**Modern Slavery and the Intransigence of America**

**Thesis**

Many prisoners in the United States are currently paid slave wages for their labor. This is

possible because of the exceptions clause of the Thirteenth Amendment, a series of adverse court decisions, and a change in federal law 40 years ago. New laws must be passed to fix the problem by closing existing loopholes and redefining the rights of prisoners.

**Thirteenth Amendment**

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. Congress shall have the power to enforce this article by appropriate legislation.

**Fourteenth Amendment §1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Introduction**

The land of the free is full of slaves. Every day, these poor souls toil away for the benefit of their owners, with no hope of pay or release. But they are not hidden out of sight in locked basements or remote cabins. These slaves are owned by the state, housed in large building complexes designed for them, wearing bright orange jumpsuits. Today in America approximately 1.43 million people are incarcerated, with nearly five million more either in local jails or out on probation and parole. *Prisoners in the United States – Statistics and Facts*, Statista, (Last Visited Oct 29, 2021), <https://www.statista.com/topics/1717/prisoners-in-the-united-states/#dossierKeyfigures>. There are more active prisoners in the United States than there are soldiers in our military. *U.S. Military Size 1985-2021*, Macrotrends, (Last Visited Oct 29, 2021), [*https://www.macrotrends.net/countries/USA/united-states/military-army-size*](https://www.macrotrends.net/countries/USA/united-states/military-army-size). And despite working long hours, often more than the country allows under its labor laws, these prisoners are paid virtually nothing for their work. Wendy Sawyer, *How much do incarcerated people earn in each state*, Prison Policy Initiative (2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>. That is slavery. That requires change. But given the country’s history and the current state of the law, that change is a long ways away.

This paper aims to bring that change a little closer through education on the circumstances which allow this injustice to happen. As the Thirteenth Amendment is supposed to bar slavery, the analysis will start there. The history of the Amendment will be dissected, beginning with its revolutionary precursors, following it through its passage, and ending with the ripple effects it has caused throughout American history. Once the history of the Amendment is covered, the analysis will shift to study Supreme Court case law which impacts the Thirteenth Amendment and slavery in general. Notable federal acts will be scrutinized next, followed by a brief exploration of circuit court opinions. After which, the need for specific legislative action will be apparent.

**Background**

Slavery is meant to be illegal in this country. As young children, all Americans hear stories of how the Thirteenth Amendment eradicated slavery in the United States, while also serving as a crucial turning point in the Civil War. It is a central cultural touchstone of America. Sadly, the actual text of the amendment falls short of the legend, and its interpretation in the years since has been twisted to meet nefarious political ends. In fact, the current iteration of the law is hardly different from where it was during the founding of America. By examining America’s stance on slavery and imprisonment before, during, and after the Thirteenth Amendment was passed, the stagnation of the law and its need for reform will quickly become apparent.

Prior to the Thirteenth Amendment

The first hints of the Thirteenth Amendment appeared shortly after the revolutionary war. America earned its independence from the British empire in 1783 with the conclusion of that war and the Treaty of Paris. *British – American Diplomacy The Paris Peace Treaty of September 30, 1783*, The Avalon Project, (Last Visited Oct 30, 2021), <https://avalon.law.yale.edu/18th_century/paris.asp>. Naturally, having just broken free from the oppressive yoke of empire, America sought to create its own. And thanks to the Treaty of Paris, they had plenty of land to expand into, in the form of the new Northwest Territory. *See id*. This territory covered much of the modern day Midwest, including Wisconsin, Michigan, Ohio, Indiana, Illinois, and part of Minnesota. *See id.* Congress quickly incorporated this territory with the Northwest Ordinance of 1787, and was faced with an important decision; to what extent should slavery be recognized in this new territory? Though the country was still in its infancy, battle lines were already being drawn over the issue. Several northern states had seen fit to limit or eliminate the practice, while the southern states considered it a vital part of their economy. Ultimately, Congress decided that these new states would be free of slavery, though any fugitive slaves caught in the territory must be returned to their owners. *Northwest Ordinance; July 13, 1787*, The Avalon Project, (Last Visited Oct 30, 2021),<https://avalon.law.yale.edu/18th_century/nworder.asp>.

