Ain’t I a Woman, Too?: The Thirteenth Amendment, In Defense of Incarcerated Women’s Reproductive Rights

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

1 Harriet Ann Jacobs, Incidents in the Life of a Slave Girl 119 (1861).
ABSTRACT

In her memoir, Harriet Ann Jacobs highlights the unique impact slavery had on women. The physical dominion imposed upon female slaves included both internal and external bodily control. Beyond sexual exploitation, the bodies of female slaves were used for a type of labor for which their male counterparts were not capable: reproduction. Forced pregnancy in the slavery context was a tragic and violative experience affecting women physically, psychologically, and emotionally.

Long after the ratification of the Thirteenth Amendment, slavery-like practices lived on through social, political, and economic mechanisms. In the penological context, peonage laws, penal plantations, and chain gangs were techniques employed to give slavery the façade of legitimacy. Legal advocates from Reconstruction through the Civil Rights Era saw through these practices. Eradicating the “badges or incidents” of slavery became as important as ending the actual slave trade. But what of women? The traumatizing effects of forced labor in the slave context are strikingly similar to those in the penal context – insufficient prenatal care, lack of freedom of choice in either direction (to bear or not to bear), and removal of the newborn upon delivery. Still, we do not associate this with slave-like labor, worthy of eradication on the same principles.

At first blush, penal policies restricting or banning abortion raises two constitutional red flags. Denying inmates reproductive choice is a deprivation of due process under the Fourteenth Amendment, and forced labor is conceptualized as a form of cruel and unusual under the Eighth Amendment. Together, the Fourteenth and Eighth Amendments support the argument that women do not forfeit the right to terminate a pregnancy while incarcerated. However, the application of these standards has produced mixed results, and the Supreme Court has not yet granted certiorari on the issue.

This Note asserts an alternative argument in favor of incarcerated women’s right to abortion: the Thirteenth Amendment protection against involuntary servitude and slavery. Although the Thirteenth Amendment makes an exception for “punishment,” this exception is a narrow one. Female inmates are not slaves of the State, and the type of servitude the State may impose upon female inmates is not without limitation. Denying an incarcerated woman the right to an abortion—in effect, forcing her to labor in prison—violates her right to be free from “slavery” and “involuntary servitude” under the Thirteenth Amendment.

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5 Compare Monmouth, 834 F.2d 326, with Victoria W., 369 F.3d 475.
Part I of this Note will introduce the Thirteenth Amendment defense to abortion. This section will briefly examine the Thirteenth Amendment’s place in abortion jurisprudence history. Part II of this Note takes a deeper look at the phenomenon of female incarceration, examines the status of the law, and highlights the varying degrees to which incarcerated women retain the right to abortion in local, state, and federal facilities. Part II also examines cases in which constitutional challenges have been brought against oppressive practices and procedures regarding female inmates’ access to abortion. An evaluation of the currently employed standards of review reveals the difficulties advocates face when challenging penitentiary policies.

Part III of this Note provides legal background on the Thirteenth Amendment. In particular, this section examines the history and meaning of the punishment clause. Part III finds that the Amendment’s protections are not wholly forfeited within the prison walls. Building on this finding, Part IV develops the theory by first showing how policies restricting or banning abortion are tantamount to forced labor. Because this labor is not the type contemplated by the punishment clause exception, Part IV concludes that prison policies restricting or banning abortion violate inmates’ Thirteenth Amendment rights.
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I. INTRODUCTION

In 1872, the Supreme Court rejected a challenge to a Louisiana statute granting monopolies to certain slaughter-houses, finding, among other things, that the State had not abridged the privileges and immunities of the butchers. For over a century following the Slaughter-House Cases, the Privileges or Immunities Clause, for all intents and purposes, did not see the light of day. In 1999, despite its previous unwillingness, the Supreme Court revived the dormant clause.

While the Slaughter-House Cases decision is most famous for its impact on the doctrinal development of the Fourteenth Amendment, the Privileges or Immunities Clause was not the only constitutional provision to die that day. Garnering less academic attention, the Court’s opinion had a significant narrowing impact on the meaning of the Thirteenth Amendment. Much like the fate of the Privileges or Immunities Clause, the Thirteenth Amendment was, for the most part, placed in the constitutional attic for most of the twentieth century. Based on subsequent holdings, judges and scholars alike were unwilling to admit the possibility that the

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7 The Slaughter-House Cases, 82 U.S. 36, 55 (1872).
8 See, e.g., Ferry v. Spokane, P. & S. Ry. Co., 258 U.S. 34 (1922) (finding a dower is not a privilege or immunity of citizenship); Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907) (finding no violation of mineowner’s privileges and immunities); and Cox v. Texas, 202 U.S. 446 (1906) (rejecting liquor sellers privileges or immunities claim).
9 Saenz v. Roe, 526 U.S. 489, 511 (1999) (Rehnquist, C.J., dissenting) (“The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment . . . ”). This case marked the second time since the enactment of the Fourteenth Amendment that the Court relied upon the Privileges or Immunity Clause to invalidate a law. Id. More than sixty years before Saenz, on the only other occasion, the Court used the Privileges or Immunities Clause to invalidate a state tax. See Colgate v. Harvey, 296 U.S. 404, 430-31 (1935). Even then, the force of the Privileges or Immunities Clause did not stick. See Madden v. Commonwealth of Kentucky, 309 U.S. 83, 93 (1940) (overruling Colgate v. Harvey).
10 Baher Azmy, Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda, 71 FORDHAM L. REV. 981, 1000 (2002).
11 Id. at 1001.
12 Id. at 999.
Thirteenth Amendment granted substantive rights. Despite mild usage in the early twentieth century, the Thirteenth Amendment has not seen a modern revival.

Notwithstanding its relative dormancy, the Thirteenth Amendment was a tool in the reproductive freedom arsenal used by advocates in the legal fight for abortion rights. This lesser-known argument recently gained national attention, though not on its merits, during President Obama’s nomination of Dawn Johnsen to the Department of Justice in 2009. Johnsen, during her time as the legal director of the National Abortion Rights Action League (“NARAL”), filed an amicus brief for a case involving a state law limiting the use of state funds for abortions.

Johnsen received immense public scrutiny for her stance on abortion, specifically “her bizarre


14 In the early twentieth century, the Court used the Thirteenth Amendment to invalidate laws that effectively imposed peonage. See, e.g., Pollock v. Williams, 322 U.S. 4, 25 (1944); Taylor v. Georgia, 315 U.S. 25, 31 (1942); United States v. Reynolds, 235 U.S. 133, 150 (1914); and Bailey v. Alabama, 219 U.S. 219, 245 (1911).

15 Some have argued the decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), “breathed life into the Thirteenth Amendment doctrine.” See Lauren Kares, Note, The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine, 80 CORNELL L. REV. 372, 379 (1995). However, the Court’s liberal construction pertained to Congress’ ability to enact legislation under section two. See Jones, 392 U.S. at 438 (“It has never been doubted . . . that the power vested in Congress to enforce the article by appropriate legislation . . . includes the power to enact laws ‘direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.’”) (emphasis added); and Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 332 (Foundation Press 2d ed. 1988) (finding a literal reading of Jones would mean “Congress possesses a power to protect individual rights under the Thirteenth Amendment, which is as open-ended as its power to regulate interstate commerce.”) (emphasis added).

In fact, most Thirteenth Amendment jurisprudence concerns the scope of congressional power under section two. Koppelman, supra note 15, at 486.


19 See Judiciary Panel Approves Justice Department Nominee Dawn Johnsen. FOX NEWS (March 04, 2010), http://www.foxnews.com/politics/2010/03/04/approval-controversial-justice-department-nominee-advances-senate/ (“One of the comments that most dismayed critics is her comparison of "forced pregnancy," or when women are unable to have abortions, to slavery.”); and Who is Dawn Johnsen?: Meet Obama’s Nominee to Justice Dept’s Office of Legal Counsel, Wrong on Terror & Wrong on Life, GOP RESEARCH BRIEFING (January 2010), http://www.gop.com/index.php/briefing/comments/who_is_dawn_johnsen (“Johnsen compared promotion of pro-life policies with slavery.”).
equation of pregnancy and slavery,” as pundits put it.\(^{20}\) In the face of strong opposition, Johnsen ultimately withdrew.\(^{21}\)

One observing the Dawn Johnsen appointment controversy may have mistakenly come to believe that Johnsen pioneered the Thirteenth Amendment defense of abortion. However, the brief to which Johnsen contributed, focusing mostly on the physical hardships associated with pregnancy, found that compelling the “continuation of pregnancy amount[s] to a significant invasion of women’s bodily integrity”\(^{22}\) in violation of the fundamental right to liberty under the *Fourteenth Amendment*.\(^{23}\) In fact, the brief mentions the Thirteenth Amendment only once—in a footnote.\(^{24}\) At the risk of disappointing Johnsen’s critics, it is worth pointing out that if any of the *Webster v. Reproductive Health Services* amici deserve credit for equating pregnancy to involuntary servitude, it is the National Organization for Women, whose brief proffered the Thirteenth Amendment argument explicitly.\(^{25}\) What is more, nearly two decades before *Webster*, an amicus brief in *Roe v. Wade* argued that laws restricting abortion violated the Thirteenth Amendment.\(^{26}\)

\(^{20}\) Andrew McCarthy, *Lawyer’s Lawyer; Radical’s Radical: Meet Obama DOJ nominee Dawn Johnsen*, NATIONAL REVIEW ONLINE (March 09, 2009), http://www.nationalreview.com/nrd/article/?q=YzcyODUwNjAwNzg3YTYyZjBiOWU3ZTQwZmYzOGIwOGQ= (“Her bizarre equation of pregnancy and slavery was not an off-the-cuff remark. It was her considered position in a 1989 brief filed in the Supreme Court.”).


\(^{23}\) Id. at 5-6.

\(^{24}\) See id. at 11, n.23 (“While a woman might choose to bear children gladly and voluntarily, statutes that curtail her abortion choice are disturbingly suggestive of involuntary servitude, prohibited by the Thirteenth Amendment, in that forced pregnancy requires a woman to provide continuous physical service to the fetus in order to further the state's asserted interest.”).


Despite the controversy surrounding the Johnsen appointment, the Thirteenth Amendment defense of abortion remains on the legal fringe. For starters, the Supreme Court has never held that the Thirteenth Amendment protects a woman’s right to terminate her pregnancy.\(^{27}\) Although conservatives and liberals alike criticized the Court’s holding in *Roe*,\(^{28}\) most attempts to resuscitate her holding have focused on privacy and equal protection arguments.\(^{29}\) Between *Roe v. Wade* and *Planned Parenthood v. Casey*, an important time in the development of reproductive rights jurisprudence, few scholars addressed the potential constitutional grounding directly.\(^{30}\)

Whatever place the Thirteenth Amendment has had in the development of abortion jurisprudence in the past, this Note contends that it certainly has a place in the future. The freedom of choice announced by the Court in *Roe* has been reduced in scope\(^{31}\) and limited by issues of access.\(^{32}\) Many economically and politically disadvantaged women in America are unable to exercise this right because of restrictive state laws, high costs, and other legal and

\(^{27}\) See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973) (“We, therefore, conclude that the right of personal privacy includes the abortion decision . . . .”); and *Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992) (“*Roe* determined that a woman’s decision to terminate her pregnancy is a “liberty” protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment.”).

\(^{28}\) The opinion in *Roe* was widely criticized by liberals and conservatives alike. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 820 (1983) (“It seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful.”). Some argue that the opinion went too far and may have done more harm than good for the reproductive rights of women. See Ruth Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 385-86 (1985) (“*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s . . . . Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.”). For other articles discussing the short-comings of the *Roe v. Wade* decision, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973); and Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973).

\(^{29}\) Koppelman, *supra* note 15, at 480-83.

\(^{30}\) See Koppelman, *supra* note 15, at 486, n.24 (finding only three previous statements in scholarly literature pertaining to the Thirteenth Amendment defense of abortion).

\(^{31}\) See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (finding laws regulating abortion will be upheld unless they impose an “undue burden” on the woman’s right).

\(^{32}\) See *Harris v. McRae*, 448 U.S. 297 (1980) (finding that the government is not required to provide funding for abortions.
practical impediments.\(^{33}\) Even worse is the current status of abortion rights for incarcerated women. This marginalized and overlooked group of women has an especially reduced ability to obtain an abortion. As one scholar noted, “[n]o where is access to abortion more precarious, however, than in prison.”\(^{34}\) For women in prisons and jails across the United States, reproductive freedom has been reduced to the point where even the mere notion of “choice” ceases to exist.

When it comes to the reproductive rights of incarcerated women, the law is unclear as to what extent, if any, women retain their abortion rights. For one thing, no national policy exists for inmates seeking to terminate a pregnancy.\(^{35}\) Policies may vary vertically, depending on the level of incarceration, and horizontally, depending on the state or jurisdiction.\(^{36}\) To make matters more confusing, policies are often “off the books.”\(^{37}\) While a number of courts have ruled that the constitutional right to obtain an abortion is one that women do not forfeit during incarceration, other courts have found that policies prohibiting women from getting abortions are constitutional.\(^{38}\) Ultimately, favorable court rulings and benevolent policies on the books are still subject to “on the ground” manipulation by prison guards and administrators.\(^{39}\)


\(^{34}\) Id.

\(^{35}\) *See* id. at 1297-98 (2006) (“The Federal Bureau of Prisons governs federal prisons; state governments create state prison policies via their state Departments of Correction; and jails are run by local municipalities. Federal, state and local legislative bodies typically delegate broad powers to prison officials in managing prisons and jails.”).

\(^{36}\) Id. at 1297-98.

\(^{37}\) Rachel Roth, *Do Prisoners Have Abortion Rights?*, 30 FEMINIST STUDIES 353, 354 (2004). In a 2007 interview, one warden explained that the Michigan State Department of Corrections gives overall guidelines to follow for medical procedures, but each prison writes its own specific policies. The warden explained that at Huron Valley Correctional Institute, pregnant women who requested abortions were taken on a case-by-case basis. It was her understanding \([?]\) that there was no concrete policy on the matter, but that the general practice was to allow abortions only for “high-risk pregnancies, like women who were drug users, or who were HIV positive.” Telephone Interview with Tekla Miller (Jan. 22, 2007).

\(^{38}\) *Compare* Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (holding that the Fourteenth Amendment, but not the Eighth Amendment, protects the rights of pregnant inmates to elective abortions), *and* Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2005) (holding that neither the Fourteenth Amendment nor the Eighth Amendment protect the rights of pregnant inmates to elective abortions), *and* Gibson v. Matthews, 926 F.2d 532 (6th Cir. 1991) (holding that prison officials were entitled to qualified immunity from an inmate's claim that the Fifth, Eighth, and Ninth
In the legal context, advocates struggle to find solid grounding upon which to support incarcerated women’s right to abortion. Thus far, advocates have challenged policies restricting or banning abortions under the Fourteenth and Eighth Amendments.40 Under the Fourteenth Amendment, the courts apply the *Turner v. Safley*41 balancing test, which weighs the prison’s penological interests against the rights of the female inmates.42 In applying this test, which is highly deferential to prison policymakers, courts reach varying results.43 Under the Eighth Amendment, courts apply the *Estelle v. Gamble*44 standard to determine whether the policy or practice exhibits “deliberate indifference” to the inmate’s serious medical need.45 Courts generally reach less favorable results under the *Estelle* model.46

Despite the current “circuit split” as to whether restrictive prison abortion policies are unconstitutional—and if so, on what grounds47—the Supreme Court has not yet addressed the Amendments protect pregnant inmates’ right to elective abortions, and that the officials’ conduct did not amount to a constitutional violation), with *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (holding that both the Eighth and Fourteenth Amendments protect pregnant inmates’ right to elective abortions) and *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007) (holding that a policy requiring a court order for jail inmates to be transported to obtain an abortion was unconstitutional).


