NO SLAVERY EXCEPT AS A PUNISHMENT FOR CRIME: THE PUNISHMENT CLAUSE AND SEXUAL SLAVERY

Kamal Ghali*

This Article is about the hidden complexity of the textual exception to the Thirteenth Amendment. The amendment mandates that there shall be no slavery "except as a punishment for crime." At first glance, the exception seems insignificant: The drafters sought to free the slaves, but did not want to curtail the power of state governments to sentence criminals to imprisonment or hard labor. Some courts, however, have interpreted the punishment clause more broadly, holding that prisoners are categorically exempt from the Thirteenth Amendment's protections. Are these courts correct? The question is not merely academic. The extensive documentation of sexual slavery in American prisons makes resolving the scope of the punishment exception critical. This Article argues that despite the explicit wording of the punishment clause, prisoners retain Thirteenth Amendment rights while in prison. Drawing on multiple approaches to constitutional interpretation, this Article concludes that the Thirteenth Amendment protects prisoners against sexual slavery.

* Law Clerk to the Honorable Thomas W. Thrash, Jr., U.S. District Court for the Northern District of Georgia. J.D., University of Michigan Law School, 2006; B.A., Emory University, 2001. Many thanks to Erica Fenby, Don Herzog, Neal Katyal, and especially Gil Seinfeld, whose detailed comments and suggestions on earlier drafts helped immensely. I am grateful to the *UCLA Law Review* board and staff for their outstanding editorial assistance.

INTRODUCTION

The text of the Thirteenth Amendment expressly authorizes slavery. It does so forthrightly and makes no apologies for it. For all the recent scholarship exploring the various activities that the Thirteenth Amendment prohibits under the banners of "slavery" and "involuntary servitude," there has been remarkably little discussion about what the Thirteenth Amendment explicitly authorizes.[1] It reads: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[2] Plainly and simply, the U.S. Constitution authorizes slavery and involuntary servitude, as punishment, if one has been convicted of a crime.[3]

Perhaps then it is no surprise that, in 1871, the Supreme Court of Virginia referred to prisoners as "slaves of the State."[4] Surely, however, the punishment clause of the Thirteenth Amendment cannot be read to

1. *See* Akhil Reed Amar & David Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359, 1377 (1992); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992); David P. Tedhams, *The Reincarnation of "Jim Crow:" A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133 (1994); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539 (2002); Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791 (1993); Kurt Mundorff, Note, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L., POL'Y, & ETHICS J. 131 (2003); Note, *The Thirteenth Amendment and Private Affirmative Action*, 89 YALE L.J. 399, 402 (1979).

2. U.S. CONST. amend. XIII, § 1.

3. Morales v. Schmidt, 489 F.2d 1335, 1338 (7th Cir. 1973) ("The Thirteenth Amendment, if read literally, suggests that the States may treat their prisoners as slaves . . . .").

4. 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.").

authorize the complete and total enslavement of a prisoner. It would be a twisted turn of irony if the very document which trumpeted the "universal civil freedom for all persons, of whatever race, color or estate"[5] also treated prisoners as the legal equivalent of property that could be bought, sold, or killed at the mercy of their masters.

The punishment clause appears to be aimed at an important concern. The drafters sought to free the slaves, but took pains to ensure that they did not inadvertently curtail the power of state governments to punish criminals. The Thirteenth Amendment, after all, sought to root out the evils of antebellum slavery, not the harshness of prison life.[6] Unfortunately, the debates of the drafters of the Thirteenth Amendment say little about the punishment clause.

Cases interpreting the Thirteenth Amendment also provide little guidance. By and large, courts have addressed the scope of a prisoner's Thirteenth Amendment rights only in the context of challenges to a sentence of hard labor. These courts have held, correctly, that the Thirteenth Amendment, by its very terms, allows states to punish criminals by making them work behind bars. Other courts, however, have taken a much broader view of the punishment clause. These courts have treated the punishment clause as a prisoner exception clause. That is, they have taken the view that prisoners, because of their status as prisoners, are expressly prohibited from bringing Thirteenth Amendment challenges. Only a few courts, in dicta, have suggested that prisoners might still retain some Thirteenth Amendment rights.

The issue is not merely academic. Indeed, what is at stake is whether the practice of sexual slavery will continue to thrive in prison. As columnists, human rights organizations, legal commentators, and federal judges have documented, sexual slavery is a daily phenomenon for some prisoners. There is ample evidence establishing the existence of sexual predators that prey on weaker and smaller inmates. These smaller inmates are sold to other inmates for further exploitation. Though the stories of daily forced rape are the most outrageous, it is no less disturbing that inmates are forced to perform the most menial of tasks for their prison slavemasters under the threat of violence. To date, no court has

5. Bailey v. Alabama, 219 U.S. 219, 241 (1911) ("[The Thirteenth Amendment] was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.").

6. *See Morales*, 489 F.2d at 1338 (noting the tension between the idea that though "a convicted person is not a slave neither is he a 'free man'").

directly addressed the issue of whether a prisoner may bring a Thirteenth Amendment challenge to conditions of sexual slavery.

This Article assumes that scholars like Akhil Amar are correct when they argue that states have a duty to eradicate slavery within their borders once they are aware of its existence.[7] Here, I argue that although the Thirteenth Amendment prohibits prisoners from challenging sentences of prison labor, the amendment's text should not be read to prohibit prisoners from bringing such claims against slavemaster-prisoners,[8] prison guards, or state officials that allow conditions of sexual slavery in their prisons. Indeed, the Thirteenth Amendment offers enslaved prisoners the hope of a remedy that far exceeds the Eighth Amendment's meager protections.[9] In order to reach this conclusion, however, one

7. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 360 (2005) ("[A]s soon as a state became aware of the existence of de facto slavery within its borders, the state had an obligation to end it."); Amar & Widawsky, *supra* note 1, at 1381 ("[O]nce any arm of the state knows of present, identifiable slavery within its territory, the state must take reasonable steps to end the enslavement." (emphasis omitted)); *see also* City of Memphis v. Greene, 451 U.S. 100, 120 (1981) ("[I]t has long been settled that the Thirteenth 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." (internal quotation marks omitted)). A full discussion of the affirmative duties that the Thirteenth Amendment imposes on states and private actors is beyond the scope of this Article.

8. Of course, a litigant would still have to prove that he had an implied private right of action to assert a constitutional tort against a fellow inmate. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 399–411 (1971) (Harlan, J., concurring) (describing the power of federal courts to create causes of action for constitutional violations even in the absence of legislatively authorized remedies). Although courts have the power to create such remedies, they may be unwilling to find that such a constitutional remedy is appropriate where a plaintiff sues a private party rather than a governmental entity. *See* Turner v. Unification Church, 473 F. Supp. 367, 375 (D.R.I. 1978) (rejecting an implied private right of action under the Thirteenth Amendment where a plaintiff sued another private entity), *aff'd* 602 F.2d 458 (1st Cir. 1979). After all, courts may well cite to state tort law as proof that other remedies are available. Some courts, however, have found an implied private right of action under 18 U.S.C. § 1584 (2000), a criminal statute that enforces the Thirteenth Amendment. *See, e.g.*, Manliguez v. Joseph, 226 F. Supp. 2d 377, 384 (E.D.N.Y. 2002). *But see* John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 997 (S.D. Ind. 2007) ("Although the question does not arise frequently, federal district courts have consistently held that the Thirteenth Amendment itself does not provide a private right of action for damages."); Buchanan v. City of Bolivar, Tenn., 99 F.3d 1352, 1357 (6th Cir. 1996); Bhagwanani v. Howard Univ., 355 F. Supp. 2d 294, 301 n.5 (D.D.C. 2005) (stating that the prevailing rule is that "there is no cause of action arising directly out of the Thirteenth Amendment" under *Bivens*). In either event, I argue that the punishment clause poses no barrier to such a claim, even if there are other obstacles. Furthermore, the main focus of this article is on whether the punishment clause prohibits claims against state officials. *See* 42 U.S.C. § 1983 (2000).

9. For a discussion of the scope of Thirteenth Amendment remedies under 42 U.S.C. § 1983, see Katyal, *supra* note 1, at 817–25.

must wrangle with the text of the Thirteenth Amendment. To state a claim, the inmate must prove that his slavery was not "slavery or involuntary servitude . . . as a *punishment* for crime."[10]

Rather than parsing the text of the Thirteenth Amendment as an isolated clause, this Article draws on several methods of constitutional interpretation. First, I examine the common law of the Constitution and analyze judicial interpretations of the amendment.[11] Second, I refer to historical evidence about the meaning of the punishment clause.[12] Third, I take an intratextual approach to constitutional interpretation and examine the Thirteenth Amendment alongside the Eighth Amendment's prohibition against "cruel and unusual punishment."[13]

The Eighth Amendment's use of the word "punishment" poses an interesting hurdle for an expansive reading of the Thirteenth Amendment's punishment clause. The amendments are the only two provisions of the Constitution that purport to regulate the treatment of prisoners. While the Thirteenth Amendment broadly authorizes states to enslave criminals "as a punishment" for a crime, the Eighth Amendment stands ready to ensure that such a punishment is neither "cruel" nor "unusual." Could it be that the word "punishment" means one thing in the Thirteenth Amendment context and another in the Eighth Amendment context? This Article argues that a principled approach to constitutional interpretation and respect for constitutional text requires a parallel interpretation of the word in both contexts.[14] Looking to the Eighth Amendment, however, provides no easy answers.

There are three competing interpretations of the word "punishment" as it pertains to the Eighth Amendment. Assuming that the word means the same thing in both the Thirteenth and the Eighth Amendment contexts, the scope of the Thirteenth Amendment's punishment exception expands or contracts dramatically depending on which definition of punishment is correct.