The Northwest Ordinance of 1787 is important for three reasons. It is important first for its eerily familiar language. Article six of the Northwest Ordinance states that “there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.” *See Id*. This language is practically identical to the current iteration of the Thirteenth Amendment. U.S. Const. Amend. 13. Second, because it was cited by anti-slavery activists including Lincoln to prove the founding fathers imagined the eventual elimination of all forms of slavery. Robert McNamara, *Northwest Ordinance of 1787*, ThoughtCo, (Feb 17, 2021), <https://www.thoughtco.com/northwest-ordinance-of-1787-4177006>. And third, because it demonstrates how ancient the current conceptions of slavery and punishment are in this country. We may think ourselves modern and enlightened on this issue, but the truth is our ideas are woefully old-fashioned.

Passage of the Thirteenth Amendment

After the Northwest Ordinance of 1787, there were decades of skirmishes over slavery, culminating in the American civil war, and the eventual passage of the Thirteenth Amendment. But passing the Amendment was not quite as easy as the history books would tell it.

For even without representatives of the southern states to block its passage, the Thirteenth Amendment faced difficulties in Congress. When it was first proposed to the house of representatives in 1863, it failed to attain the supermajority needed to send it to the states. *The 13th Amendment*, National Constitution Center, (Last Visited Oct 31, 2021), [*https://draftingtable.constitutioncenter.org/item/13th-amendment*](https://draftingtable.constitutioncenter.org/item/13th-amendment). It took over a year of intense debate to sway the representative’s minds, as well as a host of other factors. Various contemporary events such as Lincoln’s reelection, the fall of Atlanta, and passage by the senate all encouraged the house to work on the issue. *See Id*.

The proposal of a more progressive draft by senator Charles Sumner also aided in forcing the issue. The Other Thirteenth Amendment, New – York Historical Society, (Last Visited October 31, 2021), <https://wams.nyhistory.org/a-nation-divided/civil-war/other-thirteenth-amendment/>. This superior draft stated that “All persons are equal before the law, so that no person can hold another as a slave.” Id. Sumner’s draft also excluded the exception allowing slavery as a punishment for a crime. Id. Sadly, it was shot down, but the threat of more progressive legislation may have been enough to sway the hesitant senators to support the moderate version. In the years following, attempts would be made to codify the progressive position by other representatives such as John Kasson, who introduced a resolution to clarify the “true intent” of the Thirteenth Amendment. Eric Foner, We Are Not Done With Abolition, The New York Times (Dec 15, 2020). It was not meant, he insisted, to authorize the “sale or other disposition” of people convicted of crime. Id. If prisoners were required to labor, this should be under the supervision of public authorities, not private individuals or companies. Id. The resolution passed the House, but did not come to a vote in the Senate. Had any of the more potent versions been passed, American history would look extremely different.

The World Since the Thirteenth Amendment

The ink of the Thirteenth Amendment barely had time to dry before politicians created the first loopholes. For though slavery was now illegal, the demand for cheap products remained. And so, a centuries-long campaign to maintain this labor source was launched. Cazzie Reyes, *State-Imposed Forced Labor: History Of Prison Labor In The U.S.*, End Slavery Now (Feb 8, 2016), <https://www.endslaverynow.org/blog/articles/state-imposed-forced-labor-history-of-prison-labor-in-the-us>.

The first strike of this campaign came in the form of the black codes. Nadra Kareem Nittle, *How The Black Codes Limited African American Progress After The Civil War*, History (Jan 28, 2021), <https://www.history.com/news/black-codes-reconstruction-slavery>. Created in 1865 immediately following the civil war, these codes flagrantly abused the language of the Thirteenth Amendment. *Id*.Government authorities would search for any excuse to arrest African Americans and force slavery on them as a punishment for a crime. *Id*.Chatting with friends on a street corner? Arrested for vagrancy. *Id*.Refusing to sign labor contracts with near-slavery conditions? Arrested for the lack of a contract. *Id*.Fall into debt? Arrested under peonage laws. *Id*.Have parents the state deems “unfit?”Placed in an unpaid “apprenticeship” program. *Id*.By selectively applying these laws, reconstruction era states were able to punish as many of their citizens as they desired, often putting them back to work in the same fields they just escaped.

