions. *See, e.g.,* Kares, *supra* note 6, at 375 ("Read literally, the Thirteenth Amendment touches any private action that results in personal slavery or involuntary servitude. To avoid taking the Thirteenth Amendment to its literal limits and allowing a tort action for anyone deprived of a Thirteenth Amendment right, courts have reduced the self-executing power of the Amendment's first section through limiting constructions.").

18. U.S. CONST. amend. XIII, § 2 ("[T]he power to enforce this article by appropriate legislation."); *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) ("[T]he Amendment was self-executing, so far as its terms were applicable to any existing condition . . . ."); *see also* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 486 (1990).

19. U.S. CONST. amend. XIII, § 2.

20. *Civil Rights Cases*, 109 U.S. 3, 28 (1883) (finding the Thirteenth Amendment allows Congress to do what is "necessary and proper . . . for the obliteration and prevention of slavery with all its badges and incidents.").

21. William M. Wiecek, *The American Experience, 1865-1915*, *in* THE PROMISE OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 87 (Alexander Tsesis ed., 2010).

22. *See* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1296-1301 (2012) (discussing the anti-subordinating faculties of the Thirteenth Amendment).

Despite this vast potential, the Thirteenth Amendment has been restricted by doctrine and diluted by its exception. Shortly after its ratification, early legal opinions bound the Amendment's reach to its abolitionist roots.[23] The Supreme Court first substantively reviewed the Thirteenth Amendment in the *Slaughter-House Cases*, when a group of Louisiana butchers challenged a state statute granting monopolies to slaughterhouses in select parishes.[24] Among other things, the butchers argued that this law effectively created involuntary servitude in violation of the Thirteenth Amendment by infringing on their right to choice in employment.[25] In rejecting their argument, Justice Miller found the "pervading spirit" of the Amendment was to cure African slavery and its closest offspring, effectively limiting the Amendment's applicability to master-servant relationships.[26] A decade later, the Thirteenth Amendment took another significant blow in the *Civil Rights Cases*,[27] when the Supreme Court divorced the prohibition of slavery from the realm of state action.[28] While these Reconstruction-era cases are most famous for their impact on the doctrinal development of the Fourteenth Amendment, specifically the

---

23. *See* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1000-07 (2002) (discussing the Reconstruction-era cases that limited the applicability of the Thirteenth Amendment).

24. *Slaughter-House Cases*, 83 U.S. at 72 (1872). Although the Supreme Court first had occasion to analyze the Thirteenth Amendment in *Blyew v. United States*, 80 U.S. 581 (1871), the Court avoided the question. Azmy, *supra* note 23, at 1001. Interestingly, the first federal court case to address the Thirteenth Amendment came one month after its passage. Colbert, *supra* note 14, at 15. In *United States v. Rhodes*, 24 F. Cas. 785 (C.C.D. Ky. 1866), Supreme Court Justice Swayne, riding circuit in Kentucky, upheld a federal removal prosecution under the Civil Rights Act of 1866. Colbert, *supra* note 14, at 15. The criminal case involved three white defendants who burglarized an African-American family's home. *Id*. A state testimonial rule disqualified Blacks from testifying against whites. *Id*. Justice Swayne reasoned that federal removal was necessary to give the 1866 Act its full force in providing equal treatment for black victims of crime. *Id*. Between 1866 and 1872, courts at the state and federal level reaffirmed congressional power under the Thirteenth Amendment to eliminate "badges and incidents" of slavery. *See id.* at 17 ("This brief period represents the high water mark for achieving the central objective of the Thirteenth Amendment and Reconstruction legislation—empowering the federal government to abolish slavery's vestiges and to protect freedom and citizenship rights."). The *Blyew* decision, however, marked the beginning of a judicial retreat from the "badges and incidents" of slavery approach. *Id*. at 19. For a comprehensive analysis of pre-*Slaughter-House Cases* decisions interpreting the Thirteenth Amendment, see *id.* at 15-20.

25. *Slaughter-House Cases*, 83 U.S. at 66 (1872).

26. *Id.* at 71 ("[W]e mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."). The Court did, however, find that the protections afforded were not limited by a racial line. *See id.* at 72 ("Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.").

27. 109 U.S. 3 (1883).

28. Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 227 (2009).

Privileges or Immunities Clause,[29] they effectively "squeezed the Thirteenth Amendment into a doctrinal sliver."[30] Much like the fate of the Privileges or Immunities Clause,[31] the Thirteenth Amendment was placed in the constitutional attic for most of the twentieth century.[32]

In addition to enduring doctrinal setbacks, the Thirteenth Amendment faced the possibility of being swallowed by its exception. Though intending only to preserve the state's ability to implement traditional forms of prison labor, the "Punishment Clause" was vulnerable to becoming a loophole for re-enslaving African-Americans.[33] Unsurprisingly, Southern states seized this opportunity to circumvent the aims of Reconstruction.[34] As the newly borne Thirteenth Amendment took its first breath, Southern states, licensed with the punishment exception, began systematic efforts to criminalize and incarcerate Blacks.[35] As "punishment for crime," Black convicts were exposed to oppressive penal labor practices markedly similar to those of slavery.[36] Antithetical to its purpose, the Thirteenth Amendment turned from a shield

---

29. Azmy, *supra* note 23, at 1000.

30. *Id.*

31. For over a century following the *Slaughter-House Cases*, the Privileges or Immunities Clause, for all intents and purposes, did not see the light of day. *See, e.g.*, *Ferry v. Spokane, P. & S. Ry. Co.*, 258 U.S. 314 (1922) (finding a dower is not a privilege or immunity of citizenship); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907) (finding no violation of mineowner's privileges and immunities); *Cox v. Texas*, 202 U.S. 446 (1906) (rejecting liquor sellers' privileges or immunities claim). In 1999, despites its previous unwillingness, the Supreme Court revived the dormant clause. *See Saenz v. Roe*, 526 U.S. 489, 511 (1999) (Rehnquist, C.J., dissenting) ("The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment . . . "). This case marked the second time since the enactment of the Fourteenth Amendment that the Court relied upon the Privileges or Immunity Clause to invalidate a law. *Id.* More than sixty years before *Saenz*, on the only other occasion, the Court used the Privileges or Immunities Clause to invalidate a state tax. *See Colgate v. Harvey*, 296 U.S. 404, 430-31 (1935). Even then, the force of the Privileges or Immunities Clause did not stick. *See Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 93 (1940) (overruling *Colgate v. Harvey*).

32. Azmy, *supra* note 23, at 999. Despite mild usage in the early 1900s, the Thirteenth Amendment has not seen a modern revival. Some have argued the decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), "breathed life into the Thirteenth Amendment doctrine." *See* Kares, *supra* note 6, at 379. However, the Court's liberal construction pertained to Congress' ability to enact legislation under Section Two. *See Jones,* 392 U.S. at 438 ("It has never been doubted. . . 'that the power vested in *Congress* to enforce the article by appropriate legislation . . . includes the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.'" (emphasis added) (quoting *Civil Rights Cases*, 109 U.S. 3, 23 (1883)); TRIBE, *supra* note 16, at 332 (finding a literal reading of *Jones* would mean "*Congress* possesses a power to protect individual rights under the Thirteenth Amendment, which is as open-ended as its power to regulate interstate commerce" (emphasis added)). In fact, most Thirteenth Amendment jurisprudence concerns the scope of congressional power under Section Two. Koppelman, *supra* note 18, at 486.

33. See *infra* Part II.C.

34. Ocen, *supra* note 22, at 1297.

35. See *infra* Part II.C.

36. Ocen, *supra* note 22, at 1262-63.

protecting against one system of racial subordination (chattel slavery) to a sword enabling another (penal slavery).[37]

Attempts to fulfill the Thirteenth Amendment's promise of liberty have centered primarily on giving the Amendment doctrinal bite and less on minimizing the harmful effects of the Amendment's exception.[38] Still, advocates and legislatures have taken notice of the obvious nexus between prison-labor systems and the institution of slavery.[39] Since Reconstruction, efforts to decouple slavery and imprisonment have culminated in an understanding that the Thirteenth Amendment does not permit the imposition of slavery upon our prisoners.[40] Indeed, we know today that the punishment exception is a narrow one: while prisoners may be required to labor as a legal condition of their sentence, the Thirteenth Amendment protects inmates from labor tantamount to slavery.

Unfortunately, the movement to oust vestiges of slavery within our prisons has turned its back on women. Today, within the walls of female correctional facilities across the country, women are being exposed to a type of bodily degradation and control that is rooted in slavery: forced pregnancy.[41] Just as female slaves were unwilling participants in chattel breeding, often coerced to have children against their wills, women in prison today are stripped of their reproductive autonomy.[42] As the Supreme Court has yet to declare that women retain their constitutional right to terminate a pregnancy in prison, the

---

37. *Id.* at 1262.

38. Many advocates have argued that the Amendment is a latent source of substantive rights. These legal theorists and lawyers have alternatively conceptualized the Amendment as a source of workers' rights, as a means of combating hate crimes, and as a tool for defeating segregation. *See, e.g.*, Risa L. Goluboff, *The Thirteenth Amendment and a New Deal for Civil Rights*, *in* THE PROMISE OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 119 (Alexander Tsesis ed., 2010). However, based on early holdings, many judges and scholars alike have been unwilling to admit the possibility that the Thirteenth Amendment granted substantive rights. *See, e.g.*, James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 40 (2002) ("'[T]he talk about the Thirteenth Amendment [] is too silly for any practical lawyer's use'" (quoting Letter from Felix Frankfurter, Professor, Harvard Law School, to Roger N. Baldwin, Director, ACLU (Dec. 9, 1931), in Norris Papers, Library of Congress, box 285)); *see also* Colbert, *supra* note 14, at 28 (recognizing that, for the first century following its enactment, scholars did not believe the Thirteenth Amendment provided affirmative rights).

39. *See, e.g.*, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); ELINOR MYERS MCGINN, AT HARD LABOR: INMATE LABOR AT THE COLORADO STATE PENITENTIARY, 1871-1940 (1993); Ocen, *supra* note 22.

40. *See Washlefske v. Winston*, 60 F. Supp. 2d 534, 539 (E.D. Va. 1999).

41. Ocen, *supra* note 22, at 1263-64.

42. Thelma Jennings, "*Us Colored Women Had to Go Through A Plenty": Sexual Exploitation of African-American Slave Women*, 1 J. WOMEN'S HIST. 3, 48 (1990).

status of incarcerated women's abortion rights remains precarious at best.[43] Indeed, courts are split on whether policies preventing inmates from terminating their pregnancies are unconstitutional (and if so, on what grounds).[44] What is more, inmates' reproductive rights vary vertically (depending on the level of incarceration) and horizontally (depending on the state or jurisdiction).[45] Amongst the uncertainty, many women in prison are relegated to serve as slaves to their reproductive capabilities—enduring a condition of subordination that runs afoul to the constitution's longstanding prohibition of slavery. And yet, the conversation has yet to invoke the Thirteenth Amendment.

At a time when female inmates, predominately women of color,[46] face oppressive reproductive circumstances, this Article argues that the Thirteenth Amendment is the most suitable means of constitutionally critiquing restrictive penal abortion laws. The Thirteenth Amendment has both the historical underpinnings and the doctrinal malleability to support the protection of incarcerated women's reproductive rights. Although the Amendment makes an exception for "punishment," this exception is a narrow one. Female inmates are not slaves of the state, and the type of servitude the state may impose upon such prisoners is not without limitation. Denying an incarcerated woman the right to an abortion—in effect, forcing her to labor in prison—therefore violates her right to be free from "slavery" under the Thirteenth Amendment.

---

43. Elizabeth Budnitz, *Not a Part of Her Sentence: Applying the Supreme Court's* Johnson v. California *to Prison Abortion Policies*, 71 BROOKLYN L. REV. 1291, 1291-93 (2006).

44. *Compare Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008) (holding that the Fourteenth Amendment, but not the Eighth Amendment, protects the rights of pregnant inmates to elective abortions), *and Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2005) (holding that neither the Fourteenth Amendment nor the Eighth Amendment protects the rights of pregnant inmates to elective abortions), *and Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991) (holding that prison officials were entitled to qualified immunity from an inmate's claim that the Fifth, Eighth, and Ninth Amendments protect pregnant inmates' right to elective abortions, and that the officials' conduct did not amount to a constitutional violation), *with Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (holding that both the Eighth and Fourteenth Amendments protect pregnant inmates' right to elective abortions), *and Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007) (holding that a policy requiring a court order for jail inmates to be transported to obtain an abortion was unconstitutional under the Fourteenth Amendment without addressing the Eighth Amendment issue).

45. *Id.* at 1297-98.

46. According to the ACLU, women of color are "significantly overrepresented in the criminal justice system." *See Women in Prison: An Overview*, *Words from Prison – Did You Know. . .?*, ACLU (June 12, 2006), http://www.aclu.org/womens-rights/words-prison-did-you-know (finding, amongst other disturbing trends, that women of color represent two-thirds of the incarcerated female population).

I. HISTORICAL BACKGROUND: THE THIRTEENTH AMENDMENT'S EXCEPTION

A. An Introduction to the Punishment Clause

The doctrinally-stinted Thirteenth Amendment contains a much overlooked, and potentially powerful, textual exception. After broadly prohibiting slavery and involuntary servitude within the nation's borders, the Amendment provides a caveat: "*except as punishment for crime whereof the party shall have been duly convicted*."[47] Through this "Punishment Clause," the Thirteenth Amendment conceivably leaves open the possibility that either slavery or involuntary servitude (or both) may exist in the realm of criminal justice.

Despite its potentially enormous implications, Congress paid minimal attention to the Punishment Clause at the inception of the Thirteenth Amendment.[48] Perhaps this is because such exceptions were common attributes of abolitionist texts of the time.[49] Indeed, the language of the Thirteenth Amendment, which first emerged in the Northwest Ordinance as penned by Thomas Jefferson,[50] later appeared in the Missouri Compromise[51] and in acts banning slavery in the District of Columbia.[52] When the United States Senate Committee on the Judiciary, led by Senator Lyman Trumbull, released the final draft of the Thirteenth Amendment in 1864,[53] proponents of retaining the Northwest Ordinance wording argued that this language had been

---

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

48. *See* Scott W. Howe, Note, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 994 (2009) (finding recorded debate by the House of Representatives on the Punishment Clause to be minimal).

49. "The language of the [Thirteenth] Amendment was not new. It reproduced the historice [sic] words of the ordinance of 1787 for the government of the Northwest territory, and gave them unrestricted application within the United States and all places subject to their jurisdiction." *Bailey v. Alabama*, 219 U.S. 219, 240 (1911).

50. The final version of the Northwest Ordinance, passed by the Continental Congress in 1787, proclaimed that "[t]here shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes whereof the Party shall have been duly convicted." EDWARD MEESE III, THE HERITAGE GUIDE TO THE CONSTITUTION 380 (2005). Although Jefferson's draft of the Northwest Ordinance was the first known use of a punishment clause during abolition efforts, neither his notes on the draft nor his writings on slavery reveal the purpose behind this language. *See* WAGNER SWAYNE, THE ORDINANCE OF 1787 AND THE WAR OF 1861, at 31-32 (1892).

51. *See* Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 625 (2008) (finding variations of the punishment exception appeared "again and again" in important texts such as the Missouri Compromise and the Louisiana Purchase).

52. *See* Act of Apr. 16, 1862, ch. 54, § 1, 12 Stat. 376.

53. HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 224 (1913).

effective in that territory.[54] Seeing no reason to reinvent the wheel, the legislature opted to retain the language of the Ordinance—Punishment Clause and all.[55]

To the extent the language or inclusion of the Punishment Clause elicited any debate, a handful of legislatures foresaw problems with its ambiguous scope. For instance, Representative Ashley proposed a version which recognized the difference between slavery and involuntary servitude—the Clause unequivocally allowing only the latter to coexist with criminal sentencing.[56] His proposal, borrowed from the constitutions of states like Kansas and Iowa, read: "slavery, . . . is forever prohibited in the United States; and involuntary servitude shall be permitted only as punishment for crime."[57] Similarly, Senator Charles Sumner, an abolitionist, objected to any inclusion of a punishment exception in the Thirteenth Amendment,[58] fearing that it would transform convicts into slaves of the state.[59] Sumner urged the Senate to "clean the statute book of all existing supports of slavery, so that it may find nothing there to which it may cling for life."[60] Still, these attempts to cabin the punishment exception did not provoke sufficient discussion to alter the text of the Thirteenth Amendment, and the traditional language carried the day.[61]

B. The Meaning of the Punishment Exception

Although the meaning of the Punishment Clause is not easily discernible from its scant legislative history, the fact of its inclusion speaks to the historical dichotomy of the institutions of incarceration and slavery in the United States.[62] As one scholar noted, the language of the Thirteenth Amendment reflects a "cognitive separation" of the two concepts: "[t]hat the . . . Amendment

---

54. *See* Ghali, *supra* note 51, at 626 (finding the Northwest Ordinance had prevented the rise of slavery in several states north of the Ohio River—including Indiana Illinois, Michigan, Wisconsin, and Minnesota).

55. *See id.* at 627 (attributing the lack of legislative discussion to the fact that "the drafters of the Northwest Ordinance had done the legislative legwork"); Andrea C. Armstrong, *Slavery Revisited in Penal Labor*, 35 SEATTLE U. L. REV. 869, 873-74 (2012) (finding the Thirteenth Amendment warranted less debate since its text was "simply borrowed from prior federal enactments").

56. *Id.* at 875.

57. Ghali, *supra* note 51, at 627.

58. Howe, *supra* note 48, at 995.

59. "Now, unless I err, there is an implication from those words that men may be enslaved as punishment of crimes whereof they shall have been duly convicted." Cong. Globe, 38th Cong., 1st Sess. 1487-88 (1864).

60. *Id.* at 1482.

61. Senator Trumbull noted that the committee carefully considered drafting proposals, although the Committee rejected the proposals without explanation. *Id.* at 1487-88. Indeed a lack of meaningful discussion on proffered alternatives could explain why Congress kept the Amendment a mirror-image of the Northwest Ordinance. *See* Ghali, *supra* note 51, at 626 (finding the drafters "spent little time discussing alternative wordings").