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

11. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 904 (1996).

12. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts: Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 37–41 (Amy Gutmann ed., 1997).

13. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 790–91 (1999) ("Like doctrinal argument, [intratextualism] seeks to promote a certain coherence in interpretation and avoid the appearance of ad hoc adjudication; absent a good reason for doing otherwise, similar constitutional commands should be treated similarly for reasons analogous to the doctrinal principle that like cases should be treated alike.").

14. *See id.*

> *The Intent Approach*. Punishment requires intent. If one holds the view (as the U.S. Supreme Court currently does[15]) that an inmate is only punished when a guard either intentionally subjects the inmate to harm or acts with deliberate indifference to harm, then a prisoner's Thirteenth Amendment rights are in flux. Under this view of punishment, an inmate enslaved unbeknownst to prison guards retains his Thirteenth Amendment rights since he was not enslaved as punishment. If, however, a prison guard intentionally enslaves an inmate or knowingly subjects an inmate to sexual slavery at the hands of other inmates, then the enslaved inmate has been punished and is categorically prohibited from bringing a Thirteenth Amendment claim (though he obviously has a strong Eighth Amendment claim).
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> *The Realist Approach*. Punishment is rooted in a prisoner's experience, such as his prison conditions, and not the mental state of any one official. If punishment includes one's actual prison conditions, then a prisoner's sexual slavery is part of his punishment, and he is textually deprived of the Thirteenth Amendment's protections. Justices Blackmun, White, and Stevens have all championed this interpretation in the Eighth Amendment context.
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> *The Formalist Approach*. Punishment means only the prison sentence. If punishment is defined only as the actual sentence, proscribed by the legislature and meted out by the judge (the definition urged by Justice Thomas), then victims of sexual slavery are authorized to bring Thirteenth Amendment claims because they have not been enslaved "as a punishment" for a crime.

This Article argues that the Thirteenth Amendment does not textually bar prisoners from challenging conditions of sexual slavery in American prisons. Part I documents the existence of sexual slavery in the American penal system. Part II argues that the Eighth Amendment is a poor doctrinal vehicle for litigating claims of sexual slavery. Part III explores various methods of constitutional interpretation to determine the meaning of the punishment clause. It argues that the punishment clause does not prevent prisoners from bringing all Thirteenth Amendment claims. I conclude that the most reasonable approach to defining punishment in the Thirteenth Amendment context is a slightly modified intent-based approach that, by and large, maintains the definition the Supreme Court uses in the Eighth Amendment context.

15. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994).

I. SEXUAL SLAVERY AS PUNISHMENT IN AMERICAN PRISONS

Independent organizations have documented the existence of sexual slavery in prison.[16] Recent incidents have highlighted the fact that slavery in prison exists and that the problem may be widespread.[17]

Roderick Johnson's ordeal has become one of the first widely publicized cases of sexual slavery.[18] According to affidavits and his own detailed account, Johnson was sexually enslaved in a Texas prison for eighteen months.[19] Almost as soon as Johnson set foot in prison, a member of the Gangster Disciples asserted ownership over Johnson and enslaved him.[20] Johnson was raped daily and forced to sexually gratify his prison slavemaster on demand.[21] A month later, the prison gangster opted to rent Johnson out to other prisoners[22] at rates that varied depending on the sexual services Johnson was compelled to perform.[23] Over the next seventeen months, Johnson was bought and sold by various prison gangs and sexually brutalized on a daily basis.[24] There is also evidence

16. John Council, *5th Circuit Allows Prison Case to Proceed Citing 8th Amendment*, TEX. LAW., Sept. 20, 2004, at 1 ("'It's the tip of the iceberg. We're talking about thousands of people who are being victimized at the worst prisons . . . .'" (quoting Margaret Winter, Associate Director of the National Prison Project of the American Civil Liberties Union)).

17. *See* Adam Liptak, *Texas Case Exposes Prison Rape*, INT'L HERALD TRIB., Oct. 18, 2004, at 7 ("The phenomenon of sexual slavery in prison has only recently emerged from the shadows."); *see also* Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE, Oct. 1, 2003, http://www.slate.com/id/2089095 ("Moreover, the reports reveal that sexual slavery following rape is also an ordinary occurrence. Stories abound of prisoners who, once they are 'turned out' (prison jargon for the initial rape) become the rapists' subordinates, forced to do menial jobs and sometimes 'rented out' to other inmates to satisfy their sexual needs.").

18. *See* Liptak, *supra* note 17, at 7; Dave Michaels, *Reports of Rape in Prison Increase*, DALLAS MORNING NEWS, Jan. 24, 2005, at 1A; Mike Ward, *Inmate's Case Raises Profile of Prison Rapes*, AUSTIN AM.-STATESMAN, Oct. 24, 2005, at A1; Mike Ward, *ACLU: Investigation of Sex Slave Charges at Prison Was Flawed*, HOUSTON CHRON., Feb. 29, 2004, at A35; Mike Ward, *Former Prison 'Sex Slave' Cherishes New Freedom*, COX NEWS SERVICE, Jan. 9, 2004, *available at* http://www.lexis.com (searching within the "Wire Service Stories" source); *see also* Shara Abraham, *Male Rape in U.S. Prisons: Cruel and Unusual Punishment*, HUM. RTS. BRIEF, Fall 2001, at 5, 7 (2001) ("[T]he inmate literally is the sexual slave of his 'protector.'"); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference*," 92 J. CRIM. L. & CRIMINOLOGY 127, 128, 153 (2001) ("In the prison context, weaker inmates quickly are identified and converted into sex slaves to be acquired by more powerful men.").

19. *See* Liptak, *supra* note 17, at 7.

20. Johnson v. Johnson, 385 F.3d 503, 512 (5th Cir. 2004). It should be added that the defendants disputed Johnson's version of the events. *Id.* at 513–14.

21. *See* Liptak, *supra* note 17, at 7.

22. *Johnson*, 385 F.3d at 513.

23. Liptak, *supra* note 17, at 7.

24. *Id.*

that Johnson begged prison officials to move him to a safekeeping unit several times. Although he made seven written requests, the guards denied each one.[25] Some prison officials even suggested that Johnson enjoyed the treatment.[26]

Roderick Johnson's ordeal is not an isolated event. There are numerous other anecdotes of sexual slavery. For example, Michael Blucker, a twenty-eight-year-old married male, was incarcerated for a nonviolent crime.[27] According to Blucker, he was physically assaulted and gang-raped soon after he arrived in prison.[28] Blucker was alone in his cell when three prison gangsters suddenly surrounded him.[29] One of these men was his cellmate.[30] The three men choked him with an electrical cord and threatened him with two homemade knives.[31] All three raped him.[32] Soon after, his cellmate rented him out to other inmates as a sex slave.[33] Blucker's ordeal included shocking abuse by prison officials who allegedly marched him from cell to cell, collecting money and other contraband as payment. Blucker was repeatedly raped and contracted HIV.[34] Blucker's case demonstrates that sexual slavery can amount to a death sentence for some inmates.[35]

Human Rights Watch has detailed this phenomenon in a comprehensive report that analyzes prisoner sexual assaults.[36] The report describes prisoners being "bought [and] sold like shoes";[37] or, as one inmate quoted in the report put it, "like cattle."[38] Human Rights Watch's choice of language

25. *Id.*
26. *Johnson*, 385 F.3d at 512.
27. Christian Parenti, *Rape as a Disciplinary Tactic*, SALON.COM, Aug. 23, 1999, http://www.salon.com/news/feature/1999/08/23/prisons/print.html.
28. WILLIAM F. PINAR, THE GENDER OF RACIAL POLITICS AND VIOLENCE IN AMERICA: LYNCHING, PRISON RAPE, AND THE CRISIS OF MASCULINITY 1066 (2001).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 1066–67.
34. Parenti, *supra* note 27.
35. *See* 42 U.S.C. § 15601(7) (Supp. III 2004) ("Prison rape undermines the public health by contributing to the spread of these diseases, and often giving a potential death sentence to its victims."); Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 285 (1995) ("In view of the rising prevalence of HIV and AIDS in prison, sexual violence can literally mean a death sentence for rape victims.").
36. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), http://www.hrw.org/reports/2001/prison/report.html (follow "Slavery" hyperlink under "V. Rape Scenarios").
37. *Id.* (internal quotation marks omitted).
38. *Id.* (internal quotation marks omitted).

is striking. In the organization's view, the most extreme cases of sexual abuse involve situations in which victimized inmates "are literally the slaves of the perpetrators."[39] Other commentators confirm that, in many prisons, weak inmates are quickly targeted and converted into sex slaves.[40]

The slavery extends far beyond sexual assaults. Though these men are "forced to satisfy their 'owner's' sexual appetites whenever he demands,"[41] they may also be responsible for washing his clothes, cooking his food, massaging his back, cleaning his cell, and myriad other chores.[42] Prison slavemasters exercise total control over their prison slaves: "Their most basic choices, like how to dress and whom to talk to, may be controlled by the person who 'owns' them. They may even be renamed as women."[43]

Unfortunately, there have been no systematic studies that have directly examined the prevalence of sexual slavery in American prisons.[44] Statistics on the prevalence of prison rape, however, may provide a window into the scope of the problem. Reports show that "sexual slavery following rape is . . . an ordinary occurrence."[45] Once a victim is sexually attacked, he may be coerced into "long-term sexual slavery" as a survival strategy.[46] Thus, the number of prison rape victims may shed light on the actual number of prisoners enslaved behind bars.

Though prison rape statistics vary widely, the U.S. Congress has conservatively estimated that at least 13 percent of inmates have been sexually assaulted.[47] Using these figures, nearly two hundred thousand

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39. *Id.*

40. *See, e.g.*, Man & Cronan, *supra* note 18, at 153.