To their credit, the republicans who originally passed the Thirteenth Amendment saw the problems being created, and took strides to fix them. This started with the civil rights act of 1866. This reversed the dreaded Dred Scott decision and gave African Americans equal right to sue under the law. Robert Longley, *The Civil Rights Act of 1866: History And Impact*, Thoughtco (Mar 1, 2021), <https://www.thoughtco.com/civil-rights-act-of-1866-4164345>. It also expanded the rights of American citizenship for African Americans. *Id*. However, it was incapable of overturning the black codes.

To make matters worse, many southern states began leasing out their convicts starting in 1866. Cazzie Reyes, *State-Imposed Forced Labor: History Of Prison Labor In The U.S.*, End Slavery Now (Feb 8, 2016), <https://www.endslaverynow.org/blog/articles/state-imposed-forced-labor-history-of-prison-labor-in-the-us>. The convict leasing system was virtually identical to slavery, in that the plantation or factory owner would pay to house and feed the prisoners, along with a small fee to the state. *Convict Leasing*, PBS (Last Visited Nov 4, 2021), <https://www.pbs.org/tpt/slavery-by-another-name/themes/convict-leasing/>. This new system was different from the old in only one crucial way; the master did not own the slaves, and so had no incentive to keep them healthy. *Id*.

Partially to combat this new form of slavery, Congress passed two more amendments to the constitution. The Fourteenth Amendment granted equal protection under the law to African Americans, and the 15th protected their right to vote. Nadra Kareem Nittle, *How The Black Codes Limited African American Progress After The Civil War*, History (Jan 28, 2021), <https://www.history.com/news/black-codes-reconstruction-slavery>. Thanks to these amendments, African Americans were able to win a number of political seats during the radical reconstruction period, the black codes were generally repealed, and this new form of slavery was abated for a spell. *Black Codes*, History (Nov 4, 2021), <https://www.history.com/topics/black-history/black-codes>.

But radical reconstruction could not last forever, and in 1877, the federal government stepped away from their enhanced supervisory role and allowed the south to once again oversee its own affairs. Cazzie Reyes, *State-Imposed Forced Labor: History Of Prison Labor In The U.S.*, End Slavery Now (Feb 8, 2016), <https://www.endslaverynow.org/blog/articles/state-imposed-forced-labor-history-of-prison-labor-in-the-us>. Following the radical reconstruction era, segregation was once again enforced, through both the Jim Crow Laws and the “separate but equal” holding in Plessy v. Ferguson. *Jim Crow Laws*, History, (Mar 26, 2021), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws>*. Plessy v Fergusen*, 163 U.S. 537, (1896). Despite this, the days of convict leasing were numbered. Public opinion was turning against the practice after many stories of the abuses inherent in the system, and politicians were forced to make a change around the start of the 20th century. *Chain Gangs*, PBS, (Last Visited Nov 4, 2021), <https://www.pbs.org/tpt/slavery-by-another-name/themes/chain-gangs/>. However, the siren song of the Thirteenth Amendment loophole still beckoned with its promise of free labor, leading to the creation of chain gangs. *Id*. Gangs of prisoners were forced to construct roads, dig ditches, and farm, once again for no pay. *Id.* This was yet another structure allowing slavery and involuntary servitude to exist for the benefit of the state.

Unpaid prison labor continued across the country for the next few decades, until the great depression hit. Cazzie Reyes, *State-Imposed Forced Labor: History Of Prison Labor In The U.S.*, End Slavery Now (Feb 8, 2016), <https://www.endslaverynow.org/blog/articles/state-imposed-forced-labor-history-of-prison-labor-in-the-us>. Suddenly, there were too few jobs to go around, and no one wanted the added competition of unpaid prison labor. Lisa Ennis, *Hawes-Cooper Act*, Encyclopedia (Oct 26, 2021), <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/hawes-cooper-act>. So, to remove prisoners from the labor pool, Congress passed the Hawes-Cooper Act in 1929, the Ashurst Sumners Act in 1935, and the Walsh-Healey Public Contracts Act in 1936. *Id*. Taken together, these acts effectively banned the importation of prisoner made goods into any state and barred them being sold to the government in bulk, all but eliminating prisons from the economic equation. Whitfield v Ohio brought a constitutional challenge against these laws, but were defeated as paid workers simply could not compete "with enforced and unpaid or underpaid convict labor.” *Whitfield v Ohio*, 297 U.S. 431, 39, (1936). This succeeded in generally halting the practice of unpaid prison labor for private benefit, for a time. However, it would not permanently close the Thirteenth Amendment slavery loophole.