62. Marion, *supra* note 28, at 223.

simultaneously abolished slavery and initiated 'involuntary servitude' in the United States speaks to the duality of slavery and punishment in the American context."[63] Throughout world history, slavery has been used as a form of punishment.[64] Unlike, for example, the Roman Empire's use of *servi poenas*, or "slaves of punishment,"[65] however, the United States' use of slavery was based on dominion and financial gain rather than punishment.[66] Considering the unique character of the American system of slavery, therefore, it is not quixotic to believe the Thirteenth Amendment is wholesale prohibition on *slavery* while simultaneously allowing *involuntary servitude* to be used as punishment for crime.

To be sure, motivating the Thirteenth Amendment's framers to include a punishment exception was, at least to some extent, the desire to maintain the practice of imposing labor in prison.[67] At the time of the Amendment's ratification, the prevalent belief was that mandatory work for criminals had social utility.[68] This idea had gained popularity in American colonies primarily through the work of William Penn—a Quaker leader and founder of the Pennsylvania colony, who advocated for the State's imposition of penal labor in order to enforce public morals.[69] During the prison reform of the 1820s, nearly every state adopted the "Pennsylvania system of punishment."[70] By the Jacksonian era, policymakers held strongly "that disciplined labor was an essential ingredient in building within offenders a moral fiber sufficiently strong to resist the criminal temptations that prevailed in the larger society."[71] These reforms illustrate how incarceration and inmate-labor became "bedfellows" during the pre-Civil War era[72] and why, by 1835, confinement

---

63. MICHAEL A. HALLETT, PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE 4 (2006).

64. Marion, *supra* note 28, at 223-24.

65. MCGINN, *supra* note 39, at 107.

66. *See* Marion, *supra* note 28, at 223 (distinguishing American history from "the ancients and Renaissance Europeans, who used slavery to punish offenders and prisoners of war") (citing MARTIN P. SELLERS, THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS 48 (1993)).

67. *See Flannagan v. Jepson*, 158 N.W. 641, 642 (Iowa 1916) ("The very language of the Constitution, which prohibits involuntary servitude and then excepts therefrom involuntary servitude imposed as a punishment for crime, demonstrates that, in the minds of the framers . . . enforced labor as punishment for crime is such servitude, and that the exception was necessary to the continued right of Legislatures and courts to impose it.").

68. Marion, *supra* note 28, at 217. It was during this time that prisons became "penitentiaries," or instruments of "deterrence and justice." *Id.*

69. *Id.* at 217.

70. *Id.* at 218.

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

72. MCGINN, *supra* note 39, at 80.

plus hard labor was a commonplace punishment for most crimes.[73] Amidst this historical backdrop, the inclusion of a punishment exception in the Thirteenth Amendment likely meant to preserve the status quo system of prison labor.

Bolstering this view of the Punishment Clause is the fact that the post-War Reconstructionist legal world acquiesced to the doctrine of labor for punishment. In 1867, the Supreme Court found that where federal sentencing statutes required imprisonment alone, courts had the power to "order execution of [the] sentence at a place where labor is exacted as part of the discipline."[74] At the state level, courts upheld the judicial practice of imposing dual sentences—hard labor and detention—for a single crime.[75] By the late nineteenth century, most laws completely conflated punitive incarceration and punitive labor,[76] with sentences of imprisonment swallowing sentences of hard labor.[77] Eventually, Congress eliminated all separate penalties of hard labor within federal punishment provisions.[78] Nonetheless, hard labor became a disciplinary measure used within a majority of correctional facilities, regardless

---

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

74. *See Ex Parte Karstendick*, 93 U.S. 396, 399 (1876).

75. 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, 411-12 (2009); *see, e.g.*, *Ex parte Wilson*, 114 U.S. 417, 427 (1885) ("Since the punishments of whipping and of standing in the pillor were abolished . . . imprisonment at hard labor has been substituted for nearly all other ignominious punishments . . . [a]nd . . . any sentence of imprisonment at hard labor may be ordered to be executed in a state prison or penitentiary."). *But see Ex Parte Arras*, 20 P. 683, 683-84 (Cal. 1889) (voiding sentence that imposed, as part of the penalty, hard labor for non-payment of fine because the "court below had no jurisdiction to impose hard labor as a part of the punishment" for the non-felonious offense).

76. Raghunath, *supra* note 75, at 411-12. In theory, at least at the federal level, hard labor remained a distinct penalty from penitentiary confinement. *Id.* at 412 (citing *United States v. Ramirez*, 556 F.2d 909, 913 (9th Cir. 1976)). Specific crimes authorized hard labor as a punishment. *See id.* at 15 n.100 ("'Imprisonment' is to be distinguished from 'penal servitude' in as much as the former involved sentences of up to two years with or without hard labour (which, after 1865, was uniformly enforced whether or not the court had explicitly ordered it) and was served in a local prison. Penal servitude, on the other hand, was to be served in a convict prison . . . ." (quoting David Garland, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES 7 (1985))). This practice of imposing hard labor sentences without confinement had long been utilized by the U.S. military. *See* Major Joseph B. Berger III, *Making Little Rocks Out of Big Rocks: Implementing Sentences to Hard Labor Without Confinement*, ARMY LAW. (Dep't of the Army, Charlottesville, V.A.), Dec. 2004, at 1, 6, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/12-2004.pdf ("Hard labor, with or without confinement, was established as a permissible punishment in the U.S. Army nearly 200 years ago.").

77. *United States v. Ramirez*, 556 F.2d 909, 915 (9th Cir. 1976)).

78. *Id.* at 913. However, in doing so, Congress explicitly indicated that the omission of the words "hard labor" did not mean to deprive courts of the power to "impose hard labor as a part of the punishment, in any case where such power now exists." *Id.* at 915 (quoting Act of March 4, 1909, 35 Stat. 1088, 1153 (codified at 18 U.S.C. § 572 (1940)).

of the sentence imposed.[79] Today, and since 1948, although federal courts lack the ability to impose hard labor as a punishment,[80] thus the power to create work requirements lies solely in the hands of prison administrators.[81] Over time, the expansion of the prison-labor system lost momentum,[82] but the belief that incarcerated persons ought to work remains steadfast today.[83] Thus, in the end, the Thirteenth Amendment did little to disrupt the preexisting prison-labor relationship.

C. Early Understandings (Abuses) of the Punishment Clause: Prisoners as Slaves

Notwithstanding its well-intentioned roots, the Punishment Clause became a sword used by Southern states to re-implement slavery during Reconstruction: prisoners became slaves of the state.[84] In a perverse way, the

---

79. Raghunath, *supra* note 75, at 412.

80. *Id.* at 412-13.

81. *Ramirez*, 556 F.2d at 917 ("[I]t is available to prison administrators as one part of the individualized system of discipline, care, and treatment" (internal quotation marks omitted)).

82. Raghunath, *supra* note 75, at 413. The decrease in the level of prison labor was due to outside factors. *Id.* For example, in the early twentieth century, the labor union movement drew political attention to the practice. Colleen Dougherty, Comment, *The Cruel and Unusual Irony of Prisoner Work Related Injuries in the United States*, 10 U. PA. J. BUS. & EMP. L. 483, 489 (2008). Furthermore, congressional legislation during the New Deal era regulated and restricted prison labor practices insofar as inmate-produced goods flowed through interstate commerce. *See* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 869 (2008) (discussing the Ashurst-Sumners Act).

83. Raghunath, *supra* note 75, at 411 ("Ironically, the view that prisoners ought to work during confinement is supported both by penologists who advocate that prisons serve a rehabilitative purpose as well as by those who advocate that prisons serve a punishment and/or deterrence function." (quoting LAW ENFORCE. ASSIST. ADMIN., DEP'T OF JUSTICE, STUDY OF THE ECONOMIC AND REHABILITATIVE ASPECTS OF PRISON INDUSTRY: PRISON AND STATUTES 4 (1978), available at https://www.ncjrs.gov/pdffiles1/Digitization/46043NCJRS.pdf)). By the 1970s, most states moved toward a criminal system without discretionary hard labor sentencing statutes. *Id.* at 413. However, some states, primarily Southeastern states, retained hard labor sentencing laws. *Id.; see, e.g.*, ALA. CODE § 13A-5-6(a) (LexisNexis 2009) (mandating that sentences for felonies "shall be for a definite term of imprisonment, which imprisonment includes hard labor"); NEB. REV. STAT. ANN. § 29-2208 (LexisNexis 2009) (requiring imprisonment in the county jail to include keeping the convict at hard labor or, as an alternative, "the sentence may require the convict to be fed on bread and water only, the whole or any part of the term of imprisonment").

84. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) ("For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."); *see also Shaw v. Murphy*, 532 U.S. 223, 228 (2001) (remarking that "for much of this country's history, the prevailing view was that a prisoner was a mere 'slave of the State'" (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 139 (1977) (Marshall, J., dissenting))). Worth noting is that the oft cited *Ruffin* case, likening prisoners to "slaves of the [s]tate," involved a prisoner who murdered a prison guard while incarcerated and in no way implicated the Thirteenth Amendment directly. *See* Ruffin, 62 Va. at

Thirteenth Amendment, through its exception, made blacks more vulnerable by allowing slavery to be replaced with a new and equally harsh system of subordination that had the sanction of the criminal law.[85] Under the guise of peonage laws,[86] vagrancy prohibitions,[87] and other vague and discriminatory statutes, state and local governments used the long arm of the criminal law to detain and control newly freed blacks.[88] These punishable crimes were largely non-violent infractions and included acts as benign as "using obscene or abusive language."[89] Once incarcerated, convicted persons—chiefly African-American—faced daunting work requirements.[90] Indeed, many Black prisoners were forced to physically rebuild the southern infrastructure after the Civil War.[91] However, because of the existence of a punishment exception, forcing convicts to work as punishment for an "ostensible crime" was presumed to be legal.[92]

---

794 (holding the prisoner's case challenging his murder trial to "[rest] solely upon the ground that he [was not] tried by a jury of his vicinage.").

85. DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 29 (1996).

86. Nancy A. Ozimek, *Reinstitution of the Chain Gang: A Historical and Constitutional Analysis*, 6 B.U. PUB. INT. L.J. 753, 760 (1997) ("[Peonage] laws included statutes dealing with contract fraud, criminal surety, vagrancy and other "open-ended" statutes that permitted the criminal prosecution of laborers who sought to abandon their jobs.").

87. After the Civil War, Southern States required freedman to sign labor contracts or be punished for vagrancy. Benno C. Schmidt, Jr., *Principles and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 650 (1982). During this time, a black man traveling alone in Alabama, for example, could be arrested and charged for vagrancy "on almost any pretense." BLACKMON, *supra* note 39, at 124. To demonstrate his guilt, the police need only show he carried no money on him. *Id.*

88. Applicable only to the "free negro," the Black Codes – enacted in Mississippi, South Carolina, Georgia, Florida, Alabama, Louisiana, and Texas – made punishable "mischief" and "insulting gestures." *See* OSHINSKY, *supra* note 85, at 21. The Codes prohibited blacks from owning guns and from cohabitating with whites. *Id.* In fact, the punishment for interracial marriage was "confinement for life." *Id.* Throughout the Jim Crow era, the crimes for which blacks were over-incarcerated remained trivial. *See* BLACKMON, *supra* note 39, at 375. (finding that in Alabama in 1928, for example, 2735 people were charged with vagrancy; 2014 with gaming; 458 with leaving an employer's farm without permission; and 154 for adultery).

89. See *id*. at 112. Still, courts gave multiple year sentences for even the pettiest of crimes. *See* OSHINSKY, *supra* note 85, at 41. In Mississippi, for example, a man was sentenced to three years for sealing an "old suit of clothes" and another was given a two-year sentence for stealing a hog. *See id.*

90. State laws required *all* convicts, regardless of the charges against them, to work. *See* OSHINSKY, *supra* note 85, at 40-42. Ironically, labor might only be imposed in penitentiaries that housed petty criminals, sparing those with the longest sentences. *See id*. at 41. This is because blacks were routinely incarcerated for petty crimes, punishable for less than ten years, while whites were only imprisoned for the most heinous of criminal acts. *Id.*

90. Howe, *supra* note 48, at 1008.

91. *Id.*

92. *See* BLACKMON, *supra* note 39, at 53; Ghali, *supra* note 51, at 609 ("The drafters sought to free the slaves, but took pains to ensure that they did not inadvertently curtail the power of state governments to punish criminals. The Thirteenth Amendment, after all, sought to root out the evils of antebellum slavery, not the harshness of prison life.").

In its earliest form, Reconstruction-era penal labor was implemented through convict lease systems, penal plantations, and chain gangs.[93] Under convict lease systems, prisons and jails would lease out inmates as cheap laborers to private hands,[94] who would in turn provide the state or county with monetary compensation[95] or agree to cover the cost of inmates' food, shelter, and clothing.[96] Many leased convicts spent their sentences arduously working in coal mines, saw mills, or railroad camps.[97] Some institutions began using prisoners as field workers on penal plantations,[98] which operated like the antebellum slave system, with inmates working in the fields to produce cotton.[99] Others employed the "chain gang" method, forcing prisoners to build and maintain public roads while shackled.[100] As one scholar noted, the post-War penal-labor systems essentially picked up where slavery left off.[101]

Though mirroring the structural similarities to antebellum slavery, postbellum penal-labor practices subjected blacks to far worse conditions.[102] As one freedman lamented, "You kno' you niver heard tell uf a slave bein' sent ter de pen . . . now[,] de niggers goes ter de pen ebber time de courts meet. Dey had better wish dey wus slaves."[103] Whether an inmate was working on a penal plantation pursuant to a convict leasing program or by the force of the chain-gang, deplorable conditions were emblematic of the post-War prisoner's labor experience.[104] Rather than face standard detention, inmates on penal plantations were required to work in the fields from dawn until dark, to sleep in cages, and to eat food "full of bugs and worms."[105] In addition to facing health

---

93. For a discussion of the treatment of convicts in the South after 1865, *see* Howe, *supra* note 48, at 1008-1019.

94. *Id.* at 1009.

95. For example, in 1866, Texas leased 250 convicts to two railroad companies for a rate of $12.50 per month. *See* BLACKMON, *supra* note 39, at 54. In 1871, Tennessee leased its nearly eight hundred prisoners, almost all of them black, to Tennessee, Iron & Railroad Co. *Id.*at 55. In fact, by 1880, nearly every Confederate state was leasing a bulk of its state prison population. *See* Howe, *supra* note 48, at 1009.

96. *Id.* at 1010 (internal quotation marks omitted).

97. *See* OSHINSKY, *supra* note 85, at 36.

98. Howe, *supra* note 48, at 1014-15. *See* Tessa M. Gorman, Comment, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 456 (1997) ("The image evokes the same connotation of slavery.").

99. Howe, *supra* note 48, at 1015.

100. *Id.* at 1017.

101. BLACKMON, *supra* note 39, at 57 ("[C]onvict leasing adopted practices almost identical to those emerging in slavery in the 1850s.").

102. Howe, *supra* note 48, at 1008.

103. *See* OSHINSKY, *supra* note 85, at 34 (citing *Autobiography of Gabe Butler*, *in* 6 RAWICK, AMERICAN SLAVE 317).

104. Howe, *supra* note 48, at 1015-16. *See also* Schmidt, *supra* note 87, at 652.

105. Howe, *supra* note 48, at 1015-16.

risks like sunstroke and exhaustion, plantation prisoners endured inhumane punishments at the hands of their supervisors.[106]

Above all, what made the postbellum penal-labor system more deplorable than antebellum slavery was its absolute disregard for human life.[107] A captain of a convict camp detailed his experience overseeing the construction of railroads in the 1870s:

> Dozens of those who went into the tropical marshes and palmetto jungles of Lake Eustace went to certain death. There was no provision made for either shelter or supplies. Rude huts were built of whatever came to hand, and in the periods of heavy rain it was no unusual thing for the convicts to awake in the morning half submerged in mud and slime. The commissary department dwindled into nothing. I do not mean there was some food or a little food, but that there was no food at all. In this extremity, these convicts were driven to live as the wild beasts, except that they were only allowed the briefest intervals from labor to scour the woods for food . . . . Of course, there is a limit to human endurance. It was not long before the camp was ravaged by every disease induced by starvation and exposure . . . . Every stopping-place was a shambles, and the line of survey is punctuated by grave-yards.[108]

Aside from being brutalized by their environments, penal laborers were persecuted by their supervisors. To maintain order, guards "tortured" them "for minor infractions," and some "were whipped to death."[109] In any event, death was practically certain.[110] Since Black prisoners—unlike slaves—were neither in low supply nor laden with significant replacement costs,[111] penal overseers had no incentive to keep convict workers alive.[112] In light of their expendability, Blacks in the post-Civil War penal-labor system were, thus, relegated to a condition more oppressive than their slave ancestors.

Notably, Black women did not escape the transition from the institution of chattel slavery to the regime of penal slavery. The Black Codes' criminalization of conduct associated with newly freed slaves applied unbendingly to women.[113] What is more, Black women were largely targeted

---

106. *Id.*

107. Ozimek, *supra* note 86, at 759.

108. J.C. POWELL, THE AMERICAN SIBERIA OR FOURTEEN YEARS' EXPERIENCE IN A SOUTHERN CONVICT CAMP 12-13 (W.B. CONKEY CO. 1893), *available at* http://ia700502.us.archive.org/22/items/americansiberiao00powerich/americansiberiao00powerich.pdf.

109. Howe, *supra* note 48, at 1012.

110. Indeed, the annual death rates for prisoners were "staggering—typically close to twenty percent and in some places approaching fifty percent." Schmidt, *supra* note 87, at 651. In Mississippi, "[n]ot a single leased convict ever lived long enough to serve a sentence of ten years or more." OSHINSKY, *supra* note 85, at 46.