41. *Id.* at 156. Sexual violence against prison inmates is not limited to males. Women have been victimized by prison guards and sexually brutalized by packs of larger women. For example, female inmates at an Alameda County, California federal penitentiary alleged that they were sexually assaulted, beaten, and sold by guards as sex slaves for male prisoners. Dennis J. Opatrny, *3 Women Sue, Allege Sex Slavery in Prison*, S.F. EXAMINER, Sept. 29, 1996, at C1.

42. Man & Cronan, *supra* note 18, at 156.

43. *Id.*

44. Liptak, *supra* note 17, at 7.

45. Weisberg & Mills, *supra* note 17; *see* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 15 (1999) ("[A] victim of sexual harassment acquires the clearly defined, degrading status of 'sex slave,' who can be 'bought and sold' for the remainder of his sentence."); Man & Cronan, *supra* note 18, at 154 ("The initial rape commonly serves as the first step in what prisoners refer to as 'turning out' the victim, which frequently resembles a form of slavery . . . ."); Tamar Lewin, *Little Sympathy or Remedy for Inmates Who Are Raped*, N.Y. TIMES, Apr. 15, 2001, at A1 (observing that prison rape can escalate into full-blown sexual slavery where prisoners are sold and rented to other inmates for sex).

46. Robert W. Dumond, The Impact and Recovery of Prison Rape (Oct. 19, 2001) (unpublished paper presented at the National Conference, "Not Part of the Penalty": Ending Prisoner Rape, Washington D.C.), *available at* http://spr.org/pdf/Dumond.pdf.

47. 42 U.S.C. § 15601(2) (Supp. III 2004).

inmates now incarcerated have been or will be the victims of prison rape.[48] In the past twenty years, over one million inmates have been raped.[49]

Further evidence suggests that the incidence of sexual violence in prisons may be higher than current estimates.[50] Prisoners underreport sexual violence for several reasons, such as extreme feelings of shame and disgust, fear of retaliation by prison guards or fellow inmates, and a perception that nothing will be done about the problem.[51] Added to these reporting problems is the lack of reliability of official prison records.[52] The numbers are set to escalate if one takes into account the rapidly increasing number of private prisons that refuse to hire enough staff to adequately monitor the population.[53] In short, recent evidence about sexual slavery may well be just the tip of the iceberg.[54]

Historically, federal judges have played a key role in identifying some of the most despicable aspects of incarceration.[55] In 1980, Justice Blackmun described the plight of prison slaves in shocking detail. In his dissenting opinion in *United States v. Bailey*,[56] he decried the horrors of gang rape—an atrocity inflicted on youthful inmates "even in the van on the way to jail."[57] He then quickly turned to the topic of sexual slavery and described the gruesome situation whereby "[w]eaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim."[58] Stories such as these were unquestionably on the mind of Justice Brennan when he berated the "soul-chilling

48. *Id.*

49. *Id.*

50. *See* Cheryl Bell et al., Note, *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most Open Secret*, 18 YALE L. & POL'Y REV. 195, 199 (1999).

51. *See id.* at 196.

52. *See id.*

53. Jonathan Cohn, *Abroad at Home*, NEW REPUBLIC, May 24, 2004, at 16.

54. *See* Abraham, *supra* note 18, at 5 (referring to male rape in American prisons as a "systematic problem"); Council, *supra* note 16, at 20; *see also* Man & Cronan, *supra* note 18, at 128 ("A major reason why aggressors successfully rape other inmates is the absence of any officials to witness the assault. This problem is largely a result of the exponential growth of the prison population, and the failure of prison staffing to keep pace with this growth.").

55. Rhodes v. Chapman, 452 U.S. 337, 359 (1981) (Brennan, J., concurring) ("[C]ourts have emerged as a critical force behind efforts to ameliorate inhumane [prison] conditions. Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost.").

56. 444 U.S. 394 (1980).

57. *Id.* at 421 (Blackmun, J., dissenting) ("A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or it has been said, even in the van on the way to jail.").

58. *Id.*

inhumanity of conditions in American prisons [that had] been thrust upon the judicial conscience."[59]

Over two decades later, federal judges continue to confront similar horrors. Judges on the Fifth Circuit Court of Appeals were confronted with Roderick Johnson's sexual slavery.[60] Judge Justice, a senior judge in the Western District of Texas, has argued that the shocking conditions in some prisons are analogous to a sentence "to a term of enslavement by gangs."[61] Emphasizing the concerns raised by Justice Blackmun, Judge Justice noted the vulnerability of inmates who, to "preserve their physical safety . . . simply subject to being bought and sold among groups of prison predators, providing their oppressors with commissary goods, domestic services, or sexual favors."[62]

As a judge sitting on the Seventh Circuit Court of Appeals, Justice Stevens once proclaimed that "the view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual."[63] Unfortunately, for prison slaves like Roderick Johnson, such judicial proclamations mean little.

II. THE EIGHTH AMENDMENT IS A POOR DOCTRINAL VEHICLE FOR REMEDYING SEXUAL SLAVERY IN PRISONS

Despite its rhetorical appeal, the Eighth Amendment is a poor vehicle for remedying sexual slavery in prisons. The Eighth Amendment's deliberate indifference standard creates multiple problems for inmates attempting to hold prison officials liable for failure to prevent sexual slavery

59. *Rhodes*, 452 U.S. at 354 (quoting Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (D. Mass. 1973)).

60. Johnson v. Johnson, 385 F.3d 503, 512 (5th Cir. 2004).

61. Ruiz v. Johnson, 37 F. Supp. 2d 855, 861 (S.D. Tex. 1999) ("Prisons, of course, are designed to punish. . . . However, an offender is sentenced to a term of *imprisonment*; an offender should not, and must not, be sentenced to a term of enslavement by gangs, rape and abuse by predatory inmates, or excessive force by prison employees.").

62. *Id.* at 915–16.

63. United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973) (footnote omitted).

behind prison walls.[64] Though officials have a duty to protect inmates from harm,[65] the Supreme Court has narrowly construed the scope of that duty.

In order to hold a prison official liable under the deliberate indifference standard, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[66] Even if the risk of harm is objectively obvious, and any reasonable official would have been aware of it, he will avoid liability as long as he was subjectively unaware of that obvious risk.[67]

There are two reasons that litigation under the Eighth Amendment is ill-equipped to eradicate sexual violence in prisons. First, the deliberate indifference standard provides inappropriate incentives for prison officials to prevent sexual slavery. Second, the Eighth Amendment is doctrinally incapable of motivating state and local governments to investigate and prosecute prison slavemasters. Though prison inmates are of course free to bring claims against fellow inmates, suits against prison officials provide the greatest hope of a remedy through monetary and injunctive relief.

A. The Deliberate Indifference Standard

The Eighth Amendment's knowledge requirement fails to appropriately incentivize prison guards to prevent sexual assault and slavery. First, a stringent knowledge requirement creates incentives for prison officials to remain unaware of threats to inmate safety.[68] Because liability is only imposed once prison officials are subjectively aware of a threat, officials are not encouraged to take proactive measures to protect inmates from sexual slavery.[69]

64. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994); David K. Ries, Note, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J.L. & POL'Y 915, 990 (2005).

65. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1988) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."); *Farmer*, 511 U.S. at 837.

66. *Farmer*, 511 U.S. at 837.

67. *Id.* at 844.

68. HUMAN RIGHTS WATCH, *supra* note 36 (follow "VIII. Deliberate Indifference" hyperlink) (arguing that the deliberate indifference standard creates incentives for "correctional officials to remain unaware of problems").

69. The incentive to remain unaware is exacerbated in prisons that fail to hire enough staff to adequately monitor the population. *Id.* ("[L]ower numbers of correctional staff can lead to more ineffective monitoring by existing staff. Instead of redoubling their efforts to make up for their insufficient numbers, they are more likely to remain as much as possible outside of prisoners' living areas, because fewer staff makes monitoring more dangerous to those employees who do make the rounds of housing units.").

Second, the Eighth Amendment's knowledge requirement encourages passive behavior—not preventive efforts—by guards, as they are only compelled to act once they perceive a "substantial" threat to inmate safety.[70] But the unique nature of sexual slavery complicates matters. In situations in which weaker inmates "consensually" submit to sexual acts in order to avoid further victimization, it may appear that the substantial risk of an attack has ended. In these instances, the absence of overtly violent acts may be misinterpreted as an insubstantial risk. Unfortunately, the Court's Eighth Amendment jurisprudence is ill-equipped to distinguish between isolated, violent rapes and the ongoing sexual enslavement of prisoners who submit for fear of a violent sexual assault.[71] Although prison guards cannot be expected to prevent every harm that might befall a prisoner, the substantial risk requirement decreases incentives to institute preventive measures that could go a long way toward reducing the risk of sexual slavery in the first place.[72]

Third, the knowledge requirement inappropriately focuses the liability inquiry on whether a particular prison guard acted appropriately in a particular situation, rather than on the policy choices of high-level prison officials.[73] High-level officials such as wardens are unlikely to have as much knowledge about a particular assault as the prison guards that monitor the inmate population.[74] Thus, supervisory officials tend to be escape liability.[75] This discrepancy is unfortunate, given that high-level officials have a much greater chance of changing prison policies than individual correctional officers.[76] The Eighth Amendment allows high-level officials to externalize the costs of their policies onto prison guards who face liability and the prison inmates that are sexually enslaved.

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70. *Farmer*, 511 U.S. at 844; *see also* James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates From Serious Harm*, 20 QUINNIPIAC L. REV. 407, 443–44 (2001). As Judge Posner put it, "to be liable under the standard of *Farmer v. Brennan* the guards would have had to watch the rape in progress yet have done nothing to stop it though in a position to do so." Billman v. Ind. Dep't of Corr., 56 F.3d 785, 790 (7th Cir. 1995).