As the 1970s were drawing to a close, the loophole was inevitably reopened. This was done via the Justice System Improvement Act of 1979, a piece of legislation which created the Prison Industries Enhancement Program (PIECP). *Prison Industry Enhancement Program*, BJA, (Feb 20, 2012), <https://bja.ojp.gov/program/prison-industry-enhancement-certification-program-piecp/overview>. To this day, any prison which qualifies for this program is exempt from the earlier federal rules barring interstate transport and government sale of prison made goods, and is thus free to sell the prisoner’s labor. *Id*. And after prison reform in the 1980s and 1990s led to mass incarceration, there was no shortage of prisoner labor. Reiko Hillyer, *How Mass Incarceration Happened: A Brief History*, (Last Visited Apr 10, 2022), <https://www.allrisemedia.org/how-mass-incarceration-happened>. However, one interesting note is that the PIECP does grant slight protections to inmates, and their participation must be voluntary. Nancy E. Gist, *Prison Industry Enhancement Certification Program*, (Nov 1995), <https://www.ojp.gov/pdffiles/pie.pdf>. So perhaps at the very least, fully involuntary labor is a relic of the past. A small step forward for so long a struggle. A struggle characterized by a few good souls trying to claw back financial freedom for these individuals, while the cogs of society push to exploit them ever harder.

**Analysis**

Despite hearteningly vocal protests against the current prison system, the Supreme Court has never directly addressed the issue of prisoner wages nor the involvement of the Thirteenth Amendment in that equation. That job has been left to the circuit courts, who have generally struck down prisoner’s rights to fair wages for their labor. However the Supreme Court does have precedent from a number of related issues. Read together, those opinions form a clear opinion on the Court’s interpretation of prisoners’ rights and the Thirteenth Amendment. Namely, that the Amendment has little to no bearing despite its seemingly clear mandate to end involuntary labor. But that does not mean the Thirteenth Amendment is a dead end. Indeed, the Amendment may prove critical to one day unraveling this flawed system.

Interpretation of the Thirteenth Amendment

The Thirteenth Amendment may be broken into three clauses: The prohibitions clause, the exceptions clause, and the enforcement clause. Constitution Annotated, *Thirteenth Amendment*, (Last Visited Nov 19, 2021), <https://constitution.congress.gov/browse/essay/amdt13-S1-1-1/ALDE_00000992/>. The enforcement clause, which states that “Congress shall have the power to enforce this article by appropriate legislation” is worth little discussion. *Id*. This section simply affirms that the amendment is self-executing, and has generated very little controversy over the years. *Id*. The real analysis lies in the prohibitions and exceptions clauses.