111. Ozimek, *supra* note 86, at 760.

112. *Id.*

113. Ocen, *supra* note 22, at 1261-62.

for crimes that, in essence, punished them for failing to comport with mainstream notions of femininity: familial neglect, using profane language, public quarreling, and prostitution, to name a few.[114] Unlike their white counterparts, Black women could not rely on assumptions about gender to shield them from criminal punishment.[115] Indeed, Black women were disproportionately arrested for crimes of sexual deviance and moral depravity.[116] For example, in 1881, Tennessee arrested 731 Black women for solicitation, as compared to 136 white women.[117]

Moreover, despite punishing Black women for not being appropriately "feminine," the criminal justice system paradoxically treated Black women like men for purposes of incarceration and penal labor.[118] Black female convicts were subject the same backbreaking labor as Black male convicts, including convict leasing and chain gangs.[119] In addition to arduous agricultural labor, Black women were subject to profound sexual abuses.[120] In this way, Black female inmates were "doubly bound" by their race and gender: "[u]nlike Black men or white women, they were uniquely subject to sexual violence and abuse at the hands of guards as rape was endemic."[121] The physical and reproductive harms suffered by Black female inmates were undeniably akin to the conditions imposed upon female slaves.[122] Despite the nexus between chattel slavery and early forms of penal slavery, Black prisoners (male and female alike) were left to serve as slaves of the state.[123]

D. Toward a Narrow Understanding of the Punishment Clause: The Repudiation of Penal Slavery

From the outset, Congress acknowledged that the Punishment Clause could render the Thirteenth Amendment self-defeating.[124] Despite recognizing the need for clarification, however, the Amendment was left ambiguously

---

114. *Id.* at 1262.
115. *Id.* at 1262-65.
116. *Id.* at 1265.
117. *Id.*
118. *Id.* at 1262-63.
119. *Id.* at 1263. Unsurprisingly, white women were largely spared from these penal labor practices. *See id.* at 1262 ("Between 1908 and 1938, only four white women were sentenced to the chain gang in Georgia, compared to almost two thousand Black women.").
120. *Id.* at 1265.
121. *Id.*
122. Id. at 1263-64 (finding that degrading and controlling Black women's bodies, including their physical and reproductive capacities, was central to the institution of slavery).
123. Id. at 1262-63 (discussing crime and punishment as instruments of reimplementing the conditions of slavery).
124. *Id.* at 629.

worded, leaving a "gaping hole" for the Southern states to exploit.[125] Early efforts to close this loophole were consistently stymied. For example, just two years after ratification, Representative John Kasson of Iowa spoke on the floor of the House of Representatives on the need to clarify the scope of the Punishment Clause because Confederate states were using it to circumvent the Thirteenth Amendment's prohibition of slavery.[126] To Kasson, the practice of imposing slave-like conditions under the guise of a "legitimate sentence" was antithetical to the purpose of the Thirteenth Amendment.[127]

Because the Punishment Clause was designed to carve out a narrow exception, Kasson introduced a joint resolution to clarify its scope in 1867,[128] which read:

> [T]he true intent and meaning of [the Thirteenth Amendment] prohibits slavery or involuntary servitude forever in all forms, except in direct execution of a sentence imposing a definite penalty according to law, which penalty cannot, without violation of the Constitution, impose any other servitude than that of imprisonment or other restraint of freedom . . . according to the usual course thereof, to the exclusion of all unofficial control of the person so held in servitude. . . .[129]

Kasson went on to explain what would constitute "punishment" under the Thirteenth Amendment: "there must be a direct condemnation into that condition under the control of the officers of the law like the sentence of a man to hard labor in the State prison in the regular and ordinary course of law."[130] Kasson's resolution provided that this kind of involuntary servitude would be the only kind known to the Constitution and the law.[131] Though Kasson's resolution was passed by the House, the bill was postponed "indefinitely" in the Senate.[132] In addition to shedding light on early threshold questions about the scope of the Punishment Clause, Kasson's proffered resolution shows Congress

---

125. DAVID M. OSHINSKY, INVOLUNTARY SERVITUDE AFTER THE THIRTEENTH AMENDMENT, The PROMISE OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 101 (Alexander Tsesis ed., 2010).

126. Ghali, *supra* note 51, at 627. As an example, Representative Kasson showed an extract from a newspaper in Maryland that contained an advertisement with a bold caption: "NEGROES TO BE SOLD AS A PUNISHMENT FOR CRIME." *See id.*

127. *Id.*

128. *Id.*

129. *See* CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867).

130. *See id.* at 345-46.

131. *See id.*

132. *See* Ghali, *supra* note 51, at 628 ("Yet, there is no reason to treat the joint resolution's failure in the Senate as proof that Kasson's interpretation was incorrect. In fact, during the House debate over the joint resolution, some expressed skepticism over whether Congress could expand or contract the scope of a constitutional provision through legislation alone, whether it had the power to void the acts of various courts, and whether the Supreme Court was the more appropriate place to resolve the problem.").

contemplated a narrow interpretation of the Thirteenth Amendment's exception.[133]

Despite the legislative failure to clarify the letter of the Punishment Clause, its intended spirit was not entirely lost in the post-Civil War years. Perhaps due in part to the botched congressional resolution of 1867, the decoupling of prison labor and slavery proceeded in a piecemeal fashion.[134] Nonetheless, public outcry and legislative action at the state level did eventually bring reform to postbellum penal labor practices.[135] The first state to abolish convict-lease systems was South Carolina in 1885.[136] Tennessee stopped selling prisoners to coal mines in 1893,[137] and within a decade, her governor, Malcolm Patterson, admitted that the state prisons were "inhuman, unchristianlike, and not becoming to a great state and progressive people."[138] Louisiana prohibited the leasing of state prisoners in 1901 and, within a few years, states like Mississippi, Arkansas, and Texas followed suit.[139] In 1908, after extensive investigations by State Senator Thomas Felder, the Georgia legislature established a commission to examine the operations of its convict leasing system.[140] Later that year, a nearly all-white electorate in Georgia voted two-to-one to abolish the state's convict lease system by early 1909.[141] Finally, in 1928, with Alabama joining the abolition movement, the system of convict leasing ended.[142]

---

133. *See id.* at 629; *see also* Howe, *supra* note 48, at 1013. ("Although their efforts ultimately failed, the resolution certainly underscored the fact that many legislators regretted the language of the Thirteenth Amendment, which they wished said something other than what it actually said.").

134. *See* Howe, *supra* note 48, at 1012; BLACKMON, *supra* note 39, at 351.

135. Howe, *supra* note 48, at 1010. The *New York Times*, and other political opposition to the lease-system arose in condemnation of the practice. MARY ELLEN CURTIN, BLACK PRISONERS AND THEIR WORLD, ALABAMA, 1865-1900, at 70-71 (2000). *See Southern Convict Camps: A Crying Disgrace for our American Civilization* (NY TIMES, Dec. 17, 1882 (finding prison labor laws "had the effect of placing such persons in a condition worse than slavery"). Despite the quick and obvious demise of convict leasing, some remnants of penal-slavery, i.e. chain gangs, did not disappear until the 1950s. Howe, *supra* note 48, at 1017. *But see* Gorman, *supra* note 98, at 457-58 (noting that, as of 1996, some form of chain gangs still existed in Alabama).

136. Howe, *supra* note 48, at 1014.

137. BLACKMON, *supra* note 39, at 351.

138. MCKELVEY, *supra* note 74, at 120.

139. BLACKMON, *supra* note 39, at 351.

140. For detailed insights on the efforts of Thomas Felder and the Georgia commission, *see id.* at 338-70.

141. *Id.* at 351. Atlanta's leading pastor, Dr. James W. Lee, called the leasing system a "disgrace to the state." His congregation and others passed resolutions demanding abolition by the legislature. *Id.* at 350.

142. Howe, *supra* note 48, at 1014.

Although these penal-slavery practices did not end at the hands of the Thirteenth Amendment,[143] the trend away from treating prisoners as slaves evidences the limits of the punishment exception.[144] Indeed, in the backdrop of these state reforms was pressure by the federal government in the form of investigations[145] and threats of prosecution for violations of federal law.[146] For example, it was during this time that federal prosecutors and courts revived the formerly dormant Peonage Abolition Act.[147] Peonage is a "condition of compulsory service, based upon the indebtedness of the peon to the master."[148] In the South, the practice of peonage largely occurred in two forms. First, states would criminalize a laborer's breach of contract and effectively punish him by requiring restitution in labor.[149] Second, states would create criminal-surety laws whereby indigent convicts could barter labor for leniency in prosecution or sentencing.[150] Through the peonage cases,[151] the Supreme Court renounced these practices for creating involuntary servitude in violation of the Thirteenth Amendment.[152]

---

143. *See* Marion, *supra* note 27, at 225 ("Curiously, however, the courts during this time period never intervened on Thirteenth Amendment grounds to stop convict leasing . . . . In fact, no cases were brought under this amendment in the prison labor context.").

144. In the absence of Thirteenth Amendment challenges to the slavery-like conditions of postbellum penal labor, one might believe that the Amendment tolerates slavery as punishment for crime. Indeed, "[t]he long and continuous history of brutalities against prisoners across most of the South went unchallenged in the courts under the main prohibition in the amendment. . . ." *See* Howe, *supra* note 48, at 1012. However, the Thirteenth Amendment's absence from the penal-labor reform movement during the early days of Reconstruction is not surprising in light of the Reconstruction-era cases. *See* Marion, *supra* note 27, at 227 (finding the *Slaughter-House Cases*, 83 U.S. 36 (1872), limited the Amendment's scope while the *Civil Rights Cases*, 109 U.S. 3 (1883), limited its applicability to private action).

145. *See* BLACKMON, *supra* note 39, at 207-211 (detailing Attorney General Warren Reese's investigation of the farcical state of criminal justice in Alabama). Attorney General Reese described the conditions of punishment as "brutal" and concluded that the conditions were tantamount to both involuntary servitude and akin to slavery. *Id.* at 207-208. During his investigation, he even witnessed one sheriff beat an alleged convict with a pistol, tie a rope around his neck, and whip him as he ran behind a mule for miles. *See id.* at 208.

146. For example, in 1903 Attorney General Reese began prosecuting a series of cases in an effort to break up forced labor practices in Alabama. *See* BLACKMON, *supra* note 39, at 217-32. Similar cases were brought alleging involuntary servitude, violations of peonage laws, and a slave-trading conspiracy in Georgia and Florida. *Id.* at 220.

147. Ozimek, *supra* note 86, at 763.

148. *United States v. Reynolds*, 235 U.S. 133, 143 (1914). A peon's release is only possible through payment of the debt or enforcement of the service. *Id.*

149. Schmidt, *supra* note 87, at 648-49.

150. *See id.* at 649 (finding indigent convicts could "[avoid] the chain gang by contracting themselves into servitude for employers who would put up their fines" under criminal-surety laws). The "criminal-surety" laws were struck down in *Reynolds*. *Id.* at 649.

151. *See, e.g. Pollock v. Williams*, 322 U.S. 4, 25 (1944); *Taylor v. Georgia*, 315 U.S. 25, 31 (1942); *Reynolds*, 235 U.S. at 150; *Bailey v. Alabama*, 219 U.S. 219, 245 (1911); *Clyatt v. United States*, 197 U.S. 207 (1905).

152. In the seminal case *Bailey*, 219 U.S. at 244, Justice Hughes announced that the Thirteenth Amendment "does not permit slavery or involuntary servitude to be established or

Although it is difficult to tell whether the peonage cases fall technically outside the scope of the punishment exception—considering that the informal and often illegitimate arrest and detention practices of the post-War South frequently preempted "due conviction"[153]—the peonage cases do suggest limits on the state's ability to reinstitute slavery under the pretext of criminal law.[154] In denouncing peonage, the Court admonished the cyclical process of arresting and sentencing that kept convicts "chained to an everturning [sic] wheel of servitude."[155] Indeed, one scholar has argued that these cases espouse the belief that the Thirteenth Amendment may combat "entrenched patterns, practices, and policies that are rooted in slavery and that facilitate subordination."[156] By reinforcing the Thirteenth Amendment's line between the legitimate and illegitimate imposition of labor upon the criminally convicted, the peonage cases were an important step toward our country's ultimate repudiation of penal slavery.[157]

Although not forthrightly defining the hardships of the postbellum penal-labor practices as "slavery" under the Thirteenth Amendment, legislative and judicial intervention during the first half of the twentieth century still conveyed a normative and constitutional intolerance to the treatment of prisoners as slaves.[158] The oppressive penological practices employed by Southern states in

---

maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other."

153. One might argue that the peonage cases are irrelevant to a conversation about the punishment exception since most peons were never actually convicted. *See* Howe, *supra* note 48, at 1018 n.335 (finding the peonage cases were resolved by holding that "a person who merely breaches a duty of this sort is not appropriately convicted of a crime and, thus, is not within the [Thirteenth Amendment's] punishment exception"). However, this argument ignores the complicated nature of the relationship between the criminal law and forced labor in the South during the early twentieth century. For example, reports indicate a complex mixture of baseless charges, farcical judicial proceedings, governmental corruption, and inhumane punishments. *See* BLACKMON, *supra* note 39, at 207-211. Thus, it seems disingenuous to draw a line around the peonage cases based on a legal formality (convicted versus not) that was blurred, if not entirely betrayed, during this era.

154. Ocen, *supra* note 22, at 1298-99 (finding the Court in *Bailey* placed "limits on legislative authority to use crime as a means of reinstituting a system of slavery").

155. *Reynolds*, 235 U.S. at 146-47. Under these laws, the initial arrest, for a violation of a labor contract, resulted in a new offense whose punishment was to liquidate the penalty by imposing a new contract of a similar nature to the original contract. *Id.* at 146. If the new contract was broken, the offender may be prosecuted again. *Id.* Thus, the result was a perpetual and inevitable cycle. *Id.*

156. Ocen, *supra* note 22, at 1299.

157. *See, e.g.*, *Thompson v. Bunton*, 22 S.W. 863, 865 (Mo. 1893) (acknowledging that a law forcing a convict "'to be placed upon an auction block, and sold to the highest bidder, either for life or for a term of years'" could raise constitutional doubts (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 363 (6th ed. 1890))).

158. Notably, modern attempts to reinstitute the chain gang have quickly been retracted in the face of litigation. For example, in 1996, without a court order, the state of Alabama ended the practice of chaining inmates together in the state prison system, pursuant to a settlement with the Southern Poverty Law Center. *See* Gorman, *supra* note 98, at 457-58; Raghunath, *supra* note 75, at 406 ("The recent reintroduction of chain gangs in Alabama, and the hurried retraction of this

the wake of the Civil War, so markedly akin to antebellum slavery, could not withstand political and judicial scrutiny. This rejection of convict-lease systems and peonage—whose implementation was arguably made possible by the Punishment Clause—shows that the punishment exception would not justify allowing slavery or its kindred spirits to live on through our system of criminal punishment.[159] Despite initial attempts to use the punishment exception as a sword, a shield it remained at the end of the day—and today, courts and scholars embrace the supposition that prisoners do retain some Thirteenth Amendment protections notwithstanding their status as convicts.[160]

III. FEMALE INCARCERATION & ABORTION POLICIES

A. Women Behind Bars: Discussion & Demographics

The United States' current system of punishment, apart from being characterized by excessive incarceration, is still plagued by a disproportionate impact on racial minorities—African-Americans in particular.[161] Today, in lieu of vagrancy laws and peonage statutes, the United States has a drug enforcement system that is notorious for putting Blacks behind bars at astounding rates.[162] The legal response to the War on Drugs is just one modern example of society's willingness to equate race with criminality, but it is far from the only one.[163] Scholars and activists have argued that the use of racial profiling by law enforcement,[164] the proliferation of recidivism and habitual

---

policy in the face of litigation, despite strong public support for the practice, illustrates that some of the traditional forms of inmate labor no longer fall within the acceptable boundaries of modern punishment.").

159. Ghali, *supra* note 51, at 629.

160. *See, e.g., McCann v. Couglin*, 698 F.2d 112, 115 (2d Cir. 1983) (rejecting, officially the doctrine expressed in *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871), that inmates are "slaves of the State"); *Sostre v. Preiser*, 519 F.2d 763, 764 (2d Cir. 1975) (finding the *Ruffin* era, or "time . . . when prison inmates had no rights," is past); Ghali, *supra* note 51, at 629 (distinguishing prisoners and free laborers).

161. For a detailed discussion of the mass incarceration phenomenon and its impact on racial minorities, *see United States v. Bannister*, 786 F. Supp. 2d 617 (E.D.N.Y. 2011).

162. *See id*. at 651-53; Amber M. Charles, Note, *Indifference, Interruption, and Immunodeficiency: The Impact and Implications of Inadequate HIV/AIDS Care in U.S. Prisons*, 92 B.U. L. REV. 1979, 1987 (2012) (discussing the "clear and significant racialization" of the United States' prison population).

163. *See generally* PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON (2003). For background on the "war on drugs" and its consequences for African-American communities, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2010).

164. *See generally* Angela Anita Allen-Bell, *The Birth of the Crime: Driving While Black (DWB)*, 25 S.U. L. REV. 195 (1997); Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439 (2004).

offender criminal statutes,[165] and the maintenance of the capital punishment system[166] are, likewise, tools of racial oppression.

The highly racialized mass incarceration problem in the United States has not spared women.[167] In fact, as of 2007, women are the fastest growing segment of the population incarcerated in the United States.[168] Currently, more than 1 million women are under supervision of the criminal justice system,[169] with over 200,000 females in prison or jail.[170] What is worse, the overall increase in the number of women being put behind bars has not been even-handed. The female incarceration phenomenon, like its male counterpart, is characterized by racial disparity.[171] As of 2010, the incarceration rate for black women was three times that of white women.[172] Today, 1 in 100 African-

---

165. *See 10 Reasons to Oppose "3 Strikes, You're Out*, ACLU (Mar. 17, 2002), http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/10-reasons-oppose-3-strikes-youre- (discussing the disproportionate impact of a recidivist statute on minority offenders). Aside from facing harsh repeat offender statutes, ex-convicts face uphill battles during reintegration. Laws that discriminate against ex-convicts, namely minorities, have been referred to as "the new Jim Crow." *See* ALEXANDER, *supra* note 163, at 2. ("Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, . . . and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights and arguably less respect than a black man living in Alabama at the height of Jim Crow."). Framed this way, the racial caste system in America has been "redesigned" through the cyclical nature of incarceration and the legalized practice of discriminating the criminally convicted. *See id.*

166. *See* Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty, in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 211-42 (Charles J. Ogletree, Jr. and Austin Sarat eds., 2006). *See also McCleskey v. Kemp*, 481 U.S. 279, 330-33 (1987) (Brennan, J., dissenting) (highlighting the racial bias in the application of the death penalty through Supreme Court jurisprudence).

167. For a comprehensive look into the criminal and penological issues plaguing African-American women, *see* JOHNSON, *supra* note 163.