71. *See* Park, *supra* note 70, at 441–44.

72. See *id.* at 444–47 (citing Redman v. County of San Diego, 942 F.2d 1435, 1444 (9th Cir. 1991)), for examples of violence caused by the failure to institute preventive measures.

73. *See id.* at 454; Scott Rauser, Comment, *Prisons Are Dangerous Places: Criminal Recklessness as the Eighth Amendment Standard of Liability in* McGill v. Duckworth, 78 MINN. L. REV. 165, 192 (1993).

74. Park, *supra* note 70, at 453.

75. *Id.* at 453 n.218.

76. *Id.* at 453 n.219; *see also* Grau v. Gilmore, No. 94-02182, 1994 WL 718518, at *1 (7th Cir. Dec. 27, 1994) (finding that supervisory officials are unlikely to have specific knowledge needed to incur liability).

Fourth, the requirement of proving deliberate indifference imposes tremendous evidentiary burdens on plaintiffs. Inmates have the onerous burden of proving the defendant's subjective state of mind. Because direct evidence is "almost never available," inmates must resort to circumstantial evidence of a guard's state of mind.[77] Prisoner-plaintiffs are unlikely to prevail where the issue of actual knowledge comes down to a credibility determination in front of a skeptical jury.[78]

B. Compelling State Action by Nonprison Officials

Even if the Eighth Amendment could motivate prison guards to actively protect inmates from sexual slavery, it is doctrinally incapable of motivating other state actors to ensure that no slavery "shall exist within the United States." For example, the Eighth Amendment does not speak to the failure of prosecutors to charge inmates accused of raping or enslaving other inmates. Prosecutors virtually never bring criminal charges against inmates accused of raping or sexually coercing other inmates.[79] Many state prosecutors are unwilling to prosecute prisoners for political reasons and tend to ignore most prison abuses.[80] Unlike the Thirteenth Amendment, which imposes an affirmative duty on states to eradicate conditions of sexual slavery,[81] the Eighth Amendment is far more limited and prohibits only certain forms of punishment. In this context, prosecutorial discretion butts up against any Thirteenth Amendment claim a prisoner might have. Nonetheless, looking at the problem of sexual slavery through the lens of the Thirteenth Amendment reveals the possibilities of other innovative forms of relief.

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77. Park, *supra* note 70, at 450; *see also* Matthews v. Armitage, 36 F. Supp. 2d 121, 125 (N.D.N.Y. 1999) (finding that direct evidence of knowledge is almost never available); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 238 (2d ed. 1986) (arguing that in the criminal context, a defendant's subjective realization of risk must be inferred from circumstantial evidence).

78. *See* Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 49 (1980).

79. HUMAN RIGHTS WATCH, *supra* note 36 (follow "VIII. Deliberate Indifference" hyperlink) ("Few local prosecutors are concerned with prosecuting crimes committed against inmates, preferring to leave internal prison problems to the discretion of the prison authorities; similarly, prison officials themselves rarely push for prosecution of prisoner-on-prisoner abuses. As a result, perpetrators of prison rape almost never face criminal charges.").

80. *See id.* ("Prisoners have no political power of their own, and impunity for abuses against prisoners does not directly threaten the public outside of prison. Since many state prosecutors are elected officials, these factors may be decisive in leading them to ignore prison abuses.").

81. *See supra* note 7.

III. THE PUNISHMENT CLAUSE DOES NOT RESTRICT ALL THIRTEENTH AMENDMENT CLAIMS BY PRISONERS

This Part confronts the threshold issue for prisoners seeking to bring Thirteenth Amendment claims against other prisoners, prison guards, or the state: Is sexual slavery in prison punishment for crime? If it is, a prisoner is textually barred from bringing a Thirteenth Amendment claim. Here, I examine court cases interpreting the punishment clause, consider the original understanding of the punishment clause, and take an intratextual approach by examining the word "punishment" in the Eighth Amendment to shed light on its meaning in the Thirteenth Amendment context.

A. Common Law Constitutionalism: Judicial Interpretations of the Punishment Clause in the Thirteenth Amendment Context

This Subpart surveys modern judicial treatment of Thirteenth Amendment claims by prisoners. At the outset, two points are in order. First, by and large, these cases involve prisoners challenging their prison labor, the weakest type of Thirteenth Amendment claim. Second, because the cases do not deal with sexual slavery, it remains unclear whether courts would treat the issues similarly.

The overwhelming majority of courts have simply rejected Thirteenth Amendment challenges to sentences of hard labor on the narrow grounds that the Thirteenth Amendment specifically authorizes involuntary servitude as punishment for a crime.[82] This outcome is hardly shocking. After all, the amendment prohibits slavery and involuntary servitude "except as a punishment for crime."[83]

Some courts, however, have taken a much broader view of the punishment clause. These courts have held that prisoners are "explicitly excepted

82. *See, e.g.*, Smith v. Dretke, No. 04-20614, 2005 U.S. App. LEXIS 27596, at *2 (5th Cir. Dec. 14, 2005) (holding that the Thirteenth Amendment permits hard labor without pay as punishment even when the prisoner is not explicitly sentenced to hard labor); Villarreal v. Woodham, 113 F.3d 202, 206 (11th Cir. 1997) (holding that the Thirteenth Amendment limits the scope of the Fair Labor Standards Act); Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992) ("The Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude . . . ."); Wendt v. Lynaugh, 841 F.2d 619, 621 (5th Cir. 1988) (affirming the dismissal of a Thirteenth Amendment challenge to work without pay as "frivolous"); Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977) (holding that the Thirteenth Amendment explicitly authorizes compelling a prisoner to work 120 hours a week without pay).

83. U.S. CONST. amend XIII, § 1.

from [the Thirteenth Amendment's] protection."[84] In the process, these courts have implicitly defined punishment as including more than the actual prison sentence. For example, in an unpublished opinion, the Seventh Circuit rejected a prisoner's contention that a denial of medical care subjected him to slave-like conditions on the grounds that prisoners are not entitled to any Thirteenth Amendment protections whatsoever.[85] Given the Thirteenth Amendment's text, it appears that the court treated the prisoner's conditions as part and parcel of his punishment.

Only two modern decisions acknowledge the possibility that a prisoner might retain Thirteenth Amendment rights while incarcerated. The first is *Watson v. Graves*,[86] in which the Fifth Circuit acknowledged that a "prisoner who is not sentenced to hard labor retains his thirteenth amendment rights."[87] Though the court ultimately rejected the plaintiff's contention that he was indeed subjected to slavery or involuntary servitude,[88] the decision acknowledges the possibility that a prisoner might retain Thirteenth Amendment rights.

Whatever limited authority *Watson* might have been entitled to, however, has been put to rest by subsequent Fifth Circuit decisions.[89] In *Ali v. Johnson*,[90] Judge Jones attacked *Watson*'s precedential value. She correctly pointed out that *Watson*'s statement with respect to the scope of the plaintiff's Thirteenth Amendment rights was dicta, and then went on to call the statement an "anomaly in federal jurisprudence" and "lacking authority."[91]

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84. Van Hoorelbeke v. Hawk, No. 95-2291, 1995 U.S. App. LEXIS 31954, at *13 (7th Cir. Nov. 9, 1995) (rejecting a prisoner's allegation that the denial of medical treatment was slavery in violation of the Thirteenth Amendment on the grounds that "prisoners are explicitly excepted from that amendment's protection" (citing *Vanskike*, 974 F.2d at 809)); *see also* Jobson v. Henne, 355 F.2d 129, 131 (2d Cir. 1966) ("[Prisoners] are explicitly excepted from the [Thirteenth] Amendment's coverage.").

85. *Van Hoorelbeke*, 1995 U.S. App. LEXIS 31954, at *13.

86. 909 F.2d 1549 (5th Cir. 1990).

87. *Id.* at 1552 ("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.").

88. *See id.*

89. *See, e.g.*, Ali v. Johnson, 259 F.3d 317, 318 (5th Cir. 2001) (attacking *Watson* on the grounds that its suggestion regarding the possible application of the Thirteenth Amendment to a prisoner's rights claim was "dicta," "an anomaly in federal jurisprudence," and "lack[ing] authority"); Ceballos v. Scott, No. 2:00-CV-0400, 2001 U.S. Dist. LEXIS 15090, at *7 (N.D. Tex. Aug. 13, 2001) (quoting *Ali* with approval); Estes v. Johnson, No. 3:00-CV-1890-L, 2001 U.S. Dist. LEXIS 14814, at *12 n.9 (N.D. Tex. July 31, 2001) (rejecting the petitioner's reliance on dicta in *Watson* to support his Thirteenth Amendment claim).

90. 259 F.3d 317.

91. *Id.* at 318.

The only other case to use language similar to the *Watson* court's is the unpublished Tenth Circuit case of *Davis v. Hudson*.[92] Again in dicta, the court remarked that "there might be circumstances in which the opportunity for private exploitation and/or lack of adequate state safeguards could take a case outside the ambit of the Thirteenth Amendment's state imprisonment exception."[93] Thus, two courts have at least suggested that the punishment clause does not categorically exempt all prisoner claims.