The prohibitions clause states that “neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” U.S. Const. Amend. 13. Read alone, this would likely prevent prisons paying their inmates below minimum wage. And it has served that purpose in a sense, being used by Congress to outlaw peonage laws, commonly employed across the South during the reconstruction era, and across the country in the years leading up to the civil war. Constitution Annotated, *AMDT 13.S1.1.1 Prohibition Clause*, (Last Visited Nov 19, 2021) <https://constitution.congress.gov/browse/essay/amdt13-S1-1-1/ALDE_00000992/>; *A Promise The Nation Cannot Keep: What Prevents The Application Of The 13th Amendment In Prison?*, 18 WMMBRJ 395 (2009). First acknowledged as akin to slavery in the famous Slaughterhouse cases, peonage is the practice of forcing people to work in order to pay their debts. Britannica, *Peonage*, (Last accessed Nov 20, 2021), <https://www.britannica.com/topic/peonage>. The Court has been quite adamant that nothing akin to peonage is permissible, striking down variations on the system in *Bailey v. Alabama, United States v. Reynolds, Taylor v. Georgia,* and *Pollock v. Williams*. Constitution Annotated, *AMDT 13.S1.1.1 Prohibition Clause*, (Last Visited Nov 19, 2021), <https://constitution.congress.gov/browse/essay/amdt13-S1-1-1/ALDE_00000992/>. Without a doubt, forced labor to pay an owed debt is illegal. However, the similar labor practice of sentencing prisoners to forced labor for the benefit of prisons is not. *Ali v. Johnson*, 259 F.3d 317 (5th Cir. 2001). Neither is the practice of allowing prisoners to volunteer for underpaid work for private companies. There are a couple of reasons for this, the first being the exceptions clause.

The exceptions clause is nestled into the middle of the prohibitions clause of the Thirteenth Amendment. As the name implies, it creates an exception from the otherwise total ban of the prohibitions clause on slavery and involuntary servitude. Because of the exceptions clause, slavery and involuntary servitude may not be imposed “except as a punishment for crime whereof the party shall have been duly convicted.” U.S. Const. Amend. 13. Using the exceptions clause, the courts have regarded the Thirteenth Amendment impotent in most matters involving prisons, often not even warranting discussion. See, e.g., *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990). After all, anyone who is incarcerated has been duly convicted of a crime and is being punished for it. Under a simple reading of the amendment, it appears to be an open and shut case. But is labor implied to be a part of the punishment when a criminal is sentenced?

Around the passage of the Thirteenth Amendment, labor was considered part of the sentencing package. The prevailing theory of the time was that labor was essential to rehabilitation. As one 19th century warden put it “convicts during confinement need constant employment to keep from destruction and degradation.” Colorado College History Department, *Past, Present, Prison*, (Last Visited Nov 20, 2021), <https://sites.coloradocollege.edu/hip/defining-rehabilitation/>. However, these prisons were not mere labor camps. *Id*. Many made an effort to combine this labor with other rehabilitative programs of the time. *Id*. Educational opportunities, particularly literacy training for non-English speakers, were seen as crucial components of rehabilitation along with forced labor. *Id*. So while labor was commonplace throughout historical penal systems, it was a step towards a larger goal. This is in stark contrast to the labor of today’s prisons, which is justified far more by cutting costs in prison administration and the output of products than as a rehabilitative tool. Though there is likely no avenue of change through this altering of the meaning of labor, it appears that the purpose of sentencing criminals to hard labor has changed from how it was understood around the passing of the Thirteenth Amendment. This alone is reason to seek change. But this change will be difficult to achieve, and not just because of the exceptions clause. A second barrier to changing the exploitative labor policies of prisons rests in the meanings of slavery and involuntary servitude under the Thirteenth Amendment. Because after the passage of this amendment, the courts were quick to define these concepts in a highly limiting manner.

Supreme Court Case Law Regarding Prisoner’s Rights

Existing Supreme Court case law creates a frightening schema to overcome. Because in case after case, the Court has ruled against prisoners rights and the applicability of the Thirteenth Amendment to prison wage slavery.

The Supreme Court first addressed the Thirteenth and Fourteenth Amendments in the Slaughterhouse Cases. *Slaughter-House Cases*, 83 U.S. 36 (1872). In the Slaughterhouse Cases, the Court held that the Thirteenth Amendment was made primarily “to forbid all shades and conditions of African Slavery.” *Id*. The Amendment was viewed as a narrow prohibition to cure a specific societal defect, rather than as a tool for advancing general civil rights. *Id*. That being said, the Court signaled a willingness to extend the scope of the Thirteenth Amendment at least slightly beyond African slavery. *Id*.Justice Miller made it clear in his majority opinion that the term “slavery” may be applied regardless of race or nationality. *Id*. Further, that the term “involuntary servitude” included more than just slavery, lumping in “serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others.” *Id* at 90. Ultimately however, it refused to extend the definitions of slavery and involuntary servitude any further. *Id*. Thus, the workers had no rights to protections under the Thirteenth Amendment, and were denied the right to practice their chosen profession wherever they pleased. *Id*. *T*his can be directly applied to prisoner’s rights. Thanks to the Slaughterhouse Cases, prisoners do not have a right to choose what kinds of work they perform while within the prison system. *Id*.