168. *Facts About the Over-Incarceration of Women in the United States*, ACLU (Dec. 12, 2007), http://www.aclu.org/womens-rights/facts-about-over-incarceration-women-united-states. The increase in the number of women imprisoned between 1990 and 2000 was 114%. *See* Budnitz, *supra* note 43, at 1296. The ACLU purports that "[o]n any given day, more than 200,000 women are living behind prison or jail walls." *State Standards for Pregnancy-Related Health Care and Abortion for Women-Map*, ACLU, http://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map (last visited Feb. 24, 2012) [hereinafter *State Standards*].

169. *Incarcerated Women*, SENTENCING PROJECT (revised Sept. 2012), http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf, 1. This includes prison, jail, probation, and parole. *Id.*

170. *Id.* Of this incarcerated female population, over 100,000 women are imprisoned at state and federal correctional institutions. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE, PRISONERS IN 2010, at 2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf, at 1.

171. In total, African-Americans make up nearly 1 million of the total 2.3 million incarcerated. *See* JOHNSON, *supra* note 163, at 6.

172. SENTENCING PROJECT, *supra* note 169, at 2. In 2001, the lifetime likelihood of imprisonment for black women was 1 in 19. *Id.* For Hispanic women, it was 1 in 45, and for white women it was 1 in 118. *Id.*

American women are in prison.[173] "As a result of an inseparable combination of their gender, race, and economic status," African-American women have been systematically punished at a higher and harsher rate than their white sisters.[174]

Today's overwhelmingly Black female prison population faces unique hurdles within the correctional scheme. The incarcerated women's demographic is particularly in need of adequate health services, as many struggle with substance abuse, mental illness, and the after-effects of physical and sexual violence.[175] Because female prisoners currently experience substandard mental and physical health care,[176] inmates living with treatable diseases often also face risk of permanent injury or death due to lack of access to medical attention.[177]

Beyond issues of access to basic health services, female prisoners also face extreme reproductive hardships during detention.[178] Despite the exorbitant growth in the number of women entering the criminal justice system, correctional facilities are often lacking in female-specific services, such as Pap smears, mammograms, and pre-natal care.[179] While it is difficult to determine exactly how many women enter prisons and jails pregnant,[180] studies show that between six and ten percent of incarcerated women are pregnant.[181] Often, these statistics do not account for pregnancies which arise *during* the inmate's detention.[182] In spite of these growing numbers, in 2007, the ACLU found that

---

173. *Racial Disparities in Incarceration*, NAACP, http://www.naacp.org/pages/criminal-justice-fact-sheet (last visited Feb. 5, 2013).

174. Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1424 (1991).

175. Avalon Johnson, Note, *Access to Elective Abortions for Female Prisoners Under the Eighth and Fourteenth Amendments*, 37 AM. J.L. & MED. 652, 654-55 (2011). In prison, women are more likely than men to have chronic and/or communicable medical problems, including HIV and other sexually transmitted infections, and to have mental health problems. SENTENCING PROJECT, *supra* note 169, at 1.

176. Johnson, *supra* note 175, at 654.

177. *Id*. at 655.

178. Aside from reproductive healthcare issues, incarcerated women face great difficulties pertaining to family care. *See* LAW STUDENTS FOR REPRODUCTIVE JUSTICE, REPRODUCTIVE JUSTICE IN THE PRISON SYSTEM (2011), http://lsrj.org/documents/factsheets/11_RJ%20in%20the%20Prison%20System.pdf.

179. Johnson, *supra* note 175, at 655.

180. *Id*.

181. *See* Budnitz, *supra* note 43, at 1297. One study found that the pregnancy rate upon admission to prison was 1 in 25 at the state level and 1 in 33 at the federal level. *See* SENTENCING PROJECT, *supra* note 169, at 3.

182. *See id.* at 3 (reporting the high rate of reported sexual assaults on female inmates by male staff in correctional facilities). Congress has noted the high incidence of sexual assault, rape, and abuse of detained women. *See generally* NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT (2009), *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf. At both the state and federal level, the guard population is predominately male. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at 4 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/csfcf05.pdf. Some argue

between twenty and fifty percent of women in prison and jail reported not receiving pre-natal care.[183] Unfortunately, because of the unjustly racialized nature of our criminal punishment system,[184] female inmates of color are all too familiar with these shortcomings.

B. The Status of Incarcerated Women's Reproductive Rights

1. Policies at the Federal Level

At the federal level, female inmates retain the right to terminate a pregnancy. The Federal Bureau of Prisons governs the policies of federal women's correctional facilities,[185] which are also subject to congressional oversight and political lawmaking.[186] The two controlling bodies of federal policy are the "Birth Control, Pregnancy, Child Placement and Abortion"[187] program and the "Religious Beliefs and Practices"[188] program.[189] These programs set out the process by which a female inmate may obtain an abortion, from notifying the medical staff to making arrangements with the off-site clinic.[190]

Although female inmates in federal prisons have the right to abortion, various practical obstacles render this right difficult to execute. To begin, the federal process for obtaining an abortion in prison leaves room for considerable delay. From the outset, federal programs mandate that inmates receive "medical, religious, and social counseling sessions" so that they may make an

---

that allowing males to guard female inmates is inconsistent with international human rights norms. *See* LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *supra* note 178; *see also* United Nations, Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1997, Rules 53(2) and 53(3), *available at* http://www2.ohchr.org/english/law/treatmentprisoners.htm.

183. *See* Rachel Hart, *Blog Series on Reproductive Rights in Prison*, ACLU BLOG OF RIGHTS (Dec. 19, 2007, 2:57 PM), http://www.aclu.org/2007/12/19/blog- series-on-reproductive-rights-in-prison/ (finding twenty percent of women in prison and fifty percent of women in jail reportedly do not receive prenatal care).

184. The rate of incarceration for African Americans is nearly six times that of whites. *See id*.

185. *See* Budnitz, *supra* note 43, at 1297.

186. *Id*.

187. FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT: BIRTH CONTROL, PREGNANCY, CHILD PLACEMENT AND ABORTION (1996), *available at* http:// www.bop.gov/ policy/progstat/5070_005.pdf.

188. FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT: RELIGIOUS BELIEFS AND PRACTICES (2004), [*hereinafter* RELIGIOUS BELIEFS AND PRACTICES] *available at* http:// www.bop.gov/policy/progstat/5360_009.pdf.

189. Johnson, *supra* note 175, at 656.

190. *Id.* at 656.

"informed decision."[191] Although some non-incarcerated women experience similar counseling requirements,[192] the "Birth Control, Pregnancy, Child Placement and Abortion" program statement does not include a timeline for providing abortion services nor does it provide a timeframe for the Clinical Director to arrange for the procedure upon completion of the counseling.[193] Thus, the programs' grant of broad discretional authority, coupled with the practical realities of incarceration, can obstruct female prisoners' efforts to exercise reproductive choice.[194]

Moreover, limitations on abortion funding for federal inmates is a substantial hurdle for incarcerated women seeking to terminate pregnancy. At present, the federal policy only requires the Bureau of Prisons to pay for *medically necessary* abortions.[195] Though the policy allows for the expenditure of funds to "escort the inmate to a facility outside the institution to receive the procedure,[196] female inmates must pay for the actual procedure where the abortion is "elective."[197] This caveat is significant considering that the cost of an abortion is especially burdensome for inmates,[198] particularly those without

---

191. *See* RELIGIOUS BELIEFS AND PRACTICES, *supra* note 188, §548.12(a)(3)(a). On its face, this policy does not allow a pregnant inmate to obtain an elective abortion without aforementioned counseling. Johnson, *supra* note 175, at 656.

192. A. G. Sulzberger, *Women Seeking Abortions in South Dakota to Get Anti-Abortion Advice*, N.Y. TIMES (March 22, 2011), http://www.nytimes.com/2011/03/23/us/23sdakota.html?_r=0.

193. Johnson, *supra* note 175, at 656.

194. *Id.* at 656. *See* Claire Deason, Note, *Unexpected Consequences: The Constitutional Implications of Federal Prison Policy for Offenders Considering Abortion*, 93 MINN L. REV. 1377, 1386 (2009) (finding that arranging for the abortion procedure to take place can be the "most arduous" part of the process because of the limited number of facilities available).

195. Johnson, *supra* note 175, at 656. Prior to 1987, the Bureau paid for all abortions – both elective and medically necessary. Budnitz, *supra* note 43, at 1298. In 1987, under the efforts of certain Republican congressmen, Congress passed a Department of Justice appropriations bill which prohibited the use of funds for elective abortions. *Id. See* Fiscal Year 1987 Continuing Resolution for Appropriations, Pub. L. No. 99-500, 100 STAT. 1783 (1987) (General Provisions, Department of Justice, Section 209: "None of the funds appropriated by this title shall be available to pay for an abortion, except where the life of the mother would be endangered or in the case of rape.").

196. *See* RELIGIOUS BELIEFS AND PRACTICES, *supra* note 188, § 551.23(b).

197. *See* Budnitz, *supra* note 43, at 1298.

198. For example, in 2007, the average weekly earnings of a woman in federal prison was $4.80-$16.00 Phone Interview with Carmen Gutierrez, Pre-Natal Coordinator, Planned Parenthood of Southeastern Michigan (February 1, 2012) [hereinafter Gutierrez Interview]. According to Planned Parenthood, the cost of an abortion in the first trimester can range from $300 to $950. *See In-Clinic Abortion Procedures*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.asp (last visited Feb. 5, 2013). Although costs may vary by locality, the cost may go up weekly after the first trimester. Gutierrez Interview, *supra* note 198. Furthermore, abortion procedure costs may be even higher in hospitals—in situations where no public clinic is accessible. *Id*. One author found that "in the best case scenario," a female inmate could pay for a first-trimester abortion after working forty hours a week for six-and-a-half weeks. Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUDIES 353, 360 (2004).

a meaningful flow of income or access to financial support.[199] Even outside of prison, over sixty percent of women who had postponed abortions attributed the delays to "the time it took to make arrangements and raise money."[200] Thus, while the precise effect of federal abortion policies on female prisoners is unknown, it is not unlikely these policies operate to create insurmountable practical and financial impediment on inmates' right to abortion.

Prisoners under federal jurisdiction are also faced with custodial complications and barriers imposed by personnel. The events that occurred in *Gibson v. Matthews*[201] show the federal policy in action. Charged with a federal crime, Gibson was physically detained by the county and moved several times during her detention.[202] She pled to jail nurses and a female officer for help was referred to the federal marshals—all the while, receiving no abortion.[203] Despite repeated requests to "virtually everyone she came in contact with," Gibson hit roadblock denials at every turn.[204] Eventually, the delays proved too much. By the time she was able to see a physician assistant, she was too far along for the procedure.[205] Gibson's case is not necessarily an outlier, illustrating that the federal policies regarding abortion in prison become malleable on the ground.

2. Laws at the State & Local Level

Because no national standard exists as to an incarcerated woman's right to an abortion, female prisoners experience varying levels of reproductive freedom at the state and local level. Indeed, reproductive health statutes and policies at the state level range from ostensibly comprehensive to virtually non-existent. Over half of the states and the District of Columbia have pregnancy-specific policies in prisons.[206] Of those states, twenty-one speak to pregnancy whether carried to term or aborted,[207] while two states have administrative

---

199. *See* NARAL PRO-CHOICE AMERICA, FACT SHEET: ABORTION FUNDING RESTRICTIONS (2012) at 1-2, *available at* http://www.prochoiceamerica.org/media/fact-sheets/abortion-funding-restrictions.pdf (discussing the devastating effects of funding restrictions on minority women based on the strong connection between race and economic disadvantage).

200. GUTTMACHER INSTITUTE, FACTS IN BRIEF: FACTS ON INDUCED ABORTION IN THE UNITED STATES (2011), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.html.

201. 926 F.2d 532 (6th Cir. 1991).

202. *Id.* at 533.

203. *Id.* at 534.

204. *Id.* at. 533-34.

205. *Id.* at 534.

206. *State Standards*, *supra* note 168.

207. *See id.* (finding Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Idaho, Kansas, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and Washington to have standards mentioning health care for pregnant women who wish to carry their pregnancies to term and those who wish to terminate their pregnancies).

regulations that address termination options only.[208] Meanwhile, thirteen states have policies that pertain only to prenatal care, remaining silent on abortion.[209] In eight states, no relevant pregnancy or reproductive healthcare provisions for women in prison exist on the books.[210]

However, the fact that a state has an abortion policy or relevant healthcare standard does not necessarily mean that incarcerated women's reproductive interests are protected. In part, state abortion policies depend on state abortion law, which hinges on the politics of the locality.[211] Thus, state-specific laws restricting abortion access—like mandatory waiting periods and physician consent requirements—are applicable to female inmates.[212] However, as the legal landscape stands, it is unclear whether state abortion laws are a floor or a ceiling for prison and jail abortion policies.[213]

Of course, in those states without abortion and pregnancy-related health standards, reproductive choice procedures vary facility-by-facility—whether through a written policy (by its administrators) or through unwritten, "on-the-ground" practices (of its employees). Indeed, "[t]he lack of written policy in many states means that women may be subject to different practices depending on the prison to which they have been sentenced."[214] In most cases, the inmates' freedom of choice rests entirely in the hands of correctional facility actors.[215] To get an abortion, or even an initial appointment, female inmates may have to negotiate with guards, administrators, and medical staff.[216] Thus, in the absence of controlling state law, facility policies are free to remain either silent or unclear on abortion procedures, leaving inmates to the whim of

---

208. *See id.* (finding the Illinois and Minnesota policies did not contain standards for pregnancy-related health care).

209. *See id.* (finding Arizona, Connecticut, Florida, Indiana, Maine, Michigan, New Mexico, New York, North Carolina, Tennessee, Utah, Vermont, and Virginia to have policies that cover pre-natal care, but do not provide standards for abortion access). Only eleven of those fourteen are comprehensive as to what that care entails. *See id*. (finding Arizona, Maine, and Tennessee to have policies that "merely note that inmates do not have to pay for pregnancy testing and/or pregnancy care, without any further details regarding what that care entails").

210. *See id.* (unable to locate reproductive-specific correctional standards for Georgia, Iowa, Missouri, Nebraska, South Carolina, Wisconsin, and Wyoming).

211. Budnitz, *supra* note 43, at 1299. For example, in states with mandatory waiting periods, prisoners may need to make two trips outside the facility. Roth, *supra* note 198, at 371.

212. Colum. Hum. Rts. L. Rev., *Chapter 41: Special Issues of Women Prisoners*, *in* A JAILHOUSE LAWYER'S MANUAL 7 (2011), *available at* http://www3.law.columbia.edu/hrlr/jlm/chapter-41.pdf.

213. *See id.* (finding uncertain "whether prisons are allowed to impose additional restrictions on a prisoner's right to get an abortion, or whether the prisoner has the same rights as any other"). Some states—like California, for example—have codes stipulating that female prisoners retain the same abortion rights as non-incarcerated women in the state. *Id.*

214. LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *supra* note 178.

215. Johnson, *supra* note 175, at 657.

216. Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women*, 18 UCLA WOMEN'S L.J. 79, 87-90 (2010).

correctional facility employees, whose personal ethos on the issue[217] or mere ignorance of the law[218] may result in undue delays or outright denials.[219]

Whether facilities have official or unofficial policies, ministerial hurdles often pervade the procedural process. For example, some states have judicial-permission requirements.[220] By mandating a court order, these penal policies involve additional actors outside of the prison infrastructure—such as lawyers and judges—and impose further administrative burdens—such as drafting and filing motions as well as scheduling hearings.[221] The consequence of these requirements is, of course, further postponement of the procedure.[222]

Even in the absence of a court-order requirement, other practical obstacles incident to the hierarchical and fragmented nature of intra-prison communication can make obtaining the abortion exceedingly difficult.[223] In *Bryant v. Maffucci*,[224] for example, an inmate made "almost daily requests" to medical and correctional staff members, yet her procedure was delayed until she was twenty-four weeks pregnant.[225] At that point, being too late in the pregnancy, the hospital refused to give her an abortion.[226] Thus, whether a prison's "normal procedure guarantees female inmates . . . their right to choose

---

217. "For example, a prison official might announce that no inmates could obtain abortions because carrying the child to term was more rehabilitative to women." *See* Budnitz, *supra* note 43, at 1327 (arguing that gender and personal ideological beliefs may influence wardens and prison officials in decisions pertaining to inmate abortion policies).

218. Roth, *supra* note 216, at 89-90. What is more, "women who don't know they have a right to access abortion services while incarcerated may not seek such care at all." LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *supra* note 178.

219. Indeed, delays and denials at the hands of prison staff occur even when state laws protect incarcerated women's reproductive rights. *See generally* Alexandria Gutierrez, *Prisoner of Her Own Body: The Dichotomy of Theory and Practice for the Reproductive Rights of Incarcerated Women*, 1 NW. INTERDISC. L. REV. 137 (2008).

220. For a comprehensive discussion of state court-order policies, *see* Angela Thomas, Note, *Inmate Access to Elective Abortion: Social Policy, Medicine and the Law*, 19 HEALTH MATRIX 539 (2009).

221. *Id.* at 548.

222. The size of a judge's docket, among other things, can create scheduling troubles. *See id.*

223. *See, e.g.*, *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991). After being denied an abortion, the inmate was placed on suicide watch to prevent her from terminating her own pregnancy. *Id.* at 981-82. The Second Circuit held that the inmate failed to establish that the delay of procedure did not amount to "deliberate indifference" of her constitutional rights. *See id.* at 988 ("[I]t appears from the uncontested facts that the normal procedure guarantees female inmates at the correctional facility their right to choose to terminate their pregnancies. The hardship appellant experienced was an isolated incident that may well have denied her due care while incarcerated, but did not deny her right to due process.").

224. *Id.*

225. *See id.* at 980-81.

