

# ARTICLE

## Slavery Revisited in Penal Plantation Labor

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### I. INTRODUCTION

*The men assigned to field crews are woken at five o'clock in the morning. When all of the crews are assembled, the men walk (sometimes miles) to the fields and start picking cotton on the 18,000 acre plantation. The men are paid little, working mainly for their room and board. If they fail to pick enough cotton by the end of the day, they will be forced to work the fields all weekend. Everything is picked by hand, from the cotton and soybeans to the row crops of okra and tomatoes. The men work until the armed guards let them break for water, then they continue under the hot sun. Hundreds of primarily African-American men are forced to work the crops with minimal rest and meal breaks. Armed men on horseback ensure their compliance.*

This isn't a story of slavery in the early 1800s or even sharecropping in the early 1900s. Any inmate assigned to "field duty" at one of many penal plantations across the South could have told this story in 2011. In states such as Arkansas, Florida, Louisiana, and Texas, inmates

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are forced to recreate a practice outlawed in 1865—slavery.<sup>1</sup> For example, Louisiana State Penitentiary in Tunica, Louisiana was originally a slave plantation in the 1840s.<sup>2</sup> It was—and is still—familarly named “Angola,” reportedly because the best slaves came from that African country.<sup>3</sup> As recently as 1979, inmates were referred to as “hands”<sup>4</sup> in the fields, reminiscent of how masters referred to their slaves before the Civil War.<sup>5</sup>

This Article argues that the Thirteenth Amendment allows forced inmate labor only when the labor approximates the conditions of involuntary servitude, rather than conditions of slavery. There are critical differences between “slavery” and “involuntary servitude.” One of the most important differences, as described by Orlando Patterson, is that slavery imposes “social death” upon the enslaved by excluding them from society through ritual, cultural, and legal means.<sup>6</sup>

And yet, courts and society in general have failed to critically evaluate this re-creation of slavery within the prison walls.<sup>7</sup> In modern jurisprudence, there are few exceptions to the rule that prisoners may be forced to work. Indeed, the Thirteenth Amendment’s ban on slavery and involuntary servitude contains an exception for those individuals convicted of a crime. But this lack of critical attention to labor practices behind prison walls stems from confusion between the terms involuntary servitude and slavery. And the danger of slavery is not just a relic of the

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1. See ARKANSAS DEPARTMENT OF CORRECTIONS, ANNUAL REPORT FISCAL YEAR 2010 2 (2010), [http://adc.arkansas.gov/resources/Documents/Annual\\_Report\\_FY2010.pdf](http://adc.arkansas.gov/resources/Documents/Annual_Report_FY2010.pdf) (detailing crops and farm operation); Robbie Brown & Kim Severson, *Enlisting Prison Labor to Close Budget Gaps*, N.Y. TIMES, Feb. 25, 2011, A16, available at <http://www.nytimes.com/2011/02/25/us/25inmates.html?pagewanted=all> (picking row crops of collard greens in Florida); LOUISIANA STATE PENITENTIARY, ANNUAL REPORT 2009–2010 (2010), [http://www.corrections.state.la.us/LSP/docs/2010\\_Annual\\_Report.pdf](http://www.corrections.state.la.us/LSP/docs/2010_Annual_Report.pdf) (noting the majority of maximum- and medium-security inmates are kept “constructively active” working farm lines eight hours a day for five days a week); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE 6 (2010) (detailing history and operation of Texas state prisons and concluding, “Nowhere else in turn-of-the-millennium America could one witness gangs of African American men filling cotton sacks under the watchful eyes of armed whites on horseback.”).

2. Wilbert Rideau, *In the Field*, THE ANGOLITE, Sept./Oct. 1979, at 53.

3. DENNIS SHERE, CAIN’S REDEMPTION 41 (2005).

4. Rideau, *supra* note 2, at 53.

5. *Id.*; see also Blake McKelvey, *Penal Slavery and Southern Reconstruction*, 20 J. NEGRO HIST. 153, 160 (1935).

6. ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 51–62 (1982).

7. For a broader discussion of the similarities between prisons in general and slavery, see ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22–39 (2003) (discussing how the penitentiary system adopted many of the same punishments as slavery, such as whipping); see also R. L. Krebs, *Blood Took Penitentiary “Out of Red,”* NEW ORLEANS TIMES-PICAYUNE 2:4–5 (May 11, 1941), reprinted in BURK FOSTER ET AL., THE WALL IS STRONG: CORRECTIONS IN LOUISIANA 33 (1995) (reporting that inmates at Angola were “beaten in cane, rice and vegetable fields with five-foot clubs, redoubled grass ropes, blacksnake whips . . .”).

past.<sup>8</sup> States facing growing budget deficits are increasingly turning to inmate labor to produce additional revenue, or at a minimum, offset the cost of imprisonment.<sup>9</sup> The latest data available indicate that as of 2002, the Federal Bureau of Prisons and twenty-eight states had prisoners laboring in agriculture.<sup>10</sup>

This Article argues that society must critically examine the types of labor we require our inmates to perform and prohibit the imposition of slavery, even when the enslaved is an inmate. Part II focuses on the text and history of Section 1 of the Thirteenth Amendment<sup>11</sup> and argues that the Amendment's exception allowing forced inmate labor is not as broad as it first appears. Part III examines the Eighth Amendment and how the imposition of slave status on inmates should be considered cruel and unusual punishment. Lastly, Part IV applies these concepts to the history and operation of one such penal plantation—Louisiana State Penitentiary. This Article concludes by cautioning legislatures and prison wardens to be more cognizant of the inherent harms in selecting certain types

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8. This Article builds upon the critical and important work by Michelle Alexander in her book, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). While Alexander looks at the prison system as a whole and equates its operation and outcomes with Jim Crow practices of the past, this Article focuses on just one element of the prison system and argues that forced inmate labor, under certain conditions, is itself slavery.

9. Brown & Severson, *supra* note 1, at A16.

10. CRIMINAL JUSTICE INST., CORRECTIONS YEARBOOK (2002). This is the last year that the corrections yearbook was published, and there are no other authoritative sources specifically collecting data on the assignment of state prisoners to agricultural labor.

11. A full discussion of Section 2 of the Thirteenth Amendment, commonly referred to as the enforcement provision, is beyond the scope of this Article. It is worth noting, however, that even if certain forms of penal plantation labor are not considered slavery itself, penal plantation labor may still be considered a “badge” of slavery and therefore subject to congressional prohibition. Under Section 2 of the Thirteenth Amendment, “Congress shall have power to enforce this article by appropriate legislation.” But determining what practices constitute a “badge or incident” of slavery is not particularly clear and is the subject of much academic debate. *See, e.g.*, George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1368 (2008). At its core, a badge of slavery is “any practice connected with slavery as it was practiced in this country.” *Id.* at 1400. The badge or incident of slavery line of cases, beginning with the *Civil Rights Cases* holding that racial discrimination in public accommodations was not a badge of slavery, centers on congressional power to legislate and not on what is actually prohibited under the terms of Section 1 of the Thirteenth Amendment. *See* *The Civil Rights Cases*, 109 U.S. 3, 20–21 (1883); *see also* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). As George Rutherglen notes, “The badges and incidents of slavery are intermediate in both a conceptual and an instrumental sense. Conceptually, they constitute the components of slavery; instrumentally, eliminating them one-by-one serves the ultimate goal of eradicating slavery itself.” Rutherglen, *supra*, at 1397–98. Only actual slavery (including most if not all of its associated practices) is prohibited under Section 1 and subject to judicial enforcement. To prohibit penal plantation labor as a badge of slavery, Congress would have to specifically find that the labor is an extension of or a practice associated with slavery and therefore prohibited. Rutherglen, *supra*, at 1393.

of labor for inmates and will hopefully spark a broader public discussion on when inmate labor may be another form of slavery.<sup>12</sup>

## II. THE THIRTEENTH AMENDMENT: SLAVERY, INVOLUNTARY SERVITUDE, AND THE CONVICT-LABOR EXCEPTION

Not only does the Thirteenth Amendment to the U.S. Constitution prohibit involuntary labor writ large but it also includes an exception for penal servitude. Specifically, the Thirteenth Amendment states: “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”<sup>13</sup> The Punishment Clause or “prisoner-labor exception clause” is often misinterpreted to allow both conditions of slavery and involuntary servitude as a punishment for a crime.<sup>14</sup>

### A. Textual Analysis

Textually, the convict exception to the Thirteenth Amendment applies only to conditions of involuntary servitude and not to slavery. The rule of last the antecedent, a canon of judicial interpretation, requires that a clause “should ordinarily be read as modifying only the noun or phrase that it immediately follows.”<sup>15</sup> This canon, however, may be applied

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12. This Article does not examine whether the Equal Protection Clause of the Fifth and Fourteenth Amendments provide any additional limitations on penal plantation labor. The analyses for the Eighth and Thirteenth Amendments focus on the type of labor as the primary variable, whereas the Fourteenth Amendment focuses first on the specific group most impacted. In addition, a Fourteenth Amendment analysis would require data on the assignment of prison labor by job—data the author has to date been unable to pry loose from the Louisiana Department of Corrections.

13. U.S. CONST. amend XIII, § 1 (emphasis added). This exception for penal labor was affirmed in dicta by the U.S. Supreme Court. *United States v. Reynolds*, 235 U.S. 133, 149–50 (1914) (invalidating peonage policies in which a convicted inmate concluded a labor contract with a private party in exchange for payment of court-assessed fines and fees).

14. *See, e.g., Morales v. Schmidt*, 489 F.2d 1335, 1338 (7th Cir. 1973) (stating that “[t]he Thirteenth Amendment, if read literally, suggests that the States may treat their prisoners as slaves,” but noting that the Eighth and Fourteenth Amendments mitigate this harsh interpretation of the Thirteenth Amendment); Kamal Ghali, *No Slavery Except as Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 608 (2008); Scott Howe, *Slavery as Punishment*, 51 ARIZ. L. REV. 983, 987–90 (2009) (“[T]he [Thirteenth] Amendment authorized as punishment for crime the very horror it otherwise prohibited.”). *But see* *Robertson v. Baldwin*, 165 U.S. 275, 293 (1897) (Harlan, J., dissenting) (“[S]lavery cannot exist in any form within the United States . . . . 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 readings of the constitution.”).

15. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). The comma exception to the rule of the last antecedent is a grammatical rule and requires that where a restrictive clause, in this case the prisoner-labor exception, is separated from the preceding noun or phrase with a comma, the restrictive clause applies to all previous antecedents. *See In re Lehman Bros. Mortgage-Backed Securities Litigation*, 650 F.3d 167, 176 (2nd Cir. 2011) (applying the exception to note that distribution of

flexibly and subordinate to other interpretation principles, such as eliminating absurdities and nullities and reading the statute as a whole.<sup>16</sup>

Applying the rule of last the antecedent to the convict-labor exception raises the question of whether the exception modifies slavery and involuntary servitude or only the term involuntary servitude. In other words, what exactly is counted as the preceding noun or phrase? One court has noted that when terms are separated by a disjunctive conjunction (such as “or”) and the last term is followed by a modifying clause, then the modifying clause applies only to the last term and not the term preceding the disjunctive conjunction.<sup>17</sup> The convict-labor exception is immediately preceded by “neither slavery nor involuntary servitude.” “Nor” is considered a disjunctive conjunction,<sup>18</sup> and accordingly, the convict-labor exception should apply only to conditions of servitude and not to conditions of slavery.

Furthermore, an interpretation of the convict-labor exception that applies to both slavery and involuntary servitude leads to a legal absurdity. Such a reading of the Amendment perversely implies that rather than abolish slavery in its entirety, the government abolished only private slavery, while monopolizing and sanctioning government-imposed slavery.<sup>19</sup> This interpretation is squarely at odds with the intent of Congress at the time, as evidenced in the debates preceding the adoption of the Thirteenth Amendment.

### B. Historical Analysis

Historically, the terms slavery and involuntary servitude were not synonymous. From the beginning of colonization, there was a difference in status between the two terms. The language of the Thirteenth Amendment was simply borrowed from prior federal enactments and therefore

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securities modifies all previous antecedents of those who purchase, offer, or sell securities). But the comma exception applies only when the previous antecedents are themselves separated by a comma. *Hughes v. Samedan Oil Corp.*, 166 F.2d 871, 873 (10th Cir. 1948) (“It is said in that connection that no comma must be placed between restrictive clauses and that which they restrict; that a restrictive clause must be set off by a comma only when it refers to several *antecedents which are themselves separated by a comma.*”) (emphasis added). The terms slavery and involuntary servitude are not themselves separated by a comma, and therefore, the comma exception does not apply.

16. *United States v. Hayes*, 555 U.S. 415, 425–26 (2009) (noting the limited application of the rule of the last antecedent when other indicia of meaning are available to interpret a statute).

17. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000).

18. WEBSTER’S REVISED UNABRIDGED DICTIONARY 426 (1913) defines “disjunctive conjunction” as “one connecting grammatically two words or clauses, expressing at the same time an opposition or separation inherent in the notions or thoughts; as, either, or, neither, nor, but, although, except, lest, etc.”

19. *But see Ruffin v. Commonwealth*, 62 Va. (1 Gratt) 790, 796 (1871) (noting an inmate is “civilly dead” and a “slave of the State”).

not a matter of great debate prior to adoption. Nevertheless, through the submission of alternate wordings and subsequent actions by Congress to address discriminatory state laws designed to resubordinate former slaves, it becomes clear that the early colonial distinction between the two terms continued.