Besides the Slaughterhouse Cases, only a handful of Supreme Court cases have explored the rights of prisoners with respect to their labor. The next case to do so after Slaughterhouse was that of *Ex Parte Karstendick*, which significantly loosened the requirement of the Thirteenth Amendment’s exceptions clause. *Ex Parte Karstendick*, 93 U.S. 396 (1876). In this case, an inmate argued that since he had been sentenced only to imprisonment and not to hard labor, he could not be held in a facility which required labor of its inmates. However, the Court held that “imprisonment in a penitentiary necessarily implies imprisonment at hard labor.” *Id.* at 399. Because of this, prisoners do not need to be sentenced specifically to hard labor to be subjected to the slavish conditions of the modern prison system. This eliminated most potential Thirteenth Amendment solutions to the prison wage problem, as all sentences became potential sentences to labor, falling under the exceptions clause.

The impotence of the Thirteenth Amendment in these situations was further compounded by *The Civil Rights Cases* seven years later. *The Civil Rights Cases*, 109 U.S. 3 (1883). This bundle of cases dealt with the equal enjoyment of facilities by people of all races. *Id*. In a near unanimous decision, the Court held that the Thirteenth Amendment was not meant “to adjust what may be called the social rights of men and races in the community.” *Id.* at 30. Rather, it only touched on fundamental rights “which constitute[s] the essential distinction between freedom and slavery.” *Id.* at 30. Instead of relying on the Thirteenth Amendment, the Court put the burden of defending against discrimination on other sections of the Constitution, most heavily on the Fourteenth Amendment. *Id*.However, the word choice of the Court is important here. As it singled out, the Thirteenth Amendment may be invoked to deal with fundamental rights if they are important to the distinction between freedom and slavery. *Id*.So while the *Civil Rights Cases* may be seen by some as a complete barrier to applying the Thirteenth Amendment to prison wages, the possibility of applying it remains. After all, what is slavery but unpaid labor? Few elements can be considered more fundamental to slavery than the lack of pay. Still, even having to make that argument to a court makes the *Civil Rights Cases* another hurdle to overcome in remedying the prison wage situation.

Before the *Civil Rights Cases*, the Fourteenth Amendment might also have been used as a method to stop the underpayment of prisoners. After all, the Fourteenth Amendment bars “depriv[ing] any person of . . . property, without due process of the law.” U.S. Const. Amend. 14. Wages are undoubtedly property, and so failing to pay adequate wages would fit within the scope of this amendment. But the *Civil Rights Cases* serve as a far greater barrier to the Fourteenth Amendment than the Thirteenth in this situation. *Id*.For as the Court framed the Amendment, “it does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action.” *Id.* at 11. That is to say, Congress may only legislate by prohibition, making laws barring certain behaviors by the states to uphold the Fourteenth Amendment. They may not create their own municipal codes for the states to follow. Because the vast majority of prisoners are held in state rather than federal prisons, this largely removes them from the influence of the national legislature, at least through means of the Fourteenth Amendment. And even if that were not the case, the Court would likely apply a similar logic to the exceptions clause of the Fourteenth Amendment as they did the Thirteenth, a la the *Karstendick* case. They would likely hold the prisoner’s participation in the judicial process served as de facto proof of due process in that regard. *Ex Parte Karstendick*, 93 U.S. 396 (1876).

In short, the Fourteenth Amendment is a dead end when it comes to obtaining fair prisoner wages, and the Thirteenth faces a difficult battle to even be recognized in the court. Combined with the Court’s history of minimizing prisoner labor rights, it becomes apparent that a judicial solution to the problem is unlikely.

The Current Laws and Flaws

Though the judiciary is likely unhelpful, there are still other avenues to pursue. Congress may be slow, but it is capable of taking action. It has done so in the past, and can do so again, by analyzing and modifying the developments in the law after the *Civil Rights Cases*.