226. *Id.* at 981.

to terminate their pregnancies," inmates' requests may still fall on deaf ears and effectively bar them from abortion access altogether.[227]

As is the case at the federal level, women detained at the state level are encumbered by restrictive funding policies. Many states mandate that women pay for transportation, the procedure itself, or both.[228] Often, policies require that inmates make the arrangements on their own,[229] which likely entails frequent use of a telephone to coordinate both the scheduling of the appointment and the solicitation of funds to pay for the procedure. Faced with restrictions on phone use and the high costs associated with inmate to non-inmate phone communication, incarcerated women will undoubtedly find such tasks to be difficult.[230] Furthermore, additional factors like the stage of the pregnancy[231] and the penal facility's proximity to an abortion provider can exacerbate logistical hurdles, raising costs even higher.[232]

---

227. A 2007 interview with the Deputy Director for all women's prisons in the state of Illinois reveals the apparent unlikelihood that inmates' abortion requests are fully realized. Phone Interview with Debbie Denning, Deputy Director of Women and Family Services, Jan. 31, 2007 [*hereinafter* Denning Interview]. At the time of the interview, Denning had been in her position for four years. *Id*. During this time, she stipulated that not one woman had ever sought to terminate her pregnancy. *Id.* This statement was curious at the time, considering the rate of induced abortions was about 20% among pregnancies nationwide. *Abortion, Birth Control & Pregnancy*, PLANNED PARENTHOOD, 2006, *available at* http://www.plannedparenthood.org/birth-control-pregnancy/abortion-4260.htm2006. When asked why, of the 2700 imprisoned women in the state of Illinois, not a single one has asked for abortion in the past four years, Denning responded, "Most women are raised to be nurturers." Denning Interview, *supra*. The Deputy said that all "medically necessary" procedures were paid for by the state; however, in her official capacity, she felt that abortion procedures do not fall into that category. *Id.* Although no woman had exercised her right to an abortion in the past four years, Denning said general protocol did exist. *Id.* Prisoners were required to see a doctor and receive counseling as a prerequisite to the procedure. *Id.* Additionally, women must pay for the procedure, the transportation, and the mandatory two-guard security. *Id.* On a side note, Denning said she does not force any guards to take part in this endeavor, as they might be morally opposed to abortion; the guards voluntarily assist in transporting women to abortion clinics. *Id.*

228. Only six states and the District of Columbia have prison policies that fund both therapeutic and medically-necessary abortions. LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *supra* note 178. A whopping nineteen states fund only medically necessary procedures. *Id.* In one case, the fee imposed for transportation was $100. Roth, *supra* note 198, at 364. "In what sounds suspiciously like a double standard, the prison does not have guards take women to the clinic as part of their regular day's work; rather, a guard must be willing to 'moonlight' on a Saturday for the $100." *Id.*

229. *See, e.g., Victoria W. v. Larpenter*, 369 F.3d 475, 479 (5th Cir. 2005) ("[the prison medical administrator] also allowed [inmate] to contact various abortion clinics for scheduling and pricing purposes.")

230. For a look at the general costs of phone use for prisoners, see Peter R. Shults, Note, *Calling the Supreme Court: Prisoners' Constitutional Right to Telephone Use*, 92 B.U. L. REV. 369 (2012).

231. For example, prison officials in Louisiana told one inmate, "[I]t it will be necessary for you to contact an attorney so that arrangements can be made with the Correctional Department to have you transferred to a hospital where such a procedure can be performed . . . . Additionally, you should be advised that . . . you will be responsible for the costs of a guard who has to go and

C. The Constitutionality of Penal Abortion Restrictions: A Circuit Split[233]

1. Challenges Under the Fourteenth Amendment: the Turner Test

When inmates challenge restrictive or prohibitive abortion polices or practices, they typically argue that the state has violated their due process rights under the Fourteenth Amendment. In these cases, courts use the *Turner v. Safley*[234] standard to determine the constitutionality of the policy.[235] Under the *Turner* test, a court will uphold a prison regulation impinging on the constitutional rights of inmates if it is "reasonably related to legitimate penological interests."[236] This inquiry is advanced through a four-part balancing test that considers: (1) whether a "valid, rational connection" between the prison regulation and the legitimate government interest exists;[237] (2) whether "alternatives means" are available for exercising the right at issue;[238] (3) the "impact accommodation," or the ramifications on prison staff and fellow inmates;[239] and (4) whether the alternative can be achieved at a minimum cost to the prison's valid penological interests.[240]

---

stay with you while the procedure is being performed and during any hospital stay you may incur as a result of this procedure." *See Larpenter*, 369 F.3d at 479 (5th Cir. 2005).

232. *See, e.g.*, *id.* ("The closest facility that could perform an abortion was in New Orleans, about an hour away from the Parish . . . . Victoria could not obtain an abortion locally; she would need to be transported to New Orleans.").

233. *See supra* note 45 and accompanying text. Some consider the Sixth Circuit's holding in *Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991), to be a part of the "circuit split." *See, e.g.,* Johnson, *supra* note 175, at 657. In *Gibson*, an inmate brought a § 1983 suit against various officials, some unnamed, for failure to provide her with an abortion. *See Gibson*, 926 F.2d at 534 (6th Cir. 1991). The Sixth Circuit granted summary judgment in favor of defendants, finding the actors were entitled to qualified immunity. *Id.* at 536. Although the court goes on to say that the inmate's constitutional rights were not violated under the Eighth Amendment, in any event, the court did not apply the *Turner* standard. *See id*.

234. *Turner v. Safley*, 482 U.S. 78, 85 (1987). A watershed prisoners' rights case, *Turner* attempts to balance the needs of the government and the constitutional rights of the prisoner.

235. *See, e.g., Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Larpenter*, 369 F.3d 475; *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008).

236. *Turner*, 482 U.S. at 89.

237. *Id.* Under this prong of the *Turner* test, a regulation cannot be sustained if the connection between the policy and the proffered penological interest is so remote as to render the policy "arbitrary or irrational." *Id.* at 89-90.

238. *Id.* at 90. Under the second prong of the *Turner* test, in determining the validity of the policy, courts should be especially mindful of the "measure of judicial deference owed to corrections officials." *Id.* (citing *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

239. *Id.* at 89. Under the third prong of the *Turner* test, courts are advised to, again, be "particularly deferential to the informed discretion of corrections officials." *Id.*

240. *Id.* Under the fourth prong of the *Turner* test, the lack of a ready alternative is evidence of the reasonableness of the policy. *Id.* In the same vein, the presence of an "obvious, easy" alternative may be evidence that the regulation is unreasonable. *Id.* Still, the Court did not intend to impose a "least restrictive alternative test." *Id.* Thus, prison policymakers do not have to consider every conceivable means of accommodating prisoner's constitutional rights. *Id.* at 90-91.

Applied to incarcerated women's reproductive rights, the *Turner* balancing test has yielded varying results. The Third[241] and Eighth Circuits[242] have struck down restrictive abortion policies under *Turner*; while the Fifth Circuit[243] has upheld a similar policy as constitutional. For example, in *Monmouth County Correctional Institution Inmates v. Lanzaro*, inmates successfully used *Turner* to challenge the County's policy that required inmates to obtain a court order and to pay for elective abortion procedures.[244] First, the court found no "valid, rational connection" between the regulation and the penological interest proffered to justify it.[245] Second, the court found that no other avenues were available for the inmates: "court-ordered release on their own recognizance is virtually impossible, and no abortions may be performed at the prison facility."[246] Third, considering "the impact accommodation" on guards, other inmates, and on prison resources generally,[247] the court found no valid reason for the County's refusal to make accommodations since facilitating an elective abortion was no more cumbersome than facilitating a medically-necessary one (and undoubtedly less than providing resources for inmates

241. *See Monmouth Cnty. Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

242. *See Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008).

243. *See Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2005).

244. *See Lanzaro*, 834 F.2d 326, 334, 330 (3d Cir. 1987) ("MCCI inmates contend that the County's policy. . .impedes their freedom safely to choose abortion and impermissibly delays the exercise of that choice.").

245. *Id.* at 338. The court found it important that the County made no distinction in its court order requirement based on the inmate's security status. *Id.* Furthermore, because inmates were not required to obtain a court order for other medically elective procedures, the Third Circuit agreed with the District Court that "inmates who wish to have an abortion pose no greater security risk than any other inmate who requires outside medical attention." *Id.*

246. *Id.* at 339. Important to the court was the fact that a woman's right to terminate her pregnancy is both time sensitive and procedure-specific, noting that inmates faced an "unconstitutional risk of delay" under the MCCI court-ordered release requirement. *Id.* These inmates would "have no viable alternative available for the free and safe exercise of their choice to terminate their pregnancies." *Id.* In its analysis, the Third Circuit relied on a number of pre-*Casey* Supreme Court rulings invalidating state-imposed delays on access to abortion. *See id*. at 339. For example, the court cites *City of Akron v. Akron Ctr. for Repro. Health, Inc.*, 462 U.S. 416 (1983), which found mandatory twenty-four hour waiting periods to be unconstitutional. *Lanzaro*, 834 F.2d at 339. Akron was struck down by the Supreme Court in 1992. *See Planned Parenthood v. Casey*, 505 U.S. 833, 838-39 (1992) (upholding a state-imposed twenty-four hour waiting period, although such restriction "may make some abortions more expensive and less convenient."). The Third Circuit noted that a "plethora of cases" at the time had "reiterated with little variation" the heightened health risks associated with abortion delays. *Lanzaro*, 834 F.2d at 339 (citing *Zbaraz v. Hartigan*, 736 F.2d 1532, 1536 (7th Cir. 1985)). However, in light of *Casey*, considerations regarding the effects of delays on an inmate's right to terminate her pregnancy may not be as important. The idea that "time is of the essence" when it comes to abortion decisions, *H.L. v. Matheson*, 450 U.S. 398, 412 (1981), was not demonstrated in the Fifth Circuit's analysis in *Larpenter*. *See id*. at 490 n.52 ("However, while an abortion is time-sensitive and unique in its constitutional protection, . . . [t]he constitutional right to choose to abort one's pregnancy does not necessarily categorize it as an emergency.").

247. *Lanzaro*, 834 F.2d at 340. Here, the court considered the anticipated costs associated with providing access to abortion for inmates. *Id.*

during pregnancy and delivery).[248] Lastly, the court determined that the policy was an "exaggerated response" to its financial, administrative, and security concerns because providing access to the procedure would be no more disruptive than other medical services already provided.[249] Thus, based on its application of *Turner*, the Third Circuit ultimately determined that the MCCI policy did not pass constitutional muster.[250]

However, in *Victoria W. v. Larpenter*, when a former inmate challenged the constitutionality of a Louisiana policy[251] requiring inmates to obtain court-ordered release for elective abortions, the Fifth circuit upheld the policy as constitutional under *Turner*.[252] Under the first prong, the court found a "valid, rational connection" between the court order requirement for "non-emergency medical procedures performed outside of the prison" and the legitimate penological interests of inmate security, preserving prison resources, and avoiding unnecessary liability.[253] While the court did not explicitly address the second "alternative means" prong, inmates were not able to receive elective abortions at the prison.[254] In assessing the impact of accommodation under the third prong, the court rejected claimant-inmate's argument that "the prison would have lost no resources by transporting her to the abortion clinic because she was willing to pay for the procedure and the cost of the guard,"[255] finding this argument ignored "the fact that the prison is still either short-handed or out the cost of added personnel."[256] On the final prong, the court found claimant

---

248. *Id.* at 343-44.

249. *Id.* at 344 .

250. Johnson, *supra* note 175, at 661-62.

251. Although the disputed policy was "unwritten" in the sense that it did not mention abortion explicitly, the prison's medical administrator insisted that the court-order requirement applied to all elective medical procedures. *Victoria W. v. Larpenter*, 369 F.3d 475, 479 (5th Cir. 2005). In the event an inmate was judicially permitted to obtain an abortion, she would have to pay for the procedure, the cost of the guard to escort her, and any associated hospital fees she incurred. *Id*. at 480.

252. *See id.* at 485 ("We are persuaded that the policy of requiring judicial approval of elective medical procedures is here reasonably related to legitimate penological interests."). Victoria W. was incarcerated after her probation was revoked for simple battery. *Id*. at 478. Upon entering prison, a physical examination revealed that she was pregnant. *Id.* Within the first few days of her detention, she received prenatal care for which no court order was required. *Id.* During her gynecological examinations, an ultrasound showed her to be approximately fifteen weeks pregnant. *Id*. Pursuant to the Louisiana policy, prison officials informed her that she would have to obtain a court order. *Id*. Various procedural roadblocks delayed Victoria W.'s appearance in court to obtain her order. *Id*. at 478-80. By this time, she was "too late . . . to obtain a legal abortion in Louisiana." *Id.* at 480. She eventually gave birth and put the baby up for adoption. *Id*.

253. *Id.* at 485-86

254. *Id.* at 479 ("It is also undisputed that Victoria could not obtain an abortion locally; she would need to be transported to New Orleans.").

255. *Id.* at 487.

256. *Id.* Furthermore, the court said by limiting the number of inmate trips off-site, the policy conserved prison resources associated with the transport and potential liability stemming from a possible escape during transport. *Id.*

had not shown "an alternative that fully accommodates the prisoners' rights at de minimis cost to valid penological interests."[257] Accordingly, the Fifth Circuit concluded that the four *Turner* factors, taken together, supported the constitutionality of the Louisiana policy.[258]

2. *Problems with the Relying on the Turner Test to Guarantee Prisoners' Abortion Rights*

Analyzing prisoners' reproductive rights through the *Turner* lens is problematic for several reasons. First and foremost, the *Turner* balancing test is incredibly deferential to prison administrators.[259] On one hand, the prison's proffered concerns—like cost or security—are accorded a presumption of legitimacy.[260] While courts have been reluctant to find cost alone to be determinative in *Turner* balancing,[261] security concerns are a sufficient

---

257. *Id.* (citing *Turner v. Safely*, 482 U.S. 78, 91 (1987)). Claimant argued that the elective medical procedure policy could have been modified to exclude abortions. *Id.*. This alternative, however, did not address the prison's liability concerns. *Id*. Further, because *Turner* does not contemplate a "least restrictive means" test, the court did not find the existence of this alternative to be dispositive. *Id.* (citing *Turner*, 482 U.S. at 90-91).

258. Johnson, *supra* note 175, at 664.

259. The Court has consistently applied the four-part test to assess the constitutionality of a variety of prison policies, including correspondence, access to courts, and publication subscriptions. *See Shaw v. Murphy*, 532 U.S. 223 (2001) (rejecting that inmate had a First Amendment right to provide legal assistance to fellow inmates); *Lewis v. Casey*, 518 U.S. 343 (1996) (rejecting various challenges alleging the inadequacy of the legal research facilities violated inmates' due process rights); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (finding Federal Bureau of Prison policy of regulating incoming publications to pass constitutional muster under *Turner*). However, the test has been criticized for being too deferential to prison officials, and for not taking into account the importance of the prisoner's right or interest at stake. *See, e.g.*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 354-57 (1987) (Brennan, J. dissenting). In his dissent, Justice Brennan rejects the use of a single standard for reviewing prisoners' constitutional challenges to prison policies. *Id.* at 365. Based on Judge Kaufman's approach in *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir. 1985), Brennan argued that the degree of judicial scrutiny should depend on "the nature of the right being asserted." *O'Lone*, 482 U.S. at 358. This approach, he contends, is "better suited" to protecting the constitutional rights of inmates. *Id.*

260. *See, e.g., Monmouth Cnty. Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008). Query whether these concerns are legitimate. One ACLU attorney sensed that it is political animus against abortion and personal anti-choice sentiments that influence the decisions of these officials. Phone Interview with Brigitte Amiri, Staff Attorney, Reproductive Freedom Project, American Civil Liberties Union, (Dec. 18, 2006). She pointed out that transportation is typically provided for other medical services, visits to see dying relatives, and trips to cosmetology examination centers. *Id.* Having represented Plaintiffs in *Doe v. Arpaio*, Amiri discussed how the sheriff politicized the dispute by deliberately denying the abortion and publicly attacking the ACLU. *Id.* In what seemed to be a pro-life crusade, the sheriff said that his jail "would not become an abortion clinic." *Id.*

261. *See, e.g.*, *Lanzaro*, 834 F.2d at 336 (rejecting state's proffered interest of "unspecified, yet insurmountable, administrative and financial burdens [that] will result if the County is required to provide access to and funding for elective, nontherapeutic abortions" as legitimate).

penological interest.[262] On the other hand, *Turner* allows courts to treat the reproductive rights of inmates as a static factor—affording no extra weight despite unique physical exigencies or economic hardships associated with the pregnancy.[263] Thus, because *Turner* liberally grants deference to prison administrators (in an already highly discretionary zone)[264] while rigidly conceptualizing the right to abortion,[265] the precedential test is ill-suited to protect prisoners' reproductive rights.

Furthermore, review under *Turner* may permit a paradoxical scenario whereby facilities are able to grant inmates lesser reproductive rights so long as they are consistently repressive in their healthcare policies. For example, in upholding the court order requirement in *Victoria W.*, the Fifth Circuit distinguished the policy at issue, which governed *all* elective medical procedures, from the policy upheld in *Monmouth*, which applied *only to*

---

262. *See, e.g. Victoria W. v. Larpenter*, 369 F.3d 475, 486 (5th Cir. 2005) (finding inmate security and avoiding unnecessary liability to be legitimate government interests); Doe v. Arpaio, 150 P.3d 1258, 1263 (Ariz. Ct. App. 2007) ("We recognize that the County may have a legitimate security interest in keeping the number of inmate transports to a minimum."). Dissenting in *Turner*, Justice Stevens said the standard seems "to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern." *Turner v. Safely*, 482 U.S. 78, 100-01 (1987) (Stevens, J. dissenting). To be sure, the Supreme Court has long held that internal safety of detention facilities is a legitimate governmental interest. *Block v. Rutherford*, 468 U.S. 576, 586 (1984).

263. As one scholar pointed out, *Turner* does not afford a distinct analysis for the application of restrictive polices in unique situations. *See* Budnitz, *supra* note 43, at 1327-28. Indeed, all convicted inmates with non-life threatening pregnancies may be considered similarly situated irrespective of the context of the pregnancy (whether the inmate enters pregnant or the pregnancy is the product of rape by a guard); regardless of the stage of the pregnancy (whether or not an expedited track is required); and without consideration of the inmate's specific correctional circumstances (whether she is detained in a minimum or maximum security facility, on death row, or in administrative isolation). *Id.*

264. The nature and extent of this problem are demonstrated in the facts of *Victoria W. v. Larpenter*. *See supra* note 252 and accompanying text.