Leon Higginbotham contends that Africans were initially brought to the American colonies as involuntary-indentured servants.<sup>20</sup> Although the terms “buying” and “selling” were used to refer to indentured servants, the terms referred only to the buying of services for a specific period of time, and not in regard to ownership of another individual.<sup>21</sup> Certainly for Africans, the terminology was less salient because most could not speak, read, or write English, and therefore, their “services” were often sold for life.<sup>22</sup> Not until the mid-1600s, according to Higginbotham, did slavery formally diverge as an institution different from indentured servitude on American soil.<sup>23</sup> Indentured servitude became the status of white servants and slavery the status for Africans.<sup>24</sup> Thus, well before ratification of the Thirteenth Amendment, the terms slavery and involuntary servitude referred to distinct practices.

The language of Section 1 of the Thirteenth Amendment, including the prisoner-labor exception, was first used in the Northwest Ordinance. The Northwest Ordinance, passed by the Continental Congress and reenacted in 1789 by the First Congress, was a template for agreements limiting or abolishing slavery in the upper reaches of the Louisiana Purchase territory (the “Missouri Compromise”) and in the District of Columbia.<sup>25</sup> Article 6 of the Northwest Ordinance provided the following: “There 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.”<sup>26</sup> In later debates on the Thirteenth Amendment, Senator Sumner, an advocate of abolition, argued that the Northwest Ordinance’s punishment clause was intended to recognize the right of states to continue the practice of imprisoning debtors for labor.<sup>27</sup>

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20. A. LEON HIGGINBOTHAM, *SHADES OF FREEDOM* 18 (1996). But note that although treated as such, their period of servitude was likely for as long as desired or even life, since Africans, arriving involuntarily, were likely sold without a written contract specifying a period of service. *Id.* at 19.

21. *Id.* at 18.

22. *Id.*

23. *Id.* at 18–20.

24. *Id.*

25. Rutherglen, *supra* note 11, at 1372–74.

26. HENRY STEEL COMMAGER & MILTON CANTOR, *DOCUMENTS OF AMERICAN HISTORY* 128 (10th ed. 1988).

27. CONG. GLOBE, 38TH CONG., 1ST SESS. 1488 (1864).

There is little congressional documentation surrounding the drafting and debate of Section 1.<sup>28</sup> For example, there are no records of the debates occurring within the Senate Judiciary Committee—the committee that produced the text as adopted.<sup>29</sup> Instead, the majority of concerns voiced during the recorded debates by the full Senate centered on the authority of the federal government to enact the Amendment, the power of Congress to enforce the Amendment under Section 2, and a late proposal by Senator Sumner to replace the committee’s proposed text with language foreshadowing the Equal Protection Clause of the Fourteenth Amendment.<sup>30</sup>

On the other hand, the debates and discussion leading up to the adoption of the Thirteenth Amendment, to the extent that they related to the Punishment Clause, do indicate a recognized difference between involuntary servitude and slavery. For instance, in December 1863, Representative Ashley proposed that the Thirteenth Amendment should read, “Slavery being incompatible with a free government is forever prohibited in the United States, and involuntary servitude shall be permitted only as a punishment for a crime.”<sup>31</sup> His proposed text provides a distinction between the two practices and clearly limits the penalty of criminal conviction to involuntary servitude. Similarly, Ashley’s proposed text mirrored amendments to state constitutions in Kansas and Iowa, which both explicitly prohibited slavery and used independent clauses to allow involuntary servitude as punishment for a crime.<sup>32</sup>

The proposal by the Senate Judiciary Committee, however, reproduced the language found in previous federal documents limiting or abolishing slavery, such as the Northwest Ordinance. The text proposed by the Senate Judiciary Committee and eventually adopted by the Senate read, “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist

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28. See Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 174 (1951) (noting that the primary issue of debate was the scope of federal authority under the proposed Thirteenth Amendment).

29. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 449 n.64 (1989).

30. CONG. GLOBE, 38TH CONG., 1ST SESS. 1488.

31. The bill was actually co-authored by Representative James M. Ashley and the co-chair of the House Judiciary Committee, Representative James Wilson. See HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER THE LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875* 384 (1982); Howe, *supra* note 14, at 993; tenBroek, *supra* note 28, at 173–77.

32. See Howe, *supra* note 14, at 994 n.90 (Iowa: “There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime.”; Kansas: “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.”).

within the United States, or any place subject to their jurisdiction.”<sup>33</sup> The Punishment Clause in the proposed text did not elicit great debate. Indeed, the only recorded challenge to the Punishment Clause language came from Senator Sumner, who preferred an amendment that would recognize the equality of all persons before the law.<sup>34</sup>

Congressional action after the adoption of the Thirteenth Amendment further supports both arguments that slavery and involuntary servitude are distinct, and that only involuntary servitude may be imposed as punishment for a crime. Congress passed the Thirteenth Amendment on January 31, 1865, and the states ratified it on December 6, 1865.<sup>35</sup> In response, ten of the former slave states enacted a series of discriminatory criminal laws, known as the “Black Codes,” to recreate slavery in all but name.<sup>36</sup> These laws, though enacted by different states, created a legal structure to maintain the subordination of African-Americans.<sup>37</sup> In particular, the new laws ensured a steady supply of labor through the convict-labor exception to the Thirteenth Amendment.<sup>38</sup> The Black Codes created new offenses, such as “insolent gesture” or “malicious mischief,” that deliberately targeted African-Americans.<sup>39</sup> Sentences were statutori-

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33. CONG. GLOBE, 38TH CONG., 1ST SESS. 1488 (emphasis added). Compare U.S. CONST. AMEND. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”), with NORTHWEST ORDINANCE OF 1787 § 14, art. VI, reprinted in COMMAGER & CANTOR, *supra* note 26, at 128 (“There 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.”).

34. CONG. GLOBE, 38TH CONG., 1ST SESS. 1488. Howe draws heavily on this portion of the debate to argue that Congress knew it was creating slavery as a punishment upon conviction. Howe, *supra* note 14, at 995. Howe later argues that the availability of alternative language (in state constitutions, but not federal law) and the absence of legal challenges to the slavery status of prisoners under penal plantations and convict-leasing support his interpretation. *Id.* at 1021–26. I disagree. Although Sumner posits slavery as punishment as a textual possibility under the Senate Judiciary Committee draft, given his oratorical style and his outspoken and clear opposition to slavery, the context of his arguments indicate that he would prefer a positivist approach to ending slavery (i.e., that guaranteed certain rights to all), instead of a prohibitory approach (i.e., forbidding the practice). Of particular importance are the responses to Sumner’s stated possibility, none of which focused on the particular language of the Clause but rather on his counterproposal of a positivist approach. CONG. GLOBE, 38TH CONG., 1ST SESS. 1487–88.

35. ALAN GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 39 (1978); James M. McPherson, *In Pursuit of Constitutional Abolitionism*, in *THE PROMISES OF LIBERTY* 32–33 (Alexander Tsesis ed., 2010) (discussing the politics of passage and ratification).

36. William Wiecek, *Emancipation and Civic Status: The American Experience 1865–1915*, in *THE PROMISES OF LIBERTY*, *supra* note 35, at 84. For an excellent and in-depth analysis of convict-lease programs and the use of Black Codes to create a steady labor supply, see generally DAVID M. OSHINSKY, *WORSE THAN SLAVERY* (1997).

37. Wiecek, *supra* note 36, at 89.

38. See OSHINSKY, *supra* note 36, at 20–22.

39. Wiecek, *supra* note 36, at 85.

ly extended or even newly created for misdemeanor offenses.<sup>40</sup> Due process protections were summarily dispensed with, and the state became the largest “owner” of able-bodied men.<sup>41</sup> As such, the state would auction inmates off to the highest private bidder under the “convict-lease” program.<sup>42</sup> “[T]he southern leasing systems that arose after 1865 were unprecedented in the number of prisoners involved, in the heavy use of black prisoners and in the nearly unfettered control given to the leasing parties.”<sup>43</sup> In turn, Douglas Blackmon wrote that during the post-Civil War period, these leasing parties subjected the leased convicts to the same types of punishment formerly meted out to slaves (e.g, whipping and branding).<sup>44</sup>

The use of the Punishment Clause to resubordinate the formerly enslaved was not the intended effect of the Thirteenth Amendment. For example, Representative Kasson argued that the “only kind of involuntary servitude known to the Constitution and the law” was when a prisoner was directly sentenced to hard labor in the state prison under the control of state officers.<sup>45</sup> In response to the abuses of the convict-lease system, Congress enacted the Civil Rights Act of 1866 to specifically cure these—and other—abuses.<sup>46</sup>

Despite the enactment of the Civil Rights Act, some courts equated prisoners with slaves. For example, in 1870, the Virginia Supreme Court in *Ruffin v. Commonwealth* declared prisoners, by virtue of their incarceration, “civilly dead.”<sup>47</sup> Specifically, the court notoriously concluded:

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**.<sup>48</sup>

The *Ruffin* case, decided only five years after ratification of the Thirteenth Amendment, clearly conflated the status of slavery with involuntary servitude. Although the opinion glaringly did not mention *Ruffin*’s

40. BARBARA ESPOSITO & JOE WOODS, PRISON SLAVERY 101 (1982).

41. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 67 (2008); ESPOSITO & WOODS, *supra* note 40, at 101–03.

42. BLACKMON, *supra* note 41, at 67.

43. Howe, *supra* note 14, at 1009.

44. BLACKMON, *supra* note 41, at 8, 56.

45. CONG. GLOBE, 39TH CONG., 2ND SESS. 345–46 (1867).

46. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (1991)) (providing for a series of legal rights, including the rights to make and enforce contracts, and to sue and be sued).

47. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790, 796 (1871).

48. *Id.* (emphasis added).

race, newspaper reports at the time indicate that Mr. Ruffin was an African-American prisoner.<sup>49</sup> The Civil War had ended only five years prior to the *Ruffin* decision. Faced with an African-American defendant just a few years after emancipation, and still influenced by the racial legacy of slavery, the Virginia Supreme Court could see Mr. Ruffin as only a slave.

Since *Ruffin*, courts routinely have failed to properly distinguish involuntary servitude from slavery.<sup>50</sup> Although courts have taken pains to distance themselves from the *Ruffin* opinion,<sup>51</sup> their efforts have not translated into a clear understanding of the differences between these two terms. In the *Slaughter-House Cases*, one of the first cases to examine the Thirteenth Amendment, the U.S. Supreme Court held that the Thirteenth Amendment applied to all forms of slavery, not just “African slavery.”<sup>52</sup> The Court appears to recognize a distinction between the two terms, noting that if “Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race . . . this amendment may safely be trusted to make void.”<sup>53</sup>

In the *Slaughter-House Cases*, the Court defined slavery as a “legalized social relation” and just as quickly found that slavery was over following the Civil War.<sup>54</sup> This vague definition of slavery, however, was accompanied by a broad definition of involuntary servitude. “Servi-

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49. *Commutation of Sentence*, N.Y. TIMES, Feb. 11, 1872, at 3. Ruffin was initially imprisoned for “assault with intent to kill” and sentenced to five years. *Id.* While leased to contractors outside penitentiary walls, Ruffin allegedly shot a guard while attempting to escape and was sentenced to death. *Id.* The Virginia Supreme Court affirmed his conviction and sentence. *Id.* The Governor of Virginia subsequently commuted his sentence to life imprisonment. *Id.*

50. *See, e.g.*, *Ali v. Johnson*, 259 F.3d 317, 317 (5th Cir. 2001) (holding that “inmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work” without distinguishing that an inmate could challenge the constitutionality of slave labor); *Pischke v. Litscher*, 178 F.3d 497, 500–01 (7th Cir. 1999) (dismissing as frivolous prisoners’ claims that transfer to a private prison for labor violated the Thirteenth Amendment).

51. *See, e.g.*, *Washlefske v. Winston*, 60 F. Supp. 2d 534, 539 (E.D. Va. 1999), *aff’d*, 234 F.3d 179 (4th Cir. 2000) (“[T]he idea expressed by the court in *Ruffin*, that inmates are no more than ‘slaves of the State,’ has been repeatedly and expressly repudiated by other courts.”); *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973) (Circuit Judge—and future Supreme Court Justice—Stevens wrote, “[T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.”).

52. *The Slaughter-House Cases*, 83 U.S. 36, 69 (1872) (holding Louisiana statute creating monopoly on authority to stable and slaughter livestock did not violate the Constitution).

53. *Id.* at 72.

54. *Id.* at 68. The Court seemed at pains to argue that slavery caused the Civil War, but as the war is over, slavery is over as a result. Even in 1872, the horrors of the war, and perhaps fear about the recurrence of war among the states, underlie the Court’s quick burial of slavery as an institution. *But see* BLACKMON, *supra* note 41, at 7–8 (arguing that slavery continued long after formal emancipation by the Thirteenth Amendment).

tude,” the Court held, is “of a larger meaning than slavery” and includes “all shades and conditions of African slavery.”<sup>55</sup> For example, the Court claimed that “apprenticeship for long terms, as it had been practiced in the West India Islands, . . . or . . . reducing the slaves to the condition of serfs attached to the plantation” would have been constitutional if Section 1 prohibited only slavery and not involuntary servitude.<sup>56</sup> There is obvious confusion in the use of the terms “slaves” and “serfs.” The Court implied a difference in the quality of bondage—that serfdom is a worse state of being than slavery.<sup>57</sup> At the same time, the Court appeared to designate chattel slavery as the worst state of being, and involuntary servitude as a lesser form of chattel slavery.<sup>58</sup> The *Slaughter-House Cases*, rather than providing a judicial framework for recognizing instances of slavery, instead provide very little insight into what conditions constitute slavery. The case appears to teach that slavery exists (and is therefore prohibited by the Thirteenth Amendment) only when the master calls it slavery.