40 Johnson, *supra* note 4, at 658.


42 See, e.g., *Monmouth*, 834 F.2d 326.

43 Compare *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008) (holding that the Fourteenth Amendment, but not the Eighth Amendment, protects the rights of pregnant inmates to elective abortions), and *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2005) (holding that neither the Fourteenth Amendment nor the Eighth Amendment protect the rights of pregnant inmates to elective abortions).


45 See, e.g., *Monmouth*, 834 F.2d 326.


issue. Because Turner and Estelle present often insurmountable hurdles for claimant inmates, advocates should consider an alternative approach in arguing that penal policies banning or restricting abortion are unconstitutional: the Thirteenth Amendment. The Thirteenth Amendment, which reads, “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . . .”,49 has both historical underpinnings and doctrinal malleability to support an argument protecting incarcerated women’s reproductive rights.

II. LEGAL BACKGROUND: WOMEN, INCARCERATION, AND ABORTION

A. Factual Background

As of 2007, women are the fastest growing segment of the population incarcerated in the United States.50 Currently, over 100,000 female prisoners are under the jurisdiction of state or federal correctional authorities.51 Penitentiaries are unable to keep up with the enormous growth in the number of women behind bars, the result being inadequate mental and physical health care.52 Incarcerated women are particularly in need of adequate health services, as many struggle with substance abuse, mental illness, and have suffered physical and sexual violence.53 Often,

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49 U.S. CONST. amend. XIII, § 1.
52 Johnson, supra note 4, at 654.
53 Id. at 654-55.
inmates suffering from treatable diseases risk permanent injury or death due to lack of access to medical attention.\textsuperscript{54} 

The extreme growth in the number of women entering jails and prisons, however, has not shaped the ever-present reality that many facilities remain incapable of accommodating feminine needs. Prisons are often lacking in female-specific services, such as Pap smears, mammograms, and pre-natal care.\textsuperscript{55} While it is difficult to determine exactly how many women enter prisons and jails pregnant,\textsuperscript{56} studies show that between six and ten percent of incarcerated women are pregnant.\textsuperscript{57} Sadly, in 2007, the ACLU reported that twenty percent of women in prison and fifty percent of women in jail reported not receiving pre-natal care.\textsuperscript{58}

\textbf{B. The Current Status of Incarcerated Women’s Reproductive Rights}

\textit{1. Federal Law}

At the federal level, the Federal Bureau of Prisons governs the policies of female penitentiaries.\textsuperscript{59} Federal prison policies are subject to congressional oversight and political lawmaking.\textsuperscript{60} Currently, it is generally accepted that federal prisons arrange for women to get elective and medically necessary abortions.\textsuperscript{61} The procedure is governed by two federal policies: the “Birth Control, Pregnancy, Child Placement and Abortion”\textsuperscript{62} program and the “Religious Beliefs and Practices”\textsuperscript{63} program.\textsuperscript{64} These policies set out the process by which a female inmate

\begin{footnotesize}
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\item \textsuperscript{54} Id. at 655.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} See Budnitz, supra note 33, at 1297.
\item \textsuperscript{59} See Budnitz, supra note 33, at 1297.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Gutierrez, supra note 39.
\item \textsuperscript{64} Johnson, supra note 4, at 656.
\end{itemize}
\end{footnotesize}
may obtain an abortion, from notifying the medical staff to making arrangements with the off-
cite clinic.\textsuperscript{65} Notably, these programs mandate that inmates receive “medical, religious, and
social counseling sessions.”\textsuperscript{66}

As for the logistics of obtaining an abortion at the federal level, the “Birth Control,
Pregnancy, Child Placement and Abortion” program statement does not include a timeline for
providing these services nor does it provide a timeframe for the Clinical Director to arrange for
the procedure upon completion of the counseling.\textsuperscript{67} This grant of broad discretional authority
may very well result in undue delays.\textsuperscript{68} Furthermore, the policy only requires the Bureau of
Prisons to pay for medically necessary abortions.\textsuperscript{69} The policy allow for the expenditure of funds
to “escort the inmate to a facility outside the institution to receive the procedure.”\textsuperscript{70} However,
female inmates will still have to pay for the actual procedure where the abortion is “elective.”\textsuperscript{71}
This caveat is significant considering that the cost of an abortion is especially high for inmates
without a meaningful flow of income or access to outside financial support.\textsuperscript{72} Ultimately, the

\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{See Religious Beliefs and Practices, supra note 65, §548.12(a)(3)(a) (stating that a pregnant inmate will be
offered religious counseling so that she may make an “informed decision” whether to terminate her pregnancy or
carry it to term). On its face, this policy does not allow a pregnant inmate to obtain an elective abortion without
aforementioned counseling. Johnson, \textit{supra} note 4, at 656.}
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id. See Claire Deason, Note, Unexpected Consequences: The Constitutional Implications of Federal Prison
Policy for Offenders Considering Abortion, 93 Minn. L. Rev. 1377, 1386 (2009) (finding that arranging for the
abortion procedure to take place can be the “most arduous” part of the process because of the limited number of
facilities available).}
\textsuperscript{69} \textit{Johnson, supra note 4, at 656. Prior to 1987, the Bureau paid for all abortions – both elective and medically
necessary. Budnitz, \textit{supra} note 33, at 1298. In 1987, under the efforts of certain Republican congressmen, Congress
passed a Department of Justice appropriations bill which prohibited the use of funds for elective abortions. \textit{Id. See
Provisions, Department of Justice, Section 209: “None of the funds appropriated by this title shall be available to
pay for an abortion, except where the life of the mother would be endangered or in the case of rape.”).}
\textsuperscript{70} \textit{See Religious Beliefs and Practices, supra note 65, § 551.23(b).}
\textsuperscript{71} \textit{See Budnitz, supra note 33, at 1298.}
\textsuperscript{72} For example, in 2007, the average weekly earnings of a woman in federal prison was $4.80-$16.00. Gutierrez,
\textit{supra} note 39. According to Planned Parenthood, the cost of an abortion in the first trimester can range from $300
to $950. In-Clinic Abortion Procedures, Planned Parenthood, available at:
http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.asp. Although costs
may vary by locality, the cost may go up weekly after the first trimester. Phone Interview with Carmen Gutierrez,
Congressional funding ban may effectively bar most pregnant inmates from exercising their right to an abortion.\textsuperscript{73} Incidentally, women detained by immigration authorities are held under federal jurisdiction.\textsuperscript{74} The medical services provision of the Bureau of Immigration and Customs Enforcement (“BICE”) provides that detainees shall have access to abortion.\textsuperscript{75} Only in cases where pregnancy threatens the life of the mother or is a result of rape or incest will BICE assume the costs of the procedure, transportation, and counseling. The outcome, ultimately, is that women seeking asylum or refugee status are likely prevented from obtaining “elective” abortions, or those not found to be medically necessary, because of costs.\textsuperscript{76}

2. \textit{State Laws}

At the state level, prison policies pertaining to reproductive health vary. Over half of the states and the District of Columbia have pregnancy-specific policies in prisons.\textsuperscript{77} Sixteen states, no relevant pregnancy or reproductive health care provisions exists on the books.\textsuperscript{78} Those states with reproduction-specific provisions, twenty-one have policies for pregnancy whether carried to term or aborted.\textsuperscript{79} However, fourteen of the states with pregnancy-specific policies pertain only

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\textsuperscript{73} Gutierrez, \textit{supra} note 39.
\textsuperscript{74} Budnitz, \textit{supra} note 33, at 1298.
\textsuperscript{76} Roth, \textit{supra} note 37, at 361.
\textsuperscript{78} See id. (unable to locate reproductive-specific correctional standards for Alabama, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Rhode Island, South Carolina, South Dakota, West Virginia, Wisconsin, and Wyoming).
\textsuperscript{79} See id. (finding Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Idaho, Kansas, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon,
to pre-natal care. Of those fourteen, eleven are comprehensive as to what that care entails. Of course, in states without abortion and pregnancy-related health standards, the inmates’ freedom of choice rests entirely in the hands of prison administrators and medical staff.

However, the fact that a state has an abortion policy or relevant health care standard does not necessarily ensure that incarcerated women in that state retain the “freedom of choice.” In part, state abortion policies depend on state abortion law. Moreover, the state actors involved in the process, from the prison guards to the administrators, are still likely to determine the actual practices. Whether facilities have official or unofficial procedure, administrative hurdles often pervade access to abortion policies. Some states still have court order judicial permission

Pennsylvania, Texas, and Washington to have standards mentioning health care for pregnant women who wish to carry their pregnancies to term and those who wish to terminate their pregnancies).

80 See id. (finding Arizona, Connecticut, Florida, Indiana, Maine, Michigan, New Mexico, New York, North Carolina, Tennessee, Utah, Vermont, Virginia, Washington to have policies that cover pre-natal care, but do not provide standards for abortion access).

81 See id. (finding Arizona, Maine, and Tennessee to have policies that “merely note that inmates do not have to pay for pregnancy testing and/or pregnancy care, without any further details regarding what that care entails”).


83 Johnson, supra note 4, at 657.

84 Budnitz, supra note 33, at 1299. For example, in states with mandatory waiting periods, prisoners may need to make two trips outside the facility. Roth, supra note 37, at 371.

85 A 2007 interview with the Deputy Director for all women’s prisons in the state of Illinois reveals the apparent unlikelihood that inmates’ abortion requests are fully realized. Phone Interview with Debbie Denning, Deputy Director of Women and Family Services, Jan. 31, 2007. At the time of the interview, Denning had been in her position for four years. Id. During this time, she stipulated that not one woman had ever sought to terminate her pregnancy. Id. This statement was curious at the time, considering the rate of induced abortions was about 20% among pregnancies nationwide. Abortion, Birth Control & Pregnancy, PLANNED PARENTHOOD, 2006, available at: http://www.plannedparenthood.org/birth-control-pregnancy/abortion-4260.htm2006.

86 When asked why, of the 2,700 imprisoned women in the state of Illinois, not a single one has asked for abortion in the past four years, Denning responded, “Most women are raised to be nurturers.” Phone Interview with Debbie Denning, Deputy Director of Women and Family Services, Jan. 31, 2007. Denning said that all “medically necessary” procedures were paid for by the state; however, in her official capacity, she felt that abortion procedures do not fall into that category. Id. Although no woman had exercised her right to an abortion in the past four years, Denning said general protocol did exist. Id. Prisoners were required to see a doctor and receive counseling as a prerequisite to the procedure. Id. Additionally, women must pay for the procedure, the transportation, and the mandatory two-guard security. Id. On a side note, Denning said she does not force any guards to take part in this endeavor, as they might be morally opposed to abortion; the guards voluntarily assist in transporting women to abortion clinics. Id.
In the absence of a court-ordered requirement, practical obstacles such as time delays and fragmented intra-prison communication can make obtaining the abortion exceedingly difficult.  

What is more, some states mandate that women pay for transportation the procedure itself or both. Often the requirement that inmates make the arrangements on their own. In these states, women will likely have to use a telephone to coordinate both the scheduling of the appointment and the solicitation of funds to pay for the procedure. Faced with restrictions on phone use and the high costs associated with inmate to non-inmate phone communication, incarcerated women will undoubtedly find these tasks to be arduous. Furthermore, additional factors like the stage of the pregnancy and the facility’s proximity to an abortion provider can raise costs and exacerbate logistical hurdles.

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87 See, e.g., Bryant v. Maffucci, 923 F.2d 979 (2d Cir. 1991). Although inmate made “almost daily requests” to medical and correctional staff members, id. at 980, her procedure was delayed until she was 24 weeks pregnant, id. at 981. At that point, being too late in the pregnancy, the hospital refused to give her an abortion. Id. The inmate was placed on suicide watch to prevent her from terminating her own pregnancy. Id. at 981-82. The Second Circuit held that the inmate failed to establish that the delay of procedure did not amount to “deliberate indifference” of her constitutional rights. See id. at 988 (“[I]t appears from the uncontested facts that the normal procedure guarantees female inmates at the correctional facility their right to choose to terminate their pregnancies. The hardship appellant experienced was an isolated incident that may well have denied her due care while incarcerated, but did not deny her right to due process.”).

88 Johnson, supra note 4, at 657. For example, prison officials in Louisiana told one inmate, “[I]t will be necessary for you to contact an attorney so that arrangements can be made with the Correctional Department to have you transferred to a hospital where such a procedure can be performed . . . . Additionally, you should be advised that . . . you will be responsible for the costs of a guard who has to go and stay with you while the procedure is being performed and during any hospital stay you may incur as a result of this procedure.” See Victoria W. v. Larpenter, 369 F.3d 475, 479 (5th Cir. 2005). In one case, the fee imposed for transportation was $100. Roth, supra note 37, at 364. “In what sounds suspiciously like a double standard, the prison does not have guards take women to the clinic as part of their regular day’s work; rather, a guard must be willing to “moonlight” on a Saturday for the $100.” Id.

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

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

91 See, e.g., Victoria W., 369 F.3d at 479 (finding the late stage of inmate’s abortion would require a three-day stay in an abortion clinic).

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

1. Circuit Split

When inmates challenge restrictive or prohibitive abortion policies or practices, they typically argue that the State has violated their due process rights under the Fourteenth Amendment. In these cases, courts use the *Turner* standard to determine the constitutionality of the policy. Applying the *Turner* standard, courts have yielded varying results. The Third and Eighth Circuit have struck down restrictive abortion policies under *Turner*; while, the Fifth Circuit upheld a similar policy as constitutional.

In the alternative, claimant inmates also argue that restrictive abortion policies violate their Eighth Amendment right to be free from “cruel and unusual punishment.” The Eighth Amendment protects prisoners against the “unnecessary and wanton” infliction of pain without sufficient penological justification. The Eighth Amendment has also been interpreted to provide prisoners with a fundamental right to adequate medical care. In the paradigmatic case, *Estelle v. Gamble*, the Court found that withholding adequate medical care amounts to “cruel and unusual punishment.” As is the case with challenges brought under *Turner*, the application of

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93 Some consider the Sixth Circuit’s holding in *Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991), to be apart of the “circuit split.” See, e.g., Johnson, *supra* note 4, at 657. In *Gibson*, an inmate brought a §1983 suit against various officials, some unnamed, for failure to provide her with an abortion. See *Gibson v. Matthews*, 926 F.2d 532, 534 (6th Cir. 1991). The Sixth Circuit granted summary judgment in favor of defendants, finding the actors were entitled to qualified immunity. Id. at 536. Although the court goes on to say that the inmate’s constitutional rights were not violated under the Eighth Amendment, in any event, the court did not apply the *Turner* standard. See id.


95 See supra note 4.


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

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


102 Budnitz, *supra* note 33, at 1321.
Estelle had resulted in a circuit split exists: the Third Circuit has found failure to provide abortion to be violative of the Eighth Amendment, while the Fifth, Sixth, and Eighth have rejected this argument. In short, inmate claimants challenging abortion policies and practices tend to fail under the Estelle model.