265. One might argue that because the constitutional test is the same under *Turner* regardless of the context of the pregnancy, *see supra* note 250, the use of the test flies in the face of abortion jurisprudence at large. *See Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (articulating the "undue burden" standard). The court determined an undue burden exists where a law has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id*. Applying the undue burden standard, the Court upheld various state restrictions to abortion while striking down the state's spousal notification requirement. *Id*. at 837-39. Because spousal notifications imposed "substantial obstacles" and would likely "prevent a significant number of women from obtaining an abortion," the Court held the law unconstitutional. *Id*. at 893-94. In essence, the Court expressed a willingness to invalidate restrictive abortion laws that had the effect of outlawing abortion altogether. *Id*. While the Court has only struck down two abortion laws under the undue burden standard, *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and *Stenberg v. Carhart*, 530 U.S. 914 (2000), lower courts have remained open to the potential flexible understanding of what constitutes an "undue burden." *See, e.g.*, *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002) ("This is not to say that a two-visit requirement *could not* create a burden comparable to a spousal-notice requirement.").

abortions.[266] Indeed, the Supreme Court of Arizona hung its hat on this distinction when striking down a county's court-order requirement for elective abortions in *Doe v. Arpaio*.[267] In *Doe*, because the county frequently transported inmates off-site for other non-emergency reasons, the court found the policy lacked a "logical connection" to legitimate penological interests.[268] By extension of this logic, a correctional facility need only employ a policy that uniformly limits all elective procedures in order to restrict inmates' access to elective abortions and still withstand constitutional scrutiny under *Turner*.

3. Challenges Under the Eight Amendment: The Estelle Test

In the alternative, claimant-inmates also argue that restrictive abortion policies violate their Eighth Amendment right to be free from "cruel and unusual punishment."[269] Beyond protecting prisoners against the "unnecessary and wanton" infliction of pain without sufficient penological justification,[270] the Eighth Amendment also guarantees prisoners a fundamental right to adequate medical care.[271] In the paradigmatic case, *Estelle v. Gamble*, the Supreme Court articulated a two-part test to determine when withholding medical care from prisoners amounts to "cruel and unusual punishment."[272] To state an Eighth Amendment claim, an inmate much show the correctional actor exhibited (1) a "deliberate indifference" toward her (2) "serious medical need."[273] Regarding the first prong, a prison guard might show deliberate indifference by "intentionally denying or delaying access to medical care" or by "intentionally interfering with the treatment once proscribed."[274] As for the

---

266. Johnson, *supra* note 175, at 664.

267. *See Arpaio*, 150 P.3d 1258.

268. *Id.* at 1263. For example, the court pointed out that Maricopa County frequent transported inmates for "court appearances, compassionate visits (visits with dying family members or for funeral services), and for non-emergency medical care" notwithstanding the absence of a court order. *Id.*

269. *See, e.g., Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2005); *Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991); *and Monmouth Cnty. Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

270. *Wilson v. Seiter*, 501 U.S. 294 (1991) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

271. Johnson, *supra* note 175, at 658.

272. *Lanzaro*, 834 F.2d at 346.

273. Budnitz, *supra* note 43, at 1322.

274. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). A prison doctor can exhibit "deliberate indifference" by treating an inmate with penicillin knowing the inmate is allergic, *see Thomas v. Cannon*, 419 U.S. 879 (1974); by refusing to administer pain killers during leg surgery, *see Martinez v. Mancusi*, 443 F.2d 921 (2d Cir. 1970); or by refusing to provide treatment altogether, *see Jones v. Lockhart*, 484 F.2d 1992 (8th Cir. 1973). For a more detailed discussion regarding the jurisprudential developments on the meaning of "deliberate indifference," *see* Charles, *supra* note 162, at 2002-04.

second prong, the Court left open to lower courts to determine what constitutes a "serious medical need."[275]

Like cases employing the *Turner* analysis, judicial application of *Estelle* has resulted in a circuit split. The Third Circuit[276] has found failure to provide abortion to be violative of the Eighth Amendment, while the Fifth,[277] Sixth,[278] and Eighth[279] have rejected this argument. For example, in examining a prohibition on elective abortions, the Third Circuit in *Monmouth* found the penal policy to be violative of the Eighth Amendment under *Estelle*. On the second prong, the court found that pregnancy was a "serious medical need."[280] The court noted:

Pregnancy is unique. There is no other medical condition known to this Court that involves at the threshold an election of options that thereafter determines the nature of the necessary medical care. In other words, the condition of pregnancy, unlike cancer, a broken arm or a dental cavity, will require very separate and distinct medical treatment depending upon the option—childbirth or abortion—that the woman elects to pursue.[281]

Based on its analysis of the seriousness of the medical need, namely the potential for irreparable physical and psychological damage, the court found

---

275. Budnitz, *supra* note 43, at 1322. *See, e.g., Smith-Bey v. Hosp. Adm'r*, 841 F.2d 751 759-60 (7th Cir. 1988) (finding a broken nose to be a "serious medical need"); *East v. Lemons*, 768 F.2d 1000, 1000-01 (8th Cir. 1985) (finding severe muscle cramps to be a "serious medical need"); *Loe v. Armistead*, 582 F.2d 1291, 1296 (4th Cir. 1978) (determining a "serious medical need" to cover a broken arm).

276. *See Lanzaro*, 834 F.2d at 349(finding inmates met their burden of showing "that the *categorical* denial of elective, nontherapeutic abortions constitutes deliberate indifference to serious medical needs under both prongs of *Estelle"* (emphasis added)).

277. *Victoria W. v. Larpenter*, 369 F.3d 475, 489 (5th Cir. 2005) (finding inmate did not show "deliberate indifference" to support an Eighth Amendment claim).

278. In *Gibson v. Matthews*, 926 F.2d 532, 536 (6th Cir. 1991), the Sixth Circuit granted summary judgment in favor of defendants, finding the actors were entitled to qualified immunity. However, the court went on to reject inmate's Eighth Amendment challenge. *See id*. at 537 ("Even if we presume that the defendants should have known before *Monmouth* that an abortion was a "serious medical need" within the meaning of *Estelle,* we do not see how the defendants' actions could be viewed as "deliberate indifference" to that need."). The Sixth Circuit found that inmate's inability to receive an abortion was "in large part due to the delay in transporting her to the Lexington facility, actions beyond the control of the defendants." *Id*.

279. *See Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008) (finding "an elective, non-therapeutic abortion does not constitute a serious medical need" and that a prison official's "refusal to provide an inmate with access to an elective, nontherapeutic abortion does not rise to the level of deliberate indifference to constitute an Eighth Amendment violation"). This analysis, however, was after the court, applying *Turner*, struck down the policy as unconstitutional. *Id.*

280. *Lanzaro*, 834 F.2d at348. Additionally, the court found the County's characterization of the abortion as "elective" was not controlling under the *Estelle* formulation. *Id.*

281. *Id.* (finding the "fact that pregnancy presents a woman with the alternatives of childbirth or abortion affect the legal characterization of the nature of the medical treatment necessary to pursue either alternative" did not place the medical condition beyond the reach of *Estelle*).

that the categorical ban on elective abortion amounted an Eighth Amendment violation.[282]

However, in *Victoria W. v. Larpenter*, the Fifth Circuit applied *Estelle* to reject that a similarly restrictive penal abortion policy violated the Eighth Amendment.[283] The court first examined whether the policy was "promulgated with deliberate indifference to its known or obvious consequences."[284] The court did not find "deliberate indifference" because the prison provided Victoria W.—allegedly the first female inmate to request an abortion—with prenatal care, information on the court order policy, and multiple opportunities to contact her attorney.[285] The court did not address the seriousness of the injury under prong one of *Estelle*,[286] finding the absence of "deliberate indifference" sufficient to deny the inmate's Eighth Amendment claim.[287]

4. Problems with Relying on the Eighth Amendment to Vindicate Inmates' Reproductive Rights

Advocates should not rely on the Eighth Amendment to protect incarcerated women's reproductive rights. While theoretically appealing, the prisoners' abortion rights jurisprudence overwhelmingly shows the Eighth Amendment defense is difficult to make.[288] In *Roe v. Crawford*, the Eighth Circuit specifically pointed out that the Third Circuit in *Monmouth*—which stands alone in striking down a restrictive penal abortion policy on Eighth Amendment grounds[289]—was split on the interpretation of "serious medical need."[290] Specifically, the Eight Circuit noted that the *Monmouth* concurrence "stopped short" of adopting the majority's broad assumption that the Eighth

---

282. *See id.* at 349.

283. *Victoria W. v. Larpenter*, 369 F.3d 475, 489 (5th Cir. 2005).

284. *See id.* at 489-90; Johnson, *supra* note 175, at 665.

285. *Larpenter*, 369 F.3d at 489-90; Johnson, *supra* note 175, at 665. In a sense, the Fifth Circuit in *Victoria W.* applauded the prison for doing its best to handle what was deemed a rare situation. Query whether a facility's willful ignorance of the occurrence of pregnancy amongst its female inmates might strengthen its case for justifying abortion bans or delays.

286. The prison's policy governing medical emergencies—those procedures for which a court order is not required—did not apply to elective abortions. *See Larpenter*, 369 F.3d at 479 ("The policy governing emergency medical situations enumerates examples, including severe internal/external hemorrhage, loss of consciousness, difficult or labored breathing, heat stroke, chest pains, labor pains less than seven minutes apart, and excessive vaginal bleeding.").

287. Johnson, *supra* note 175, at 665.

288. *See, e.g., Roe v. Crawford*, 514 F.3d 789, 801 (8th Cir. 2008) (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions), *and Larpenter*, 369 F.3d at 489 (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions). Even within the same courts, judges are divided on the issue. *Compare Monmouth Cnty. Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 347-49 (3d Cir. 1987) (finding the Eighth Amendments does protect pregnant inmates' right to elective abortions) *with id*. at 355 (Mansmann, J., concurring) (disagreeing).

289. *See supra* note 44.

290. *See Crawford*, 514 F.3d at 800 (8th Cir. 2008); *Lanzaro*, 834 F.2d at 355 (Mansmann, J., concurring).

Amendment is implicated "merely because abortion is a medical procedure."[291] Furthermore, courts are more likely to attribute delays in an inmate's abortion access to bureaucratic blunders than to "deliberate indifference."[292] As the Eighth Amendment has proven largely fruitless in guarding incarcerated women's reproductive rights,[293] it behooves advocates to seek alternative constitutional arguments.

IV. ARGUMENT: THE THIRTEENTH AMENDMENT DEFENSE OF PRISONERS' RIGHT TO ABORTION

Because the Fourteenth and Eighth Amendments have proven inadequate protectors of incarcerated women's reproductive rights, and because the Supreme Court has not yet addressed the issue, this Article argues that advocates should consider an alternative approach proceeding under the Thirteenth Amendment. The Thirteenth Amendment provides, "[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[294] Despite its punishment exception, the Amendment is a universal prohibition of slavery. Because the right to be free from slavery is retained during incarceration, female inmates subjected to conditions tantamount to slavery have a cognizable Thirteenth Amendment claim. This Article argues that policies banning abortion, or having the effect of forcing women to reproductively labor in prison, impose a condition of servitude that is markedly akin to slavery. Since this type of labor does not fall into the "involuntary servitude" punishment exception, such policies violate inmates' Thirteenth Amendment right to be free from slavery.

---

291. Likewise, the Eight Circuit was unwilling to make the "quantum leap to the conclusion that a state's refusal affirmatively to provide elective abortions to female prisoners constitutes cruel and unusual punishment." *Crawford*, 514 F.3d at 800.

292. *See, e.g., Bryant v. Maffucci*, 923 F.2d 979, 986 (2d Cir. 1991) (agreeing with the district court that the procedure "did not evidence deliberate indifference to plaintiff's constitutional rights" and finding that "[e]ven if there were an error in the chain that led to the denial of plaintiff's abortion, it was an isolated instance which does not rise to the level of a constitutional violation.").

293. *See, e.g.*, *Crawford*, 514 F.3d at 80008) (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions); *Larpenter*, 369 F.3d at 489 (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions); *Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991) (finding that even if abortion is a "serious medical need," actions of prison actors did not amount to "deliberate indifference" to that need). *But see Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (finding the Eighth Amendments does protect pregnant inmates' right to elective abortions).

294. U.S. CONST. amend. XIII, § 1.

A. The Thirteenth Amendment's Punishment Clause is a Narrow Exception and Does Not Permit the Imposition of "Slavery" in Prison.

A narrow understanding of the punishment exception to permit only involuntary servitude in prison has textual, historic, and jurisprudential support. Fundamentally, a plain reading of the Amendment provides that involuntary servitude may be imposed as a punishment for crime.[295] Indeed, an original proposal by one of the architects of the Thirteenth Amendment, Representative Ashley, implied a difference between slavery and involuntary servitude in the punishment context[296]: "slavery, . . . is forever prohibited in the United States; and involuntary servitude shall be permitted only as punishment for crime."[297] Although Ashley's unambiguous version of the Thirteenth Amendment was not formally adopted, several states whose constitutions speak to this issue specifically modified this language for clarity.[298]

What is more, a narrow reading of the Punishment Clause comports with the common understanding of penal-labor relationship that existed during the drafting of the Thirteenth Amendment.[299] Scholars and judges alike did not question that the Punishment Clause permitted the imposition of servitude in a customary manner,[300] but the exception was understood to have limits. On one hand, laws that "[allowed] the letting of the services of the convicts, . . . [for

---

295. *See Robertson v. Baldwin*, 165 U.S. 275, 292 (1897) (Harlan, J. dissenting) ("As to involuntary servitude, it may exist in the United States; but it can only exist lawfully as a punishment for crime of which the party shall have been duly convicted. Such is the plain reading of the constitution."); *Reynolds*, 235 U.S. at 149 (1914) ("There can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the [Thirteenth] Amendment, and such punishment expressly exception from its terms.").

296. *See* Howe, *supra* note 48, at 994.

297. Ghali, *supra* note 51, at 627.

298. *See, e.g.,* ALA. CONST. art I, § 32 ("That no form of slavery shall exist in this state; and there shall not be any involuntary servitude, otherwise than for the punishment of crime, of which the party shall have been duly convicted"); CAL. CONST. art I, § 6 ("Slavery is prohibited. Involuntary servitude is prohibited except to punish crime."); COLO. CONST. art II, § 26 ("There shall never be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted."); 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."); KAN. BILL OF RIGHTS, § 6 ("There shall be no slavery in this state; and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted."); MICH. CONST. art I, § 32 ("Neither slavery, nor involuntary servitude unless for the punishment of crime, shall ever be tolerated in this state."); N.C. CONST. art I, §17 ("Slavery is forever prohibited. Involuntary servitude, except as a punishment for crime whereof the parties have been adjudged guilty, is forever prohibited."); OHIO CONST. art I, § 6 ("There shall be no slavery in this state; nor involuntary servitude, unless for the punishment of crime."); and R.I. CONST. art I, § 4 ("Slavery shall not be permitted in this state.").

299. "When Congress submitted the Thirteenth Amendment to the States, it must have been aware of generally accepted convict labor policies and practices, and the Court is persuaded that the Amendment's exception manifested a Congressional intent not to reach such policies and practices." *Holt v. Sarver*, 309 F.Supp. 362, 372 (E.D. Ark. 1970).

300. *Thompson v. Bunton*, 22 S.W. 863, 865 (Mo. 1893).

employment] in mechanical trades in or near the prison, and under the surveillance of its officer," were permissible forms of involuntary servitude under the punishment clause. On the other, laws that "placed [the convict] upon an auction block, and sold [him] to the highest bidder" were in disharmony with the constitutional prohibition against slavery and were, therefore, unconstitutional.[301]

Acquiescing to the original limits on prison labor, courts regard slavery and involuntary servitude as dichotomous institutions for Punishment Clause purposes and permit only the latter to exist within the prison walls.[302] Courts have long held that prisoners are not slaves of the state,[303] acknowledging that prisoners retain at least some Thirteenth Amendment protection.[304] Meanwhile, courts have rejected Thirteenth Amendment challenges brought against modern prison labor programs because the work imposed is customary in nature and, therefore, is conceptualized as involuntary servitude.[305] Thus, the Thirteenth

---

301. *Id.* (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 363 (6th ed. 1890)).

302. *See Flannagan v. Jepson*, 158 N.W. 641, 642 (Iowa 1916) ("The very language of the Constitution, which prohibits involuntary servitude and then excepts therefrom involuntary servitude imposed as a punishment for crime, demonstrates that, in the minds of the framers . . . enforced labor as punishment for crime is such servitude, and that the exception was necessary to the continued right of Legislatures and courts to impose it."). *See also* Marion, *supra* note 28, at 223. In early colonial times, imprisonment was not apart of criminal punishment. *Id.* at 215. Detention was pragmatic: jails were holding areas for those awaiting trial or punishment. *Id.* Detained persons were often required to pay a fee for their meals and accommodations. *Id.* at 216. The practice of laboring during incarceration likely came to be as a means for prisoners to offset these holding costs. *Id.* Recovering prisoner housing costs would later become a secondary motive. *Id.* at 217.

303. *See, e.g.*, *Washlefske v. Winston*, 60 F. Supp. 2d 534, 539 (E.D. Va. 1999) ("[T]he idea . . . that inmates are no more than 'slaves of the State,' has been repeatedly and expressly repudiated by other courts.").

304. 2 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 8:1 (4th Ed. 2009) ("The Thirteenth Amendment prohibits involuntary servitude, but a specific exception exists for those duly convicted of crimes. Nonetheless, questions regarding the reach of that exception remain.").

305. *See infra* Part IV.B. Arguably, the fact that modern Thirteenth Amendment challenges to prison labor focus on defining the threshold of "involuntary servitude" presupposes the limited scope of the punishment exception. Indeed, federal courts have generally precluded Thirteenth Amendment challenges to convict labor requirements, presuming the Amendment does not apply to the standard imposition of work. Raghunath, *supra* note 75, at 397. *See, e.g.*, *Ali v. Johnson*, 259 F.3d 317 (5th Cir. 2001) ("[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work."); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (citing *Butler v. Perry*, 240 U.S. 328, 332 (1916)) ("Prison rules may require appellant to work but this is not the sort of involuntary servitude which violates Thirteenth Amendment rights."); *Blass v. Weigel*, 85 F. Supp. 775, 782 (D.N.J. 1949) ("The Thirteenth Amendment has no application to a situation where a person is held to answer for violations of a penal statute."). Although unwilling to deem prison work violative of the constitution, courts often leave open whether these practices or programs violate state statutes. *See, e.g.*, *Murray v. Mississippi Dep't. of Corrections*, 911 F.2d 1167 (5th Cir. 1990); *Ali*, 259 F.3d at 318, n.2 ("The Constitution does not forbid an inmate's being required to work. Whether that requirement violates state law is a separate, non-constitutional issue.").