Just a few years later, the Court again confronted the definition of slavery and involuntary servitude in the *Civil Rights Cases*.<sup>59</sup> While the Court indicated that it knew what slavery was, it failed to define the term.<sup>60</sup> Instead, the Court concentrated on specific incidents of slavery, such as compulsory service, inability to hold property, lack of standing in court, and prohibitions against being a witness against a “white person.”<sup>61</sup> Nor did the Court meaningfully distinguish between the terms involuntary servitude and slavery. The Court, for example, failed to identify whether any specific circumstances apply to involuntary servitude. Although the opinion focused primarily on the extent of congressional authority to enact a law prohibiting racial discrimination under the enforcement provisions of the Thirteenth and Fourteenth Amendments, the Court continued to gloss over the distinctions between the two terms.

The question before the Court in the *Civil Rights Cases* was whether Congress, under Section 2 of the Thirteenth and Fourteenth Amendment’s enforcement provisions, had authority to pass the Civil Rights Act of 1875, making it illegal to discriminate on the basis of race.<sup>62</sup> The Civil Rights Act prohibited discrimination in the provision of public

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55. *The Slaughter-House Cases*, 83 U.S. at 69.

56. *Id.*

57. *Id.* (“reducing slaves to conditions of serfs . . .”).

58. *Id.*

59. *The Civil Rights Cases*, 109 U.S. 3 (1883).

60. *See id.* at 23–25.

61. *Id.* at 22.

62. *Id.*

transportation and accommodation.<sup>63</sup> Without illuminating the difference between the two terms, the Court simply held,

It would be *running the slavery argument into the ground* to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater or deal with in other matters of intercourse or business.<sup>64</sup>

This trend of failing to distinguish between the two conditions of slavery and involuntary servitude continued in a series of cases through the modern era. For example, in *Plessy v. Ferguson*, the Court held that segregation of races on trains did not imply slavery or involuntary servitude.<sup>65</sup> Most of the cases in the early-twentieth century focused solely on involuntary servitude.<sup>66</sup> For example, the Court in *Bailey v. Alabama* held an Alabama statute unconstitutional under the Thirteenth Amendment because the law created the condition of involuntary servitude by requiring labor to repay a previously owed debt.<sup>67</sup>

In the mid- to late-twentieth century, Thirteenth Amendment cases focused on the enforcement powers of Congress under Section 2. In *Jones v. Mayer*, the first case contemplating an expanded role for congressional action, the Court held that 42 U.S.C. § 1982, barring private and public racial discrimination, was a “valid exercise of the power of Congress to enforce the Thirteenth Amendment.”<sup>68</sup> Despite a series of cases centered on the rights created by the Thirteenth Amendment, the Court has provided little guidance on understanding how slavery and involuntary servitude are actually different.

At most, courts have incorporated the American memory of slavery and have failed to provide a broader framework for understanding and distinguishing the terms slavery and involuntary servitude.<sup>69</sup> While the American memory, or narrative, of slavery plays an important role in recognizing slavery, it does little to help us distinguish slavery from other conditions. Moreover, involuntary servitude is a much more nebulous

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63. *Id.* at 23.

64. *Id.* at 24–25 (emphasis added).

65. *Plessy v. Ferguson*, 163 U.S. 537, 542, 548 (1896) (holding that the “separate but equal” doctrine is constitutional under the Thirteenth and Fourteenth Amendments).

66. *See, e.g.*, *Pollock v. Williams*, 322 U.S. 4, 9 (1944) (noting that peonage is involuntary servitude); *Butler v. Perry*, 240 U.S. 328, 333 (1916) (finding that forced labor to repair roads near one’s own residence without compensation is not involuntary servitude); *Clyatt v. United States*, 197 U.S. 207, 215 (1905) (noting that peonage is involuntary servitude).

67. *Bailey v. Alabama*, 219 U.S. 219, 244–45 (1911).

68. *Jones v. Mayer*, 392 U.S. 409, 413 (1968).

69. *See* Julie Chi-Hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 327–31 (2007).

concept in American history and therefore harder to identify. Accordingly, courts have refused to examine allegations of slavery behind prison walls, instead construing such claims as involuntary servitude and therefore constitutionally permitted.<sup>70</sup> For example, the Fifth Circuit rejected a prisoner's claim that forced labor without compensation violated his Thirteenth Amendment rights.<sup>71</sup> But instead of engaging in a deeper analysis of his claim, the Court preferred to apply "the Thirteenth Amendment precisely as it is written."<sup>72</sup>

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. One explanation for this failure to differentiate is that the distinction between the two terms is practically meaningless in the majority of Thirteenth Amendment claims. Many of the initial cases brought under Section 1 of the Thirteenth Amendment were not on behalf of actual slaves or prisoners. Instead, the initial Thirteenth Amendment cases concerned, for example, butchers or owners of restaurants or public accommodations.<sup>73</sup> Both types of status—slavery and involuntary servitude—are forbidden, and therefore, nonprisoner plaintiffs suing for redress need to prove only one or the other. Courts, in providing or denying redress, are required to find only one of the above factors. The differences between the two are immaterial if a nonprisoner plaintiff only needs to prove either condition.

Second, the courts and the public have relied too extensively on the legally formalistic notion of slavery as legal ownership. Courts have assumed that slavery is not claimed in Thirteenth Amendment challenges to forced labor.<sup>74</sup> In part, this assumption results from the contested discourse on race and racial history in the United States. By safely tucking slavery away as a long-dead practice, issues of persistent socioeconomic

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70. *See, e.g.,* *Van Hoorelbeke v. Hawk*, No. 95-2291, 1995 WL 676041, at \*4 (7th Cir. Nov. 9, 1995) (dismissing a prisoner's claim of being made a slave as noncognizable under the Thirteenth Amendment, and noting that the prisoner has "no rights" under the Thirteenth Amendment); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (noting that the Thirteenth Amendment simply does not apply inside the prison walls but also restricting its analysis to involuntary servitude); *Mitchell v. San Jose Immigration & Customs Enforcement Dir.*, No. C 07-3843 SI (pr), 2007 WL 2746745, at \*2 (N.D. Cal. Sept. 20, 2007) (dismissing Mitchell's claim that he is forced to engage in slave labor because the Thirteenth Amendment allows for involuntary servitude by those duly convicted).

71. *Wendt v. Lynaugh*, 841 F.2d 619, 620 (5th Cir. 1988).

72. *Id.* at 621.

73. *See* *The Civil Rights Cases*, 109 U.S. 3, 20–21 (1883); *The Slaughter-House Cases*, 83 U.S. 36, 69 (1872).

74. *See, e.g.,* *Ali v. Johnson*, 259 F.3d 317, 317 (5th Cir. 2001) ("[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.").

inequality center not on history but on the personal characteristics associated with certain racial groups.

In sum, Thirteenth Amendment jurisprudence indicates a difference between the terms slavery and involuntary servitude. Both the Amendment text and dicta in the jurisprudence, with few exceptions, confirm that only involuntary servitude may be imposed for punishment of a crime. But while acknowledging the distinction, judges and society have failed to give meaning to the content of the terms slavery and involuntary servitude.

### *C. Distinguishing Involuntary Servitude and Slavery*

The distinctions between slavery and involuntary servitude become meaningful when applied to prison labor. All prisoners duly convicted may be forced to work against their will.<sup>75</sup> Indeed, penal labor was initially conceived in the late-seventeenth century as an alternative to other methods of punishment, like death and branding.<sup>76</sup> In the modern era, many justify prison labor because it enhances the prospect of rehabilitation by providing training in job skills and fostering a sense of responsibility and duty.<sup>77</sup> For example, the U.S. Catholic Conference has emphasized the importance of meaningful prison-work opportunities that enhance human dignity for restorative justice and rehabilitation.<sup>78</sup> Even if prison labor fails to reach the lofty goals of the Catholic Conference, there is still an expectation that prison labor will “drain ‘the filthy puddle of idleness.’”<sup>79</sup> Prison labor, for both rehabilitative and punishment purposes, is perceived as normatively good.

Most types of prison labor will approximate conditions of involuntary servitude and thereby become permissible under the convict-labor exception of the Thirteenth Amendment and under society’s general ex-

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75. For analysis of the meaning of “punishment” as applied to nonconvicted prisoners and forced labor, see 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, 435–43 (2009). For a historical approach comparing the rights of prisoners (under conditions of involuntary servitude) and the greater rights and protections associated with workers, see Leroy D. Clark & Gwendolyn M. Parker, *The Labor Law Problems of the Prisoner*, 28 RUTGERS L. REV. 840 (1975).

76. Clark & Parker, *supra* note 75, at 841.

77. See, e.g., Warren E. Burger, *More Warehouses, or Factories With Fences?*, 8 NEW ENG. J. ON PRISON L. 111, 111 (1982); Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC’Y REV. 33, 38–39 (2011).

78. See William P. Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1168–74 (2007).

79. Stephen P. Garvey, *Freeing Prisoners’ Labor*, 50 STAN. L. REV. 339, 346 (1998).

pectation for punishment.<sup>80</sup> Other types of labor, however, may approximate conditions of slavery. In such cases, the prisoner's enslavement is an anathema to the Constitution and to society's principles of human dignity.

Chattel slavery, as practiced in the United States, is the clearest form of slavery, but there is significant disagreement on whether slavery encompasses more than just chattel slavery. Lea VanderVelde, in her arguments for an expanded and aspirational Thirteenth Amendment, rejects the three primary interpretations of the term slavery as "limitations."<sup>81</sup> She argues that slavery heretofore has been interpreted narrowly to apply only to conditions (1) coerced by violence; (2) of legal ownership in the person by another; or (3) of lesser liberty entitlements than free men.<sup>82</sup> Indeed, chattel slavery is a legally formalistic approach to slavery and has been the dominant understanding of slavery internationally.<sup>83</sup> Nevertheless, most scholars would agree that while slavery and involuntary servitude may share many characteristics, the practice of slavery has distinct and unique harms beyond the involuntary nature of the labor performed.<sup>84</sup>

Involuntary servitude is, at its core, forced labor for the benefit of another.<sup>85</sup> Such labor may be compelled by physical force or coerced. Coercion must amount to the laborer justifiably believing he has no choice but to perform the ordered work.<sup>86</sup> Such coercion may, but need not necessarily, be physical. The classic example of involuntary servitude is the system of peonage, whereby the poor were forced to labor

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80. Angela Davis, among others, has argued for the "abolition" of the prisoner-labor exceptions found in both the Thirteenth Amendment and state constitutions. She argues that the exception was intended to recreate slavery and therefore is indelibly tainted and the exception continues to propagate slavery in modern times, particularly during the current era of mass incarceration. See Angela Y. Davis, *From the Convict Lease System to the Super-Max Prison*, in STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISON 60 (Joy James ed., 2000); see also ESPOSITO & WOODS, *supra* note 40, at 3–6 (1982) (summarizing the argument that the prisoner-labor exception is simply slavery by other means and the exception should therefore be removed from the Thirteenth Amendment).

81. Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 885, 860 (2007).

82. *Id.*

83. See *infra* Part III.B discussion of international law on slavery.

84. See, e.g., Stanley L. Engerman, *Slavery at Different Times and Places*, AM. HIS. REV. 480, 480–81 (2000) (noting the difficulties of definition and delineation between slavery and non-slavery practices, but acknowledging that the harms accompanying slavery are invariably greater than similar, non-slave practices).

85. See *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (interpreting the Thirteenth Amendment to "prohibit[] that control by which the personal service of one man is disposed of or coerced for another's benefit").

86. See *Wicks v. S. Pac. Co.*, 231 F.2d 130, 138 (9th Cir. 1956).

until their debt was satisfied.<sup>87</sup> More recently, examples include claims of involuntary servitude against human trafficking, the denial of abortion services,<sup>88</sup> racial profiling, and rape.<sup>89</sup> In this sense, involuntary servitude is broader than the practice of slavery.

It could be argued that the key difference between slavery and involuntary servitude is that slavery status attaches for life, but involuntary servitude for only a definite period of time. This supposed distinction, however, is meaningless when we consider the purpose behind a future possibility of freedom. Involuntary servitude need not necessarily be for life but rather may exist for a few days, months, or years. The framers of the Amendment referred to the practice of indentured apprenticeship, which is where a person or child is compelled to labor against their will for the benefit of another, ostensibly to learn a particular trade.<sup>90</sup> After the period of servitude, the person is free, perhaps to practice the trade for their own benefit or take on their own apprentices.<sup>91</sup> Thus, involuntary servitude may be a temporary condition, after which the stain of servitude is removed and no longer socially recognized.