2. Challenging Abortion Policies Under the Fourteenth Amendment: the Turner Test

Prior to the 1960’s, the Supreme Court used a “hands off” approach when considering penitentiary policies. This practice of judicial restraint represented the Court’s determination that policymakers were best equipped to answer questions arising within the prison context. Furthermore, this practice reflected the longstanding notion that the Constitution affords less

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103 See Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987) (finding inmates met their burden of showing “that the categorical denial of elective, nontherapeutic abortions constitutes deliberate indifference to serious medical needs under both prongs of Estelle”) (emphasis added).

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

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

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

107 See, e.g., Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions); Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2005) (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions); and Gibson v. Matthews, 926 F.2d 532, 534 (6th Cir. 1991) (finding that even if abortion is a “serious medical need,” actions of prison actors did not amount to “deliberate indifference” to that need). But, see Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987) (finding the Eighth Amendments does protect pregnant inmates’ right to elective abortions).

108 Budnitz, supra note 33, at 1304.

109 See Turner v. Safley, 482 U.S. 78, 84-85 (1987) (citing Martinez, 416 U.S. 396, 405 (1974)) (“Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government . . . . Where a state penal system is involved, federal courts have, as we indicated in Martinez, additional reason to accord deference to the appropriate prison authorities.”)
protection in the prison context, regardless of what right is at stake.\textsuperscript{110} Despite its underlying rationale, the Court found the “hands off” doctrine to be unworkable and unpredictable.\textsuperscript{111} Finally, in 1987, the Court articulated a new standard to review prison policies—the “\textit{Turner test}.”\textsuperscript{112}

In \textit{Turner}, the Court provided a concrete standard to determine the constitutionality of a prison regulation.\textsuperscript{113} In doing so, the Court set out to balance the needs of the government and the constitutional rights of the prisoner.\textsuperscript{114} So, while recognizing that the prison walls do not act as a “barrier” between prisoners and the Constitution, the Court held that a prison regulation impinging on the constitutional rights of inmates will be upheld provided it is “reasonably related to legitimate penological interests.”\textsuperscript{115} The Court set out a four-part test by which to make this determination.\textsuperscript{116} First, there must be a “valid, rational connection” between the prison regulation and the legitimate government interest.\textsuperscript{117} Second, courts should consider whether there are “alternative means” available for exercising the right at issue.\textsuperscript{118} Third, courts should

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\textsuperscript{110} See Johnson v. California, 543 U.S. 499 (2005) (Thomas, J. dissenting) (“The Constitution has always demanded less within the prison walls. Time and again, even when faced with constitutional rights no less “fundamental” than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials experienced in running this Nation’s prisons.”)
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\textsuperscript{111} See Procunier v. Martinez, 416 U.S. 396, 406 (1974) (finding the “tension” between the traditional policy of judicial restraint and the need to protect constitutional rights when reviewing challenges to prison policies led the courts to adopt widely varying and inconsistent approaches). In \textit{Martinez}, the Court struck down California Department of Correction policies: mail censorship regulations and the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates). \textit{Id.} at 396. Petitioners argued that the policies infringed on their freedom of speech. \textit{Id.} at 398. The Court agreed that the policies were unconstitutional, but did not articulate a new standard. \textit{Budnitz, supra} note 33, at 1304. Instead, the decision was based on the First Amendment rights of persons outside of the prison – or those with whom the inmates were communicating. \textit{Id.}
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\textsuperscript{112} Turner v. Safley, 482 U.S. 78 (1987).
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\textsuperscript{113} \textit{Budnitz, supra} note 33, at 1305.
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\textsuperscript{115} \textit{Id.} at 89.
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\textsuperscript{116} \textit{Id.} at 89-91.
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\textsuperscript{117} \textit{Id.} at 89. Under this prong of the \textit{Turner test}, a regulation cannot be sustained if the connection between the policy and the proffered penological interest is so remote as to render the policy “arbitrary or irrational.” \textit{Id.} at 89-90.
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\textsuperscript{118} Turner, 482 U.S. at 90. Under the second prong of the \textit{Turner test}, in determining the validity of the policy, courts should be especially mindful of the “measure of judicial deference owed to corrections officials.” \textit{Id.} (citing Pell v. Procunier, 417 U.S. 817, 827 (1974)).
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consider the “impact accommodation,” or the ramifications on prison staff and fellow inmates.\footnote{119} Lastly, if an alternative exists to accommodate the inmate’s rights, it must do so at a minimum cost to the prison’s valid penological interests.\footnote{120}

Applying the newly minted four-part test, the Court in \textit{Turner} upheld a letter-writing restriction while striking down an inmate marriage restriction.\footnote{121} Since \textit{Turner}, the Court has consistently applied the \textit{Turner} test to assess the constitutionality of a variety of prison policies ranging from correspondence,\footnote{122} to access to courts,\footnote{123} to publication subscriptions.\footnote{124} Although the test arguably provides an objective or more reliable standard, the \textit{Turner} test has been criticized for being too deferential to prison officials\footnote{125} and for not taking into account the right at stake.\footnote{126}

\footnote{\textit{Id.} at 89. Under the third prong of the \textit{Turner} test, courts are advised to, again, be “particularly deferential to the informed discretion of corrections officials.” \textit{Id.}}

\footnote{\textit{Turner} v. Safley, 482 U.S. 78, 89 (1987). Under the fourth prong of the \textit{Turner} test, the lack of a ready alternative is evidence of the reasonableness of the policy. \textit{Id.} In the same vein, the presence of an “obvious, easy” alternative may be evidence that the regulation is unreasonable. \textit{Id.} Still, the Court did not intend to impose a “least restrictive alternative test.” \textit{Id.} Thus, prison policymakers do not have to consider every conceivable means of accommodating prisoner’s constitutional rights. \textit{Id.} at 90-91.}

\footnote{\textit{Turner} v. Safley, 482 U.S. 78, 91 (1987).}

\footnote{\textit{See} Shaw v. Murphy, 532 U.S. 223 (2001) (rejecting that inmate had a First Amendment right to provide legal assistance to fellow inmates).}

\footnote{\textit{See} Lewis v. Casey, 518 U.S. 343 (1996) (rejecting various challenges alleging the inadequacy of the legal research facilities violated inmates’ due process rights).}


\footnote{\textit{See} \textit{Turner}, 482 U.S. at 100 (“But if the standard can be satisfied by nothing more than a ‘logical connection’ between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless.”) (Stevens, J. dissenting) (internal citation omitted, internal quotes omitted, emphasis in original). For a discussion of why the \textit{Turner} standard is too deferential, \textit{See} Budnitz, \textit{supra} note 33, at1307-1311; \textit{and} Lorijean Golichowski Dei, \textit{The New Standard for Prisoners’ Rights: A “Turner” for the Worse?), 33 VILL. L. REV. 393, 426-36 (1988).}

\footnote{\textit{See} O’Lone v. Estate of Shabazz, 482 U.S. 342, 354-57 (1987) (Brennan, J. dissenting). In his dissent, Justice Brennan rejects the use of a single standard for reviewing prisoners’ constitutional challenges to prison policies. \textit{Id.} at 365. Based on Judge Kaufman’s approach in \textit{Abdul Wali v. Coughlin}, 754 F.2d 1015 (2d Cir. 1985), Brennan argued that the degree of judicial scrutiny should depend on “the nature of the right being asserted . . . .” \textit{Id.} at 358. This approach, he posits, is “better suited” to protecting the constitutional rights of inmates. \textit{Id.}}
In Monmouth County Correctional Institution Inmates v. Lanzaro, inmates challenged a policy that required a court order to obtain an elective abortion. Beyond requiring a court order, the Monmouth County Correctional Institution (“MCCI”) also mandated that an inmate seeking an elective abortion pay for the procedure. The Third Circuit used the four-part Turner analysis in determining that the MCCI policy was unconstitutional.

Under the first prong, the court found no “valid, rational connection” between the regulation and the penological interest proffered to justify it. The court found it important that the County made no distinction in its court order requirement based on the inmate’s security status. Furthermore, because inmates were not required to obtain a court order for other medically elective procedures, the Third Circuit agreed with the District Court that “inmates who wish to have an abortion pose no greater security risk than any other inmate who requires outside medical attention.”

As to the second “alternative means” prong, the court found that no other avenues were available for the inmates: “court-ordered release on their own recognizance is virtually

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127 The Eighth Circuit in Roe v. Crawford struck down a state policy that prohibited the transportation of inmates for elective abortions, 514 F.3d 789, 792 (8th Cir. 2008). Although this case applies Turner balancing to strike down the law, this paper will not go into details about the holding because the facts are easily distinguishable. See id. at 797 (finding the policy at issue, which was effectively a flat prohibition on elective abortion procedures, went “far beyond policy the policy upheld in Victoria W., and beyond the policy struck down in Monmouth . . .”). For a detailed analysis of the Eighth Circuit’s application of Turner, see Johnson, supra note 4, at 665-67.

128 Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 334 (3d Cir. 1987) (“MCCI inmates contend that the County’s policy...impedes their freedom safely to choose abortion and impermissibly delays the exercise of that choice.”)

129 Id. at 351.

130 Id. at 338.

131 Id.

132 Id.

133 Id.
impossible, and no abortions may be performed at the prison facility."\textsuperscript{134} Important to the court was the fact that a woman’s right to terminate her pregnancy is both time sensitive and procedure-specific.\textsuperscript{135}

Under the third prong, the court considered the “the impact accommodation of the asserted constitutional right would have on guards and other inmates, and on the allocation of prison resources generally.”\textsuperscript{136} Here, the court considered the anticipated costs associated with providing access to abortion for inmates.\textsuperscript{137} Because a pregnant inmate seeking to terminate her pregnancy sought no more than one who required a “medically necessary” abortion and no more (and probably less) than one seeking to carry her pregnancy to term, the court found the County had not shown a valid reason for refusing to make accommodations for elective abortions.\textsuperscript{138}

On the final prong, the court looked to whether “ready alternatives” existed to test the reasonableness of the MCCI policy.\textsuperscript{139} Pursuant to\textsuperscript{Turner}, “if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at\textit{de minimus} cost to valid penological

\textsuperscript{134} Id. at 339.
\textsuperscript{135} Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 339 (3d Cir. 1987). The court noted that inmates faced an “unconstitutional risk of delay” under the MCCI court-ordered release requirement. \textit{Id.} These inmates would “have no viable alternative available for the free and safe exercise of their choice to terminate their pregnancies.” \textit{Id.} In its analysis, the Third Circuit relied on a number of pre-\textit{Casey} Supreme Court rulings invalidating state-imposed delays on access to abortion. See id. at 339. For example, the court cites \textit{City of Akron v. Akron Center for Reproductive Health, Inc.}, 462 U.S. 416 (1983), which found mandatory 24-hour waiting periods to be unconstitutional. Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 339 (3d Cir. 1987). Akron was struck down by the Supreme Court in 1992. \textit{See} Planned Parenthood v. Casey, 505 U.S. 833, 838-39 (1992) (upholding a state-imposed 24-hour waiting period, although such restriction “may make some abortions more expensive and less convenient.”). The Third Circuit noted that a “plethora of cases” at the time had “reiterated with little variation” the heightened health risks associated with abortion delays. Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 339 (3d Cir. 1987) (citing Zbaraz v. Hartigan, 736 F.2d 1532, 1536 (7th Cir. 1985)). However, in light of \textit{Casey}, considerations regarding the effects of delays on an inmate’s right to terminate her pregnancy may not be as important. The idea that “time is of the essence” when it comes to abortion decisions, \textit{H.L. Matheson}, 450 U.S. 398, 412 (1981), was not demonstrated in the Fifth Circuit’s analysis in \textit{Victoria W. v. Larpenter}, 369 F.3d 475 (5th Cir. 2005). \textit{See id. at n.52 (“However, while an abortion is time-sensitive and unique in its constitutional protection, . . . [t]he constitutional right to choose to abort one’s pregnancy does not necessarily categorize it as an emergency.”)}.

\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at 343-44.
\textsuperscript{139} \textit{Id.} at 344.
interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard. The court determined that the MCCI policy was an “exaggerated response” to its financial, administrative, and security concerns because providing access to the procedure would be no more disruptive than other medical services already provided. Based on the application of *Turner*, the Third Circuit ultimately determined that the MCCI policy did not pass constitutional muster.

**b. Victoria W. v. Larpenter**

In *Victoria W. v. Larpenter*, a former inmate challenged the constitutionality of a Louisiana statute requiring inmates to obtain court-ordered release to obtain elective abortions. Although the disputed policy was “unwritten” in the sense that it did not mention abortion explicitly, the prison’s medical administrator insisted that the court-order requirement applied to all elective medical procedures. In the event an inmate was judicially permitted to obtain an abortion, she would have to pay for the procedure, the cost of the guard to escort her, and any associated hospital fees she incurred. Applying the *Turner* standard, the Fifth circuit upheld the policy as constitutional.

140 Id. (citing *Turner v. Safley*, 482 U.S. 78, 90 (1987)).
142 Johnson, supra note 4, at 661-62.
143 *See Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2005).* Victoria W. was incarcerated after her probation was revoked for simple battery. *Id.* at 478. Upon entering prison, a physical examination revealed that she was pregnant. *Id.* Within the first few days of her detention, she received prenatal care for which no court order was required. *Id.* During her gynecological examinations, an ultrasound showed her to be approximately fifteen weeks pregnant. *Id.* Pursuant to the Louisiana policy, prison officials informed her that she would have to obtain a court order. *Id.* at 478. Various procedural roadblocks delayed Victoria W.’s appearance in court to obtain her order. *Id.* at 478-80. By this time, she was “too late . . . to obtain a legal abortion in Louisiana.” *Id.* at 480. She eventually gave birth and put the baby up for adoption. *Id.*  
144 *Victoria W. v. Larpenter, 369 F.3d 475, 479 (5th Cir. 2005).*  
145 Id.  
146 Id. at 485.
At the first prong, the court found that inmate security, preserving prison resources, and avoiding unnecessary liability were “legitimate penological interests.”\textsuperscript{147} The court found a “valid, rational connection” between the court order requirement for “non-emergency medical procedures performed outside of the prison” and these interests.\textsuperscript{148} While the court did not explicitly address the second “alternative means” prong, inmates were not able to receive elective abortions within the prison.\textsuperscript{149}

Under the third prong, in assessing the impact of accommodating, the court rejected claimant inmate’s argument that “the prison would have lost no resources by transporting her to the abortion clinic because she was willing to pay for the procedure and the cost of the guard.”\textsuperscript{150} The court said this argument ignored “the fact that the prison is still either short-handed or out the cost of added personnel.”\textsuperscript{151} Furthermore, by limiting the number of inmate trips off-site, the policy conserved prison resources associated with the transport and potential liability stemming from a possible escape during transport.\textsuperscript{152}

In assessing whether “ready alternatives” existed un the fourth prong, the court found claimant had not met her burden to provide “an alternative that fully accommodates the prisoner's rights at \emph{de minimis} cost to valid penological interests.”\textsuperscript{153} Claimant argued that the elective medical procedure policy could have been modified to exclude abortions.\textsuperscript{154} This alternative, however, did not address the prison’s liability concerns.\textsuperscript{155} Further, because Turner does not contemplate a “least restrictive means” test, the court did not find the existence of this

\begin{footnotesize}
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\item Id. at 486.
\item Id.
\item Johnson, \textit{supra} note 4, at 664 (“It is also undisputed that Victoria could not obtain an abortion locally; she would need to be transported to New Orleans.”).
\item Victoria W. v. Larpenter, 369 F.3d 475, 487 (5th Cir. 2005).
\item Id.
\item Id.
\item Id. (citing Turner v. Safley, 482 U.S. 78, 91 (1987)).
\item Id.
\item Id.
\end{enumerate}
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alternative to be dispositive.\textsuperscript{156} The Fifth Circuit concluded that the four \textit{Turner} factors, taken together, supported the constitutionality of the Louisiana policy.\textsuperscript{157}

c. \textit{Problems with Relying on Turner to Vindicate Inmates’ Reproductive Rights}