Amendment doctrine in prison reflects a spectrum of permissibility: with slavery on one end and involuntary servitude on the other.

B. The Constitutionality of a Prison-Labor Policy Under the Thirteenth Amendment Hinges on Whether the Policy Qualifies as "Involuntary Servitude."

Understanding the difference between "slavery" and "involuntary servitude" is crucially important in the punishment context because the Thirteenth Amendment will only tolerate work requirements that approximate "involuntary servitude." Unfortunately, because most Thirteenth Amendment cases involve non-prisoner plaintiffs, courts have rarely had the occasion to meaningfully distinguish these two Thirteenth Amendment terms.[306] Although no clear, judicially-articulated standard for differentiation exists, the State's power to impose labor as a punishment for crime is undeniably limited to the imposition of "involuntary servitude."[307] Thus, while the line between slavery and involuntary servitude has not been drawn with precision, the existence and importance of the line are not in question.[308]

To begin, "slavery" and "involuntary servitude" are, by definition, distinguishable legal concepts. *Black's Law Dictionary* defines "slavery" as (1) "[a] situation in which one person has absolute power over the life, fortune, and liberty of another[,]" and (2) "[t]he practice of keeping individuals in a state of bondage of servitude."[309] By contrast, "involuntary servitude" is defined succinctly as "[t]he condition of forced labor . . . for another by coercion or imprisonment."[310] Although slavery and involuntary servitude may, on occasion, share many characteristics—for example, the coercive nature of the labor or the type of the task assigned—no judge today would deny that the distinction is of constitutional magnitude for prisoners, who retain their right to

306. Armstrong, *supra* note 55, at 881. Outside of the prison context, a plaintiff need not distinguish between the statuses of "slavery" and "involuntary servitude" because both are prohibited by the Thirteenth Amendment. *Id.*

307. *Id.* at 869, 883-84.

308. *See id.* at 880 ("The actual text, the history, and the Court's jurisprudence all consistently, with few exceptions, explicitly recognize—but fail to concretely articulate—a difference between the terms slavery and involuntary servitude."). Acknowledging the difficulty in identifying slavery, some have employed a "smell test" or used a "totality of the circumstances" analysis to determine if a condition of slavery has been imposed. *See, e.g., id.* at 909 (2012); *United States. v. Kozminski*, 487 U.S. 931, 962-63 (1988) (Brennan, J., concurring) (finding no one factor is dispositive in defining slavery, but noting things like "complete domination," "oppressive work conditions," and "lack of pay or personal freedom" are hallmark characteristics).

309. BLACK'S LAW DICTIONARY 1515 (9th ed. 2009).

310. *Id.* at 1493.

be free from slavery.[311] Assessing the historical, jurisprudential, and normative understandings of "slavery" and "involuntary servitude," the distinguishing features of each status become discernable.

Fundamentally, juxtaposing their historic roots, slavery is a wholly more pervasive condition than is involuntary servitude.[312] In defining slavery under the Thirteenth Amendment, credence should be given to the unique history of the practice of *chattel* slavery—the institution at which the Amendment was aimed.[313] In its prototypical form, slavery is identified as a condition that lacks temporal limitation; attaches by virtue of an immutable trait (race); and begets physical as well as dignitary harms.[314] Far from a restriction on the proper function of labor relations, the American form of slavery includes "the state of entire subjection of one person to the will of another"[315] and entails "distinct and unique harms beyond the involuntary nature of the labor performed."[316] Meanwhile, the prohibition of involuntary servitude—a practice with less historical profundity[317]—merely intended to maintain a system of free and voluntary labor[318] and to protect against "coerced wage labor in the market economy."[319] Viewed this way, slaves are distinguishable from involuntary servants by "the breadth and depth" of the control exerted over them.[320]

Although the unique circumstances of incarceration undoubtedly blur the line between slavery and involuntary servitude, the traditional distinctions remain largely intact. In accordance with the historical understandings of

---

311. Armstrong, *supra* note 55, at 882. *See, e.g.*, *Washlefske v. Winston*, 60 F. Supp. 2d 534, 539 (E.D. Va. 1999) ("[T]he idea . . . that inmates are no more than 'slaves of the State,' has been repeatedly and expressly repudiated by other courts.").

312. Armstrong, *supra* note 55, at 880-81.

313. ANDREW E. TASLITZ, CRIMINAL JUSTICE SUCCESSES AND FAILURES OF THE THIRTEENTH AMENDMENT, THE PROMISE OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 252-53 (Alexander Tsesis ed., 2010).

314. Armstrong, *supra* note 55, at 882-84.

315. *Hodges v. United States*, 203 U.S. 1, 17 (1906). This definition "transcends mere economics" because "although forced labor for economic gain was one characteristic of slavery as practiced in the antebellum South, forced labor itself does not exhaust the meaning of slavery." Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1369 (1992).

316. Armstrong, *supra* note 55, at 883.

317. *Id.* at 881 (finding its lack of historical import renders "involuntary servitude" a nebulous concept).

318. *Pollock v. Williams*, 322 U.S. 4, 17 (1944) ("The undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."). The Court went on to say that forced labor may be consistent with a system of free labor, using forced labor "as a means of punishing crime" as an example. *Id.* The use of the term "labor" undoubtedly refers to standard prison work.

319. Joyce E. McConnell, *Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 213 (1992).

320. Taslitz, *supra* note 313, at 252-53 (quoting Joshua Cohen, *The Arc of the Moral Universe, in* SUBJUGATION & BONDAGE: CRITICAL ESSAYS ON SLAVERY AND SOCIAL PHILOSOPHY 285-86 (Tommy L. Lott ed., 1998)).

slavery writ large, slavery in the penal context is a more substantive and oppressive condition than is involuntary servitude. Without having the occasion to define the hardships of penal plantations, convict lease systems, and chain gangs as "slavery," the abolition of these practices is evidence of their intolerability under the Thirteenth Amendment.[321] The fact that these post-Civil War penal practices imposed the same peculiar physical and dignitary harms associated with chattel slavery undoubtedly rendered them constitutionally offensive.[322] What is more, these practices lack constitutional legitimacy under the punishment exception through their arbitrary imposition of taxing work requirements which far exceed the purpose of the exception.[323]

Meanwhile, courts have held most modern prison work requirements qualify as involuntary servitude and, therefore, pass constitutional muster.[324] For example, the Thirteenth Amendment permits state laws which give inmates the option to participate in work-release programs[325] or those that mandate work as a condition of detention.[326] Courts have found that inmates can be required to do general housekeeping duties, such as cleaning their cells and assisting with the upkeep of the facility.[327] Indeed, having accepted that most

---

321. *See supra* Part II.D.

322. Armstrong, *supra* note 55, at 886-87 (discussing the difference between slavery and involuntary servitude as a matter of cultural significance and social stigma by reference to the American slave narrative).

323. *See* Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 388-90 (1998) (conceptualizing the original function of the punishment exception for "involuntary servitude" as a means of facilitating penal labor for rehabilitative and economic purposes).

324. *See, e.g.*, *Smolczyk v. Gaston*, 24 N.W.2d 862, 865 (Neb. 1946). The Supreme Court has said: "Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude' for crime . . . ." *Ex Parte Wilson*, 114 U.S. 417, 429 (1885). As an aside, incarceration, itself, does not qualify as "involuntary servitude." *Howard v. United States*, 274 F.2d 100, 103 (8th Cir. 1960).

325. Notwithstanding the type of labor imposed, challenges to work release programs fail because the compulsion necessary to render the labor involuntary is found to be lacking. *See Flood v. Kuhn,* 316 F. Supp. 271, 281 (D.C.N.Y. 1970), *aff'd,* 443 F.2d 264 (2d Cir.1971), *aff'd on other grds.,* 407 U.S. 258 (1972) ("A showing of compulsion is thus a prerequisite to proof of involuntary servitude."). For example, when an inmate has the option between staying inside to earn no wages and leaving the prison to earn twenty dollars a day, the court has found no involuntary servitude. *See Watson v. Graves*, 909 F.2d 1549, 1552-53 (5th Cir. 1990) (finding that while the choice may have been "painful," the prisoner was not forced to work against his will in violation of the Thirteenth Amendment).

326. *See Omasta v. Wainwright*, 696 F.2d 1304, 1305 (11th Cir. 1983) (finding the Thirteenth Amendment not implicated where inmate was forced to work pursuant to prison regulations or state statutes); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) ("It follows, therefore, that whether appellant is being held in the state penitentiary or the county jail, he may be required to work in accordance with institution rules.").

327. *See Watson v. Graves*, 909 F.2d 1549 n.12 (5th Cir. 1990) (citing LA. REV. STAT. ANN. §§ 15:708, 15:711). Requiring maintenance or custodial work has been upheld even when the inmate has not been convicted. *See, e.g.*, *Bijeol v. Nelson*, 579 F.2d 423 (7th Cir. 1978) (upholding simple housekeeping rule that required inmates, including pretrial detainees, to clean cells). Mental hospital patients, too, may be required to perform housekeeping choices. *See Jobson v. Henne*, 355 F.2d 129 (2d Cir. 1966). In this context, "housekeeping tasks" have been

penal work requirements qualify as "involuntary servitude," modern Thirteenth Amendment challenges to prison work programs come in the form of employment disputes. A prisoner might, for example, challenge her assignments, ask for wages, or demand the ability to unionize.[328] Faced with these issues, courts have determined that not only may a prisoner be compelled to work,[329] but she need not be compensated for her work.[330] Furthermore, if her conviction is subsequently reversed, she has no right to compensation for the work she completed while detained.[331]

Normatively, the "involuntary servitude" threshold for penal labor reflects the well-established belief that prisoners may be subject the customary imposition of work.[332] Unlike their Civil War-era ancestors, today's penal work programs impose involuntary servitude without subjugating inmates to slavery. At the federal level, for example, "sentenced inmates are required to work if they are medically able."[333] The Inmate Financial Responsibility Program ("IFRP")[334] mandates that inmates work in order to pay court-ordered fines, satisfy victim restitution, meet child support, and comply with other monetary judgments.[335] In addition to its interest in collecting debts and compensating victims, the Federal Bureau of Prisons ("Bureau") supports IFRP because it promotes inmates' interests in being financially responsible.[336] Thus, the days of inflicting arduous workloads in grueling conditions for profit (or for spite) have been replaced by labor programs that comport with basic human decency and serve a beneficial purpose. [337] In sum, most modern prison

---

understood to include "[working] in hospital kitchens, fixing meals and scrubbing dishes, . . . cutting grass, . . . cutting and styling other patients' hair, . . . maintaining the lanes and pinsetting machines, . . . doing secretarial and clerical work, . . . washing sheets and clothes of other patients, . . . and . . . scrubbing floors and cleaning." Bayh v. Sonnenburg, 573 N.E.2d 398, 412 (Ind. 1991).

328. 2 MUSHLIN, *supra* note 304, at § 8:2.

329. *See Berry v. Bunnell*, 39 F.3d 1056, 1057 (9th Cir. 1994) ("And the Thirteenth Amendment does not apply where prisoners are required to work in accordance with prison rules.").

330. "[C]ompensating prisoners for work is not a constitutional requirement but, rather, 'is by the grace of the state.'" *Mikeska v. Collins*, 900 F.2d 833, 837 (5th Cir.1990) (quoting *Wendt v. Lynaugh,* 841 F.2d 619, 621 (5th Cir.1988)).

331. *Omasta v. Wainwright*, 696 F.2d 1304, 1305 (11th Cir. 1983) (rejecting plaintiff's Thirteenth Amendment claim for minimum wage payment for the hours he worked during his three years of confinement after his conviction was reversed because plaintiff was incarcerated pursuant to a presumptively valid judgment).

332. Armstrong, *supra* note 55, at 883.

333. *See Work Programs*, U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, http://www.bop.gov/inmate_programs/work_prgms.jsp (last visited April 17, 2012).

334. *See Inmate Financial Responsibility Program (IFRP)*, U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, http://www.bop.gov/inmate_programs/victim_witness_notice.jsp#2 (last visited April 17, 2012).

335. *See id.*

336. *See id.*

337. In fact, in 2002, the ACLU opposed federal legislation that would limit prisoners' ability to work making furniture. *See ACLU Opposes End to Prison Work Program; Calls Inmate*

work programs withstand constitutional scrutiny because they conform with the letter and spirit of the punishment exception.

C. Reproductive Labor in Prison is More like "Slavery" than "Involuntary Servitude."

Prison policies that force women to carry unwanted pregnancies to term impose physically and psychologically oppressive labor requirements akin to slavery. First and foremost, these policies inflict physical as well as dignitary harms that have the peculiar connotative qualities of the traditional institution of slavery. What is worse, these policies affix a condition of servitude that attaches by virtue of an immutable trait (here, sex) for a lifetime. Lastly, while forcing inmates to labor against their wills, these policies do not comport with the justifications of the prison-labor exception of the Thirteenth Amendment. Much like the post-War penal practices of the South, today's restrictive reproductive penal policies—those that force upon women conditions of pregnancy, reproductive labor, and/or motherhood—cannot withstand constitutional scrutiny under the Thirteenth Amendment.

To begin, scholars and advocates have long argued that refusing women the right to abortion violates the command of the Thirteenth Amendment. Discussing forced pregnancy as a Thirteenth Amendment violation, Professor Andrew Koppelman posited: "But what would we call any activity that demanded that a man, in order to produce a tangible result, endure constant exhaustion, loss of appetite, vomiting, sleeplessness, bloatedness, soreness, swelling, uncontrollable mood swings, and, ultimately, hours of agony, often followed by deep depression?"[338] Indeed, very few women with first-hand knowledge could deny that pregnancy, childbirth, motherhood, or all of the above, are physically and emotionally exhausting experiences. Thus, because no meaningful distinction should be drawn between "the powers of a man's back and arms and those of a woman's uterus," conceptualizations of coerced pregnancy under the Thirteenth Amendment can and should be persuasively analogized to traditional forms of manual labor imposed upon generally male populations.[339]

The argument that carrying an unwanted pregnancy to term can be tantamount to a Thirteenth Amendment violation finds support in the general body of reproductive rights cases.[340] In several of its watershed abortion cases,

---

Employment Important for Rehabilitation, ACLU (Apr, 24, 2002), http://www.aclu.org/racial-justice_drug-law-reform_immigrants-rights_womens-rights/aclu-opposes-end-prison-work-programs.

338. Koppelman, *supra* note 18, at 488.

339. *Id.*

340. Professor James Fleming presented this view in a speech for an event "Rearguing *Roe v. Wade*" at Boston University School of Law. He cited Blackmun's concurrence in Casey as one example of the Court "[intimating] the involuntary servitude argument without specifically

the Supreme Court has acknowledged that pregnancy imposes bodily and dignitary harms that have lasting effects. For example, in Blackmun's opinion in *Roe v. Wade*, he discusses the "specific and direct" medical harms of pregnancy, which are both physical and psychological.[341] Maternity, he said, "may *force* upon the woman a distressful life and future."[342] Likewise, the majority in *Planned Parenthood v. Casey* discussed the unique physical burdens borne by pregnant women.[343] Furthermore, concurring in the *Casey* decision, Justice Blackmun's opinion smacks of Thirteenth Amendment principles in defending women's abortion rights:

> State restrictions on abortion *compel* women to continue pregnancies they otherwise might terminate . . . [conscripting] women's bodies into its *service*, *forcing* women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.[344]

Thus, by acknowledging that physical hardship and bodily servitude are necessary incidents of pregnancy, particularly when the pregnancy is unwanted, reproductive rights jurisprudence supports the argument that laws depriving women of the right to abortion may create a situation of forced labor in violation of the Thirteenth Amendment.

Insofar as forced pregnancy at large is a coercive condition of servitude under the Thirteenth Amendment, forced pregnancy *in the penological context* undoubtedly qualifies as "slavery" under the Punishment Clause. As was the case for the postbellum penal labor practices, reproductive exploitation has a relationship with chattel slavery that should inform the analysis.[345] As one

---

invoking the Thirteenth Amendment." James Fleming, Professor of Law at Boston University, Panelist Address at the Women's Law Association "Rearguing *Roe v. Wade*" Event (Jan. 26, 2012). However, the Supreme Court has never explicitly held that the Thirteenth Amendment protects a woman's right to terminate her pregnancy. *See, e.g., Roe v. Wade*, 410 U.S. at 154 (1973) ("We, therefore, conclude that the right of personal privacy includes the abortion decision . . . ."); *and Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992) ("Roe determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment.").

341. *Roe*, 410 U.S. at 153. These harms are also economic and extend to the woman's family. *See id.* (discussing the "distress . . . associated with the unwanted child, and . . . the problem of bringing a child into a family already unable . . . to care for it").

342. *Id.* (emphasis added).

343. "The mother who carries a child to full term is subject to anxieties, *to physical constraints, to pain that only she must bear*." *Casey*, 505 U.S. at 852 (emphasis added).

344. *Id.* at 928 (Blackmun, J. concurring) (emphasis added).

345. Sexual and reproductive services are certainly understood as commodities capable of being transacted for in the marketplace. *See generally* Ghali, *supra* note 51. *See also* Koppelman, *supra* note 18, at 480-88. ("Indeed, the recent advent of "surrogate motherhood"' has shown that women's reproductive powers are as capable as any others of being transacted for in the marketplace . . . .").

scholar noted, the "extreme loss of control" that defined chattel slavery rendered slaves "lacking in the power to dispose of his/her physical and mental powers, including both the capacity to produce and control of the body generally" extended to sexuality and reproduction.[346] Because "[r]eproduction became a successful sub-industry during slavery," plantation owners took "full advantage of the profitability of the . . . impregnation of slaves."[347] Thus, for women, slavery included forced participation in chattel breeding—specifically, coerced reproduction.[348] Apart from its economic motivations, this reprehensible practice of forcing women to bear children constituted a "uniquely gendered form of punishment."[349] Just as female slaves experienced peculiar hardships of slavery because "the services they [were] capable of performing [included] the production of human beings,"[350] female inmates, by virtue of their reproductive capacities, face the unique penological hardship of forced pregnancy.