In contrast, slavery, under our traditional narrative, was for life. Slavery could be inherited, such that an African-American could be born and die as a slave, never knowing any other status. As applied to prisoners, it could be argued that prisoners are not always sentenced to life and that their status within the prison, even if appearing slave-like, is more like involuntary servitude. The length of their degraded status, under this argument, is entirely dependent on the sentence received at the end of their criminal trial.

Another supposed distinction between slavery and involuntary servitude is the legal ownership of the enslaved versus the compulsion by nonlegal methods (e.g., quasi-contractual or psychological) of involuntary servants. Focusing solely on this formalistic distinction ignores the broader differential effects of law upon the enslaved. The role of law is important for a rich understanding of slavery, not as a formal matter, but because law undergirds and reinforces social death.

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87. See *Bailey*, 219 U.S. at 243 (noting that “peonage, however created, is compulsory service, involuntary servitude”).

88. See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 483–84 (1990).

89. See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1666967](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666967).

90. See *The Slaughter-House Cases*, 83 U.S. 36, 69 (1872).

91. See VanderVelde, *supra* note 81, at 878.

Slavery cannot exist without a legal structure that maintains the obligation of a slave to serve the master.<sup>92</sup> In this case, it is the law that provides the compulsion, instead of the compulsion by a private actor. Whereas in cases of involuntary servitude the servant must justifiably believe there is no alternative other than service, in slavery there simply is no other alternative, as the law stands ready to enforce the obligation.

Not only is the law used for enforcement but it also differentiates punishment based on a person's enslaved status. Prior to the Civil War, the law provided a different set of punishments for violations of the law for those legally designated as slaves.<sup>93</sup> After the Civil War, prisoners could be whipped and beaten under authority of law for any supposed transgression.<sup>94</sup> In modern times, an inmate may be subject to additional punishments (e.g., segregation, revocation of privileges, etc.) for committing the same crime as a person who is not imprisoned, and acts that normally are not considered a "crime," such as failure to work, become disciplinary violations within the prison walls and thereby punishable by the prison administration.<sup>95</sup>

Compared to involuntary servitude, the law plays a more significant role in slavery even beyond the primary functions of enforcement and punishment. Law structures the rights and obligations of one person to another and of the government to individuals. By law, slaves were, among other things, forbidden to marry by choice, unable to conclude contracts, and noncognizable as witnesses testifying in a court of law.<sup>96</sup> Involuntary servants, however, retained their full panoply of rights once beyond their master's control of their economic productivity (i.e., after their term of service).<sup>97</sup> For slaves, all rights and duties flowed either to

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92. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) ("It is true that slavery cannot exist without law any more than property in lands and goods can exist without law.").

93. Slaves were more often subjected to "plantation justice" (i.e., the judgment of the owner), instead of judgment in a court of law. But the rare cases of criminal prosecution for slaves indicate a different set of punishments than for those not designated as slaves. MARK T. CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* 15 (1971).

94. See BLACKMON, *supra* note 41, at 71.

95. See *McKune v. Lile*, 536 U.S. 24, 39 (2002) ("An essential tool of prison administration, however, is the authority to offer inmates various incentives to behave. The Constitution accords prison officials wide latitude to bestow or revoke these perquisites as they see fit."); *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (noting that "[the punishment of incarcerated prisoners] effectuates prison management and prisoner rehabilitative goals," and such "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law").

96. See generally tenBroek, *supra* note 28, at 171 (summarizing the prohibitions facing slaves at the time of the Thirteenth Amendment).

97. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL SYSTEM: THE COLONIAL PERIOD 352-55* (1978).

or through their master.<sup>98</sup> For indentured servants, there remained an independent authority—the contract and the will of the state to enforce it beyond the master, through whom rights and duties were perfected.<sup>99</sup>

#### D. Social Death as a Concept

The key difference between slavery and involuntary servitude is the social death of the unwilling laborer. Orlando Patterson has argued that slavery is unique in its imposition of social death.<sup>100</sup> Based on his comparative study of over 180 separate slave societies around the world, Patterson argues that a distinguishing characteristic of slavery as compared to other forms of forced labor is the social death of the slave.<sup>101</sup> Social death is the alienation or exclusion of the slave from the community at large justified by the general unworthiness of the slave.<sup>102</sup> Social death may be accomplished through law, such as through the lack of legal recognition of a slave's genealogical relationships (ascendants and descendants).<sup>103</sup> But it may also be accomplished through repetitive practices, rituals, and symbols denoting unworthiness and, ultimately, social banishment.<sup>104</sup> It is these symbolic interactions and relationships of domination culminating in social death that fundamentally distinguish slavery from involuntary servitude. Forced plantation labor is culturally significant in the American narrative of slavery.<sup>105</sup> Penal plantation labor arose as a method to reimpose slavery following enactment of the Thirteenth Amendment.<sup>106</sup> In modern times and as practiced, it lacks any rehabilita-

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98. *Id.*

99. *Id.*

100. Patterson rejects the traditionally American characteristics of chattel slavery (race and proprietary rights) as the primary denominators of slavery. See PATTERSON, *supra* note 6, at vii–xiii, 1–14. But for the purposes of this Article—with its focus on American history—it is unnecessary to make this distinction. I argue that social death is an important characteristic, regardless of the validity of the other traditionally American characteristics.

101. But see Kevin Bales & Peter T. Robbins, “No One Shall Be Held in Slavery or Servitude”: A Critical Analysis of International Slavery Agreements and Concepts of Slavery, 2 HUM. RTS. J. 18, 30–32 (2001) (critiquing viability of Patterson’s social death thesis with modern examples of slavery). Bales posits a more general framework for slavery that focuses on the loss of free will, the appropriation of labor power, and violence (or the threat of violence). Under his framework, similar to the analysis in this Article, not all prison labor is considered slavery, but depending on the facts of the situation, some forms of prison labor may apply. *Id.* at 33.

102. PATTERSON, *supra* note 6, at 38–45.

103. *Id.* at 7.

104. *Id.* at 51–62.

105. For example, a Connecticut Office of Legal Research Memo reports that “many black inmates viewed farm work under these circumstances [as prison labor and] as too close to slavery to want to participate.” CHRISTOPHER REINHART, CONN. OFFICE OF LEGAL RES., PRISON FARMS (2008), <http://www.cga.ct.gov/2008/rpt/2008-R-0081.htm>.

106. David M. Oshinsky, *Convict Labor in the Post-Civil War South: Involuntary Servitude After the Thirteenth Amendment*, in THE PROMISES OF LIBERTY, *supra* note 35, at 100–16.

tive value and in fact may actually delay a prisoner's reintegration into society even when freed.<sup>107</sup> When a prisoner is forced to labor on a plantation, he is ritually marked as enslaved.

The cultural symbols of exclusion and degradation symbolic of social death produce a stigma of inferiority. Charles R. Lawrence III, in his seminal article on unconscious racism,<sup>108</sup> has argued that the cultural meaning of an act or practice is a better predictor of underlying racism than the intent requirement announced in *Washington v. Davis*.<sup>109</sup> Although his analysis focuses on the Fourteenth Amendment,<sup>110</sup> his general proposition on the influence of culture is still relevant to distinguishing slavery from involuntary servitude. When an act "conveys a symbolic message," the act draws on a shared language of symbols and culture developed over time.<sup>111</sup> An act may stigmatize an individual or group and produce unique harms beyond those contemplated by the act. Much like social death, the stigma both "assault[s] a person's self-respect and human dignity" and "brands the individual" as inferior and outcast.<sup>112</sup> In cases of slavery, we are confronted with the most extreme form of stigma possible, namely, social death.

Although a prisoner may not be a slave for life, as Orlando Patterson notes, slavery as an institution is not just about the static existence of a slave but rather about the processes associated with maintaining the institution.<sup>113</sup> The potential access to eventual freedom molds the institution, creating incentives, and indeed, justifying the existence of slavery as a practice. Patterson's argument makes practical sense, particularly in this day and age of longer sentences and mandatory terms for habitual offenders. For an inmate sentenced to twenty or forty years, the fact that at some point he may eventually seek parole or release at the end of the term in fact aids the maintenance of his confinement and labor, creating

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107. See *infra* notes 120–21 and accompanying text.

108. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987).

109. *Washington v. Davis*, 426 U.S. 229 (1976) (creating an intent requirement for allegations of disparate impact under the Equal Protection Clause of the Fourteenth Amendment).

110. In particular, Lawrence argues that a facially neutral law or act may be considered "racist" or "intentionally discriminatory" without a finding of deliberate intent through interrogating the cultural meaning and symbolism of the law or act. Lawrence, *supra* note 108, at 322–24. Certainly an argument could be made that the prisoner-labor exception in general is intentionally discriminatory under his "cultural meaning" test, given the history of prisoner labor. Others, such as Angela Davis, have indeed made this argument in support of abolishing prisons in general. DAVIS, *supra* note 7, at 105–13. While important, those arguments are beyond the scope of this Article, which focuses on only one type of prison labor: forced plantation labor.

111. Lawrence, *supra* note 108, at 355–62.

112. *Id.* at 351.

113. PATTERSON, *supra* note 6, at 217.

incentives toward participation in labor that would otherwise be considered slavery.

Historically, the use of symbols and rituals in slavery branded or marked the servant as a slave. As such, those particular practices, symbols, or rituals assume a particular significance when invoked in modern-day prisons. Accordingly, the history of slavery in a specific place becomes relevant when determining if the prison, by forcing an inmate to labor in a certain way, has fostered the social death of the inmate.

Adopting Orlando Patterson's framework into our understanding of the definition of slavery largely avoids the difficulties inherent in the previously described frameworks. By focusing on the harm to be avoided rather than the condition of slavery or the legal formality of slavery, the actual situations to be prohibited are much clearer.

#### *E. Social Death in the Modern Era*

All convicts, whether laboring on state-run plantations or not, experience a degree of social death. Their ability to meaningfully participate in our democracy is severely curtailed while serving a sentence of punishment. For example, states may preclude inmates from voting<sup>114</sup> and organizing unions.<sup>115</sup> But the harm suffered by certain inmates working on penal plantations is the dignitary harm of being made into a slave, laboring in similar conditions as generations prior, and being made property, even if it is property of the state. To be made slaves again is to strip inmates of their basic human dignity and to "treat members of the human race as nonhumans."<sup>116</sup>

Moreover, the punishment of degradation, of being enslaved and thereby excluded, is contrary to our professed (even if confused) penological goals of retribution, deterrence, incapacitation, and rehabilitation.<sup>117</sup> While retribution still plays a role in our criminal justice system, retribution nevertheless has limits. Our laws do not permit torture as a legitimate form of retributive punishment because "[e]ven the vilest

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114. See generally Deborah Parks, *Ballot Boxes Behind Bars: Toward Repeal of Felon Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71 (2003) (summarizing state felon disenfranchisement laws, and arguing that prisoners should not lose the right to vote while completing their sentences).

115. See *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

116. *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring) (noting that the rack and the screw are considered cruel and unusual punishments because of their fundamental injury to human dignity).

117. *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010) (holding that life without parole sentences for crimes committed as a juvenile violated the Eighth Amendment, and "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation provides an adequate justification").

criminal remains a human being possessed of common human dignity.”<sup>118</sup>

Imposing slavery also fails to serve the goal of deterrence. First, the punishment of slavery status does not depend on the crime of conviction and could apply to prisoners convicted of robbery as well as murder. By sweeping so broadly, slavery as punishment loses any deterrent effect it might have had if targeted to a particular class of crimes. Second, deterrence is undermined by the pronounced racial dynamics in the modern operation of prisons, whereby minority racial groups are significantly overrepresented in prison populations.<sup>119</sup> Accordingly, members of these groups may instead believe that, whether or not they commit criminal acts, the purpose of prison is simply to codify their enslaved status.

Last, slavery status undermines the goals of rehabilitation because prisoners experience feelings of injustice as they undergo a punishment ordered by a prison administrator<sup>120</sup> rather than a sentencing judge. As Foucault wrote, when the administrator’s power seems arbitrary—when the prisoner is “exposed in this way to suffering, which the law has neither ordered nor envisaged, [the prisoner] becomes habitually angry against everything around him; he sees every agent of authority as an executioner; he no longer thinks that he was guilty: he accuses justice itself.”<sup>121</sup> Such attitudes detract from the promise of rehabilitation and the potential contribution of a prisoner once he rejoins society.

The public, in discussing when and how slave status attaches, may find that it is connected to the nation’s (or even the specific region’s) historical practice of slavery. The dominant American narrative of slavery is chattel slavery as practiced in the South at the time of the Civil War.<sup>122</sup> The Southern economy, based on the production of raw goods for shipment to the manufacturing centers in the North, profited from the large-scale enslavement of individuals working the agricultural fields for cotton, soybeans, sugar, and row crops.<sup>123</sup> To maintain slavery as an institution, both the laws and culture demonized the slave and beatified the

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118. *Furman*, 408 U.S. at 273.

119. See Catherine London, *Racial Impact Statements: A Proactive Approach to Discussing Racial Disparities in Prison Populations*, 29 *LAW & INEQUALITY* 211, 213–23 (2011) (summarizing current inequalities in prison populations by race).

120. Prison administrators assign inmate work assignments within the prison walls and enjoy a relatively high degree of judicial deference in their assignments. See, e.g., *Turner v. Safley*, 482 U.S. 78, 90–92 (1987) (discussing judicial deference).

121. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF PRISON* 266 (1976).

122. See *The Slaughter-House Cases*, 83 U.S. 36, 69 (1872).

123. See generally Paul Finkelman, *The First Federal Human Rights Legislation: Suppressing the African Slave Trade*, 3 *THE CRIT* 20 (2010) (discussing the politics and economics of ending slavery).

owner.<sup>124</sup> Slavery, according to this narrative, attached to African-Americans by virtue of their race.<sup>125</sup> Yet, other narratives and experiences may also be salient in considering when a particular type of work is so connected to our nation's history of slavery that it mimics the social death experience.<sup>126</sup>

Slavery in the United States was much more varied than the dominant narrative of Southern-style plantation slavery suggests. Historically, the types of work performed—like mining for gold and laying railroad track—varied by region, as did the particular groups treated as slaves (e.g., Mexican and Chinese).<sup>127</sup> The California Constitution of 1879, despite its deliberate subordination of the Chinese by forbidding Chinese employment, specifically noted that “Asiatic coolieism is a form of human slavery.”<sup>128</sup> The U.S. Supreme Court also specifically allowed for the possibility that Mexican peonage and Chinese “coolie” labor, for example, could “develop” into slavery.<sup>129</sup> Without dismissing or denigrating these other experiences, it is clear that at least chattel slavery is a part of our American narrative on slavery.

Unlike slavery, involuntary servitude was not racially defined; servitude did not automatically attach by virtue of belonging to a particular race or ethnic group.<sup>130</sup> Indeed, involuntary servitude was expressly included in the Thirteenth Amendment to encompass those types of compelled labor where race was not the defining criterion.<sup>131</sup> The U.S. Supreme Court has noted that involuntary servitude was intended to free all types of labor—from the English practice of debt servitude to the bondage of newly arrived immigrants paying for their passage to America.<sup>132</sup> The architects of the Thirteenth Amendment, by adding the term invol-

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124. ALEXANDER, *supra* note 8, at 25.

125. See *The Slaughter-House Cases*, 83 U.S. at 69 (referring to slavery as only “African slavery”).

126. It is certainly worth considering, but beyond the scope of this Article, whether forced plantation labor is so exceptional that it is the only modern-day circumstance of prisoner slavery. I am inclined to argue that indeed other slavery narratives are present and although perhaps not as national in scope, could also be relevant in determining when prisoner labor becomes slavery. But the point of this Article is confined solely to demonstrating that forced plantation labor by prisoners is slavery. I leave the possibilities of other forms of prisoner labor as slavery for another paper.

127. For similarities between the African slave trade and the Chinese “coolie” trade, see Samuel Pyeatt Menefee, *The Smuggling of Refugees by Sea: A Modern Day Maritime Slave Trade*, 2 REGENT J. INT'L L. 1, 10 (2003).

128. CAL. CONST. art. XIX, § 4 (1879).

129. *The Slaughter-House Cases*, 83 U.S. at 71–72 (“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.”).

130. See HIGGINBOTHAM, *supra* note 97, at 352–55.

131. *The Slaughter-House Cases*, 83 U.S. at 69.

132. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (holding an Alabama peonage statute unconstitutional).

untary servitude, sought to erase more than slavery as it was practiced prior to the Amendment. Instead, the Amendment sought to maintain a free labor supply, no matter how or why the labor was compelled.<sup>133</sup>

Although the dominant American narrative of slavery is the racialized assignment of slave status,<sup>134</sup> the harm of social death in modern times affects prisoners of all races.<sup>135</sup> From a public policy perspective, should the public be concerned about certain types of labor when performed by a group of Caucasian inmates who were not historically treated as slaves? Put differently, should we be concerned for all convicts performing the same type of labor? The harm at the heart of this argument is the social death and exclusion that result from an implied or explicit slave status. That stigma applies to all inmates who perform slave labor—not just those whose ancestors may indeed have been slaves. While historically slave status was race-dependent, slave status also independently denied a person's humanity. Returning to our example of Caucasian inmates, their ideas are also shaped by slavery narratives, and therefore, the social death entailed is just as real for them as it is for African-American inmates.

The cultural meaning of plantation labor in America is the imposition of stigma to all participating inmates, regardless of their race. The imposition of that stigma, and the accompanying exclusion and social death, bestow an additional punishment on the prisoner beyond that meted out by a judge. The punishment, likely not contemplated by either the sentencing judge or society in general, strips a prisoner's humanity from him and recasts the prisoner as property of the state.

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133. *Id.*

134. Race is a fluid concept and modern conceptions of race have shifted from purely biological to a cultural identification model. See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994). Courts have relied on a combination of internal identification with external validation when a claimant's race is disputed. See *Arthur Perkins v. Lake Cnty. Dep't of Util.*, 860 F. Supp. 1262, 1277–79 (N.D. Ohio 1994) (Title VII employment discrimination claim in which state disputed whether claimant was Native-American).

135. Although the harm accrues to all, minority communities may nevertheless be disproportionately impacted because of their overrepresentation in the prison population. See Stephen F. Ostertag & William T. Armaline, *Image Isn't Everything: Contemporary Systemic Racism and Antiracism in the Age of Obama*, 35 *HUM. & SOC'Y* 261, 271 (2011) (summarizing incarceration statistics, and applying a critical race theory lens to the war on drugs); see also Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 *SEATTLE U. L. REV.* 623, 629 (2012) (analyzing the overrepresentation of minorities in Washington state's prison population and finding that current racial disparities stem in part from the disparate impact of facially neutral laws and implicit racial bias).

### III. THE EIGHTH AMENDMENT: INMATE LABOR AS CRUEL AND UNUSUAL PUNISHMENT

Beyond the Thirteenth Amendment, the differences between slavery and involuntary servitude are also relevant under the Eighth Amendment's ban on cruel and unusual punishment.<sup>136</sup> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."<sup>137</sup> It is our "[r]espect for that dignity [that] animates the Eighth Amendment prohibition against cruel and unusual punishment."<sup>138</sup> As a legal matter, there is little precedent for finding forced plantation labor to be cruel and unusual, as the majority of cases have focused on the individual circumstances and capabilities of the prisoner–plaintiff. In addition, even where a punishment has no penological value, a prisoner–plaintiff would have to show that prison officials knew of the harm—the imposition of slave status or social death—and were nevertheless "deliberately indifferent."<sup>139</sup> As a matter of public policy, however, the imposition of slave status may be considered cruel and unusual along the lines of *Trop v. Dulles*, where denationalization was deemed an unconstitutional punishment. But unlike *Trop*, neither national nor international consensus is clear regarding the appropriateness of forced plantation labor.

#### A. Unconstitutional as Applied

In general, courts have adopted a hands-off approach to the administration of prisons and the enforcement of inmate rights.<sup>140</sup> Prisons may restrict the exercise of almost any constitutional right as long as it is "reasonably related to a legitimate penological interest."<sup>141</sup> While "the Constitution does not require that every aspect of prison discipline serve a rehabilitative purpose,"<sup>142</sup> punishments that are "totally without penological justification" may be deemed "unnecessary and wanton" and

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136. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend VIII.

137. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

138. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

139. See *Wiecek v. Brennan*, 511 U.S. 825, 832–48 (1994) (discussing the deliberately indifferent standard for Eighth Amendment claims).

140. For an excellent summary of Eighth Amendment jurisprudence, as well as a thoughtful critique on the Court's flawed interpretation of the meaning of punishment, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

141. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (upholding restriction on inmate correspondence but denying restriction on inmate marriage). One exception to this standard is the right to not be discriminated against on account of one's race, which is reviewed under strict scrutiny. *Johnson v. California*, 543 U.S. 499, 509 (2005).

142. *Hutto v. Finney*, 437 U.S. 678, 687 n.8 (1979).

thereby prohibited.<sup>143</sup> Mental harm is legally cognizable in prisoner lawsuits.<sup>144</sup> In *Farmer v. Brennan*, an inmate alleged that prison officials were “deliberately indifferent” to the risk of violence and sexual assault and failed to adequately protect him from other inmates.<sup>145</sup> The Court recognized that “shame, depression, and a shattering loss of self-esteem” constituted a cognizable harm under the Eighth Amendment.<sup>146</sup>

To date, inmates have had little success in arguing that forced plantation labor is cruel and unusual punishment. But the lack of success is based in part on the nature of the claim raised. Inmates have focused on the actual conditions of the work, rather than the type of work performed and the unique harms that flow from certain types of work. In short, prisoner claims of enslavement on penal plantations are treated as individual claims under the framework first established in *Estelle v. Gamble* in 1976.<sup>147</sup>

Under the *Gamble* framework, a prisoner must prove two distinct elements.<sup>148</sup> First, as an objective matter, the inmate must show that he suffered a deprivation that was “sufficiently serious.”<sup>149</sup> Successful claims have focused on the denial of basic necessities, such as food, medical care, or sanitary living conditions, which resulted in a “substantial risk of serious harm.”<sup>150</sup> Second, the prisoner must demonstrate that prison administration officials acted with a “sufficiently culpable state of mind” such as “deliberate indifference.”<sup>151</sup> To prove “deliberate indifference,” an inmate must show that the administrator had an actual awareness or knowledge of the risk of harm.<sup>152</sup>

The standard establishes a high bar for inmate claims of unconstitutional conditions. It is designed to separate aspects of confinement that are unpleasant from those that are unconstitutional by requiring not just

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143. See *Hope v. Pelzer*, 536 U.S. 730, 737 (2002); *Farmer v. Brennan*, 511 U.S. 825, 853 (1994) (discussing that rape or other forms of inmate violence serve no penological justification (citing *Rhodes v. Chapman*, 452 U.S. 337, 345–46 (1981))).

144. Of course, where only mental or emotional damage is at issue, the Prison Reform Litigation Act restricts an inmate’s recovery to nominal damages. 42 U.S.C. § 1997e(e). John Boston, Director of the New York City Legal Aid Society’s Prisoners’ Rights Project, provides the most in-depth discussion of this particular provision. See John Boston, *Mysteries of the PLRA: Major Unresolved Issues Fifteen Years Later*, 228 PRAC. L. INST. 113 (2011).

145. *Farmer*, 511 U.S. at 853.

146. *Id.*

147. *Estelle v. Gamble*, 429 U.S. 97 (1976).

148. *Id.*

149. *Wilson v. Seiter*, 501 U.S. 294, 299 (1991).

150. *Farmer*, 511 U.S. at 834.

151. *Id.*

152. *Id.* at 842.

proof of an injury (or risk thereof) but also subjective knowledge of the injury by a prison official.<sup>153</sup>

Courts apply the *Gamble* framework when a prisoner challenges the execution of “otherwise constitutional punishments.”<sup>154</sup> Here, the Constitution provides for involuntary servitude, such as labor for the benefit of another, as a constitutional punishment. In terms of penal plantation labor, an inmate would have to allege not only the injury occasioned by enslavement but also that prison officials actually knew of the risk of injury and failed to act.

Forced penal labor has been deemed unconstitutional only when the labor is “cruel and unusual” because it is beyond a particular inmate’s strength. For example, in *Jackson v. Cain*, the Fifth Circuit upheld an inmate’s claim challenging a work assignment that was beyond his physical capacity.<sup>155</sup> Jackson was forced to work 106 days of hard labor in the sun while he underwent treatment for syphilis.<sup>156</sup> The Fifth Circuit held that “[i]f prison officials knowingly put Jackson on a work detail which they knew would significantly aggravate his serious physical ailment such a decision would constitute deliberate indifference to serious medical needs.”<sup>157</sup>

In the U.S. Supreme Court, only a dissent by Justice Douglas in the case *Sweeney v. Woodall* supports the argument that forced agricultural labor by inmates may constitute cruel and unusual punishment.<sup>158</sup> In *Sweeney*, the Supreme Court denied certiorari for a habeas petition from an African-American inmate who had escaped from Alabama but been recaptured in Ohio. The inmate alleged that conditions in Alabama prisons constituted cruel and inhuman punishment.<sup>159</sup> Justice Douglas argued in dissent that, if true, the inmate’s claim that he was “stripped to his waist and forced to work in the broiling sun all day without a rest period” would constitute cruel and inhuman punishment.<sup>160</sup>

More generally, some punishments may be unconstitutional as applied, even if not generally prohibited. For example, solitary confinement

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153. For a critique of the subjective component, see Dolovich, *supra* note 140, at 884.

154. *Id.*

155. *Jackson v. Cain*, 864 F.2d 1235, 1253 (5th Cir. 1989) (relying on Eighth Circuit precedent).

156. *Id.* at 1238–40. The physical impact of syphilis depends on the stage of the disease, but at the secondary stage, symptoms can include “rashes, fever, swollen lymph glands, sore throat, patchy hair loss, headaches, weight loss, muscle aches, and fatigue.” *Syphilis – CDC Fact Sheet*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/std/syphilis/stdfact-syphilis.htm> (last visited Mar. 15, 2012).

157. *Jackson*, 864 F.2d at 1246.

158. *Sweeney v. Woodall*, 344 U.S. 86, 91–92 (1952).