Viewing prisoner’s reproductive rights through the \textit{Turner} lens is problematic for several reasons. First and foremost, the \textit{Turner} standard is incredibly deferential to prison administrators. As Justice Stevens noted in his dissenting opinion in \textit{Turner}, the standard seems “to permit disregard for inmates’ constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.”\textsuperscript{158} Prison officials often cite cost or security concerns as legitimate penological interests justifying the policy.\textsuperscript{159} While courts have been reluctant to consider cost as a determinative factor in \textit{Turner} balancing,\textsuperscript{160} of course courts will find security concerns to be a “legitimate penological interest.”\textsuperscript{161} The Supreme Court has found that “there is no dispute that internal security of detention facilities is a

\textsuperscript{156} Victoria W., 369 F.3d at 487 (citing Turner v. Safley, 482 U.S. 78, 90-91 (1987)).
\textsuperscript{157} Johnson, \textit{supra} note 4, at 664.
\textsuperscript{158} Turner v. Safley, 482 U.S. 78, 100-01 (1987) (Stevens, J. dissenting).
\textsuperscript{159} Query whether these concerns are legitimate. One ACLU attorney sensed that it is political animus against abortion and personal anti-choice sentiments that influence the decisions of these officials. Phone Interview with Brigitte Amiri, Staff Attorney for the American Civil Liberties Union, Reproductive Freedom Project (Dec. 18, 2006). She pointed out that transportation is typically provided for other medical services, visits to see dying relatives, and trips to cosmetology examination centers. \textit{Id.} Having represented Plaintiffs in \textit{Doe v. Arpaio}, Amiri discussed how the sheriff politicized the dispute by deliberately denying the abortion and publicly attacking the ACLU. \textit{Id.} In what seemed to be a pro-life crusade, the sheriff said that his jail “would not become an abortion clinic.” \textit{Id.}
\textsuperscript{160} Victoria W. v. Larpenter, 369 F.3d 475, 488 (5th Cir. 2005). See Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 336 (3d Cir. 1987) (rejecting state’s proffered interest of “unspecified, yet insurmountable, administrative and financial burdens [that] will result if the County is required to provide access to and funding for elective, nontherapeutic abortions” as legitimate).
\textsuperscript{161} See, e.g. Victoria W. v. Larpenter, 369 F.3d 475, 486 (5th Cir. 2005) (finding inmate security and avoiding unnecessary liability to be legitimate government interests); and \textit{Doe v. Arpaio}, 150 P.3d 1258, 1263 (Ariz. Ct. App. 2007) (“We recognize that the County may have a legitimate security interest in keeping the number of inmate transports to a minimum.”).
legitimate governmental interest.”162 Thus, courts have been willing to find the penitentiary’s
crimes to be legitimate.163

Second, the Turner balancing test gives too much leeway to prison officials who may be
institutionally biased. When the Fifth Circuit in Victoria W. upheld the court order requirement
for elective abortions, the court distinguished the Third Circuit’s holding in Monmouth on
narrow grounds. The Fifth Circuit pointed out that the State had given different penological
interests than those deemed insufficient in Monmouth.164 In Monmouth, the county merely
asserted monetary and administrative concerns.165 In Victoria W., the Fifth Circuit was satisfied
that the State had given additional concerns: “to ensure inmate security and avoid unnecessary
liability.”166 Whether differences in plaintiff’s pleadings accounts for the disparate outcomes,
the fact remains that prison officials, equipped with broad discretionary powers, are able to assert
potentially unsubstantiated rationales for restrictive abortion policies.167

Third, in addition to being overly flexible, the Turner test is also under-flexible. In other
words, the Turner standard allows flexibility in prison administration decision-making, but is
rigid in its view of pregnant inmates. As one scholar articulated this problem:

Under Turner, there would be no distinct analysis of a policy that denies an abortion to a
victim of rape by guards; an inmate who was in a late stage of her pregnancy and needed
an expedited track; an inmate on death row or administrative isolation; or an inmate in a
medium or maximum security prison who is not permitted release on furlough. If the
policy were reasonably related to a penological interest, all inmates could be subject to
the same policy.168

Crawford, 514 F.3d 789 (8th Cir. 2008).
164 Johnson, supra note 4, at 664.
165 Id.
166 Victoria W. v. Larpenter, 369 F.3d 475, 487 (5th Cir. 2005).
167 See Budnitz, supra note 33, at 1327 (arguing that gender and personal ideological beliefs may influence wardens
and prison officials in decisions pertaining to inmate abortion policies). “For example, a prison official might
announce that no inmates could obtain abortions because carrying the child to term was more rehabilitative to
women.” Id.
168 Id. at 1327-28.
Succinctly put, prisons policies need not account for variations in circumstances to satisfy
Turner. Not only does this fly in the face of abortion jurisprudence at large,\textsuperscript{169} but it permits
discretionary abuse by actors operating in an already highly deferential zone.\textsuperscript{170}

Fourth, as applied, the Turner standard may permit a paradoxical scenario whereby
inmates receive lesser reproductive rights so long as the prison is consistently repressive in its
policies. In distinguishing the Third Circuit’s holding in Monmouth, the Fifth Circuit in Victoria
W. pointed out that the policy at issue in Monmouth applied only to abortions; whereas the policy
at issue in Victoria W. applied to all elective medical procedures.\textsuperscript{171} Indeed, the Supreme Court
of Arizona applied this very rationale in striking down a county policy requiring a court order to
obtain an elective abortion.\textsuperscript{172} Because the county frequently transported inmates off-site for
other non-emergency reasons, the court found the policy lacked a “logical connection” to
legitimate penological interests.\textsuperscript{173} In the event that a prison policy uniformly limits all elective
procedures, restrictive elective abortion policies may withstand constitutional scrutiny under
Turner.

\textsuperscript{169} See Planned Parenthood v. Casey, 505 U.S. 833 (1992) (articulating the “undue burden” standard). The court
determined an undue burden exists where a law has the “purpose or effect of placing a substantial obstacle in the
path of a woman seeking an abortion of a nonviable fetus.” Id. at 877. Applying the undue burden standard, the
Court upheld various state restrictions to abortion while striking down the state’s spousal notification requirement.
Id. at 837-39. Because spousal notifications imposed “substantial obstacles” and would likely “prevent a significant
number of women from obtaining an abortion,” the Court held the law unconstitutional. Id. at 893-94. In essence,
the Court expressed a willingness to invalidate restrictive abortion laws that had the effect of outlawing abortion
altogether. Id. While the Court has only struck down two abortion laws under the undue burden standard, see id.;
and Stenberg v. Carhart, 530 U.S. 914 (2000), lower courts have remained open to the potential flexible
understanding of what constitutes an undue burden. See, e.g., A Woman’s Choice-East Side Women’s Clinic v.
Newman, 305 F.3d 684 (7th Cir. 2002) (“This is not to say that a two-visit requirement could not create a burden
comparable to a spousal-notification requirement.”).

\textsuperscript{170} The nature and extent of this problem are demonstrated in the facts of Victoria W. v. Larpenter. See supra note
143.

\textsuperscript{171} Johnson, supra note 4, at 664.


\textsuperscript{173} Id. at 1263. For example, the court pointed out that Maricopa County frequent transported inmates for “court
appearances, compassionate visits (visits with dying family members or for funeral services), and for non-
emergency medical care” notwithstanding the absence of a court order. Id.
Lastly, and most importantly, while the *Turner* standard may be effective in striking down wholesale bans on elective abortions, it will not suffice to address the practical hurdles inmates face in seeking to terminate their pregnancies. For example, in *Roe v. Crawford*, the Eighth Circuit invalidated a policy banning transportation for elective abortions under *Turner*, but found that the Department of Corrections might remedy its policy by “[implementing] a policy similar to that in *Victoria W.*, requiring inmates to obtain a court order authorizing the abortion.”\(^{174}\)

Most notably, the Eighth Circuit illustrated the range of permissible restrictions. On the impermissible end lies the policy in *Monmouth County*, which “required inmates to get a court order releasing them on their own recognizance, making it more difficult for full-security inmates to obtain an order of release.”\(^{175}\) In effect, this policy required an inmate to obtain a court order allowing temporary release *without supervision*.\(^{176}\) Closer down the spectrum, to the permissible end, is the Louisiana court order policy upheld in *Victoria W.* which required merely judicial permission.\(^{177}\) In light of this distinction, prison administrators are still left to their own devices to craft abortion policies that comport with *Turner* while also effectively preventing inmates from attaining the actual procedure.


The Eighth Amendment is a proscription against “cruel and unusual punishment.”\(^{178}\) However, the Eighth Amendment goes beyond the governance of modes of punishment.\(^{179}\) The Amendment prohibits “unnecessary and wanton” infliction of pain in the absence of a

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\(^{174}\) See *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008).

\(^{175}\) Id. at 797 (citing *Victoria W. v. Larpenter*, 369 F.3d 475, 488 (5th Cir. 2005)).

\(^{176}\) *Roe v. Crawford*, 514 F.3d 789, 797 (8th Cir. 2008).

\(^{177}\) Id.

\(^{178}\) See U.S. CONST. amend. IX (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

penological justification. Because the denial medical care in its worst form “may actually produce physical torture or a lingering death,” the Eighth Amendment also prevents the denial of adequate medical care in the penitentiary setting.

In the paradigm Eighth Amendment case, *Estelle v. Gamble*, the Supreme Court declared, in accordance with notions of human dignity, civilized standards, and decency, that the government is required “to provide medical care for those whom it is punishing by incarceration.” The Court based this holding on the common law view that the State must take (1) a “deliberate indifference” toward (2) an inmate’s “serious medical need.”

Regarding the first prong, both prison doctors and guards might exhibit deliberate indifference. Prison doctors, for example, can exhibit “deliberate indifference” by treating an inmate with penicillin knowing the inmate is allergic, by refusing to administer pain killers during leg surgery, or by refusing to provide treatment altogether. Prison guards might show deliberate indifference by “intentionally denying or delaying access to medical care” or by

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180 Budnitz, *supra* note 33, at 1321.
181 Estelle, 429 U.S. at 103.
182 Budnitz, *supra* note 33, at 1321.
184 See Estelle, 429 U.S. at 102 (finding the Eighth Amendment “proscribes more than physically barbarous punishments”).
185 Id. at 104 (citing Spicer v. Williamson, 191 N.C. 487, 490 (1926).
187 Budnitz, *supra* note 33, at 1322.
188 Estelle, 429 U.S. at 104.
190 See Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970).
191 See Jones v. Lockhart, 484 F.2d 1992 (8th Cir. 1973).
“intentionally interfering with the treatment once proscribed.” The Court left open to lower courts what constitutes a “serious medical need” under the second prong.

**a. Monmouth County Correctional Institution Inmates v. Lanzaro**

In examining the prohibition on elective abortions, the Third Circuit in *Monmouth* found the penal policy to be violative of the Eighth Amendment under *Estelle*. On the first prong, the court found that pregnancy was a “serious medical need.” The court noted:

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

Additionally, the court rejected the County’s characterization of the abortion as “elective” to be persuasive in the *Estelle* formulation. Based on its analysis of the seriousness of the medical need, and noting the potential for irreparable physical and psychological damage, the court found that the categorical ban on elective abortion amounted to deliberate indifference to serious medical needs under both prongs of *Estelle*.

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192 *Estelle*, 429 U.S. at 104-05.
193 *Budnitz*, *supra* note 33, at 1322. See, e.g., *Smith-Bey v. Hosp. Adm’r*, 841 F.2d 751 759-60 (7th Cir. 1988) (finding a broken nose to be a “serious medical need”); *East v. Lemons*, 768 F.2d 1000, 1000-01 (8th Cir. 1985) (finding severe muscle cramps to be a “serious medical need”); *and Loe v. Armistead*, 582 F.2d 1291, 1296 (4th Cir. 1978) (determining a “serious medical need” to cover a broken arm).
194 *Monmouth*, 834 F.2d at 348.
195 Id. (finding the “fact that pregnancy presents a woman with the alternatives of childbirth or abortion affect the legal characterization of the nature of the medical treatment necessary to pursue either alternative” did not place the medical condition beyond the reach of *Estelle*).
196 *See Monmouth*, 834 F.2d at 348.
197 *See* id. at 349.
b. Victoria W. v. Larpenter

Applying the *Estelle* standard, the Fifth Circuit rejected that a restrictive prison abortion policy violated the Eighth Amendment. The court first examined whether the policy was “promulgated with deliberate indifference to its known or obvious consequences.” Of note in the analysis is the fact that Victoria W. was allegedly the first female inmate to request an abortion; the fact that she had received pre-natal care several times; that officials had given her information on the court order policy; and the fact that Victoria W. had been provided with multiple opportunities to contact her attorney. In short, the court did not find “deliberate indifference” to plaintiff’s right to obtain an elective abortion. Although the court did not address the seriousness of the injury under prong one of *Estelle*, the policy governing medical emergencies, or those medical procedures for which a court order is not required, did not include elective abortions.

c. Problems with Relying on Estelle to Vindicate Inmates’ Reproductive Rights

Advocates should not rely on the Eighth Amendment to protect incarcerated women’s right to terminate their pregnancies. For one, most federal courts that have addressed this issue

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198 Although the Sixth and Eighth Circuits upheld policies applying *Estelle*, this Note will address these analyses in detail. In *Gibson v. Matthews*, the Sixth Circuit granted summary judgment in favor of defendants, finding the actors were entitled to qualified immunity, 926 F.2d 532, 536 (6th Cir. 1991). However, the court went on to reject inmate’s Eighth Amendment challenge. See *id.* at 537. In *Roe v. Crawford*, the court found that inmate had shown neither a “serious medical need” nor “deliberate indifference,” 514 F.3d 789, 801 (8th Cir. 2008). This analysis, however, was after the court, applying *Turner*, struck down the policy as unconstitutional. *Id.*

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

200 *Id.*

201 *See id.* at 489-90; *Johnson, supra* note 4, at 665.

202 *Johnson, supra* note 4, at 665.

203 *See* *Victoria W.*, 369 F.3d at 479 (“The policy governing emergency medical situations enumerates examples, including severe internal/external hemorrhage, loss of consciousness, difficult or labored breathing, heat stroke, chest pains, labor pains less than seven minutes apart, and excessive vaginal bleeding.”).
have rejected the Eighth Amendment claims. The Eighth Circuit specifically pointed out that in *Monmouth*, the court was split on the interpretation of “serious medical need.”

Concurring with the holding that the policy at issue was overbroad under the *Turner* analysis, Judge Mansmann “stop[ped] short, however, of adopting the majority’s blanket assumption that the Eighth Amendment is also implicated merely because abortion is a medical procedure [...]” and was “unwilling to join what amounts to a quantum leap to the conclusion that a state's refusal affirmatively to provide elective abortions to female prisoners constitutes cruel and unusual punishment.” Judge Mansmann further criticized the majority for “bootstrapping the liberty interest protected by the Fourteenth Amendment into the Eighth[.]” and reasoned that the only way denying elective abortions could be considered cruel and unusual punishment would be to assume “a commonly perceived inhumanity of refusing to provide elective abortions as a general matter.”