One court has taken a view that might be referred to as an "incident to punishment" approach to the punishment clause. In 1959, the Seventh Circuit rejected a prisoner's Thirteenth Amendment challenge to his continued incarceration under the Indiana Habitual Criminal Act.[94] The trial court sentenced the defendant to prison for a ten-year term for the crime of carjacking, but added the penalty of life imprisonment because of his status as a "habitual criminal."[95] The defendant appealed his life sentence under the Act on the grounds that it included a term of involuntary servitude.[96] He argued that because his life sentence was punishment for his status as a habitual criminal, and not punishment for the crime of carjacking, any forced labor would run afoul of Thirteenth Amendment.[97] The court rejected his challenge on the grounds that the "penalty is imposed as an incident to a conviction of crime and in our opinion is punishment for crime excepted from the prohibition of the Thirteenth Amendment."[98]

The dissent, however, offered a pointed critique of the majority's reading of the punishment clause.[99] Referring to the actual language of the Thirteenth Amendment, the dissent noted:

> The exception in the Thirteenth Amendment does not read punishment incident to crime nor does it read punishment for criminal conduct by commission of repetitive felonies for which the full statutory punishment has been inflicted. It clearly and succinctly states "as a punishment for crime." We have no right to rewrite the Amendment and extend the provisions of the exception to include that which is clearly without its ambit.[100]

92. No. 00-6115, 2000 U.S. App. LEXIS 18913, at *9 (10th Cir. Aug. 4, 2000).
93. *Id.* The court found, however, that "Davis's complaint presents us with no such factual allegations." *Id.*
94. United States *ex rel.* Smith v. Dowd, 271 F.2d 292, 295–96 (7th Cir. 1959).
95. *Id.* at 294.
96. *Id.*
97. *Id.* at 295.
98. *Id.*
99. *Id.* at 297–98 (Parkinson, J., dissenting).
100. *Id.* at 298 (emphasis omitted) (quoting U.S. CONST. amend. XIII, § 1).

This Seventh Circuit decision offers a distinct reading of the punishment clause, which would treat punishment as including the incidents of punishment. Such a view might be the equivalent of the "prisoner exception" reading of the punishment clause[101]—assuming, of course, that harsh prison conditions, such as sexual slavery, are incidents to punishment. On the other hand, grotesque prison conditions, which include sexual slavery, should hardly be treated as an incident of punishment. After all, the Seventh Circuit only treated an additional, judge-imposed penalty as such an incident. Nonetheless, the Seventh Circuit's reading suggests that more than the formal "punishment for crime" may fall under the rubric of punishment. The dissent, however, offered a narrow and more literal view of the punishment clause, treating it as only including the actual prison sentence.

Courts addressing Thirteenth Amendment challenges by prisoners have implicitly adopted one of two definitions of the word "punishment." Some have treated the word as synonymous with a "judicially imposed penalty."[102] These cases hold that those sentenced to prison labor are appropriately punished well within the boundaries of the Thirteenth Amendment. Thus, the general prison labor challenge cases fall within this category, as well as the cases suggesting that prisoners may retain their Thirteenth Amendment rights. Other courts, however, have taken an extra-literal view of the Thirteenth Amendment and read the word "punishment" to include everything that happens to a prisoner during his period of incarceration.

Unfortunately, these cases fail to meaningfully guide litigants or courts addressing Thirteenth Amendment challenges by prisoner-slaves. In large part, this is because courts have yet to address a Thirteenth Amendment challenge to conditions of sexual slavery in prison.[103] In order to better understand the meaning of the punishment clause in the Thirteenth Amendment context, the next Subpart reviews the historical evidence.

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101. *See supra* text accompanying notes 84–85.

102. *See supra* note 82.

103. In one reported federal district court case, a pretrial detainee asserted a Thirteenth Amendment challenge on the grounds that she was sexually enslaved at the hands of a prison official and three inmates. Newsome v. Lee County, Ala., 431 F. Supp. 2d 1189, 1198 (M.D. Ala. 2006). The court refused to decide the merits of the claim, however, on the grounds that the plaintiff's claim rested on a "novel theory." *Id.* ("This appears to be a novel theory, and Newsome has not cited any decisional authority that would lead the Court to believe otherwise. As mentioned above, the Fourteenth Amendment provides the applicable constitutional standard for the treatment of pretrial detainees, and the Court has not been provided with adequate reason to deviate from that approach here.").

B. An Original Understanding of the Punishment Clause

An examination of the historical evidence reveals that the Thirteenth Amendment's punishment clause does not categorically exclude prisoners from the scope of its protections. Yet, the debates surrounding the drafting of the Thirteenth Amendment reveal little about the proper meaning of the punishment clause.[104] After all, the Radical Republican Congress was not the first to use such language.[105] The punishment clause was first seen in a draft of the Northwest Ordinance originally penned by Thomas Jefferson.[106] Though it never passed, Jefferson's draft of the 1784 Ordinance contained a provision stating: "That, after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said states, *otherwise than in the punishment of crimes* whereof the party shall have been duly convicted to have been personally guilty."[107]

The final version of the Northwest Ordinance, passed by the Continental Congress in 1787 and reenacted by the First Congress in 1789, declared 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."[108] Variations of the punishment clause appeared again and again, "in the Missouri Compromise abolishing slavery in the northern part of the Louisiana Purchase,"[109] and in acts banning slavery in the District of Columbia[110] and in territories of the United States.[111] Jefferson's draft of the Northwest Ordinance marks

104. *See* United States v. Shackney, 333 F.2d 475, 484 (2d Cir. 1964) ("The debates show nothing here relevant save what would have been obvious without them—an intention to follow the words of the Northwest Ordinance.").

105. *See* EDWIN MEESE III, THE HERITAGE GUIDE TO THE CONSTITUTION 380 (2005) ("Eschewing originality, the authors of the amendment relied on the language of the Northwest Ordinance of 1787, intended to keep slavery from being taken into national territory, to abolish it in lands where it had been established for over two centuries."); George Rutherglen, *State Action and the Thirteenth Amendment* (Univ. of Va. Law Sch. Pub. Law and Legal Theory Working Paper Series, Paper No. 78, 2007), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1124&context=uvalwps.

106. *See* Aaron Schwabach, *Jefferson and Slavery*, 19 T. JEFFERSON L. REV. 63, 74–75 (1997).

107. *See* WAGER SWAYNE, THE ORDINANCE OF 1787 AND THE WAR OF 1861, at 31, 32 & n.* (1892).

108. Northwest Ordinance of 1787, 1 Stat. 50, 51 n.(a), art. VI, 53 (1789), *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 334, 343 (Roscoe R. Hill ed., 1936).

109. Rutherglen, *supra* note 105 (citing Act of March 6, 1820, ch. 22 § 8, 3 Stat. 547, 548 ("[S]lavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited . . . .")).

110. Act of April 16, 1862, ch. 54, § 1, 12 Stat. 376.

111. Act of June 19, 1862, ch. 111, 12 Stat. 432.

the first known use of the punishment clause in federal efforts to abolish slavery, and it became a template for subsequent efforts. None of Jefferson's notes about slavery or the draft, however, reveals precisely what he meant to accomplish with respect to the "otherwise than in the punishment of crimes" language.[112]

On February 10, 1864, the final draft of the language that ultimately would be the first clause of the Thirteenth Amendment emerged from the U.S. Senate Committee on the Judiciary under the leadership of Senator Lyman Trumbull.[113] Senator Trumbull made no secret of the fact that he borrowed the first clause of the amendment from the Northwest Ordinance.[114] Indeed, when Senator Charles Sumner protested the retention of the Northwest Ordinance's language, Senator Howard of Michigan insisted that he preferred

> to go back to the good old Anglo-Saxon language employed by our fathers in the Ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood by both the public and by judicial tribunals; a phrase, I may say further, which is peculiarly near and dear to the people of the northwestern territory, from whose soil slavery was excluded by it.[115]

Senator Howard had a point. The Ordinance had been effective in preventing the rise of slavery in areas north of the Ohio River, Indiana, Illinois, Michigan, Wisconsin, and Minnesota.[116] And there was, in his view, little reason to fix what was not broken.

Because the drafters of the Northwest Ordinance had done the legislative legwork with respect to wording the prohibition, the drafters of the Thirteenth Amendment spent little time discussing alternative wordings.[117] Thus, the punishment clause crept through without major discussion of its implications or its proper meaning.

There is reason to believe that the drafters of the amendment did not intend for criminals to be excluded from all of the Thirteenth Amendment's protections. For example, on December 14, 1863, Representative James Ashley of Ohio proposed an amendment to the Constitution declaring that "[s]lavery, being incompatible with a free

112. *See* SWAYNE, *supra* note 107, at 31, 32 & n.*.
113. HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 224 (1913).
114. *See id.*
115. SWAYNE, *supra* note 107, at 73 (internal quotation marks omitted).
116. Rutherglen, *supra* note 105.
117. *Id.* ("What was not extensively discussed were alternatives to the language that was adopted.").

Government, is forever prohibited in the United States; and involuntary servitude shall be permitted only as a punishment for crime."[118] Ashley's proposal was referred to the House Judiciary Committee, but before any action could be taken on the proposal, Senator Trumbull's version became the focus of the national discussion.[119] Ashley's narrower version, which would have allowed only indentured servitude of prisoners, but not slavery, would have provided a clear textual basis for the claim that prisoners may be sentenced to hard labor but are still protected by the prohibition on slavery. Yet, the measure was never voted on, and the Northwest Ordinance's use of the punishment clause carried the day.

Unlike the individuals impacted by the Northwest Ordinance, the Southern states and those sympathetic to the Confederacy sought to emasculate the Thirteenth Amendment from the moment it passed. And they knew how to do it. Some states explicitly used the punishment clause as a basis for reinstituting slavery.[120]

Two years after the United States ratified the Thirteenth Amendment, Representative John Kasson, a Republican congressman from Iowa, spoke on the U.S. House of Representatives floor about the need to clarify the scope of the punishment clause.[121] Some states were taking advantage of the "except as a punishment" language of the Thirteenth Amendment in order to maintain slavery. Kasson cited, as one example, an "extract from a paper showing what ha[d] been done near us in the State of Maryland."[122] An advertisement contained the following bold caption: "NEGROES TO BE SOLD AS A PUNISHMENT FOR CRIME."[123] According to Kasson, judges across the country were evading the requirements of the Thirteenth Amendment by enslaving blacks "as a punishment

118. SWAYNE, supra note 107, at 71 (internal quotation marks omitted).

119. *Id.* at 71–73.

120. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 152–53 (1998) ("Prisoners, after all, are the one group of people explicitly excluded from the Thirteenth Amendment's prohibition against slavery, and southerners took this obscure detail of constitutional prose very much to heart."). A full discussion of the means by which Southern states sought to evade the Thirteenth Amendment is beyond the scope of this Article.

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

122. *Id.* at 345.

123. *Id.* The advertisement read as follows:

> PUBLIC SALE.—The undersigned will offer for sale at the court-house door in the city of Annapolis, at eleven o'clock a.m. on Saturday, the 22d of December, a negro man named John Johnson, aged about forty years. The said negro was convicted at the October term, 1866, of the circuit court of Anne Arundel county, of larceny, and sentenced to be sold.

Id.

for crime."[124] He explained that these "inferior tribunals [would] order that a man shall be sold at a public auction, and call that an execution of a legitimate sentence."[125]

This practice, Kasson argued, represented a gross departure from what the Thirteenth Amendment sought to achieve. The punishment clause was designed to serve a narrow purpose. It meant that "a freeman can be condemned by the law only to the involuntary servitude now existing within the United States, within the walls of prisons, and within the jurisdiction of the law and officers of the law."[126] Thus, Kasson sought to introduce a joint resolution that would clarify that

> the 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 . . . .[127]

Kasson sought to make clear that in order to qualify as 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, and that is the only kind of involuntary servitude known to the Constitution and the law.[128]

Though Kasson was successful in securing passage of the resolution in the House,[129] the bill was postponed "indefinitely" in the Senate.[130]

It is difficult to determine how much weight to place on Kasson's interpretation of the Thirteenth Amendment. On the one hand, it is clear that a majority of the drafters, at least in the House of Representatives of the Thirty-Ninth Congress, urged an interpretation of the punishment clause that secured the rights of prisoners. On the other hand, the fact that the bill was postponed indefinitely in the Senate might be evidence

124. *Id.* ("BALTIMORE, *December* 24.—Four negroes convicted of larceny, and ordered to be sold by Judge Magruder at Annapolis, were sold on Saturday last.").
125. *Id.* at 324.
126. *Id.* at 345.
127. *Id.* at 324.
128. *Id.* at 345–46.
129. *Id.* at 348 (121 yeas, 25 nays, 45 not voting).
130. *Id.* at 1600.

that the drafters of the Thirteenth Amendment explicitly rejected Kasson's view of the punishment clause.

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.[131] The clarification could have failed for any one of a number of reasons unrelated to the Senate's view about the proper interpretation of the punishment clause.

Kasson's effort to clarify the Thirteenth Amendment is evidence that the punishment clause is ambiguous. He admitted as much when he noted that the question of whether chattel slavery could be imposed as sentence for a crime was "left slightly in doubt in the former draft before the country."[132] Hence the need for clarification. It would be wrong, however, to vindicate state efforts to evade the Thirteenth Amendment. To treat the punishment clause as a slavery loophole would reward what Kasson called the "South['s] rebellion against the lawful authority of the United States" by means of "trickery and deception."[133] For the purposes of determining the original understanding of the punishment clause, the relevant understanding should be the understanding of those that drafted and passed the amendment—not the understanding of those entities that sought to choke the amendment in its crib. At a minimum, Kasson's statements and his successful effort to pass his resolution in the House are evidence that the original understanding of the punishment clause was consistent with a view that afforded prisoners some Thirteenth Amendment rights.

Meanwhile, state courts insisted on equating prisoners with slaves. In 1871, six years after the ratification of the Thirteenth Amendment, the Supreme Court of Virginia referred to prisoners as "slave[s] of the State."[134]

131. *Id.* at 345.
132. *Id.*
133. *Id.* at 346.
134. 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. N. Prisoners' Labor Union, Inc., 433 U.S. 119, 139 (1977) (Marsall, J., dissenting))).

In *Ruffin v. Commonwealth*,[135] a prisoner brought a claim challenging the constitutionality of his murder trial.[136] The prisoner challenged whether his jury trial was conducted in the appropriate venue. Citing "general principles" and an instinct that the Bill of Rights must be afforded a "reasonable and not a literal construction," the court held that a prisoner, having forfeited his civil liberties, was entitled to only those liberties that a state, in its discretion, wanted to extend.[137] As long as he was incarcerated, the prisoner had "forfeited his liberty."[138]

Two years after *Ruffin*, however, the U.S. Supreme Court stated that the Thirteenth Amendment targeted not only African slavery but also "any other kind of slavery, now or hereafter."[139] By 1893, state courts began to acknowledge that prisoners retained Thirteenth Amendment rights.[140] In addressing the scope of the punishment clause, the Supreme Court of Missouri quoted approvingly of Thomas Cooley's argument that the Thirteenth Amendment protected prisoners from slavery:

> "Throughout the land involuntary servitude is abolished by constitutional amendment, except as it may be imposed in the punishment of crime. Nor 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*."[141]

In 1897, the first Justice Harlan echoed Cooley's view in his dissenting opinion in *Robertson v. Baldwin*.[142] Chastising the majority for authorizing the indentured servitude of naval seamen, Justice Harlan argued that the Thirteenth Amendment only tolerates involuntary servitude when the servitude is "imposed as a punishment for crime."[143]

135. 62 Va. (21 Gratt.) 790.
136. *Id.* at 792.
137. *Id.* at 795–96.
138. *Id.* at 796.
139. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873).
140. *See, e.g.*, Thompson v. Bunton, 22 S.W. 863, 865 (Mo. 1893).
141. *Id.* (emphasis added) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 363 (6th ed. 1890)).
142. 165 U.S. 275 (1897).
143. *Id.* at 301 (Harlan, J., dissenting).

He distinguished between the penalty of prison labor and a "condition of enforced servitude, even for a limited period, in the private business of another."[144]

By 1911, in the course of invalidating Alabama's peonage laws, the U.S. Supreme Court made clear that although the Thirteenth Amendment bans slavery except as a punishment for crime,

> the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It 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.[145]

Even Justice Holmes, who dissented from the case by noting that "involuntary servitude as a punishment for crime is excepted from the prohibition of the Thirteenth Amendment in so many words," also made clear that peonage laws would be unconstitutional if they "allowed a private master to use private force upon a laborer who wishes to leave."[146]

A narrow interpretation of the punishment clause, which acknowledges that prisoners retain some Thirteenth Amendment rights, is consistent with the historical evidence. This interpretation is predicated on textual arguments advanced by representatives that ratified the amendment, scholars of the era such as Thomas Cooley, and judicial interpretations from the decades that followed the amendment's ratification.

One might argue that I am defining the issue far too narrowly and insist that the individuals that drafted the Thirteenth Amendment—and the judges that interpreted it—could not have understood it to authorize prisoners to file lawsuits challenging their prison conditions. After all, the *Ruffin* court, a court that surely was aware of the Thirteenth Amendment, nonetheless classified prisoners as slaves of the state.

This objection misses the relevant question for our purposes. The relevant question is whether the punishment clause means that prisoners forfeit all Thirteenth Amendment liberties. The answer to this question is a resounding no. An original understanding of the punishment clause is fully consistent with the view that prisoners retain a limited set of

144. *Id.* at 292.

145. Bailey v. Alabama, 219 U.S. 219, 243–44 (1911) ("The state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.").

146. *Id.* at 247 (Holmes, J., dissenting).

Thirteenth Amendment rights. In this context, the understanding of scholars, judges, and legislators should count for more than the views of state entities that sought to neuter the amendment from the moment it was ratified.

Furthermore, decades of precedent have uprooted the basis for the claim that the prisoners are mere "slaves of the state" and, therefore, are not entitled to any liberties. By the early 1970s, federal courts, in a series of watershed decisions, massively expanded prisoner rights.[147] To place a heavy emphasis on the *Ruffin* court's reasoning would radically disrupt a long line of precedent extending liberties to prisoners. It would call into question nearly every court decision predicated on the assumption that people are born with certain inalienable rights. In other words, an originalist could latch onto the original understanding of the Thirteenth Amendment's punishment exception as narrowly authorizing only incarceration and hard labor while accepting the impact of precedent on the question of whether prisoners have any rights at all. As Justice Scalia has argued, there is nothing "uniquely inappropriate about the acceptance of *stare decisis* by an originalist. . . . The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interests of stability."[148] In other words, precedent has undermined the basis for the view that prisoners are slaves of the state, and none of that precedent has called into question the view that the punishment clause should be construed narrowly.

The evidence I have cited calls into serious question the view that prisoners are, definitively, exempt from the scope of the Thirteenth Amendment. Although the tumultuous political circumstances of the era in which the amendment was drafted renders difficult any effort to determine with certainty how it was understood,[149] there is ample evidence that the punishment clause originally was understood to be quite narrow, and that it did not authorize much more than incarceration and hard labor.

147. *See* Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."); *see also* Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting) ("I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights."); United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973) ("[T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual." (footnote omitted)).

148. Scalia, *supra* note 12, at 139.

149. *See* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2001).

C. Overcoming an Intratextual Dilemma: Defining Punishment in the Eighth Amendment Context

Here, I examine the three competing approaches to defining punishment in the Eighth Amendment context. As a textual matter, all that stands in the way of a prisoner's right to challenge his conditions of sexual slavery under the Thirteenth Amendment is the word "punishment." This fact makes defining the term an important threshold issue for slave victims.