In fact, the case for defining forced pregnancy as a Thirteenth Amendment violation (specifically, slavery) is strengthened in the penological context. Though critics may deplore the notion that pregnancy could be equated with slavery, the fact remains that pregnancy is an incredibly taxing and time-intensive form of labor—one most women would prefer not to endure behind bars. As with any prohibitive abortion policy, penal anti-abortion polices force women to bear unwanted pregnancies; to continue dangerous pregnancies at the risk of their own lives; and to suffer invasive termination procedures when delays cause the abortion to occur in later terms of the pregnancy.[351] However, the special circumstances of incarceration impose additional hardships upon female inmates, such as increased likelihood of sexual exploitation,[352] inadequate prenatal care,[353] denial of access to their children,[354] and shackling during delivery.[355]

---

346. Taslitz, *supra* note 313, at 252-53 (quoting Joshua Cohen, *The Arc of the Moral Universe, in* SUBJUGATION & BONDAGE: CRITICAL ESSAYS ON SLAVERY AND SOCIAL PHILOSOPHY 285-86 (Tommy L. Lott ed., 1998)).

347. McConnell, *supra* note 319, at 217.

348. *Id.* Reproductive exploitation proliferated after the end of the international slave trade, when plantation owners realized the value of female reproductive capabilities. Pamela D. Bridgewater, *Reconstructing Rationality: Towards a Critical Economic Theory of Reproduction*, 56 EMORY L.J. 1215, 1222 (2007).

349. Roth, *supra* note 198, at 376.

350. Koppelman, *supra* note 18, at 480-88. For a fascinating look at how slave women dealt with unwanted pregnancies, see JUNIUS P. RODRIGUEZ, *Infanticide*, *in* 1 ENCYCLOPEDIA OF SLAVE RESISTANCE AND REBELLION, 260 (2007) (discussing the abortion techniques of slaves and infanticide as a form of female slave rebellion).

351. COUNCIL ON SCIENTIFIC AFFAIRS, AMERICAN MED. ASSOC., INDUCED TERMINATION OF PREGNANCY BEFORE AND AFTER *ROE V. WADE*, 268 JAMA 3231, 3238 (1992).

352. *See* SENTENCING PROJECT, *supra* note 169, at 3.

353. See *supra* Part III.B.

354. At the federal level, "[n]ewborn children are not permitted to return to the institution with their mothers." *Female Offenders Program*, U.S. DEP'T OF JUSTICE, ,FED. BUREAU OF

Indeed, the physical suffering experienced during pregnancy is intensified by the inmate's punitive surroundings and inadequate medical care.[356] As one pregnant inmate lamented:

I went for my monthly checkup. They couldn't find my baby's heartbeat . . . [Five days later] I was in a lot of pain and was spotting a lot. I told my housing staff and he called the [medical technical assistant]. She told him I didn't have proof, that she wouldn't see me. At that time the bleeding slow down so I put a pad on. It was blood on it but not good enough for her. She told me that *All Pregnant Women Bleed*. I told her that I was a high risk and when I see the doctor last week he couldn't find a heartbeat. So she called the doctor and he told her to send me back to my unit . . . [Three days later at 3:00 a.m.] I lost my baby in my bathroom.[357]

To this end, some courts reviewing restrictive prison abortion polices have recognized the enormous psychological anguish associated with forced pregnancy for female inmates and have determined that the potential harms to inmates are "irreparable."[358] All things considered, bearing a child in prison is not dissimilar to bearing a child in slavery.[359]

Lastly, when compared to legal, customary forms of prison labor—like custodial tasks that qualify as involuntary servitude under the Punishment

---

PRISONS, http://www.bop.gov/inmate_programs/female.jsp (last visited November 19, 2012). However, the Bureau does offer a community residential program called "Mothers and Infants Nurturing Together" ("MINT"). *Id.* The MINT program promotes bonding and parenting skills for female inmates who enter with low-risk pregnancies. *Id.* Women are eligible to enter the program if (1) they are in their last three months of pregnancy; (2) they have less than five years remaining to serve on their sentence; and (3) they are eligible for furlough. *Id.* Furthermore, the inmate or a guardian must assume financial responsibility for the child's medical care while residing at MINT. *Id*. If such preconditions and requirements are met, the MINT program affords the mother three months to bond with the newborn child before returning to a correctional facility to complete her sentence. *Id.* Some states offer similar community-based residential programs or prison nurseries; however, in most cases, the child is taken from the mother immediately and placed in foster care. WOMEN'S PRISON ASSOC., MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 4 (2009), http://www.wpaonline.org/pdf/Mothers%20Infants%20and%20Imprisonment%202009.pdf.

355. Colum. Hum. Rts. L. Rev., *supra* note 212. Currently, New York, California, Connecticut, Illinois, and the District of Columbia have laws or polices that explicitly prohibit this practice. *Id.* Still, the practice of shacking women—both en route to the hospital and/or during delivery—is common in other states. *Id.*

356. *See* Mary Catherine McGurrin, *Pregnant Inmates' Right to Health Care*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 163, 164-70 (1993) (discussing the inadequacies of prison prenatal care).

357. Roth, *supra* note 198, at 428 (quoting Letters to LSPC, summarized and quoted by permission) (emphasis in original).

358. *See Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 339 (3d Cir. 2008).

359. *See* Wilma King, *Suffer with Them Till Death: Slave Women and Their Children in Nineteenth-Century America, in* MORE THAN CHATTEL: BLACK WOMEN AND SLAVERY IN THE AMERICAS 148-49 (David Barry Gaspar et al. eds., 1996) (discussing hardships of slave pregnancy, including poor prenatal care and inadequate medical assistance during delivery).

Clause—it becomes clear that forced pregnancy is a form of labor that is more akin to slavery. Although none of the Thirteenth Amendment prison cases cited thus far have involved a female inmate, let alone one forced to carry a pregnancy to term, the servitude permitted by the punishment exception has included work like cleaning, laundry, or washing dishes.[360] Standard prison work pales in comparison to the lasting physical and psychological demands of forced pregnancy and motherhood. Unlike the discrete tasks of involuntary servitude, forced pregnancy imposes around-the-clock physical labor for nine months and entails lasting harms that extend beyond the duration of her incarceration.[361] Moreover, unlike the incidental harms associated with customary prison work, these indefensible and irreparable harms cannot be reconciled with the rehabilitative goals of prison work requirements.[362] Thus, policies that ban or restrict abortion access impose a type of servitude on female inmates that goes far beyond standard prison polices imposing inmate work, which is excepted under the Thirteenth Amendment.

D. Restrictive Penal Abortion Policies Impose Slavery Upon Inmates in Violation of the Thirteenth Amendment.

In sum, the Thirteenth Amendment provides a narrow exception that permits the imposition of involuntary servitude as a punishment for crime.[363] Considering the history and legal framework underlying the Thirteenth Amendment, only traditional and customary forms of labor comport with the narrow exception for involuntary servitude. Thus, the constitutionality of a prison labor practice depends on whether the imposition of labor constitutes involuntary servitude (permitted) or slavery (not). Because forced pregnancy undoubtedly falls on the slavery side of the Punishment Clause's slavery-

---

360. *See supra* note 327.

361. As one Congresswoman noted, this punishment is exacerbated and complicated by post-delivery procedure, which often includes immediate removal of the child. *See* Schakowsky, 106th Cong. 2d sess., Cong. Rec. 80 (22 June 2000): H 5024 ("[W]e are going to force them to have that child, but that child is going to immediately ripped away from that mother whether she wants that baby now or not."). The practice of post-delivery separation is not unlike the birthing experience for slave women. *See, e.g.*, Jacobs, *supra* note 1, at 119 ("On the fourth day after the birth of my babe, he entered my room suddenly, and commanded me to rise and bring my baby to him.").

362. Like the Quakers of yesterday, today's religious organizations active in the penological world advocate for healthy prison work based on concepts of human dignity and restorative justice. *See* Armstrong, *supra* note 55, at 882.

363. As an aside, the oppressive penal labor policies of the post-Civil War era, though disproportionately applied to Blacks, were applicable to white prisoners. *See, e.g.*, OSHINSKY, *supra* note 85, at 46 (discussing the astoundingly high mortality rates of Black convicts in a Mississippi leasing system as compared to that of white convicts). Like the abortion restrictions at hand, however, the fact of universal applicability does not save the policy from constitutional scrutiny.

involuntary servitude spectrum, penal policies banning or severely restricting abortion are unconstitutional under the Thirteenth Amendment.

Legal standards aside, as a normative matter, the imposition of the slave-like condition of reproductive labor upon female inmates does not comport with the purposes underlying the punishment exception. The original justifications historically proffered for upholding prison labor—that it benefits both the inmate and the state—remain pertinent today.[364] The modern variety of productive prison work is intended to have practical and rehabilitative value.[365] Worlds away from the system of customary labor, forced pregnancy is neither legally nor pragmatically tenable as a form of permissible labor for punishment under the Thirteenth Amendment.

CONCLUSION

In early 2009, almost exactly 144 years after Lincoln's push for ratification, another Illinois-based president would have a chance encounter with the Thirteenth Amendment. Shortly after taking office, President Obama nominated Dawn Johnsen to the Department of Justice.[366] During her time as the legal director of the National Abortion Rights Action League ("NARAL"), Johnsen filed an amicus brief[367] for a case involving a state law limiting the use of state funds for abortions.[368] At the time of her nomination, the Obama appointee received immense public scrutiny for her stance on abortion,[369] specifically "her bizarre equation of pregnancy and slavery," as pundits put it.[370] Despite the fact that Johnsen proffered this argument in a single,

---

364. 2 MUSHLIN, *supra* note 304, at § 8:1.

365. *Id.*

366. *Judiciary Panel Approves Justice Department Nominee Dawn Johnsen*. FOX NEWS (Mar. 4, 2010), http://www.foxnews.com/politics/2010/03/04/approval-controversial-justice-department-nominee-advances-senate/.

367. Brief of Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No 88-605) [hereinafter Brief of Seventy-Seven].

368. *Webster*, 492 U.S. 490.

369. See *Judiciary Panel Approves Justice Department Nominee Dawn Johnsen*, FOX NEWS (Mar. 4, 2010), http://www.foxnews.com/politics/2010/03/04/approval-controversial-justice-department-nominee-advances-senate/. ("One of the comments that most dismayed critics is her comparison of "forced pregnancy," or when women are unable to have abortions, to slavery."); WHO IS DAWN JOHNSEN?: MEET OBAMA'S NOMINEE TO JUSTICE DEPT'S OFFICE OF LEGAL COUNSEL, WRONG ON TERROR & WRONG ON LIFE, RNC RESEARCH BRIEFING (2010), *available at* http://www.gop.com/index.php/briefing/comments/who_is_dawn_johnsen ("Johnsen compared promotion of pro-life policies with slavery.").

370. Andrew McCarthy, *Lawyer's Lawyer, Radical's Radical: Meet Obama DOJ nominee Dawn Johnsen*, NAT'L REV. ONLINE (Mar. 9, 2009), http://www.nationalreview.com/nrd/article/?q=YzcyODUwNjAwNzg3YTYyZjBiOWU3ZTQwZmYzOGIwOGQ= ("Her bizarre equation of pregnancy and slavery was not an off-the-cuff remark. It was her considered position in a 1989 brief filed in the Supreme Court.").

inconsequential footnote, she ultimately withdrew as a result of the critical opposition.[371]

In spite of, or perhaps because of, the sensationalist coverage of the efforts of advocates like Johnsen,[372] the Thirteenth Amendment defense of abortion remains on the legal fringe. Although conservatives and liberals alike criticized the Court's holding in *Roe*,[373] most attempts to resuscitate her holding have focused on privacy and equal protection.[374] Between *Roe v. Wade* and *Planned Parenthood v. Casey*, an important time in the development of reproductive rights jurisprudence, few scholars directly addressed the alternative constitutional grounding of the Thirteenth Amendment.[375] Ultimately, although the Thirteenth Amendment was considered a tool in the reproductive freedom

---

371. Charlie Savage, *Obama Nominee to Legal Office Withdraws*, N.Y. TIMES (Apr. 9, 2010), http://www.nytimes.com/2010/04/10/us/politics/10johnsen.html?ref=johnsendawne

372. One observing the Dawn Johnsen appointment controversy may have mistakenly come to believe that Johnsen pioneered the Thirteenth Amendment defense of abortion. However, the brief to which Johnsen contributed, focusing mostly on the physical hardships associated with pregnancy, found that compelling the "continuation of pregnancy amount[s] to a significant invasion of women's bodily integrity" in violation of the fundamental right to liberty under the *Fourteenth Amendment*. Brief of Seventy-Seven, *supra* note 367, at 11, 5-6. In fact, the brief mentions the Thirteenth Amendment only once—in a footnote. *See id.* at 11 n.23 ("While a woman might choose to bear children gladly and voluntarily, statutes that curtail her abortion choice are disturbingly suggestive of involuntary servitude, prohibited by the Thirteenth Amendment, in that forced pregnancy requires a woman to provide continuous physical service to the fetus in order to further the state's asserted interest."). At the risk of disappointing Johnsen's critics, it is worth pointing out that if any of the *Webster v. Reproductive Health Services* amici deserve credit for equating pregnancy to slavery, it is the National Organization for Women, whose brief proffered the Thirteenth Amendment argument explicitly. Brief for Organizations for Women as Amicus Curiae Supporting Appellees, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605). What is more, nearly two decades before *Webster*, an amicus brief in *Roe v. Wade* argued that laws restricting abortion violated the Thirteenth Amendment. Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 6, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

373. The opinion in *Roe* was widely criticized by liberals and conservatives alike. *See Mark V. Tushnet*, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 820 (1983) ("It seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful."). Some argue that the opinion went too far and may have done more harm than good for the reproductive rights of women. *See* Ruth Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385-86 (1985) ("*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s . . . . Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."). For other articles discussing the shortcomings of the *Roe v. Wade* decision, *see* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920 (1973); *and* Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

374. Koppelman, *supra* note 18, at 480-83.

375. *See id.* at 486 n.24 (finding only three previous statements in scholarly literature pertaining to the Thirteenth Amendment defense of abortion).

arsenal during the legal fight for abortion rights, fewer and fewer advocates outwardly rely on the argument today.

Whatever place the Thirteenth Amendment has had in the development of abortion jurisprudence in the past, this Article contends that it certainly has one in the future: to protect the abortion rights of women in prison. Today, the laws governing the reproductive rights of incarcerated women are both fragmented and unclear.[376] Moreover, cases examining the constitutionality of restrictive policies have yielded mixed results.[377] In the fight to protect the reproductive rights of incarcerated women, advocates have challenged policies restricting or banning abortions under the Fourteenth and Eighth Amendments.[378] Under the Fourteenth Amendment, the application of the *Turner*[379] balancing test, which is highly deferential to prison policymakers, has produced varying results.[380] Under the Eighth Amendment, challenges have been largely unsuccessful.[381] Based on the unpredictable landscape, and because the Supreme Court has not yet addressed the issue, this Article argues that advocates should consider an the Thirteenth Amendment as an alternative approach in arguing that penal policies banning or restricting abortion are unconstitutional.

In theory, the Punishment Clause could mean that the Thirteenth Amendment's prohibitions against slavery and involuntary servitude do not apply to convicted persons. However, courts have long recognized that prisoners do retain some Thirteenth Amendment protections.[382] Although many constitutional protections have been, and are still, denied to prisoners,[383] courts have repeatedly repudiated the notion that prisoners are merely "slaves of the state."[384] Thus, while the Constitution may demand less within the prison walls,[385] the Supreme Court has never drawn an "iron curtain between the Constitution and the prisons of the country."[386]

---

376. See *supra* Part III.B.

377. *See supra* Part III.C.

378. Johnson, *supra* note 175, at 658.

379. *Turner v. Safley*, 482 U.S. 78 (1987).

380. *See supra* note 44.

381. *See supra* note 293.

382. *See, e.g*, *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990) ("We agree that a prisoner who is not sentenced to hard labor retains his thirteenth amendment rights; however, in order to prove a violation of the thirteenth amendment the prisoner must show he was subjected to involuntary servitude or slavery.").

383. *See Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 795-96 (1871) ("A convicted felon . . . [f]or the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.").

384. *See supra* note 160.

385. *Johnson v. California*, 543 U.S. 499, 524 (2005) (Thomas, J. dissenting).

386. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84 (1987). Thus, "[w]hen a prison regulation or practice offends a fundamental constitutional

Furthermore, a closer look at the relationship between the Thirteenth Amendment and the system of criminal justice reveals that the punishment exception for involuntary servitude is a narrow one. Considering its historical purpose and doctrinal developments, this Article finds that the Thirteenth Amendment's applicability in prison operates on a permissibility spectrum. On one end, the Amendment's exception permits the imposition of traditional forms of prison work—such as those legally and customarily imposed as an incident of incarceration. On the other end, the Amendment is violated when prisons impose upon inmates practices that closely resemble slavery—such as convict leasing or abusive chain gangs.

Where does forced pregnancy fall on the Punishment Clause's permissibility spectrum? Comparing the policies effectively imposing unwanted motherhood in women's prisons to the work requirements deemed constitutionally permissible under the Thirteenth Amendment in men's prisons, the answer becomes clear. Pregnancy is one of the most laborious tasks of which the female human body is capable—if not the most. Aside from inflicting upon inmates physical hardships associated with pregnancy, policies that restrict or ban abortion force inmates into motherhood under especially unhealthy and unsafe conditions. Indeed, these modern penal practices are akin to the reproductive dominion exerted over the bodies of female slaves. Against the historical backdrop of a slave market that forced females to breed against their wills, prison policies that operate to deny women, mainly women of color, reproductive freedom must be seen for what they are: modern manifestations of reproductive domination, in violation of the Thirteenth Amendment's command. If the image of a man inmate working on a penal plantation reminds us of slavery, so too should the picture of a female inmate carrying an unwanted pregnancy. She's neither internally nor externally free, her body is no longer her own.

---

guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. 396, at 405-406. Over the past few decades, the Supreme Court has consistently found that prisoners retain constitutional rights. *See, e.g.*, *Haines v. Kerner*, 404 U.S. 519 (1972) (finding prisoners may not be deprived of life, liberty, or property without due process); *Younger v. Gilmore*, 404 U.S. 15 (1971) (finding prisoners retain the right to access the courts while incarcerated); *Johnson v. Avery*, 393 U.S. 483 (1969) (finding prisoners retain the constitutional right to petition the government for redress of grievances); *and Lee v. Washington*, 390 U.S. 333 (1968) (finding the Equal Protection Clause of the Fourteenth Amendment protects prisoners against invidious discrimination).