Furthermore, courts are likely to attribute delays in an inmate’s abortion access to bureaucratic blunders than to deliberate indifference to a constitutional right.

### III. LEGAL BACKGROUND: THE THIRTEENTH AMENDMENT

#### A. The Thirteenth Amendment: An Introduction

The first section of the Thirteenth Amendment provides, “[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

While the second section of the Amendment gives Congress “the power to enforce this article by appropriate legislation,” the first section of the Thirteenth Amendment is self-executing.

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204 *See, e.g.*, *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008) (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions), *and* *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2005) (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions). *But, see Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (finding the Eighth Amendment does protect pregnant inmates’ right to elective abortions).


206 Id.

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

208 U.S. CONST. amend. XIII, § 1.

209 Id. at§ 2.
The Amendment, by its terms, prohibits both slavery and involuntary servitude, whether compelled by law or personal, private coercion.

In 1865, when the Thirteenth Amendment was added to the Constitution, Congress’s immediate concern was African chattel slavery. Indeed, the Amendment “fulfilled the promise of the Emancipation Proclamation.” However, the Amendment was not limited to this scope. In fact, words of this prohibition against slavery and involuntary servitude, though traceable to the Northwest Ordinance of 1787, are “ancient ones.” The historic import of these words indicates an expansive scope:

The prohibition of ‘slavery and involuntary servitude’ in every form and degree . . . comprises much more than the abolition or prohibition of African slavery. Slavery in the annals of the world had been the ultimate solution of controversies between the creditor and debtor; the conqueror and his captive; the father and his child; the state and an offender against its laws. The laws might enslave a man to the soil. The whole of Europe in 1787 was crowded with persons who were held as vassals to their landlord, and serfs on his dominions. The American constitution for that great territory was framed to abolish slavery and involuntary servitude in all forms, and in all degrees in which they have existed among men . . . .

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210 Koppelman, supra note 15, at 486. See Bailey v. State of Alabama, 219 U.S. 219, 241 (1911) (“While the Amendment was self-executing, so far as its terms were applicable to any existing condition . . . .”).
213 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 333 (Foundation Press 2d ed. 1988). Some have argued that it is because the Amendment covers both private and public acts that the Court has been prudent in its Thirteenth Amendment jurisprudence. See Kares, supra note 15, at 392 (“Read literally, the Thirteenth Amendment touches any private action that results in personal slavery or involuntary servitude. To avoid taking the Thirteenth Amendment to its literal limits and allowing a tort action for anyone deprived of a Thirteenth Amendment right, courts have reduced the self-executing power of the Amendment’s first section through limiting constructions.”).
215 Kares, supra note 15, at 374. The Emancipation Proclamation was President Abraham Lincoln’s Civil War order that purported to emancipate the slaves. Id. Prior to the passage of the Thirteenth Amendment, the Constitution ambiguously prevented Congress from enacting laws against the slave trade. See U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”).
216 Bailey, 219 U.S. at 241.
217 Slaughter-House Cases, 83 U.S. 36, 49 (1872) (“The expressions are ancient ones, and were familiar even before the time when they appeared in the great Ordinance of 1787, for the government of our vast Northwestern Territory; a territory from which great States were to arise.”).
218 Id. at 49-50.
By proscribing “involuntary servitude” and forbidding slave-like conditions, the Framers of the Thirteenth Amendment “expressed a view of personal liberty that extends beyond freedom from legal ownership by another person.” Thus, the Amendment was a “grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government . . .” “It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag.”

Still, the Thirteenth Amendment was not without limits. The exact contrs of its intended reach were initially unclear. The Supreme Court had its first opportunity to address the meaning of the Thirteenth Amendment in Blyew v. United States; however, the Supreme Court did not substantively review the Amendment’s scope until the Slaughter-House Cases. In th, Justice Miller rejected the argument that a state law granting a monopoly to one area slaughterhouse implicated the Thirteenth Amendment. Striking down the butchers’ claim,

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219 Kares, supra note 15, at 374.
222 Kares, supra note 15, at 374.
223 Blyew v. United States, 80 U.S. 581 (1871). However, the first federal court case to address the Thirteenth Amendment came one month after its passage. Douglas L. Colbert, Liberating the Thirteenth Amendment, 30 Harv. C.R.-C.L. Rev. 1, 15 (1995). In United States v. Rhodes, 24 F. Cas. 785 (C.C.D. Ky. 1866), Supreme Court Justice Swayne, riding circuit in Kentucky, upheld a federal removal prosecution under the Civil Rights Act of 1866. Id. The criminal case involved three white defendants who burglarized an African-American family’s home. Id. A state testimonial rule disqualified blacks from testifying against whites. Id. Justice Swayne reasoned that federal removal was necessary to give the 1866 Act its full force in providing equal treatment for black victims of crime. Id. Between 1866 and 1872, courts at the state and federal level reaffirmed congressional power under the Thirteenth Amendment at the 1866 Act to eliminate “badges and incidents” of slavery. See id. at 17 (“This brief period represents the high water mark for achieving the central objective of the Thirteenth Amendment and Reconstruction legislation--empowering the federal government to abolish slavery's vestiges and to protect freedom and citizenship rights.”). The Blyew decision, however, marked the beginning of a judicial retreat from the “badges and incidents” of slavery approach. Id. at 19. For a comprehensive analysis of pre-Slaughter-House Cases decisions interpreting the Thirteenth Amendment, see Douglas L. Colbert, Liberating the Thirteenth Amendment, 30 Harv. C.R.-C.L. Rev. 1, 15-20 (1995).
224 Slaughter-House Cases, 83 U.S. 36, 72 (1872).
225 Id. at 57-60.
Justice Miller pointed to the legislative purpose of the Amendment: the abolition of slavery.\footnote{See id. at 71 (“. . . we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”).}

Although the Court found that the protections afforded were not limited by a racial line,\footnote{See Slaughter-House Cases, 83 U.S. 36, 72 (1872) (“Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.”).} the \textit{Slaughter-House} reading of the Thirteenth Amendment was still closely tied to the African-American slavery experience.\footnote{See Douglas L. Colbert, Liberating the Thirteenth Amendment, 30 Harv. C.R.-C.L. Rev. 1, n.126 (1995) (“The Supreme Court’s \textit{Slaughter-House} decision suggested that the prohibition should apply only when the condition was analogous to African slavery.”).}

A few years following the \textit{Slaughter-House} Cases, the Supreme Court faced another opportunity to determine the meaning and applicability of the Thirteenth Amendment. In the \textit{Civil Rights Cases}, most known for impacting the scope of the Fourteenth Amendment, the Supreme Court limited the Thirteenth Amendment to an abolitionist purpose.\footnote{Ryan S. Marion, Note, \textit{Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts}, 18 WM. & MARY BILL RTS. J. 213, 227 (2009).} Justice Bradley argued that the Amendment “simply abolished slavery.”\footnote{Civil Rights Cases, 109 U.S. 3, 23 (1883). However, the Court did recognize that the Thirteenth Amendment established “universal freedom” in the United States. See id. at 20 (“[F]or the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”).} Although later cases would somewhat expand upon these interpretations,\footnote{See Pollock v. Williams, 322 U.S. 4, 17 (1944) (finding purpose of the Thirteenth Amendment was not merely to end slavery; rather, it was meant to “maintain a system of completely free and voluntary labor throughout the United States”); and Bailey v. State of Alabama, 219 U.S. 219, 241 (1911) (“The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.”).} the Reconstruction-era cases “squeezed the Thirteenth Amendment into a doctrinal sliver” and relegated it to the role of a “jurisprudentially inconsequential precursor to the Fourteenth Amendment.”\footnote{Azmy, supra note 10, at 1000.}
B. The Punishment Clause

1. Historical Perspectives and Legislative Intent

The doctrinally-stinted Thirteenth Amendment contains a much overlooked, potentially powerful, textual exception. The punishment clause reads “[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted . . .”233 The language used in drafting the Thirteenth Amendment mimicked the influential text of the time.234 First used in the Northwest Ordinance by Thomas Jefferson, these words appeared again in the Missouri Compromise235 and in acts banning slavery in the District of Columbia.236 Although Jefferson’s draft of the Northwest Ordinance was the first known use of a punishment clause during abolition efforts, neither his writings on slavery nor his notes on the draft reveal the purpose behind this language.237

On February 10, 1864, the U.S. Senate Committee on the Judiciary, led by Senator Trumbull, released the final draft of the language of the Thirteenth Amendment, which retained the punishment clause exception.238 Proponents of retaining the language of the Northwest Ordinance argued that the expression had been effective in the northwestern territory.239 In light

233 U.S. CONST. amend. XIII, § 1 (emphasis added).
234 “The language of the 13th Amendment was not new. It reproduced the historice [sic] words of the ordinance of 1787 for the government of the Northwest territory, and gave them unrestricted application within the United States and all places subject to their jurisdiction.” Bailey v. State of Alabama, 219 U.S. 219, 240 (1911). The final version of the Northwest Ordinance, passed by the Continental Congress in 1787, proclaimed that “[t]here shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes whereof the Party shall have been duly convicted.” Edward Meese III, The Heritage Guide to the Constitution 380 (2005).
236 Act of April 16, 1862, ch. 54, §1, 12 Stat. 376.
238 HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 224 (1913).
239 See Swayne, supra note 237 at 73. The Senator’s argument had merit, as the Northwest Ordinance had prevented the rise of slavery in areas north of the Ohio River – including Indiana Illinois, Michigan, Wisconsin, and Minnesota. See Rutherglen, supra note 235.
of its effectiveness, the drafters of the Thirteenth Amendment retained the language of the Ordinance without much discussion over its implications.240

When the House promulgated the Thirteenth Amendment, the punishment clause received minimal debate.241 Representative Ashley’s original proposal in December of 1863 implied a difference between slavery and involuntary servitude in that the former could not be imposed as a punishment for crime.242 In the Senate debate, Charles Sumner, an abolitionist, objected to the inclusion of the punishment clause in the language of the Thirteenth Amendment,243 fearing that it would transform convicts into slaves of the State.244 Sumner urged the Senate to “clean the statute book of all existing supports of slavery, so that it may find nothing there to which it may cling for life.”245 While Senator Trumbull noted that the committee carefully considered drafting proposals, the Committee rejected the proposals without explanation.246 In the end, the Northwest Ordinance language, including the punishment clause, carried the day.247

In the years immediately following the ratification of the Thirteenth Amendment, the punishment clause became a self-defeating loophole. Just two years after the ratification of the Thirteenth Amendment, Representative John Kasson of Iowa spoke on the floor of the House of

240 See id. (“What was not extensively discussed were alternatives to the language that was adopted.”).
242 See id. (“slavery, being incompatible with a free government, is forever prohibited in the United States; and involuntary servitude shall be permitted only as punishment for crime.”). Ashley’s version would have provided a clear textual basis for the claim that prisoners may still be sentenced to hard labor while retaining Thirteenth Amendment protection against slavery. Kamal Ghali, No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery, 55 UCLA L. REV. 607, 627 (2008).
243 Howe, supra note 241, at 995.
244 “Now, unless I err, there is an implication from those words that men may be enslaved as punishment of crimes whereof they shall have been duly convicted.” Cong. Globe, 38th Cong., 1st Sess. 1487-88 (1864).
245 Id. at 1482.
246 Id. at 1487-88.
247 Ghali, supra note 242, at 627.
Representatives for the need to clarify the scope of the punishment clause. Kasson discussed how states used the punishment exception to circumvent the Thirteenth Amendment’s prohibition of slavery. As an example, he showed an extract from a paper in Maryland that contained an advertisement with a bold caption: “NEGROES TO BE SOLD AS A PUNISHMENT FOR CRIME.”

Kasson believed that state courts would order black men to be sold and enslaved while calling the execution of the order a “legitimate sentence.” To Kasson, this practice was antithetical to the purpose of the Thirteenth Amendment. Because the punishment clause was designed to carve out a narrow exception, Kasson introduced a joint resolution to clarify the scope of the punishment clause:

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

Kasson went on to explain what would constitute “punishment” under the Thirteenth Amendment: “there must be a direct condemnation into that condition under the control of the officers of the law like the sentence of a man to hard labor in the State prison in the regular and ordinary course of law.” Thus, Kasson’s resolution provided that this kind of involuntary servitude would be the only kind known to the Constitution and the law.

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248 Id.
249 Id.
250 Id.
251 Id.
252 Id.
253 Id.
255 See id. at 345-46.
256 See id.
Though Kasson’s resolution was passed by the House, the bill was postponed “indefinitely” in the Senate. At a minimum, his efforts to explicate the meaning of the Thirteenth Amendment reveal that the text is ambiguous. His statements on the floor of the House highlight the early problems arising from this ambiguity. Kasson’s proffered resolution contemplates the nature and scope of the punishment clause.

2. The Purpose and Meaning of the Punishment Clause

Because of its scant legislative history, the rationale for the “punishment exception” is not wholly clear. The most likely reason is that nineteenth-century prison labor was not considered an incident of slavery. Because the Reconstruction Amendments responded to the evil of Southern slave codes, the Amendments acted as a remedy to previous deprivations of rights and privileges denied to black citizens. Slave codes, unlike prison policies, applied to freed persons; thus, the deprivation of life and liberty involved in the latter are “justified” whereas the deprivation of life and liberty involved in the former are not. Under this rationale, the Reconstruction Amendments did not apparently disrupt the State’s ability to deprive citizens of certain rights.

257 See Ghali, supra note 242, at 628 (“Yet, there is no reason to treat the joint resolution’s failure in the Senate as proof that Kasson’s interpretation was incorrect. In fact, during the House debate over the joint resolution, some expressed skepticism over whether Congress could expand or contract the scope of a constitutional provision through legislation alone, whether it had the power to void the acts of various courts, and whether the Supreme Court was the more appropriate place to resolve the problem.”).

258 Id. at 629.

259 See Marion, supra note 229, at 223.

260 See, e.g., U.S. CONST. amend. XIV, § 1, cl. 3 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”). In Plessy v. Ferguson, 163 U.S. 537, 553 (1896) (Harlan, J., dissenting), Justice Harlan argues: “[The Thirteenth Amendment] having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment . . . . These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship.”

261 See Marion, supra note, 229 at 223. (“Prisoners, on the other hand, had to be convicted of a crime before they fell under the Punishment Clause’s exception. Assuming that a prisoner has no claim to lack of due process, federal courts have largely been in agreement that the state is justified in depriving him or her of his life and liberty . . . .”)

262 “Assuming that a prisoner has no claim to lack of due process, federal courts have largely been in agreement that the state is justified in depriving him or her of his life and liberty . . . .” Id.
Another plausible reason for the inclusion of a punishment clause is that this exception reflects the understanding that “imprisonment” and “enslavement” are entirely distinct in the United States. One scholar noted language of the Thirteenth Amendment itself reflects a “cognitive separation” of the two concepts. “That the... Thirteenth Amendment simultaneously abolished slavery and initiated ‘involuntary servitude’ in the United States speaks to the duality of slavery and punishment in the American context.” Throughout world history, slavery has been used as a form of punishment. Unlike the Roman Empire, for example, which used servi poenas, or “slaves of punishment,” the American practice of slavery was not conceptualized as a form of punishment. Instead, American slavery was based on dominion and financial gain.