159. *Id.*

160. *Id.*

is constitutionally permissible but may become impermissible in its execution.<sup>161</sup> In *Gates v. Collier*, a Fifth Circuit case cited by the Supreme Court, inmates were punished by being placed naked and alone in dark cells without adequate food, heat, or opportunities for hygiene for continuous periods lasting more than twenty-four hours.<sup>162</sup> But courts have held solitary confinement constitutional when the prison supplies the basic necessities of life (e.g., clothing, food, and hygiene).<sup>163</sup>

If we think about the various types of agricultural labor, the *Gates* analysis supports the argument that in some situations forced inmate labor is cruel and unusual, but in others it is not. Plantation labor typically involves large-scale operations covering hundreds or even thousands of acres. Enslaved inmates harvest the crops in lines from one end of the row to the next. Decisions on planting (e.g., when and which crops to plant or when and which rows to harvest) are solely the province of the overseer without any decision-making authority by the enslaved. Quotas for harvest are enforced by the master who also has authority to extend additional punishments for nonproduction or other deemed “offenses.”

But not all penal agricultural labor is the same. For example, imagine a voluntary prison farm in which prisoners farm individual or small-group plots, perhaps even organically. Prisoners would make the decisions on which crops to seed, maintain, or harvest. One could imagine tasking each inmate with responsibility for maintaining a small section of farm land from which an inmate would be allowed to sell any proceeds to the state. Such farms do not produce the dehumanization of the prisoner, as an inmate is empowered with decision-making authority regarding his plot of land and provided incentives and knowledge to make use of that authority. Given the current renaissance of community garden farming in urban areas,<sup>164</sup> the skills learned at such farms, unlike the plantation farms, could be useful once a prisoner is released. In such situations, where the critical elements of plantation labor are absent, the cultural and ritual imposition of social death would be avoided.

Being designated and treated as a slave—property of the state, much as an inmate’s ancestors were property of private owners—has no penological purpose. While a state may make use of an inmate’s economic productivity for the term of the sentence, there is no additional penal value in rebranding an inmate as property instead of as human. The

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161. See, e.g., *Gates v. Collier*, 501 F.2d 1291, 1304 (5th Cir. 1974).

162. *Id.* at 1304–05.

163. *Id.*

164. For example, see the work of Urban Farming, a nonprofit organization focused on using community spaces in food deserts. URBAN FARMING, <http://www.urbanfarming.org> (last visited Mar. 15, 2012).

social death of the inmate is not intrinsic to either the retributive or rehabilitative goals of the prison. Nor is an inmate's social death an essential element of the state's interest in recouping the costs of incarceration. In addition, the harm of re-branding may produce many of the same effects decried in *Farmer*, such as depression and loss of honor.

### B. *Per Se Unconstitutionality*

At the core of the Eighth Amendment is a protection of basic human dignity *beyond* the actual conditions of the forced labor. Human dignity is not a static concept. Rather, human dignity is tied to contemporary and evolving standards of human decency.<sup>165</sup> Courts take contemporary values into account in deciding whether a particular punishment violates the Eighth Amendment ban on cruel and unusual punishment.<sup>166</sup>

Punishments that were socially acceptable in the past can become legally cognizable as cruel and unusual as societal values change over time. *Hope v. Pelzer* provides the most recent nondeath-penalty example of a formerly accepted practice becoming unconstitutional.<sup>167</sup> In *Hope*, the Court held that "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat" violated the Eighth Amendment.<sup>168</sup> Although torture, the rack and the screw were formerly considered appropriate punishments, but modern concepts of decency no longer permit these punishments.<sup>169</sup> These punishments, as well as the punishment of Larry Hope in Alabama, result in treatment "antithetical to human dignity."<sup>170</sup> As such, certain penal punishments may be found *per se* unconstitutional.<sup>171</sup>

A punishment may also become cruel and unusual under the Eighth Amendment even when it does not inflict physical harm, as in *Trop v. Dulles*.<sup>172</sup> In *Trop*, a U.S. soldier was stripped of his American citizenship, pursuant to statute, as punishment for desertion while overseas.<sup>173</sup> The U.S. Supreme Court held that denationalization as punishment for a

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165. See *Roper v. Simmons*, 543 U.S. 551, 561–62 (2005) (holding that the Eighth Amendment prohibits execution of offenders under the age of eighteen at the time of the offense).

166. *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); see also *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (noting that contemporary views are not dispositive and that any punishment must still comport with basic human decency in upholding constitutionality of the death penalty).

167. *Hope v. Pelzer*, 536 U.S. 730, 747 (2002).

168. *Id.* (internal quotation marks omitted).

169. *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

170. *Hope*, 536 U.S. at 745.

171. Dolovich, *supra* note 140, at 884.

172. *Trop v. Dulles*, 356 U.S. 86, 88 (1958).

173. *Id.*

crime is “cruel and unusual punishment” and therefore per se unconstitutional.<sup>174</sup>

Indeed, the *Trop* Court’s reasoning as to the harm of denationalization is strikingly similar to the harm of social death imposed by penal plantation labor. Denationalization involves the “total destruction of the individual’s status in organized society.”<sup>175</sup> “[T]he expatriate has lost the right to have rights.”<sup>176</sup> The denationalized individual—due to his expelled status—is “subject[] . . . to a fate of ever-increasing fear and distress”<sup>177</sup> and without any guarantee of protection under the law. Similarly, a prisoner branded a slave through forced plantation labor is deemed no longer human. The prisoner becomes de facto property of the state. An enslaved prisoner is subject to the same fears as in *Trop*, that his designation as “slave” will entail the loss of other essential rights and protections under the law.

The punishments in *Trop* and *Farmer*, for example, were deemed excessive or disproportionate according to “evolving standards of human decency.”<sup>178</sup> To evaluate whether the punishment violates contemporary values, courts must assess objective indicia of consensus that the challenged practice is cruel and unusual. Objective indicia include looking at state laws and practice and evaluating the consistency and coherency of trends disallowing the punishment.<sup>179</sup> In addition, the U.S. Supreme Court has looked to its own judgment, particularly in the death penalty cases, on whether the punishment is disproportionate.<sup>180</sup>

The national consensus supporting forced prisoner labor in general appears relatively clear. The American Bar Association (ABA) has recommended that “each sentenced prisoner should be employed substantially full-time unless there has been an individualized determination that no work assignment . . . is consistent with security and safety.”<sup>181</sup> Unlike the federal Prisoner Industry Enhancement Program, the ABA does not require that the work be voluntary.<sup>182</sup> States are partnering with private

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174. *Id.*

175. *Id.* at 101.

176. *Id.* at 102.

177. *Id.*

178. *Id.* at 101; *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

179. See *Roper v. Simmons*, 543 U.S. 551, 563–68 (2005).

180. See, e.g., *id.* at 564.

181. *American Bar Association Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1361, 1404 (2010).

182. The Prisoner Industry Enhancement program allows state prisoners to produce goods for interstate commerce, so long as the work is voluntary and paid at prevailing local rates (among other requirements). But note that the program was created by legislative act and contains several guarantees to not displace private labor, of which the “voluntariness” requirement may be one. NANCY E.

corporations to use forced prison labor to produce a wide range of goods.<sup>183</sup>

But the national consensus is more opaque when it comes to forced plantation labor. The ABA standards on the treatment of prisoners allow for “agricultural” work assignments but simultaneously note that all work assignments should “teach vocational skills . . . , instill a work ethic, and . . . respect prisoners’ human dignity.”<sup>184</sup> Forced plantation labor, by denoting an inmate a slave, would certainly conflict with the ABA’s concern for human dignity. In part, a national consensus is harder to discern because of the lack of transparency on exactly what type of work prisoners perform. Local prison administrators make most decisions about prison operations, including labor, under a general grant of authority from the state.<sup>185</sup> Each facility usually decides whether to force prisoners to work plantation farms in conjunction with the state’s prison enterprise office; this decision depends on the land available, the economics of the practice, the facility’s needs, and other factors.<sup>186</sup> In short, much of the public is probably unaware of the prevalence of forced plantation labor unless someone has a relative or friend among the incarcerated.

International consensus appears similar to our national consensus that generally allows for forced penal labor, but ambiguous regarding forced plantation labor. Eighth Amendment jurisprudence allows consideration of the values of the international community to determine “evolving standards of decency.”<sup>187</sup> In particular, the Court has been partial to evidence from nations with a similar background and approach in law, such as those with an “Anglo-American heritage” or the “Western European community.”<sup>188</sup> While international law is not controlling, the Court has consistently found international law instructive in construing whether or not a punishment was cruel and unusual.<sup>189</sup>

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GIST, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, FACT SHEET: PRISON INDUSTRY ENHANCEMENT PROGRAM 2 (1995), <https://www.ncjrs.gov/pdffiles/pie.pdf>.

183. See generally Robert P. Weiss, “Repatriating” Low-Wage Work: *The Political Economy of Prison Labor Reprivatization in the Postindustrial United States*, 30 CRIMINOLOGY 253 (2001). But see Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 215 (2009) (arguing that private forced labor is prohibited by the Thirteenth Amendment).

184. *American Bar Association Criminal Justice Standards on the Treatment of Prisoners*, *supra* note 181, at 1404–05 (emphasis added).

185. See *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (acknowledging discretion in the management of prisons vested in wardens by states).

186. Telephone Interview with Cathy Fontenot, Assistant Warden, Louisiana State Penitentiary (June 3, 2010) (on file with author).

187. *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

188. *Id.*

189. *Id.* at 575–76 (citations omitted).

Under international law, slavery is absolutely prohibited.<sup>190</sup> The Slavery Convention of 1926 prohibited slavery in all its forms, and slavery has since attained *jus cogens* status.<sup>191</sup> The Universal Declaration of Human Rights goes even further, declaring that “no one shall be held in slavery or servitude.”<sup>192</sup> Both the European Convention on Human Rights and the American Convention on Human Rights absolutely prohibit slavery, but similar to U.S. law, discussed *supra* Part II, the conventions allow for forced prisoner labor like involuntary servitude.<sup>193</sup> In terms of prison labor, the key distinguishing factor appears to be whether forced prison labor is contracted out for profit-making enterprises. In this respect, the United States appears to be one of only nine countries that explicitly facilitates the practice of forcing prisoners to work for profit.<sup>194</sup> The International Labor Organization, concerned with the privatization of prisons and forced prison labor for private corporations, specifically has requested reports from each of the member states regarding their domestic practices.<sup>195</sup>

There is little national or international evidence regarding the appropriateness of forced plantation labor. While it could certainly be argued that there is a clear consensus that slavery should never be imposed, it is decidedly unclear if international consensus supports the prohibition of forced plantation labor as slavery. In any event, the international evidence is not as strong as in *Trop*, where the Court confronted a clear and uncompromising stance against imposed statelessness.

The lack of visible consensus on the inappropriateness of forced plantation labor is not the end of the discussion but rather the beginning. By rediscovering the aims of the Eighth and Thirteenth Amendments, it

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190. Slavery Convention, Sept. 25, 1926, T.S. 778, 60 L.N.T.S. 253, *amended by* Slavery Convention Protocol, *opened for signature* Dec. 7, 1953, 7 U.S.T. 479 [hereinafter Slavery Convention]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987). For a comprehensive overview of the international treaties and restatements defining slavery, see KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY: A READER (2005).

191. Slavery Convention, *supra* note 190, at 253; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702. *Jus cogens* is Latin for “compelling law” and refers to “[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.” BLACK’S LAW DICTIONARY (9th. ed. 2009).

192. Universal Declaration of Human Rights art. 4, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

193. European Convention on Human Rights art. 4, Apr. 11, 1950, C.E.T.S. No. 005; American Convention on Human Rights art. 6, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

194. Australia, Austria, China, Cote d’Ivoire, France, Germany, Madagascar, New Zealand, and the United States all provide prisoner labor for profit. *Types of Forced Labor*, USA TODAY, June 19, 2001, <http://www.usatoday.com/news/world/2001-05-25-labor-chart-usat.htm> (chart of the forms of forced labor and the countries that permit those forms of labor).

195. *See, e.g.*, INT’L LABOUR ORG., THE ELIMINATION OF ALL FORMS OF FORCED OR COMPULSORY LABOUR 226 (2000), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/d2-elim.pdf>.

is possible to have a broader conversation about which types of work should be considered appropriate for prisoners and which types of work, because of their cultural meaning and imposition of social death, society should forever prohibit. The first step in that conversation is distinguishing between slavery and involuntary servitude; the second is applying that framework to the history and operation of penal plantations in the United States.

#### IV. MODERN SLAVE PLANTATIONS: LOUISIANA

Distinguishing between slavery and involuntary servitude is not just a remnant of the past but also remains vitally important in today's correctional institutions. In Arkansas, Louisiana, Mississippi, and Texas, prison administrators force inmates to pick cotton and work plantation-style row crops.<sup>196</sup> "Prisons in Arizona, California, Washington, Utah, Montana and Idaho now deploy inmates to do agricultural work."<sup>197</sup> Similarly, in Colorado, prisoners now farm plantation-style crops due to a state-wide labor shortage because of new restrictive law that penalizes the employment of undocumented workers.<sup>198</sup>

These penal plantations are not a modern invention but rather arose in the aftermath of the Civil War as a means to retain slavery as an institution and continue the subordination of Africans.<sup>199</sup> Following the Civil War, a number of states passed the so-called Black Codes or "Pig Laws" to create or enhance criminal penalties for misdemeanors.<sup>200</sup> State legislatures created new offenses, such as leaving an employer's land or refusing to fulfill a contract.<sup>201</sup> As a result, the prison population in most of these states increased dramatically, producing an inmate labor force in service to the state.<sup>202</sup> To understand the direct links between today's penal plantation labor and slavery, we, as a society, must trace the history of penal plantations to understand the cultural and ritual symbols of modern-day social death.<sup>203</sup>

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196. See sources cited *supra* note 1.