After the *Civil Rights Cases*, the Court paid little heed to rights even tangentially related to prisoner’s wages. The next major developments in inmate labor law did not come for over half a century, with the passage of several Acts spurred on by the great depression and Roosevelt’s new deal. Lisa A. Ennis, *Hawes-Cooper Act*, Encyclopedia (Last Visited Dec 7, 2021) <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/hawes-cooper-act>. Sumners-Ashurst Act of 1935, 18 U.S.C. §1761-62 (2011). Hether C. Macfarlane, *Walsh-Healey Public Contracts Act (1936)*, Encyclopedia (Last Visited Dec 7, 2021) <https://www.encyclopedia.com/history/united-states-and-canada/us-history/walsh-healey-act>. First was the Hawes-Cooper Act of 1929, which subjects prison goods made out of state to the laws of their current state, allowing individual states to decide to what extent goods are regulated. Lisa A. Ennis, *Hawes-Cooper Act*, Encyclopedia (Last Visited Dec 7, 2021) <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/hawes-cooper-act>. This can be crucial to local economies, as unregulated prison labor is undoubtedly cheaper than labor provided by the free market, thanks both to the unpaid labor and tax subsidizes of prison facilities. *Id*. And the law was quickly put to use by afflicted states in cases such as *Whitfield v State of Ohio* to protect local industry.But while this creates a potential avenue for reform, it may only be used on a state-by-state basis. So though some states may use this authority to address the problems caused by prison labor, it is not a nationwide solution.

Luckily, Congress did pass a pair of complementary Acts to deal with prison reform on a nationwide basis around this same time. First was the Sumners-Ashurst Act of 1935. This Act allowed prison labor to continue, but banned interstate and foreign trade of goods produced by convict labor. Sumners-Ashurst Act of 1935, 18 U.S.C. §1761-62 (2011). The Act contained a few loopholes, allowing the government to continue benefiting from cheap prison labor and protecting certain industries. *Id*.However on the whole, it was and is an excellent tool to reduce unpaid prison labor by eliminating the interstate demand. And once augmented by the Walsh-Healey Public Contracts Act (PCA), which Congress passed one year later, it became a truly powerful tool to promote fair wages. *Walsh-Healey Public Contracts Act (PCA)*, U.S. Department of Labor (Last Visited Dec 7, 2021) <https://www.dol.gov/agencies/whd/government-contracts/pca>. Because while the Sumners-Ashurst Act had no sway over any intrastate commerce, the PCA did, setting very strict rules for all government purchases greater than 10,000 dollars, be they intra or inter state. Walsh-Healey Public Contracts Act (PCA), 41 U.S.C. §6502 (2011). Under this Act, for government contracts greater than 10,000 dollars, “no incarcerated individual will be employed by the contractor in the manufacture or furnishing of materials, supplies, articles, or equipment under the contract, except… [those that] satisf[y] the conditions of §1761(c) of title 18.” Walsh-Healey Public Contracts Act (PCA), 41 U.S.C. §6502(3) (2011). Section 1761(c) was not added till many years after these acts were passed, so at the time it served as a near total ban on government purchases from private prison entities. *Id*. Together, this initial schema created a system which all but eliminated prison labor for private benefit.

The Hawes-Cooper, Sumner-Ashurst, and Walsh-Healey Acts provided excellent protection for prisoners, and still do to an extent. However, a number of loopholes exist in their net which prisons have exploited to underpay their inmates. One is the exception for government entities. If a government prison is manufacturing commodities for a government entity or non-profit, they are exempt from these rules. Walsh-Healey Public Contracts Act (PCA), 18 U.S.C. §1761(b) (2011). Another issue is the freedom of private enterprise. Private prisons may still sell to other private entities within their state, as the laws only prohibit private interstate sales. Sumners-Ashurst Act of 1935, 18 U.S.C. §1761-62 (2011). And of course, the agricultural sector was given an exemption, because somebody has to pick the cotton. *Id*. Still, when they were first passed, these acts prevented most exploitative prison labor in the country. Until the Percy Amendment ripped a multi billion dollar hole in the net via §1761(c).