The fact that slavery and criminal justice are historically dichotomous institutions is important in analyzing the purpose and scope of the punishment clause. Under this model, the Thirteenth Amendment may be a wholesale prohibition on slavery while simultaneously allowing “involuntary servitude” “as punishment for crime whereof the party shall have been duly convicted.” This reading of the Thirteenth Amendment, that it banned slavery while permitting involuntary servitude as punishment for crime, has both textual and historical support.

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263 Marion, supra note 229, at 223.
265 Id.
266 Marion, supra note 229, at 223-24.
268 See Marion, supra note 229, at 223 (distinguishing American history from “the ancients and Renaissance Europeans, who used slavery to punish offenders and prisoners of war”) (citing Martin P. Sellers, The History and Politics of Private Prisons: A Comparative Analysis 48 (1993)).
269 Id.
270 U.S. Const. amend. XIII, § 1 (emphasis added).
271 See Flannagan v. Jepson, 158 N.W. 641, 642 (Iowa 1916) (“The very language of the Constitution, which prohibits involuntary servitude and then excepts therefrom involuntary servitude imposed as a punishment for crime,
The notion that indentured servitude could be a mode of criminal punishment and social improvement gained popularity in American colonies, primarily through the work of William Penn.273 Penn, a Quaker leader and the founder of the Pennsylvania colony, advocated for the use of imprisonment as punishment.274 Under Penn’s system, the imposition of work served the State’s police function of enforcing public morals.275 Prisons became “penitentiaries,” or instruments of “deterrence and justice.”276 During the 1820 prison reform, nearly every state adopted the “Pennsylvania system of punishment.”277 By the Jacksonian era, policymakers “had great faith that disciplined labor was an essential ingredient in building within offenders a moral fiber sufficiently strong to resist the criminal temptations that prevailed in the larger society.”278

Thus, for a variety of practical and moral reasons, “incarceration and inmate labor became bedfellows” in colonial America.279 “[B]y 1835 confinement and hard labor were the most common punishments for all but the relatively few capital crimes in most states.”280 In 1867, the Supreme Court found that where federal sentencing statutes require imprisonment alone, the court has the power to “order execution of its sentence at a place where labor is...
exact as part of the discipline and treatment of the institution or not, as it pleases." At the state level, courts found simultaneous imposition of separate sentences of hard labor and detention. At the state level, courts found simultaneous imposition of separate sentences of hard labor and detention.

In the late nineteenth century, courts and legislators had almost completely conflated punitive incarceration and punitive labor. In theory, at least at the federal level, hard labor remained a distinct penalty from penitentiary confinement. Specific crimes authorized hard labor as a punishment. This practice, of imposing hard labor sentences without confinement, had long been utilized by the U.S. military. By the early 1900s, hard labor was no longer a separate punishment; rather, hard labor was a disciplinary measure used within a majority of correctional facilities, regardless of the sentence imposed.

In 1909, in revising the penal code, Congress eliminated all penalties of hard labor within the punishment provisions. However, in doing so, Congress explicitly indicated that the omission of the words “hard labor” did not mean to deprive courts of the power to “impose hard labor as a part of the punishment, in any case where such power now exists.”

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281 See Ex Parte Karstendick, 93 U.S. 396, 399 (1876).
282 Raja Raghunath, A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?, 18 WM. & MARY BILL RTS. J. 395, 411-12 (2009). See, e.g., Ex parte Wilson, 114 U.S. 417, 427 (1885) (“Since the punishments of whipping and of standing in the pillor were abolished . . . imprisonment at hard labor has been substituted for nearly all other ignominious punishments . . . [a]nd . . . any sentence of imprisonment at hard labor may be ordered to be executed in a state prison or penitentiary.”). But, see Ex Parte Arras, 20 P. 683, 683-84 (Cal. 1889) (voiding sentence that imposed, as part of the penalty, hard labor for non-payment of fine because the “court below had no jurisdiction to impose hard labor as a part of the punishment” for the non-felony offense).
283 Raghunath, supra note 282, at 411-12.
284 Id. at 412 (citing United States v. Ramirez, 556 F.2d 909, 913 (9th Cir. 1976)).
285 See id. at n.100 (citing David Garland, Punishment and Welfare: A History of Penal Strategies 7 (1985)) (“‘Imprisonment’ is to be distinguished from ‘penal servitude’ in as much as the former involved sentences of up to two years with or without hard labour (which, after 1865, was uniformly enforced whether or not the court had explicitly ordered it) and was served in a local prison. Penal servitude, on the other hand, was to be served in a convict prison . . . “). See Major Joseph B. Berger III, Making Little Rocks Out of Big Rocks: Implementing Sentences to Hard Labor Without Confinement, Army Law., Dec. 2004, at 1, 6 (“Hard labor, with or without confinement, was established as a permissible punishment in the U.S. Army nearly 200 years ago.”).
286 Raghunath, supra note 282, at 412 (citing United States v. Ramirez, 556 F.2d 909, 915 (9th Cir. 1976)).
287 Id. (citing United States v. Ramirez, 556 F.2d 909, 913 (9th Cir. 1976)).
courts no longer have the ability to impose hard labor as a punishment.\textsuperscript{290} Thus, at the federal level, the power to impose hard labor lies solely in the hands of prison administrators.\textsuperscript{291} Over time, the expansion of the prison labor practice lost momentum,\textsuperscript{292} but the belief that incarcerated persons ought to work remains steadfast today.\textsuperscript{293}

C. The Thirteenth Amendment in the Prison Context: Early Understandings

1. Prisoners as Slaves: Convict Lease Systems, Penal Plantations, and Chained Road Gangs

As originally understood, the Thirteenth Amendment was of no consequences to the notion that prisoners are “slaves of the State.”\textsuperscript{294} In the south after 1865, the treatment of convicts was comparable to that of slaves, if not worse at times.\textsuperscript{295} In the post-slavery South,

\textsuperscript{290} Raghunath, \textit{supra} note 282, at 412-13.

\textsuperscript{291} United States v. Ramirez, 556 F.2d 909, 917 (9th Cir. 1976) (“[I]t is available to prison administrators as one part of the ‘individualized system of discipline, care, and treatment’ . . . .”) (internal citations omitted).


\textsuperscript{293} Raghunath, \textit{supra} note 282, at 411 (citing National Criminal Justice Reference Service, Study of the Economic and Rehabilitative Aspects of Prison Industry-Prison Industry Statutes 4 (1978), NCJ 046046) (“Ironically, the view that prisoners ought to work during confinement is supported both by penologists who advocate that prisons serve a rehabilitative purpose as well as by those who advocate that prisons serve a punishment and/or deterrent function.”). By the 1970s, most states moved toward a criminal system without discretionary hard labor sentencing statutes. \textit{Id.} at 413. However, some states, primarily Southeastern states, retained hard labor sentencing laws. \textit{Id.} See, e.g. Ala. Code § 13A-5-6(a) (LexisNexis 2009) (mandating that sentences for felonies “shall be for a definite term of imprisonment, which imprisonment includes hard labor”) and Neb. Rev. Stat. Ann. § 29-2208 (LexisNexis 2009) (requiring imprisonment in the county jail to include keeping the convict at hard labor or, as an alternative, “the sentence may be convicted to be fed on bread and water only, the whole or any part of the term of imprisonment”).

\textsuperscript{294} Ghali, \textit{supra} note 242, at 629. See Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (“For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.”); see also Shaw v. Murphy, 532 U.S. 223, 228 (2001) (noting that “for much of this country’s history, the prevailing view was that a prisoner was a mere ‘slave of the State’”) (quoting Jones v. North Carolina Prisoners’ Labor Union, Inc., 433 U.S. 119, 139 (1977) (Marshall, J., dissenting))). Although the Court in \textit{Ruffin} referred to prisoners as “slaves of the state,” the case involved a prisoner who murdered a prison guard while incarcerated. See Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 794 (1871) (finding the prisoner’s case challenging his murder trial to “[rest] solely upon the ground that he [was not] tried by a jury of his vicinage.”). The case did not implicate the Thirteenth Amendment directly.

\textsuperscript{295} Howe, \textit{supra} note 241, at 1008.
African-Americans flooded the criminal justice system.\textsuperscript{296} Under the guise of peonage statutes,\textsuperscript{297} vagrancy prohibitions, and other vague statues, southern states partook in the mass incarceration of blacks.\textsuperscript{298} These states would routinely force convicts to work to rebuild the southern infrastructure after the Civil War.\textsuperscript{299}

Early forms of convict labor were convict lease systems, penal plantations, and chain gangs.\textsuperscript{300} Under convict lease systems, prisons would also lease out prisoners, who were exploited by the use of forced labor.\textsuperscript{301} One author explained this practice:

> Usually the lessee assumed complete custody and control of the prisoners. The lessee agreed to provide the prisoners with food, shelter, and clothing and to ensure that they did not escape. In return, the lessee could exploit their labor and use force as necessary to make them work. Although the agreements contemplated that the lessee assumed both rights and obligations, the state generally paid no attention to the prisoners . . . after the transfer of custody, thus undermining the lessee’s sense of obligation.\textsuperscript{302}

Additionally, in the post-Civil War South, institutions began to use prisoners as field workers on penal plantations.\textsuperscript{303} The system was organized like the antebellum slave system—with the inmates working the fields to produce cotton—and the prisoners were exploited much like antebellum field slaves.\textsuperscript{304}

Furthermore, convicts faced the grueling “chain gang” prison-labor experience, whereby prisoners built and maintained roads in harsh conditions.\textsuperscript{305} The chain gang system was not

\textsuperscript{296} Id.
\textsuperscript{297} Peonage is the compulsion of labor for the payment of a debt. Kares, \textit{supra} note 15, at 385.
\textsuperscript{298} See Nancy A. Ozimek, Reinstitution of the Chain Gang: A Historical and Constitutional Analysis, 6 B.U. PUB. INT. L.J. 753, 760 (1997) (“These laws included statutes dealing with contract fraud, criminal surety, vagrancy and other “open-ended” statutes that permitted the criminal prosecution of laborers who sought to abandon their jobs.”).
\textsuperscript{299} Howe, \textit{supra} note 241, at 1008.
\textsuperscript{300} For a discussion of the treatment of convicts in the South after 1865, see id. at 1008-1019.
\textsuperscript{301} See id. at 1009 (“Sporadic leasing of prisoners also occurred outside of the South after the passage of the Thirteenth Amendment.”).
\textsuperscript{302} Howe, \textit{supra} note 241, at 1010 (internal quotations omitted).
\textsuperscript{303} Id. at 1014-15. See Tessa M. Gorman, Comment, \textit{Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs}, 85 CAL. L. REV. 441, 456 (March 1997) (“The image evokes the same connotation of slavery.”).
\textsuperscript{304} Howe, \textit{supra} note 241, at 1015.
\textsuperscript{305} Id. at 1017.
much more humane than the convict lease system: inmates faced cruelties, continuous labor and corporal punishment.306 Like the convict lease system, the chain gang method of punishment was used to exploit prisoners for the State’s financial benefit.307 To avoid the chain gang, some convicts were forced into criminal surety contracts.308 Under a contract, convicts would their labor to employers pay the fines.309

The practice of “rounding up” blacks on “petty” and “trumped up charges” in order to attain a cheap system of labor met both legal and political opposition.310 Public opposition, which arose at the inception of this new slave-labor system, eventually forced reform to the convict-lease system.311 The first state to abolish convict-lease systems was South Carolina in 1885.312 In 1911, the governor of Tennessee, Malcolm Patterson, admitted that the state prisons were “inhuman, unchristianlike, and not becoming to a great state and progressive people.”313 Finally, by 1928, with Alabama joining the abolition movement, the system of convict-leases

306 Id.
307 Id.
309 Id. These agreements, called “surety contracts,” functioned like a “servitude trap” from newly freed African-Americans. Id.
310 Id.
311 Howe, supra note 241, at 1010. The New York Times, and other political opposition to the lease-system arose in condemnation of the practice. MARY ELLEN CURTIN, BLACK PRISONERS AND THEIR WORLD, ALABAMA, 1865-1900, at 70-71 (2000). See “Southern Convict Camps: A crying Disgrace for our American Civilization” (NY Times, Dec. 17, 1882) (“laws…had the effect of placing such persons in a condition worse than slavery”). “As the twentieth century dawned, the Thirteenth Amendment had been rendered ineffective and convict leasing was in full swing. By the 1920s, however, the system was falling out of favor, but not due to Thirteenth Amendment concerns.” Marion, supra note 229, at 229.
312 Howe, supra note 241, at 1014.
313 BLAKE MCKELVEY, AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915, at 120 (1936).
ended.\textsuperscript{314} Chain gangs began to disappear in the 1950s.\textsuperscript{315} In many cases, courts did not get a chance to weigh in on the constitutionality of the chain gang practice.\textsuperscript{316}

\textbf{2. Limitations on Prison Labor: The Peonage Cases}

In the absence of Thirteenth Amendment challenges to these practices, one might think that the Amendment permitted slavery as punishment for crime.\textsuperscript{317} After all, “[t]he long and continuous history of brutalities against prisoners across most of the South went unchallenged in the courts under the main prohibition in the amendment . . . .” However, the lack of a judicial response to convict leasing and other post-Civil War penal labor practices is not surprising in light of the \textit{Slaughter-House}\textsuperscript{318} holding, which prevented Thirteenth Amendment claims against the states.