The Supreme Court has never addressed the question of whether prisoners retain Thirteenth Amendment rights while incarcerated, and it certainly has not addressed it since it started interpreting "punishment" to include prison conditions.[150] This, of course, means that the question of how "punishment" should be defined in the Thirteenth Amendment context would be a matter of first impression for the Court. Before delving into the various ways that punishment has been defined in the Eighth Amendment context and then applying it to the Thirteenth Amendment context, I should explicitly state my assumptions.

First, in my view, most commentators, as well as most courts, will at least attempt to define the word "punishment" similarly in both contexts. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[151] The Thirteenth Amendment guarantees: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[152]

There is nothing obvious in either amendment that suggests that punishment should mean one thing for the purposes of the Eighth Amendment and another in the context of the Thirteenth Amendment. The only differences between the two seem trivial. It is true that the Eighth Amendment's usage of punishment is plural, whereas the Thirteenth Amendment's usage is singular. But that is hardly a distinction that makes a difference. Both uses of punishment appear to contemplate some kind of a penalty.

There is also a small difference in what each amendment seeks to achieve by including the word "punishment." The Eighth Amendment's use of punishment is a part of a prohibition. It forbids certain kinds of

150. *See* Estelle v. Gamble, 429 U.S. 97, 102–04 (1976).
151. U.S. CONST. amend. VIII.
152. *Id.* amend. XIII, § 1.

punishments—cruel and unusual ones. The Thirteenth Amendment's use of punishment is part of an exception to the amendment. The Thirteenth Amendment bans all slavery, but the punishment clause limits the amendment's reach. In not so many words, the punishment clause says that if the slavery or indentured servitude is punishment, then the Thirteenth Amendment's ban on slavery is inapplicable. Again, there is no obvious reason to believe that the definition of punishment mutates when we go from the Eighth Amendment to the Thirteenth Amendment.

Second, I assume that if the Supreme Court ever directly confronted the issue, its Eighth Amendment case law would provide a rich source of material to draw on for the purpose of defining punishment. Though cases such as *Farmer v. Brennan*[153] have directly addressed the question of what punishment means,[154] the Court has never explicitly addressed the question in the Thirteenth Amendment context. Thus, cases such as *Farmer* might well foreshadow what the Court would do if confronted with the question of whether prisoners retain Thirteenth Amendment rights. At the same time, because the Court has not addressed the issue in the Thirteenth Amendment context, it would be free from the constraints of stare decisis to revisit the debate over the meaning of punishment and to chart a new course.

1. The Intent Approach: Punishment Requires a Mental State

Since *Estelle v. Gamble*,[155] the Supreme Court has adhered to the view that punishment means more than one's actual sentence.[156] That is, punishment can include the treatment one receives in prison. In *Estelle*, the Court, speaking through Justice Marshall, held that the government was obligated to provide for "those whom it is punishing by incarceration."[157] The Court concluded that an allegation that officials were "deliberately indifferent" to a prisoner's medical needs was enough to state an Eighth Amendment claim.[158] The Court, however, did not explicitly define punishment. Rather, it simply assumed that punishment included one's prison conditions.[159]

153. 511 U.S. 825 (1994).
154. *Id.* at 837–38.
155. 429 U.S. 97 (1976).
156. *Id.* at 106 (holding that prisoners must prove "deliberate indifference" to their medical needs in order to state a cognizable Eighth Amendment claim).
157. *Id.* at 103.
158. *Id.* at 106.
159. The Court continued this unexamined assumption that prison conditions are part of one's punishment in *Rhodes v. Chapman*, 452 U.S. 337 (1981), in which it addressed a challenge

Recognizing this deficiency, the Court articulated a textual basis for its deliberate indifference requirement, as well a concrete definition of punishment, in *Wilson v. Seiter*.[160] In *Wilson*, Justice Scalia explained: "[I]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."[161] He then quoted approvingly Judge Posner, who had observed:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century. . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.[162]

Under the Court's jurisprudence, punishment always requires a mental state: It is imposed intentionally by a legislature or a sentencing judge, or by a prison official through her deliberate indifference. Prison conditions, no matter how harsh, can never qualify as punishment without inquiring into the mental state of a prison official because the Eighth Amendment outlaws not "cruel and unusual 'conditions,'" but "cruel and unusual 'punishments.'"[163]

2. The Realist Approach: Punishment Includes One's Prison Conditions Regardless of the Prison Official's Intent

The realist approach offers a more expansive definition of punishment. This view, most forcefully defended by Justices Blackmun, White, and Stevens,[164] accepts that punishment includes the actual sentence passed by a legislature or dispensed by the sentencing judge, but rejects the

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to double-ceiling housing of inmates. Justice Powell noted that "[it] is unquestioned that confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards." *Id.* at 345 (internal quotation marks omitted).

160. 501 U.S. 294 (1991) (holding that an Eighth Amendment challenge to prison conditions requires intent on the part of prison officials).

161. *Id.* at 300.

162. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).

163. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

164. Justices Stevens and Blackmun both have argued that punishment does not require intent. Though Justice Stevens concurred with Justice Souter's majority opinion and did not join Justice Blackmun's separate concurring opinion, he expressly noted that he continues "to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation." *Id.* at 858 (Stevens, J., concurring). Justice White also ardently expressed this view in his concurring opinion in *Wilson*, 501 U.S. at 301 (White, J., concurring).

insistence on an intent requirement as it pertains to prison conditions cases. Justice Stevens has argued that that the intent approach "improperly attaches significance to the subjective motivation" of prison officials for determining whether cruel and unusual punishment has been inflicted.[165] Justice Blackmun followed this line of reasoning in his concurring opinion in *Farmer* and articulated a definition rooted in the inmate's experience rather than the prison official's intentions.[166] In Justice Blackmun's estimation, the Court's definition of punishment represents an "unduly narrow definition of punishment [that] blinds it to the reality of prison life."[167]

First, there is nothing in the word "punishment" that demands an intent requirement.[168] In *Farmer*, Justice Blackmun argued that a "prisoner may experience punishment when he suffers 'severe, rough, or disastrous treatment,' regardless of whether a state actor intended the cruel treatment to chastise or deter."[169]

Second, because incarceration is a form of punishment, conditions within the prison are necessarily part of that punishment.[170] The only limit is whether the punishment is cruel or unusual. This argument, according to Justice Blackmun, is bolstered by common use of the word "punishment."[171] When people discuss an inmate's punishment, it is natural to think of a harsher prison condition as part of the punishment for a crime.[172] Realists therefore have urged a broader and more inclusive reading of punishment.

165. Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting).
166. *Farmer*, 511 U.S. at 854 (Blackmun, J., concurring).
167. *Id.* at 855.
168. *Id.* at 854–855.
169. *Id.* (citations omitted).
170. Wilson v. Seiter, 501 U.S. 294, 306 (1991) (White, J., concurring).
171. *Farmer*, 511 U.S. at 855 (Blackmun, J., concurring).
172. Blackmun explained his reasoning by providing an example:

> Consider, for example, a situation in which one individual is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. Under such circumstances, it is natural to say that the latter individual was subjected to a more extreme punishment. It matters little that the sentencing judge did not specify to which prison the individuals would be sent; nor is it relevant that the prison officials did not intend either individual to suffer any attack. The conditions of confinement, whatever the reason for them, resulted in differing punishment for the two convicts.

Id.

3. The Formalist Approach: Punishment Is Limited to One's Sentence

Justice Thomas has urged the narrowest possible reading of the word "punishment" in the Eighth Amendment context. In his dissenting opinion in *Hudson v. McMillian*,[173] Justice Thomas defended an original understanding of the Eighth Amendment as applying only to "torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration."[174]

One year later, in *Helling v. McKinney*,[175] Justice Thomas further advanced his definition of punishment and laid out the basis for his conclusion that prison deprivations do not fall within the realm of punishment. He argued that at the time of the ratification of the Eighth Amendment, the word "punishment" only referred to the "penalty imposed for the commission of a crime."[176] He contended that there is no "historical evidence indicating that the Framers and ratifiers of the Eighth Amendment had anything other than this common understanding of 'punishment' in mind."[177] The English Declaration of Rights of 1689, which had the same "cruel and unusual punishment" language, was, in Justice Thomas's view, exclusively directed against "sentencing abuses of the King's Bench."[178] Just as there was no suggestion in English constitutional history that prison conditions were considered to be part of punishment, the debates surrounding the Bill of Rights were silent on the issue of whether the Eighth Amendment was concerned with more than sentencing abuses.[179]

Justice Thomas did not quarrel in either case with the *Hudson* majority's view that punishment requires intent.[180] His understanding of punishment assumes that every punishment is, by definition, inflicted with the highest levels of intentionality: "[I]f a State were to pass a statute ordering that convicted felons be broken at the wheel, we would not separately inquire whether the legislature had acted with 'deliberate

173. 503 U.S. 1 (1992).
174. *Id.* at 18 (Thomas, J., dissenting).
175. 509 U.S. 25 (1993) (holding that the involuntary exposure of a prison inmate to environmental tobacco smoke can form the basis for relief under the Eighth Amendment).
176. *Id.* at 38 (Thomas, J., dissenting).
177. *Id.*
178. *Id.*
179. *Id.* at 38–39.
180. *See* Hudson v. McMillian, 503 U.S. 1, 21 (1992).

indifference,' since a statute, as an intentional act, necessarily satisfies an even higher state-of-mind threshold."[181]

D. Punishment From the Eighth Amendment to the Thirteenth Amendment Context

Where do these competing approaches to defining punishment leave us? And how should they apply in the Thirteenth Amendment context? Before putting together the pieces of the puzzle, I wish to make a few observations. The discussion of how to define punishment is relevant not only to the litigation options of prisoners, but also to those interested in questions of constitutional interpretation. Therefore, I begin by discussing the practical implications of the definition of punishment with respect to prisoners that may have Thirteenth Amendment claims. I then defend a modified version of the intent-based approach in the Thirteenth Amendment context. Lastly, I highlight the ways in which the definition of the word in the context of one amendment ricochets across the Constitution to affect another amendment.