197. Marty Durlin, *Field Day*, HIGH COUNTRY NEWS, Oct. 13, 2008, at 8.

198. Kirk Mitchell, *Prisons' Farm Team: Inmate Work Program Benefiting Low-Risk Convicts and Labor-Strapped Farmers*, DENVER POST, July 11, 2007, at A1.

199. Wiecek, *supra* note 36, at 84–86.

200. *Id.*

201. *Id.*; Christopher Adamson, *Punishment After Slavery: Southern State Penal Systems 1865–1890*, 30 SOC. PROBS. 555, 560 (1983).

202. Oshinsky, *supra* note 106, at 103–05 (noting the "exploding post-war prison population" after enactment of Black Codes and state use of inmate labor).

203. Applying Prof. Reva Siegel's analysis of the evolution of law and discrimination, the history of slavery is also relevant because current narratives on slavery are created and shaped not only by the legal regime existing at the time of slavery but also by all succeeding legal regimes because those regimes are simply subordination by other means. See generally Reva Siegel, *Why*

*A. The Origins of Prison Labor in Louisiana*

The use of convict labor began well before the end of the Civil War. Louisiana built its first state penitentiary in 1837 in Baton Rouge after decades of housing prisoners in local parish jails.<sup>204</sup> In 1844, the state government agreed to cede management and operation of the penitentiary through a lease contract with James MacHatton and William Pratt.<sup>205</sup> The contract lease agreement provided that the lessees would operate the penitentiary, including paying all costs relating to the upkeep of inmates, in return for use of convict labor inside and outside of the prison walls.<sup>206</sup>

An indignant Senate report stated that before the Civil War, the majority of Louisiana convicts were Caucasian but were treated “like slaves.”<sup>207</sup> Most African-Americans, as slaves, faced “plantation justice” instead of the state criminal justice system.<sup>208</sup>

After the capture and burning of the Baton Rouge penitentiary by Union forces during the Civil War, the Louisiana government continued to rely on lessees to clothe, house, guard, and feed inmates who were then scattered all over the state.<sup>209</sup> In 1868, the then Commanding General of Louisiana, General Hancock, signed a lease with John M. Huger and Charles Jones to operate the penitentiary, including the use of inmate labor.<sup>210</sup> Lessees such as Huger and Jones—whose every expenditure on basic goods for inmates reduced their profits—had little incentive to provide minimal care for inmates.<sup>211</sup> Convicts in Louisiana were leased to railroad companies, as well as levee construction teams and plantations, including one owned by a local parish judge.<sup>212</sup>

But after the Civil War, the demographics of the Louisiana prison population changed dramatically. Over half of Louisiana’s population was “freed” through the Emancipation Proclamation in 1863 and the Un-

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*Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

204. Leon Stout, *Origin and Early History of the Louisiana Penitentiary* (1934) (unpublished master’s thesis, Louisiana State University) (on file with Louisiana State University-Baton Rouge).

205. *Id.* app. II.

206. *Id.* The Bureau of Labor Statistics describes the defunct lease system as follows: “[T]he prison enters into a contract with a lessee who agrees to receive, feed, clothe, house, and guard the prisoners, and to pay the State a stipulated amount per day per man.” *Prison Labor in the United States*, 53 MONTHLY LAB. REV. 578, 581 (1941).

207. CARLETON, *supra* note 93, at 10 n.17.

208. *Id.* at 15; Adamson, *supra* note 201, at 560.

209. McKelvey, *supra* note 5, at 157.

210. *A Hancock Legacy*, CHI. DAILY TRIB., Oct. 2, 1880.

211. CARLETON, *supra* note 93, at 10.

212. *A Hancock Legacy*, *supra* note 210.

ion victory in the Civil War in 1865.<sup>213</sup> In 1865, the Louisiana legislature began drafting discriminatory laws against “freedmen,” more familiarly known as the Black Codes.<sup>214</sup> Legislative drafting committees prepared legislation that would make freedmen labor “available to the agricultural interests of the State” and “protect the State from . . . support[ing] . . . minors, vagrants, and paupers.”<sup>215</sup> For example, the legislature changed the punishment for vagrancy from short-term imprisonment to being hired out for labor on public construction projects or private lands for up to a year.<sup>216</sup> In addition to the statewide laws passed in December 1865, many local municipalities enacted ordinances that banned African-Americans from entering city limits or selling items without permission from the mayor.<sup>217</sup> The objective of the Black Codes according to one Louisiana republican was “getting things back as near to slavery as possible.”<sup>218</sup>

As of 1868, the impact of the Civil War and the Black Codes was apparent in Louisiana’s statewide prison population: 85 Caucasian males, 203 African-American males, and 9 African-American women.<sup>219</sup> Professor Mark Carleton, who has published the only definitive history of Louisiana State Penitentiary, notes that although specific race-to-crime ratios are unavailable, the majority of inmates were African-American and the majority of inmates were sentenced to terms of four months to one year for crimes “no [more] serious than larceny.”<sup>220</sup> Although prisons still included Caucasian inmates, anecdotal evidence from 1880 suggests that prison guards permitted Caucasian convicts to take more breaks and work slower than African-American inmates because the Caucasian convicts were “not used to hard labor” like clearing land for plantations.<sup>221</sup>

The radical change in Louisiana’s inmate demographics may have contributed to the brutality of the convict-lease system. Scores of inmates

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213. CARLETON, *supra* note 93, at 13. The Emancipation Proclamation went into effect January 1, 1863, although delivered by President Lincoln on September 22, 1862. GRIMES, *supra* note 35, at 34.

214. THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 77–78 (1965). Wilson’s study provides a broad overview of various Black Code provisions, but unfortunately, the subsequent analysis and commentary is a product of its time.

215. *Id.*

216. *Id.* at 78.

217. *Id.* at 79–80.

218. Wiecek, *supra* note 36, at 84.

219. CARLETON, *supra* note 93, at 15.

220. *Id.* Prof. Carleton’s study examines the history of the Louisiana state penal system from 1835 until 1968 but does not focus specifically on mandatory labor laws.

221. *A Hancock Legacy*, *supra* note 210. The story reports on the death of a Caucasian convict through the eyewitness accounts from both Caucasian and African-American convicts.

died under convict-leasing.<sup>222</sup> Commenting on the use of prison labor across the south in 1883, one interviewee noted,

Before the war we owned the negroes. If a man had a good negro, he could afford to take care of him: if he's sick, get a doctor. He might even get gold plugs in his teeth. But these convicts; we don't own 'em. One dies, get another.<sup>223</sup>

Convicts, sentenced for crimes ranging from fraud to arson, would march for miles from one work site to the next, working from sunrise to sunset.<sup>224</sup> Each year between 1894 and 1901, an estimated 10% of convicts incarcerated in Louisiana died.<sup>225</sup> Those that didn't die could be severely injured. Theophile Chevalier, an African-American inmate sentenced to five years for stealing five dollars, lost both of his feet to gangrene while forced to work outside without shoes in 1884.<sup>226</sup> The post-Civil War history of Louisiana clearly demonstrates that penal plantation labor is an outgrowth of slavery as practiced before Emancipation.

#### *B. Angola as a Penal Plantation*

The convict-lease system ended on January 1, 1901, as required by the 1898 constitutional convention. Up until this point, prison reform efforts tried and failed, for over a decade, to secure legislation that would end convict-leasing in Louisiana.<sup>227</sup> Profit, however, succeeded where prison reformers failed. During this time, the Board of Control faced increasing difficulty collecting payments from the lessee, a former Confederate, Major Samuel James.<sup>228</sup> In 1875, Louisiana sued Major James to recover \$50,000 in past due payments, but the case never went to trial, and the parties eventually settled.<sup>229</sup> Greed, not lack of revenue, precluded payment. In 1870, Major James had concluded "half a million dollars worth of business."<sup>230</sup> Indeed, Major James worked the inmates on his

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222. See generally McKelvey, *supra* note 5, at 157 (also reporting that one in ten inmates died each year in the convict-lease system in 1883).

223. Hilda Jane Zimmerman, *Penal Systems and Penal Reforms in the South Since the Civil War*, at 93 (1947) (unpublished Ph.D. dissertation, University of North Carolina) (on file with author).

224. *A Hancock Legacy*, *supra* note 210.

225. Mark Carleton, *The Movement to End the Convict Lease System in Louisiana*, 8 LA. STUD. 211 (1969).

226. CARLETON, *supra* note 93, at 15.

227. Carleton, *supra* note 225, at 213.

228. McKelvey, *supra* note 5, at 157.

229. LA. S. COMM. ON THE PENITENTIARY, ANNUAL REPORT TO THE SENATE 9 (1878). Governor Nicholls subsequently requested the case not be brought to trial. CARLETON, *supra* note 93, at 27.

230. CARLETON, *supra* note 93, at 15.

own property, including his own Angola and Laguna plantations.<sup>231</sup> By 1901, the cost of maintaining approximately 1076 convicts was approximately \$200,000.<sup>232</sup> Given Major James's profits in 1870, the state and the general public expected a net profit from resuming operational control of the penitentiary.<sup>233</sup>

The constitutional convention mandating state control of the convict-lease system eliminated only the private lessee. Very little else changed. After the state resumed control, inmates still labored on levees, plantations, and road construction.<sup>234</sup> Even the personnel responsible for overseeing prisoner labor remained the same. Members of the newly created State Penitentiary Board (created at the end of convict-leasing in 1901 to assume administration of the penitentiary) and penitentiary staff were primarily recent employees of the most recent leaseholder, the son of Major Samuel James.<sup>235</sup>

Nor did state control of inmates lead to construction of a new penitentiary. Rather, the state simply purchased the Angola plantation from Major James.<sup>236</sup> Prisoners were housed in the old slave quarters and worked in the now state-owned cotton fields.<sup>237</sup>

Although the state constitution supposedly abolished the convict-lease system, the state would nevertheless continue to lease its predominantly African-American inmates to private employees for another fifteen years.<sup>238</sup>

It was only when Angola fully developed its sugar cane industry that African-American convicts were permanently reincorporated into the inmate labor force within the prison walls of Angola.<sup>239</sup> Sugar cane and cotton dominated Angola's 18,000 acre plantation until 1960 when many of the fields were converted to row crops of vegetables.<sup>240</sup>

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231. *Id.* at 23.

232. Carleton, *supra* note 225, at 221.

233. *Id.*; see also *Convict System Changed in the South*, CHI. TRIB., Aug. 3, 1901.

234. *Changes in the Convict System*, NEW ORLEANS DAILY PICAYUNE, Jan. 9, 1901, at 6, reprinted in FOSTER ET AL., *supra* note 7, at 26.

235. Carleton, *supra* note 225, at 221.

236. *The Angola Story*, LOUISIANA STATE PENITENTIARY ANGOLA MUSEUM, available at <http://angolamuseum.org/?q=History#history> (last visited Aug. 17, 2011). A subsequent 10,000 adjacent acres were purchased by the state in 1922, which when combined with Major James's 8000 acres made Angola one of the largest penal plantations in the United States. CARLETON, *supra* note 93, at 92.

237. CARLETON, *supra* note 93, at 92.

238. Blake McKelvey, *A Half Century of Southern Penal Exploitation*, 13 SOC. FORCES 112, 115-16 (1934). For example, when the boll weevil destroyed Angola's cotton crops, the State leased inmates out to construct levees. *Id.*

239. *Id.*

240. Ed Clinton, *Angola: The Story of Louisiana State Penitentiary*, AM. J. CORRECTION 4, 6 (1960).

The development of the state penal plantation directly related to the end of slavery. Ninety percent of all inmates in Louisiana were black in 1901.<sup>241</sup> The dominant discourse of a still racially segregated America perceived the penal plantation as beneficial for African-American inmates. A national prison reform advocate praised the penal plantation as particularly well-suited for dealing with the “negro [who] is not fitted for indoor life.”<sup>242</sup> Newspaper editors exclaimed that the Angola plantation “has brought the convict Negro out of a thralldom worse than slavery into a condition of moral and physical well-being that has never been known in the history of the Southern States.”<sup>243</sup> Indeed, the state penal farm, according to one newspaper account, was preferred to freedom by African-Americans in the South because the farm always offered a “comfortable bed and good food.”<sup>244</sup>

### *C. Plantation Labor as Punishment*

Profit—and not rehabilitation, retribution, or deterrence—became the guiding penological goal of Louisiana State Penitentiary.<sup>245</sup> Prison administration policies long relied on inmates to produce a financial profit, or at least make the penitentiary self-sufficient (even when leased to private interests). The possibility of cheap labor and the influence of politician–farmers (whose operations had been threatened by the legal emancipation of slaves) led to a profit-oriented policy of inmate plantation farming that closely mirrored slavery.<sup>246</sup>

A 1923 state report to the governor made clear that profit was a primary penological goal. For instance, the report’s authors devoted the first five pages to detailing an inspection of the prison, focusing on the condition of the sugar mill, sugar cane, and cotton crops.<sup>247</sup> Only a few lines were spared to discuss the condition of the 1596 inmates.<sup>248</sup> By 1940, of the 3127 inmates incarcerated, over half worked on the plantation.<sup>249</sup> The plantation, in addition to the limited operation of other factories on penitentiary grounds, produced commodities worth \$1.3 million

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241. *Convict System Changed in the South*, *supra* note 233.