In any event, the Supreme Court was not entirely silent on the prison labor practices at that time. In 1905, in \textit{Clyatt v. United States},\textsuperscript{319} the Supreme Court affirmed the “then dormant” Peonage Abolition Act.\textsuperscript{320} The Act sought to strike down all laws that attempted to directly or indirectly maintain the voluntary or involuntary service of a person as a peon to discharge a debt.\textsuperscript{321} Peonage is a “condition of compulsory service, based upon the indebtedness of the peon to the master.”\textsuperscript{322} A peon can release himself from the master either by payment of the debt or

\textsuperscript{314} Howe, \textit{supra} note 241, at 1014.
\textsuperscript{315} Id. at 1017. \textit{But, see} Tessa M. Gorman, Comment, \textit{Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs}, 85 CAL. L. REV. 441, 457-58 (March 1997) (noting that, as of 1996, chain gangs still existed in Alabama).
\textsuperscript{316} See Marion, \textit{supra} note 229, at 225 (finding no cases were brought under the Thirteenth Amendment in the prison labor context during the late nineteenth and early twentieth centuries).
\textsuperscript{317} See id. at 225 (“Curiously, however, the courts during this time period never intervened on Thirteenth Amendment grounds to stop convict leasing . . . . In fact, no cases were brought under this amendment in the prison labor context.”).
\textsuperscript{318} Slaughter-House Cases, 83 U.S. 36, 72 (1872).
\textsuperscript{319} Clyatt v. United States, 197 U.S. 207 (1905).
\textsuperscript{321} U.S. v. Reynolds, 235 U.S. 133, 143 (1914).
\textsuperscript{322} Id.
enforcement of the service.\textsuperscript{323} In denouncing peonage, the Court described the cyclical process of arresting convicts for violation of labor contracts and re-sentencing them to hard labor: “the convict is thus kept chained to an everturning wheel of servitude.”\textsuperscript{324}

For Thirteenth Amendment doctrinal purposes, the peonage cases importantly denounced that prisoners were merely slaves of the states.\textsuperscript{325} While the peonage cases are important to exhibit post-Reconstruction use of the Thirteenth Amendment, the evil at which these opinions are directed is a narrow one.\textsuperscript{326} These cases show that the early focus of courts interpreting the Thirteenth Amendment in the prison context was on the conditions imposed for crimes.\textsuperscript{327} In many ways, peonage was a unique system of punishment because the statutes whereby a person could be forced to labor indefinitely.\textsuperscript{328} Furthermore, these laws were unique insofar as the punishments imposed were disproportionately long and the fines relatively large, speaking to what Representative Kasson had identified as attempts to circumvent the constitutional mandate of the Thirteenth Amendment.\textsuperscript{329} Yet, these cases recognize, at the very least, that prisoners do retain some Thirteenth Amendment protections, notwithstanding their incarceration.\textsuperscript{330}

\textsuperscript{323} Id.
\textsuperscript{324} Id. at 146-47.
\textsuperscript{325} See, e.g., Thompson v. Bunton, 22 S.W. 863, 865 (1893) (doubting the constitutionality of a law that forced a convict “to be placed upon an auction block, and sold to the highest bidder, either for life or for a term of years”).
\textsuperscript{326} In the seminal case Bailey v. Alabama, 219 U.S. 219, 244 (1911), Justice Hughes announced that the Thirteenth Amendment “does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other.”
\textsuperscript{327} Kares, supra note 15, at 386.
\textsuperscript{328} U.S. v. Reynolds, 235 U.S. 133, 146 (1914). Under these laws, the initial arrest, for a violation of a labor contract, resulted in a new offense whose punishment was to liquidate the penalty by imposing a new contract of a similar nature to the original contract. \textit{Id.} If the new contract was broken, the offender may be prosecuted again. \textit{Id.} Thus, the result was a perpetual and inevitable cycle. \textit{Id.}
\textsuperscript{329} Ghali, supra note 242, at 629.
\textsuperscript{330} Id.
D. The Thirteenth Amendment in the Prison Context: Modern Application

1. “Crime whereof the party shall have been duly convicted”

For the most part, courts have broadly construed the term “crime” to include both felonies and misdemeanors. Although requiring “due conviction,” the Thirteenth Amendment does not provide substantive procedural safeguards. In other words, an inmate may not invoke the Thirteenth Amendment to challenge the validity of her conviction or imprisonment. However, at a minimum, the inmate need be “duly tried, convicted, sentenced and imprisoned” for the court to find no Thirteenth Amendment violation.

On this basis, courts reviewing claims for wages brought under the Thirteenth Amendment, courts have distinguished between pre-trial or post-conviction detainees. For example, the Second Circuit found that an inmate of a state mental institution stated a Thirteenth Amendment violation when forced to work in a boiler house “eight hours a night, six nights a week, while working eight hours a day at assigned jobs in the village.” Still, the question is a threshold one, as courts have maintained found the state may impose general housekeeping duties upon mental hospital inmates. Relying on this supposition the Fifth Circuit found that requiring Immigration and Naturalization Service detainees to do housekeeping choices—here, working in a food service department—to be constitutionally permissible under the Thirteenth

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331 See, e.g., City of Fort Lauderdale v. King, 222 So. 2d 6 (Fla. 1969); Stone v. City of Paducah, 120 Ky. 322, 27 Ky. L. Rptr. 717, 86 S.W. 531 (1905).
332 Lindsey v. Leavy, 149 F.2d 899, 901-02 (9th Cir. 1945). See also Blass v. Weigel, D.C., 85 F.Supp. 775, 781 (D.N.J. 1949) (“The Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute.”).
334 Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999).
335 Jobson v. Henne, 355 F.2d 129, 132 (2d Cir. 1966). But see Williams v. Henagan, 595 F.3d 610, 622 (5th Cir. 2010) (rejecting prisoner’s claim that more than ten hours of labor per day necessarily amounted to involuntary servitude in violation of the Thirteenth Amendment).
Amendment. Thus, if a pre-trial inmate alleges conditions “tantamount to slavery,” she may have a viable Thirteenth Amendment claim.

2. “Involuntary Servitude” as “Punishment”

Today, courts seem to have adopted the reading of the Thirteenth Amendment which regards slavery and involuntary servitude as dichotomous institutions. Thus, the punishment clause excepts only involuntary servitude. Incarceration, itself, is not “involuntary servitude.” Standard prison rules requiring inmates to work is “involuntary servitude,” however, it is not the kind “which violates Thirteenth Amendment rights.” The rationale is that the state is permitted to impose “finances and penalties which must be worked out for the benefit of the state” as long as the imposition is in “such manner as the state may legitimately prescribe.” Thus, lower courts have found as a general matter that requiring prisoners to work during incarceration is constitutionally permissible, though the Supreme Court has not addressed the issue directly. Although courts are unwilling to deem prison work violative of the constitution, courts often leave open whether these practices or programs violate state statutes.

337 See, e.g., Channer v. Hall, 112 F.3d 214, 219 (5th Cir. 1997).
339 See supra Part III.B.2. See also Robertson v. Baldwin, 165 U.S. 275, 292 (1897) (Harlan, J. dissenting) (“As to involuntary servitude, it may exist in the United States; but it can only exist lawfully as a punishment for crime of which the party shall have been duly convicted. Such is the plain reading of the constitution.”)
340 See U.S. v. Reynolds, 235 U.S. 133, 149 (1914) (“There can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the [Thirteenth] Amendment, and such punishment expressly exception from its terms.”).
341 Howard v. U.S., 274 F.2d 100, 103 (8th Cir. 1960).
343 Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963).
345 Federal courts have generally precluded Thirteenth Amendment challenges to convict labor requirements, permitting most penitentiary policies mandating convict labor. Raghunath, supra note 282, at 397. See, e.g., Ali v. Johnson, 259 F.3d 317 (5th Cir. 2001) (“[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.”); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963) (citing Butler v. Perry, 240 U.S. 328, 332 (1916)) (“Prison rules may require appellant to work but this is not the sort of involuntary servitude which violates Thirteenth Amendment rights.”); and Blass v. Weigel, 85 F. Supp. 775, 782
Beyond legal standards, as a normative matter, “the value of productive prison work and its relationship to rehabilitation are widely accepted.” The theoretical justifications historically proffered for upholding prison labor – that it benefits both the inmate and the State – remain pertinent today. At the federal level, for example, “sentenced inmates are required to work if they are medically able.” The Inmate Financial Responsibility Program (“IFRP”) mandates that inmates work in order to pay court-ordered fines, satisfy victim restitution, meet child support, and comply with other monetary judgments. The Federal Bureau of Prisons (“Bureau”) supports IFRP not only because of its own interests in collecting debts and compensating victims, but also because it promotes inmates’ interests in being financially responsible.

Having accepted that sentenced persons may be required to work, modern Thirteenth Amendment challenges to prison work programs come in the form of employment disputes. Prisoners might, for example, challenge their assignments, ask for wages, or demand the ability to unionize. Faced with these issues, courts have determined that not only may a prisoner be compelled to work, but she need not be compensated for her work. Furthermore, if her

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348 Id. See supra Part III.B.2.
351 See id.
352 See id.
354 See Berry v. Bunnell, 39 F.2d 1056, 1057 (9th Cir. 1994) (“And the Thirteenth Amendment does not apply where prisoners are required to work in accordance with prison rules.”).
355 “[C]ompensating prisoners for work is not a constitutional requirement but, rather, ‘is by the grace of the state.’” Mikeska v. Collins, 900 F.2d 833, 837 (5th Cir.1990) (quoting Wendt v. Lynaugh, 841 F.2d 619, 621 (5th Cir.1988)).
conviction is subsequently reversed, she has no right to compensation for the work she completed while detained.356 If an inmate disputes the condition of her labor, she will likely be unsuccessful,357 unless the manual work is so physically dangerous as to constitute “cruel and unusual punishment.”358 In the event an inmate refuses to work, she may constitutionally be subject to punishment in the form of solitary confinement or loss of good-time credits.359

Modern prison labor programs have been upheld as permissible forms of “involuntary servitude.”360 Typically, courts are willing to uphold prison labor associated with voluntary work release programs.361 Notwithstanding the type of labor imposed, these cases fail because the compulsion necessary to render the labor involuntary is found to be lacking.362 For example, when an inmate has the option between staying inside to earn no wages and leaving the prison to earn twenty dollars a day, the court has found no involuntary servitude.”363 In cases of involuntary service, challenges typically fail because the labor is imposed pursuant to a state law

356 Omasta v. Wainwright, 696 F.2d 1304, 1305 (11th Cir. 1983) (rejecting plaintiff’s Thirteenth Amendment claim for minimum wage payment for the hours he worked during his three years of confinement after his conviction was reversed because plaintiff was incarcerated pursuant to a presumptively valid judgment).
357 See Williams v. Henagan, 595 F.3d 610, 622 (5th Cir. 2010) (rejecting a prisoner’s Thirteenth Amendment challenges to a prison labor program based on either location of the work or the number of hours worked per day).
358 See, e.g., Morgan v. Morgensen, 465 F.3d 1041 (9th Cir. 2006) (upholding prisoner’s Eighth Amendment claim where laboring for a prison print shop resulted in the loss of his right thumb).
359 See Magoon v. Texas Dept. of Criminal Justice, 247 F.3d 240 (5th Cir., 2001) (inmate failed to state a viable Thirteenth Amendment claim where he had to choose between housekeeping work and solitary confinement) and Franklin v. Kyle, 66 F.3d 323 (5th Cir. 1995) (unpublished opinion) (finding inmate’s choice between working in prison industries program or facing loss of good-time credits, though painful, was not unconstitutionally coercive).
360 Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963).
361 See, e.g., Bijeol v. Nelson, 579 F.2d 423 (7th Cir. 1978). Mental hospital patients, too, may be required to perform housekeeping choices. See Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966). In this context, “housekeeping tasks” have been understood to include “[working] in hospital kitchens, fixing meals and scrubbing dishes, . . . cutting grass, . . . cutting and styling other patients’ hair, . . . maintaining the lanes and pinsetting machines, . . . doing secretarial and clerical work, . . . washing sheets and clothes of other patients, . . . and . . . scrubbing floors and cleaning.” Bayh v. Sonnenburg, 573 N.E.2d 398, 412 (Ind. 1991).
363 See Watson v. Graves, 909 F.2d 1549, 1552-53 (5th Cir. 1990) (finding that while the choice may have been “painful,” the prisoner was not forced to work against his will in violation of the Thirteenth Amendment).
or institutional rules.\textsuperscript{364} Otherwise, outside of challenges to actual challenges to imprisonment itself or prison work programs, courts have not had the chance to define the threshold of “involuntary servitude” (permitted under the Thirteenth Amendment) and “slavery” (not).

\textbf{IV. ARGUMENT}

\textbf{A. The Punishment Clause Exception for “Involuntary Servitude” is a Limited One}

In relevant part, the Thirteenth Amendment reads “[n]either slavery nor involuntary servitude, \textit{except as a punishment for crime whereof the party shall have been duly convicted}, shall exist within the United States . . . .”\textsuperscript{365} In the prison context, the extent to which inmates retain Thirteenth Amendment protection depends on several variables. First, does the Thirteenth Amendment permit either slavery or involuntary servitude or both as punishment for crime? Because courts have found that prisoners are not merely slaves of the state,\textsuperscript{366} the next question is what constitutes “involuntary servitude” under the punishment clause?\textsuperscript{367} In other words, what is the scope of involuntary service to be tolerated under this exception?

First, the State’s power to impose involuntary servitude as a punishment for crime is limited by the text of the punishment clause. The Thirteenth Amendment will tolerate the legal or legitimate imposition of involuntary servitude, and the scope of involuntary servitude that may be imposed for punishment of crime has historical and practical boundaries. As Judge Thomas Cooley set forth in his constitutional law treatise,

\textsuperscript{364} See Omasta v. Wainwright, 696 F.2d 1304, 1305 (11th Cir. 1983) (finding the Thirteenth Amendment not implicated where inmate was forced to work pursuant to prison regulations or state statutes); and Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963) (“It follows, therefore, that whether appellant is being held in the state penitentiary or the county jail, he may be required to work in accordance with institution rules.”) State laws may give inmates the option regarding work-release programs while requiring maintenance or custodial work. See Watson v. Graves, 909 F.2d 1549, n.12 (5th Cir. 1990) (citing LA. REV. STAT. ANN. §§ 15:708, 15:711).

\textsuperscript{365} U.S. CONST. amend. XIII (emphasis added).

\textsuperscript{366} See, e.g., Washlefske v. Winston, 60 F. Supp. 2d 534, 539 (E.D. Va. 1999) (“[T]he idea . . . that inmates are no more than ‘slaves of the State,’ has been repeatedly and expressly repudiated by other courts.”).

\textsuperscript{367} 2 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 8:1 (4th Ed. 2009) (“The Thirteenth Amendment prohibits involuntary servitude, but a specific exception exists for those duly convicted of crimes. Nonetheless, questions regarding the reach of that exception remain.”).
“[n]or do we suppose the exception will permit the convict to be subjected to other servitude than such as is under the control and direction of the public authorities in the manner heretofore customary. The laws of the several states allow the letting of the services of the convicts, either singly or in numbers, to contractors, who are to employ them in mechanical trades in or near the prison, and under the surveillance of its officers; but it might well be doubted if a regulation which would suffer the convict to be placed upon an auction block, and sold to the highest bidder, either for life or for a term of years, would be in harmony with the constitutional prohibition.”

In this way, the text of the punishment clause may be understood to create a spectrum of permissibility – with slavery on one end and involuntary servitude on the other. The closer a prison labor practice is to slavery, the more likely it is to be deemed “unconstitutional.” Whereas the standard imposition of prison labor—i.e. mechanical trades, as Cooley noted—will be found to be constitutionally permissible.

Second, a narrow interpretation of the types of labor permissibly imposed under the punishment clause is consistent with both past and present doctrine. Historically, slave-like prison conditions have not been tolerated, as shown by the abolition of practices like penal plantations, convict lease systems, and chain gangs. Although these practices did not end at the hands of Thirteenth Amendment challenges, modern attempts to reinstitute the chain gang have quickly been retracted in the face of litigation. Today, the fact that most prisoners’ Thirteenth Amendment challenges to prison work programs fail demonstrates the acquiescence

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369 See supra Part III.C.1.
370 For example, in 1996, without a court order, the state of Alabama ended the practice of chaining inmates together in the state prison system, pursuant to a settlement with the Southern Poverty Law Center. See Tessa M. Gorman, Comment, Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs, 85 CAL. L. REV. 441, 457-58 (March 1997). See Raghunath, supra note 282, at 406 (“The recent reintroduction of chain gangs in Alabama, and the hurried retraction of this policy in the face of litigation, despite strong public support for the practice, illustrates that some of the traditional forms of inmate labor no longer fall within the acceptable boundaries of modern punishment.”).
of the original limits on prison labor. In short, modern practices reflect that the well-established belief that prisoners may be subject to the legal, customary imposition labor.

Furthermore, the limits imposed on labor for pretrial detainees, though not yet convicted, provides some guidance for creating appropriate limits. The rationales for requiring a lawfully committed inmate, though not yet convicted, to perform certain chores without compensation are both reducing the state’s financial burden and rehabilitative or therapeutic purposes. So while the state may subject inmates to “a wide variety of programs with both therapeutic and cost saving purposes without violating the Thirteenth Amendment . . . there may be some mandatory programs so ruthless in the amount of work demanded, and in the conditions under which the work must be performed, and thus so devoid of therapeutic purposes, that a court justifiably could conclude that the inmate had been subjected to involuntary servitude.” This sentiment is consistent with the original reasons for punitive labor for all inmates. Finding no meaningful distinction in the types of tasks imposed for those detained pre or post-conviction, it is difficult to see why the Thirteenth Amendment cannot be understood as having an inherent limitation on the extent and type of labor imposed for punishment of a crime.