If adopted in the Thirteenth Amendment context, the Supreme Court's most recent articulation of what punishment means in the Eighth Amendment context—the intent-based approach—would provide prisoners with a strong though limited set of Thirteenth Amendment rights. If punishment requires intent, then a prisoner is punished only when (1) he is actually sentenced by the judge; or (2) a prison official either intentionally or recklessly subjects an inmate to a substantial risk of harm.[182]

In the typical scenario in which a prison gang enslaves an inmate, the punishment clause would pose no barrier to a Thirteenth Amendment claim.[183] After all, punishment requires an intentional act by a prison official, and, in this case, the inmate was not sentenced to a term of sexual enslavement, nor did a prison official intentionally or recklessly subject him to sexual slavery. The inmate therefore could bring a claim against his slavemasters.

This is all well and good, but if we change the scenario, we get a disturbing result. Let us assume that prison guards are well aware that a particular inmate has been enslaved by a prison gang. Let us further assume that a prison guard has participated in the enslavement. In this scenario,

181. *Id.*
182. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994).
183. *See supra* note 8.

an inmate might be barred from bringing a Thirteenth Amendment challenge. His slavery was, in this case, an intentional act by an official. For Eighth Amendment purposes, he was punished.

The intent-based approach leaves prisoners in such a situation without an effective Thirteenth Amendment remedy. Could it really be that a prison official escapes Thirteenth Amendment liability so long as he intentionally enslaves an inmate?[184] This issue may well be a trivial one. Obviously, prison officials that cruelly and intentionally enslave prison inmates act in flagrant violation of the Eighth Amendment.[185] Nonetheless, there is something unseemly about excluding government-perpetuated slavery from the scope of the Thirteenth Amendment. While the intent-based approach has the advantage of allowing prisoners to bring some claims, it has the major drawback of letting prison officials off the hook for their intentional acts of slavery.

This odd outcome may well reflect the limits of an intratextual approach to constitutional interpretation, especially in this instance. On the one hand, it is highly relevant to compare interpretations of the same word that is used in almost the exact same way. But, as Akhil Amar has argued, there are situations in which intratextualism may be inappropriate.[186] Here, I have argued that the default position should be that the similar words should be interpreted similarly. An interpretation of the Thirteenth Amendment that sanctions outright slavery committed by prison guards, however, raises questions about the wisdom of this approach. Not only does such a reading seem implausible, but it leads to an absurd outcome that appears to be at odds with the purpose of the Thirteenth Amendment.

If we take a harder look at the intent-based approach, there are ways to avoid the problem I have identified: where prison guards that engage in slavery remain outside the scope of the amendment. For example, one could argue that the Thirteenth Amendment's definition of punishment cannot be read to include unconstitutional or unlawful punishment. The amendment was ratified in 1865, almost one hundred years after the Eighth Amendment. It would be strange for the drafters of the Thirteenth Amendment to have assumed that the word "punishment" in the

184. In this Subpart, I do not address the full scope of Thirteenth Amendment liability. I merely wish to address whether the punishment clause would bar prisoners from bringing any claims at all. Thus, there could be varying standards of culpability required before an entity or individual was liable for slavery within the meaning of the Thirteenth Amendment.

185. *See Farmer*, 511 U.S. at 837.

186. *See supra* note 13.

Thirteenth Amendment was synonymous with illegal and unconstitutional state-sanctioned punishments. Perhaps the better way to read the amendment then is to assume that the word "punishment" in the Thirteenth Amendment is only a lawful punishment. This interpretation is supported by the full text of the punishment clause, which only authorizes slavery or indentured servitude when an individual is "duly convicted of a crime"[187]—or, in other words, slavery or indentured servitude imposed within the bounds of due process and the law.[188]

From a practical standpoint, this interpretation would mean that a prison official exceeds the scope of punishment authorized by the Thirteenth Amendment when the act of so-called punishment also constitutes illegal conduct or when the punishment is not authorized by law. For example, if a prison guard enslaved an inmate, she would have a powerful Eighth Amendment and therefore Thirteenth Amendment claim on her hands. But she need not be limited to proving an Eighth Amendment violation to ensure that the Thirteenth Amendment protects her. Such arbitrary and shocking conduct no doubt violates the Due Process Clause of the Fourteenth Amendment.[189] Furthermore, such behavior by a prison guard likely violates numerous criminal statutes as well as internal prison policies. None of these acts are the type of lawful punishment contemplated under the Thirteenth Amendment's use of the word. The intent-based approach, modified to account for a gloss on the word "punishment" in the Thirteenth Amendment context, provides the best hope of redress for prisoners, is faithful to the text of the Constitution, and is virtually symmetrical with the Court's interpretation of the word in the Eighth Amendment context.

If we turn our attention to the war between the realist and the formalist approaches to defining punishment, we see more straightforward consequences. If we assume, as I mentioned earlier, that the word "punishment" should mean exactly the same thing in both the Eighth and Thirteenth Amendment contexts, then we witness fascinating ideological outcomes. For example, if we take what might be described as the more liberal and progressive definition of the word "punishment" advanced by the realists and apply it in the Thirteenth Amendment context, prisoners

187. U.S. CONST. amend. XIII, § 1.

188. *See* AMAR, *supra* note 7, at 359 ("Neither states nor the federal government would be allowed to revive slave codes . . . save as criminal punishment subject to due process[ ].").

189. *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protections of the individual against arbitrary action of government . . . ." (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889))).

would be barred from advancing any Thirteenth Amendment claims. If punishment means more than the actual prison sentence and includes one's prison conditions, then conditions of sexual slavery would be considered part of one's punishment. Here, the more liberal and progressive interpretation of punishment applied to the Thirteenth Amendment arguably results in a major setback to the victims of sexual slavery.

On the other hand, if we apply the more conservative, narrower interpretation of punishment advanced by the formalists in the Thirteenth Amendment context, prisoners retain the maximum amount of Thirteenth Amendment freedoms. Because punishment only includes one's prison sentence, a prisoner is free to challenge sexual slavery behind bars. Now, we have the odd situation in which Justices Stevens and Blackmun would favor an interpretation that narrowly construes prisoner rights while Justice Thomas stands poised as a champion of prisoner rights.

Obviously, each of these Justices might support or reject the effort to graft an interpretation of punishment from the Eighth Amendment onto the face of the Thirteenth Amendment for a variety of reasons. Indeed, a host of other factors may well enter into the equation. As demonstrated above, it is possible to adopt a narrower definition of punishment in the Thirteenth Amendment context and to assume that punishment means only lawful punishment. Nonetheless, it is interesting to see the ways that each camp's interpretation of the word plays out in another context. From the standpoint of the victims of sexual slavery in prison, the formalist interpretation provides the greatest amount of Thirteenth Amendment protection. Yet, it offers brutally little by way of the Eighth Amendment.

The best interpretation of the punishment clause is the one that I describe above: a modified version of the intent-based approach that defines punishment in the Thirteenth Amendment as only including lawful punishments. It has several advantages. First, it provides an interpretation of the punishment clause that gives prison slaves an opportunity to challenge their sexual slavery, even if the perpetrator is a prison official. Second, it promotes coherence and uniformity across the Eighth and Thirteenth Amendments. For example, accepting Justice Thomas's interpretation of punishment in the Thirteenth Amendment context would create a divergence between the Eighth and Thirteenth Amendments. That is, punishment would be limited to one's sentence in the Thirteenth Amendment context while encompassing one's prison conditions in the Eighth Amendment context. One might argue that this scenario is tolerable, especially if one believes that Justice Thomas has

the better argument. For those, however, that value legal stability and favor only minimal tinkering with the fabric of constitutional law,[190] the better approach is to avoid contradictory interpretations of punishment that call into question a long line of Eighth Amendment jurisprudence. Third, it is the most natural reading of the language of the Thirteenth Amendment. This interpretation is faithful to a practical and sensible interpretation of the amendment, which permits state and local governments to continue to sentence criminals to hard labor, while still allowing prisoners to challenge the despicable practice of sexual slavery behind bars.

CONCLUSION

Courts should recognize that prisoners have a right to bring Thirteenth Amendment challenges to conditions of sexual slavery. In this Article, I have argued that (1) sexual slavery is a problem; (2) the Eighth Amendment is a poor vehicle for attempting to eradicate sexual slavery; and (3) the Thirteenth Amendment's text, specifically the punishment clause, poses no barrier to such a claim. But I have not sketched out a comprehensive picture of what a prisoner bringing a Thirteenth Amendment claim must prove. Of course, if courts ended up drawing on the Eighth Amendment standards of liability, namely, the deliberate indifference as well as the substantial risk of harm requirement, we might be right back where we started. Even if courts treated Eighth and Thirteenth Amendment claims similarly, however, there still would be an added benefit to litigating under the Thirteenth Amendment as "a plaintiff's story is most compelling when cast in terms of the constitutional provision that best captures the victim's plight."[191] But my hope is that the novelty of a Thirteenth Amendment approach leaves courts unencumbered by the baggage of Eighth Amendment jurisprudence, and free to tailor the harm requirement to the warning signs of sexual slavery. In addition, a new course provides courts with an opportunity to focus liability on prison policymakers rather than low-level guards that are much less likely to change the day-to-day operations of the prison. Indeed, the Thirteenth Amendment may be capable of doing what the Eighth Amendment cannot—vigorously protecting human beings from the fate of enslavement at the hands of sexual predators behind bars.

190. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–6 (1999).

191. Amar & Widawsky, *supra* note 1, at 1385.