242. FREDERICK WINES, *THE PRISONS OF LOUISIANA AT THE NATIONAL PRISON ASSOCIATION OF THE UNITED STATES, PROCEEDINGS OF THE ANNUAL CONGRESS* (1906).

243. *Convict System Changed in the South*, *supra* note 233.

244. *Id.*

245. CARLETON, *supra* note 93, at 13–31.

246. McKelvey, *supra* note 238, at 115–16.

247. Letter from the Administration of Louisiana State Penitentiary, to John M. Parker, Governor of Louisiana (1923), *reprinted in* LA. S. COMM. ON THE PENITENTIARY, *ANNUAL REPORT TO THE SENATE* (1923).

248. *Id.*

249. *Prison Labor in the United States*, *supra* note 206, at 595.

dollars.<sup>250</sup> Tellingly, in 1940, Angola listed zero inmates either as “attending school” or “idle.”<sup>251</sup>

Race remained an important touchstone in the operation of Angola. In 1937, for example, a federal government investigation recommended the construction of new dormitory housing.<sup>252</sup> Specifically, the federal report noted that housing was required for “1000 negroes” for farm labor.<sup>253</sup> African-Americans continued to be a majority in Angola, constituting 52% of the inmates in 1953.<sup>254</sup> During the 1950s, African-Americans were three times more likely than Caucasians to be incarcerated in Louisiana, despite being a minority statewide.<sup>255</sup>

It is unclear how mandatory plantation labor furthers Louisiana State Penitentiary’s stated penological aim of rehabilitating prisoners. The prison itself admitted as much. As early as 1956, an official publication of Angola noted, “At one time, about the only work available at Angola was labor in the cotton and sugar fields. This work could not help him [the prisoner] get a job when he left the prison, particularly since most of the prisoners came from city areas.”<sup>256</sup>

By 1971, the state still had not adopted meaningful vocational training programs for all of its inmates. At that time, Angola maintained a large sugar mill and cane crops, and paid inmates only half a cent more than it had thirteen years earlier.<sup>257</sup> Indeed, as one former warden noted,

During the sugar cane era [1967], everything existed to get that crop in. Wardens came and went based on what kind of cane harvest they produced. Academic, vocational, and recreational programs were simply not important. The only thing that mattered was whether that sugar mill rolled, because if it didn’t, then the officials did—right out the front gate.<sup>258</sup>

The background of the majority of Angola’s inmates made agricultural training impractical as a vocation. Ninety-five percent of Angola’s inmates were from urban areas at that time.<sup>259</sup> According to the warden of

250. *Id.* at 585.

251. *Id.* at 588.

252. U.S. DEP’T OF JUSTICE, BUREAU OF PRISONS & FED. PRISON INDUS., STATE OF LOUISIANA: RECOMMENDATIONS FOR REORGANIZATION OF THE PENITENTIARY SYSTEM (1937).

253. *Id.*

254. LOUISIANA DEP’T OF INSTITUTIONS, LOUISIANA STATE PENITENTIARY 10 (1956).

255. *Id.*

256. *Id.*

257. Report from Joseph W. Mullen, Young Lawyer’s Section, American Bar Association, to Warren E. Burger, Honorable Chief Justice of the United States 5 (1971).

258. WILBERT RIDEAU, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 181 (1992).

259. Report from Joseph W. Mullen, *supra* note 257, at 5. Fifty-two percent of all Angola inmates came from two parishes in Louisiana, Orleans and Jefferson, which are primarily urban areas. *Id.*

Angola in 1971, the disconnect between the background of inmates and the focus on agricultural training was unavoidable.<sup>260</sup> The Louisiana State Penitentiary was, he argued, “agriculturally oriented” and had difficulty attracting qualified instructors for other trades to its remote location.<sup>261</sup>

Given the urban origins of most of the prisoners and the continued reliance on mandatory farm labor, profit still appears to undergird prison policies. In a section detailing the rehabilitative aspects of work and scientific farming at Angola, an official penitentiary publication from 1956 notes,

Other [training] facilities will be added which will serve as training aids *and also cut the expenses of these items to state institutions . . .* The new farming and industrial program is good for the prisoners and also for the state. During the last fiscal year *more than \$1 million has been saved* through these programs. *More than \$500,000 has been saved* in the construction of the new prison buildings by the use of prison industries and labor.<sup>262</sup>

Similarly, in the 1980s, a state official advocated expanding a small vocational program to teach inmates how to work printing presses.<sup>263</sup> Through increased investments and greater inmate productivity, he predicted a larger prison printing program would produce a net profit for the state.<sup>264</sup>

The current operation of the penal plantation of Angola is hidden from public view. The Louisiana State Penitentiary has refused my repeated requests for written documentation on policies and procedures governing field labor assignments and crop planting decisions.<sup>265</sup> Certainly, the failure to provide documents further underscores the questions raised in this Article and raises questions of the unconscious objectives of plantation farming as punishment. If field labor has any penological, rehabilitative, or even institutional value, then releasing that information, as well as the procedures governing the field labor program, could incrementally mitigate the social death imposed on prisoners by such forced labor. In light of the lack of written information regarding the current operation of the plantation farm program, this Article relies on both

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260. *Id.*

261. *Id.*

262. LOUISIANA DEP'T OF INSTITUTIONS, *supra* note 254, at 7–9.

263. RIDEAU, *supra* note 258, at 181.

264. *Id.*

265. Telephone Interview with Cathy Fontenot, *supra* note 186; email correspondence with Assistant Warden Cathy Fontenot of Louisiana State Penitentiary, March 16, 2010, April 13, 2010, May 20, 2010, May 21, 2010, May 27, 2010, and June 3, 2010 (on file with author) (requesting information and denial of request).

older accounts of the modern era, newspaper reports, and current interviews with relatively recent prisoners.<sup>266</sup>

Current Louisiana State Penitentiary policy requires that all new inmates must work in the field as their initial assignment for ninety days without a write-up for an infraction.<sup>267</sup> After ninety days, the inmate may apply for other types of mandatory work available on the Angola property.<sup>268</sup> But as the *Angolite*—a magazine produced for and by Angola inmates—concludes, even if all inmates had perfect disciplinary records, there are not enough out-of-field jobs available for all of Angola's inmates.<sup>269</sup> Inmates view assignment to field labor, as compared to say the metal work factory, as punishment.<sup>270</sup> Indeed, inmates claim they have been transferred to the field by the Disciplinary Board and individual administrators for disciplinary infractions.<sup>271</sup> In the past, some inmates have alleged that they have applied for out-of-field jobs after the requisite period and have been rejected despite perfect records.<sup>272</sup>

Burl Cain, the current warden of Angola, recently noted that Angola is “like a big plantation in days gone by.”<sup>273</sup> Currently, inmates at Angola farm cotton and soybeans, in addition to row crops of vegetables such as corn, squash, and watermelon.<sup>274</sup> Norris Henderson, a former inmate and now civil rights advocate, notes that inmates still pick cotton by hand, despite the availability of modern machinery.<sup>275</sup> Although Angola claims that most inmates work only eight hours a day, five days a week,<sup>276</sup> one news report indicates that extending field duty as a punish-

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266. Interview with John Doe #1, in New Orleans, La. (July 29, 2010); Interview with John Doe #2, in New Orleans, La. (Aug. 25, 2010); Interview with John Doe #3, in New Orleans, La. (Oct. 9, 2010). I interviewed three former prisoners who collectively have spent over seventy years at Angola regarding the current operation of the “farm” in summer and fall 2010. They were released within the last five years and remain in contact with current prisoners. I am withholding their names out of respect for their experience and concern for their remaining friends and acquaintances in Angola.

267. *Id.*; see also Rideau, *supra* note 2, at 52.

268. Fontenot Interview, *supra* note 186.

269. Rideau, *supra* note 2, at 51–52.

270. *Id.*

271. *Id.*; Interview with John Doe #2, *supra* note 266; Interview with John Doe #3, *supra* note 266.

272. Rideau, *supra* note 2, at 51–52.

273. THE FARM: 10 DOWN, at 10:05 (Highest Common Denominator Media Group 2009).

274. BURL CAIN, DEP'T OF PUB. SAFETY & CORR., LA. STATE PENITENTIARY, ANNUAL REPORT 13 (2009–2010), available at [http://www.corrections.state.la.us/LSP/docs/2010\\_Annual\\_Report.pdf](http://www.corrections.state.la.us/LSP/docs/2010_Annual_Report.pdf).

275. Jordan Flaherty, *Organizing for Freedom*, COUNTERPUNCH (June 10, 2008), <http://www.counterpunch.org/2008/06/10/organizing-for-freedom/>.

276. CAIN, *supra* note 274 at 4 (“To keep offenders constructively active, the majority of the maximum and medium custody offenders work 8 hours-per-day, five days-per-week in the farm lines.”).

ment for disciplinary violations continues.<sup>277</sup> It appears that prisoners are still expected to fill a daily harvest quota or risk punishment.<sup>278</sup> Prisoners also have to fill a quota each day in the fields. Inmates, like Nathaniel Anderson, feel like slaves.<sup>279</sup> “People on the outside should know that Angola is still a plantation with every type and kind of slave conceivable.”<sup>280</sup>

Many of the initial justifications for mandatory farm labor in the early-twentieth century are repeated today. Prison officials say that field labor “is good therapy for prisoners and a meaningful attempt on the part of the administration to teach the inmates good work habits.”<sup>281</sup> Warden Cain, declared in 1998 that mandatory field labor is

good for morale in Angola because you start out with a ditch bank blade in the fields and can have illusions of grandeur that you might at some point get to drive a tractor . . . you come outside and you’re in the sunshine and you’re out here working and it’s good for you and feel like you’re healthier and you’re gonna live longer and it makes this business a little less violent too.<sup>282</sup>

Of course, profit continues to play a role in the administration of the prison. Angola is home to a “multi-million dollar prison enterprise.”<sup>283</sup> According to Warden Cain, “You have to be a good businessman too to run this place.”<sup>284</sup> At the same time, only 1% of the budget for Louisiana State Penitentiary is dedicated to rehabilitation programs.<sup>285</sup>

Devoid of vocational or rehabilitative elements, the penal plantation at Angola is reminiscent of features of chattel slavery, which was formally abolished in 1865. Forcing African-American prisoners to pick cotton and soybeans for approximately thirty-two cents a day in modern times looks, smells, and feels like slavery.

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277. Maya Schenwar, *Slavery Haunts America’s Plantation Prisons*, TRUTHOUT (Aug. 28, 2008), <http://archive.truthout.org/article/slavery-haunts-americas-plantation-prisons>.

278. Lillian Segura, *Dispatch from Angola: Faith-Based Slavery in a Louisiana Prison*, ALTERNET (Aug. 4, 2011), [http://www.alternet.org/story/151910/inside\\_angola%3A\\_faith-based\\_slavery\\_in\\_a\\_louisiana\\_prison/](http://www.alternet.org/story/151910/inside_angola%3A_faith-based_slavery_in_a_louisiana_prison/) (interviewing then-inmate Lane Nelson, who noted that you had to learn “real quick” because of the quota).

279. Jordan Flaherty, *Fighting Hell in Angola: Prison Activism Yesterday and Today*, THE INDEPENDENT, June 6, 2008, <http://www.independent.org/2008/06/06/fighting-hell-angola-prison-activism-yesterday-and-today>.

280. *Id.*

281. *Id.*

282. THE FARM: ANGOLA (Gabriel Films 1998).

283. *Id.*

284. *Id.*

285. DEP’T OF PUB. SAFETY & CORR., LA CORR. SERVS., EXECUTIVE BUDGET SUPPORTING DOCUMENT FY 2011–2012 62, available at [http://www.doa.louisiana.gov/OPB/pub/FY12/SupportingDocument/08A\\_Corrections\\_Services.pdf](http://www.doa.louisiana.gov/OPB/pub/FY12/SupportingDocument/08A_Corrections_Services.pdf).

## V. CONCLUSION

There are consequences to ignoring the imposition of slavery-like conditions on the incarcerated. Our criminal justice system depends in large part on the trust of the populace and is ideally presumed to be operating in good faith. From the reporting of crimes to the testimony of witnesses to participation as a juror, society's role is deeply embedded in the functioning of our criminal justice system. Creating slaves out of inmates undermines society's trust and faith in our criminal justice system and ultimately lessens the government's ability to protect society. Distrust of government motives in criminal prosecution grows when mothers see sons picking cotton on plantations, much like their great-grandparents may have done.

The retention and reimposition of slave practices on convicted inmates implies that conditions of slavery can be a justifiable punishment for a crime. It implies that we as a society are entitled by virtue of the criminal act to remove one of the last vestiges of humanity from any person serving a sentence. In so doing, we sever any moral or community obligation toward the inmate because he is deemed no longer human. Yet, when we do so, we also negate the promise of a democratic society. As former Chief Justice Warren Burger argued,

[W]hen a sheriff or a marshal[] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, this is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not.<sup>286</sup>

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286. Warren Burger, *Address by The Chief Justice*, 25 REC. ASS'N B. CITY OF N.Y. 14, 17 (Supp. Mar. 1970).