B. Forced Pregnancy is More Like “Slavery” than “Involuntary Servitude”

As previously discussed, courts interpret the Thirteenth Amendment’s ban on involuntary servitude as a “prohibition against coerced wage labor in the market economy.” Slavery, on
the other hand, is more than coercion of productive labor for economic purposes.377 Post-Reconstruction courts defined “slavery” in the Thirteenth Amendment context broadly: “the state of entire subjection of one person to the will of another.”378 This definition “transcends mere economics” because “although forced labor for economic gain was one characteristic of slavery as practiced in the antebellum South, forced labor itself does not exhaust the meaning of slavery.”379 Indeed, courts have acknowledged that slavery is different than involuntary servitude, the latter involving the wage-labor system.380 For slavery, the scope is not limited to services with an existing market equivalent.381 Thus, along with forced economic and domestic labor, slavery included “personal services such as sex and reproduction.”382

In determining the types of services that constitute slavery (or impermissible involuntary servitude) in violation of the Thirteenth Amendment, gender is crucially important. Of course, females differ from men in that “the services they are capable of performing include the production of human beings.”383 For example, women who labored under the system of chattel

377 Id.
378 Hodges v. United States, 203 U.S. 1, 17 (1906). While no one factor is dispositive in finding slave-like conditions of servitude, things like “complete domination,” “oppressive work conditions,” and “lack of pay or personal freedom” are hallmark characteristics. U.S. v. Kozinski, 487 U.S. 931, 962-63 (1988) (Brennan, J., concurring).
380 Pollock v. Williams, 322 U.S. 4, 17 (1944) (“The undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.”). The Court went on to say that forced labor may be consistent with a system of free labor, using forced labor “as a means of punishing crime” as an example. Id. The use of the term “labor” undoubtedly refers to standard prison work.
381 McConnell, supra note 376, at 219-20.
382 Id. at 217. Although, sexual and reproductive services are certainly understood as commodities capable of being transacted for in the marketplace. See generally Ghali, supra note 242. See also Koppelman, supra note 15, at 480-88. (“Indeed, the recent advent of “surrogate motherhood” has shown that women's reproductive powers are as capable as any others of being transacted for in the marketplace . . . .”).
383 Koppelman, supra note 15, at 480-88. For a fascinating look at how slave women dealt with unwanted pregnancies, see JUNIUS P. RODRIGUEZ, Infanticide, in 1 ENCYCLOPEDIA OF SLAVE RESISTANCE AND REBELLION, 260 (2007) (discussing the abortion techniques of slaves and infanticide as a form of female slave rebellion).
slavery, enslavement included the compulsion of both sexual and reproductive services.\textsuperscript{384} Female slaves were unwilling participants in chattel breeding, often forced to reproduce.\textsuperscript{385}

Although the Court has never explicitly held that the Thirteenth Amendment protects a woman’s right to terminate her pregnancy, the Court has at times “tipped its hat” to the argument in the development of its abortion jurisprudence.\textsuperscript{386} For example, in Blackmun’s opinion in \textit{Roe}, he discusses the “specific and direct” medical harms of pregnancy, which are both physical and psychological.\textsuperscript{387} Maternity, he said, “may \textit{force} upon the woman a distressful life and future.”\textsuperscript{388} In addition to the physical and psychological harm accompanying unwanted pregnancy, he discussed the “distress . . . associated with the unwanted child, and . . . the problem of bringing a child into a family already unable . . . to care for it.”\textsuperscript{389}

Writing for a majority in \textit{Casey}, Justice O’Connor discussed the physical burdens borne by pregnant women, which she found as too high to endure simply for the state’s insistence.\textsuperscript{390} “The mother who carries a child to full term is subject to anxieties, to \textit{physical constraints}, to \textit{pain that only she must bear}. That these sacrifices . . . cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role . . . .”\textsuperscript{391} Concurring in the \textit{Casey} decision, Justice Blackmun suggested that equal protection concerns arise when the state bans or

\begin{footnotes}
\item[384] McConnell, supra note 376, at 217.
\item[386] Professor James Fleming presented this view in a speech for an event “Rearguing Roe v. Wade” at Boston University School of Law. He cited Blackmun’s concurrence in \textit{Casey} as one example of the Court “[intimating] the involuntary servitude argument without specifically invoking the Thirteenth Amendment.” James Fleming, Professor of Law at Boston University, Panelist Address at the Women’s Law Association “Rearguing \textit{Roe v. Wade}” Event (Jan. 26, 2012).
\item[388] Id. (emphasis added).
\item[389] Id.
\item[391] Id. (emphasis added).
\end{footnotes}
severely restricts abortion. However, his rhetoric smacks of the Thirteenth Amendment’s protection against forced pregnancy: “State restrictions on abortion compel women to continue pregnancies they otherwise might terminate . . . [conscripting] women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.”

These sentiments reflect the Court’s acknowledgement the Thirteenth Amendment may be implicated in abortion restrictions. While Johnsen critiques deplore the notion that pregnancy could be equated with slavery, the fact remains that pregnancy is an incredibly taxing and time-intensive form of labor. As far as the Thirteenth Amendment is concerned, no meaningful distinction may be drawn between “the powers of a man’s back and arms and those of a woman’s uterus.” As Professor Andrew Koppelman posited: “But what would we call any activity that demanded that a man, in order to produce a tangible result, endure constant exhaustion, loss of appetite, vomiting, sleeplessness, bloatedness, soreness, swelling, uncontrollable mood swings, and, ultimately, hours of agony, often followed by deep depression?” As a practical and legal matter, forced pregnancy is less like involuntary servitude, involving customary labor, and more like slavery.

C. Policies Banning or Restricting Abortion Do Not Fall Within the Punishment Exception

Ultimately, to the extent that prisoners retain Thirteenth Amendment protections depends on the threshold of “involuntary servitude” that will be tolerated as punishment for crime. Policies that ban or restrict abortion access impose a type of service on female inmates that goes

392 Id. at 928 (Blackmun, J. concurring) (emphasis added).
393 See supra Part I.
394 Koppelman, supra note 15, at 488.
395 Id.
far beyond standard prison polices imposing inmate work, which is excepted under the Thirteenth Amendment. Although none of the prison cases cited thus far have involved a female inmate, let alone one forced to carry a pregnancy to term, the coerced labor allowed under the Thirteenth Amendment has included work like cleaning, laundry, or washing dishes. 396 Standard prison work pales in comparison to the lasting physical and psychological demands of forced pregnancy and motherhood. When an inmate is denied access to abortion, not only must she labor around the clock for nine months, but she is faced with lasting harms likely to extend beyond the duration of her incarceration. 397

Because forced pregnancy undoubtedly falls on the slavery side of the punishment clause’s slavery-involuntary servitude spectrum, penal policies banning or severely restricting abortion are unconstitutional under the Thirteenth Amendment. Forcing women to bear children “constitutes a uniquely gendered form of punishment.” 398 The suffering she experiences is only intensified by her oppressive surroundings and inadequate access to medical care. 399 One inmate lamented:

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

396 See supra note 361.
397 As one Congresswoman noted, this punishment is exacerbated and complicated by post-delivery procedure, which often includes immediate removal of the child. See Schakowsky, 106th Cong. 2d sess., Cong. Rec. 80 (22 June 2000): H 5024 (“[W]e are going to force them to have that child, but that child is going to immediately ripped away from that mother whether she wants that baby now or not.”). The practice of post-delivery separation is not unlike the birthing experience for slave women. See, e.g., Jacobs, supra note 1, at 119 (“On the fourth day after the birth of my babe, he entered my room suddenly, and commanded me to rise and bring my baby to him.”).
398 Roth, supra note 37, at 376.
the doctor and he told her to send me back to my unit . . . . [Three days later at 3:00 a.m.] I lost my baby in my bathroom.”

Indeed, courts reviewing restrictive prison abortion policies have determined that the potential harms to inmates are “irreparable.” Furthermore, courts have long recognized the enormous psychological anguish associated with forced pregnancy.

Prison practices and policies that restrict or ban abortion allow the State to make “critical decisions in women’s lives . . . whether women will be made into mothers against their will. By forcing pregnant inmates to be mothers, these laws relegate women to a servant caste. The consequence of these laws is that women, by virtue of their immutable biological trait—the ability to birth children—are “subject to a special duty to serve others and not themselves.”

State laws and prison policies give correctional facility employees enormous discretion, “placing women at the mercy of those who hold power over them.” In doing so, these laws effectively create the very situation “control” that the Thirteenth Amendment sought to prevent. By forcing women to maintain pregnancy and endure childbirth, against their will, for a benefit not their own, the state is violating the Thirteenth Amendment, notwithstanding the punishment clause exception.

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400 Roth, supra note 37, at 428 (citing Letters to LSPC, summarized and quoted by permission; emphasis in original.)
402 See supra Part IV.B.
403 Roth, supra note 37, at 356.
404 Koppelman, supra note 15, at 484.
405 Id.
406 Roth, supra note 37, at 355.
407 Koppelman, supra note 15, at 484. Most shockingly, the dominion over which the State’s control extends to inmates’ reproductive processes is not limited to compelling pregnancy, as those who refuse to have abortions are also subject to punishment. Roth, supra note 37, at 354.
V. CONCLUSION

As understood today, the punishment clause is read to bar most Thirteenth Amendment claims raised by prisoners.\(^{408}\) Still, courts are willing to recognize that prisoners do retain some Thirteenth Amendment protections.\(^{409}\) Although many constitutional protections have been, and are still, denied to prisoners,\(^{410}\) courts\(^{411}\) have repeatedly repudiated the notion that prisoners are merely “slaves of the state.”\(^ {412}\) Today, despite high deference to prison officials, courts are unwilling to accept that prisoners forfeit all constitutional rights at the prison door.\(^ {413}\) So while the Constitution may demand less within the prison walls,\(^ {414}\) the Supreme Court refuses to draw an “iron curtain between the Constitution and the prisons of the country.”\(^ {415}\)

The laws governing the reproductive rights of incarcerated women are both fragmented and unclear. Moreover, courts examining the constitutionality of restrictive policies have mixed results.\(^ {416}\) What is worse, neither the existence of progressive policies nor the judicial

\(^{408}\) Raghunath, supra note 282, at 399-400.

\(^{409}\) See, e.g., Watson v. Graves, 909 F.2d 1549, 1552 (5th Cir. 1990) (“We agree that a prisoner who is not sentenced to hard labor retains his thirteenth amendment rights; however, in order to prove a violation of the thirteenth amendment the prisoner must show he was subjected to involuntary servitude or slavery.”).

\(^{410}\) See Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 795-96 (1871) (“A convicted felon . . . [f]or the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.”).

\(^{411}\) See, e.g., Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (“A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken away from him by law.”).

\(^{412}\) See Walshefske v. Winston, 60 F. Supp. 2d 534, 539 (E.D. Va. 1999) (rejecting the idea, expressed in Ruffin, that inmates are no more than “slaves of the State”); and McCann v. Coughlin, 698 F.2d 112, 115 (2d Cir. 1975) (finding the time when prisoners had no rights is past).

\(^{413}\) “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” Turner v. Safley, 482 U.S. 78, 85 (1987). Thus, “[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.” Procunier v. Martinez, 416 U.S., at 405-406. Over the past few decades, the Supreme Court has consistently found that prisoners retain constitutional rights. See, e.g., Haines v. Kerner, 404 U.S. 519 (1972) (finding prisoners may not be deprived of life, liberty, or property without due process); Younger v. Gilmore, 404 U.S. 15 (1971) (finding prisoners retain the right to access the courts while incarcerated); Johnson v. Avery, 393 U.S. 483 (1969) (finding prisoners retain the constitutional right to petition the government for redress of grievances); and Lee v. Washington, 390 U.S. 333 (1968) (finding the Equal Protection Clause of the Fourteenth Amendment protects prisoners against invidious discrimination).


\(^{416}\) See supra Part II.C.1.
invalidation of oppressive policies protects inmates from arbitrary and discretionary decisions made by prison guards and administrators. In the fight to protect the reproductive rights of incarcerated women, advocates have challenged policies restricting or banning abortions under the Fourteenth and Eighth Amendments. Under the Fourteenth Amendment, the application of the Turner balancing test, which is highly deferential to prison policymakers, has produced varying results. Under the Eighth Amendment, advocates have reached generally unfavorable results. Between these two types of constitutional challenges, a “circuit split” has emerged as to whether restrictive prison abortion policies are unconstitutional—and if so, on what grounds.

Based on these unpredictable results, and because the Supreme Court has not yet addressed the issue, this Note argues that advocates should consider an alternative approach in arguing that penal policies banning or restricting abortion are unconstitutional: the Thirteenth Amendment. In theory, text of the Thirteenth Amendment could provide that the punishment clause includes both slavery and involuntary servitude in its scope. However, the punishment clause does not permit the State to impose slavery as punishment for crime. Furthermore, a closer look into the Thirteenth Amendment’s role in the prison context reveals that the punishment exception for involuntary servitude is a narrow one.

417 See Gutierrez, supra note 39 (finding a discrepancy between the state of abortion policies for prisons and jails and female inmate’s actual ability to successfully terminate her pregnancy).
418 Johnson, supra note 4, at 658.
420 Compare Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (holding that the Fourteenth Amendment, but not the Eighth Amendment, protects the rights of pregnant inmates to elective abortions), and Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2005) (holding that neither the Fourteenth Amendment nor the Eighth Amendment protect the rights of pregnant inmates to elective abortions).
421 See, e.g., Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions), and Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2005) (finding the Eighth Amendment does not protect the rights of pregnant inmates to elective abortions). But, see Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987) (finding the Eighth Amendments does protect pregnant inmates’ right to elective abortions).
The Note finds that the punishment clause is limited by its text, historical purposes, and modern doctrinal developments. The Note argues that, viewed as a whole, the punishment clause is bound by a permissibility spectrum. On one hand, the exception to the Thirteenth Amendment’s prohibitions includes traditional forms of prison work, those legally and customarily imposed as an incident of incarceration. On the other hand, courts reject the notion that prisoners are slaves of the state. Practices that closely resemble slavery have raised legislative concern and provoked public outcry. Thus, the courts have been and should be willing to strike down those prison labor practices that closely resemble slavery.

Where does forced pregnancy fall on the punishment clause’s permissibility spectrum? Comparing the practices that have been deemed constitutionally permissible under the Thirteenth Amendment in men’s prisons to the policies imposing (or resulting in) unwanted motherhood in women’s prisons, the answer becomes clear. Pregnancy is one of the most, if not the most, laborious tasks of which the female human body is capable. Prison policies that restrict or ban abortion force women into motherhood – a practice not unlike the reproductive dominion exerted over the bodies of female slaves. While the Supreme Court has never found abortion prohibitions to be directly violative of the Thirteenth Amendment, a review of the reproductive rights jurisprudence demonstrates that this argument is not without merit. Furthermore, in conjunction with incarceration, forced pregnancy becomes a far worse form of servitude. If the image of the chain gang reminds us of slavery, so too should the picture of a detained and subordinated pregnant woman, neither internally nor externally free, her body no longer her own.