The Percy Amendment of 1979, also known as the Justice Systems Improvement Act, was the final nail in the coffin for prisoner’s labor rights. This act created the Prison Industry Enhancement Certification Program (PIECP), and built a huge loophole into prison labor laws. 18 U.S.C. §1761(c) (2011).This loophole allows interstate sale of prison goods, as well as large scale sales to government entities, so long as four criteria are met. Namely, that the prisoners must: (1) be participating in a prison work pilot project, (2) be paid wages commensurate with local rates for the jobs they do, (3) be given the opportunity to obtain benefits such as workers compensation, and (4) be doing the work voluntarily. 18 U.S.C. §1761(c) (2011). Sill in theory this could be a positive act. It was allegedly created with the twin goals of teaching offenders marketable skills and making a profit to repay their debt to society. *About PIECP*, National Correctional Industries Association (Last Visited December 8, 2021) <https://www.nationalcia.org/about-piecp>. But while the goals are admirable, they are generally not achieved. Because prisons are not required to achieve them to run their programs, and have instead worked hard to abuse the boundaries set out. *About PIECP*, National Correctional Industries Association (Last Visited Dec 8, 2021) <https://www.nationalcia.org/about-piecp>. The private companies running PIECP programs do not have to actually teach marketable job skills, and most of the profits made are paid back to the private company, not to society. *Id*.To the company, the prisoners are not there to be improved, they are just “a readily available workforce in low cost manufacturing.” *Contract Manufacturing Opportunities*, Unicor (Last Visited Dec 8, 2021) <https://www.unicor.gov/PieProgram.aspx>. A workforce which is often supplemented by the prisoners themselves, as prisons may deduct up to 80 percent of a prisoner’s wages for various charges, most egregiously room and board. 18 U.S.C. §1761(c)(2) (2011). Meaning companies can force prisoners to build the prisons they live in, do the menial jobs inside them, and force them to make products to sell, all for free. And if prison officials want to sell to a restricted group, they can pay minimal wages, and deduct “reasonable costs” for living in the prison the prisoners themselves built and for eating the food the prisoners themselves prepared. *Id*.

PIECP programs are not going anywhere, because they have been successful in some regards. A joint study by the National Institute of Justice and the Office of Justice Programs found a modest increase in post-prison employment and reduced recidivism for individuals in the PIECP program. Marilyn C. Moses and Cindy J. Smith, *Factories Behind Fences: Do Prison “Real Work” Programs Work?*, 257 NIJ Journal, 32-5 (2007). Though whether these numbers are actually a benefit of the program is a contentious topic. *Id*. *T*his is an opt-in program, so a clear selection bias exists towards more productive individuals. *Id*. And as covered previously, labor has been seen as a time-honored rehabilitative method for prisoners, so whether these gains are significantly higher than they would be naturally is also up for debate. Colorado College History Department, *Past, Present, Prison*, (Last Visited Nov 20, 2021), <https://sites.coloradocollege.edu/hip/defining-rehabilitation/>. These programs also tout the hundreds of millions of dollars they have made to “cover the costs of incarceration,” as well as the much smaller amounts paid in to taxes and victim accounts. *Prison Industry Enhancement Certification Program*, Bureau of Justice Assistance (Last Visited Dec 8, 2021) <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PIECP-Program-Brief_2018.pdf>.Curiously, the program administrators fail to mention how much the inmates have made in this system, choosing to focus on the impressive corporate profits. *Id*.And to be fair, prisoners in these programs do make more on average than those in state run institutions, though it is still a pittance. Wendy Sawyer, *How much do incarcerated people earn in each state*, Prison Policy Initiative (2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>. With claims that they are saving taxpayers money and some positive data they can point to, it is unlikely this system of private prison labor will be abolished anytime soon. Nor will conditions likely approve, as prisoners do not have a right to unionize under current precedent. *Jones v. NC Prisoners’ Labor Union, Inc*, 433 U.S. 119 (1977).

Circuit Court Opinions

The Supreme Court has never addressed the issue of prisoner wages with regard to the Thirteenth Amendment. As of yet there is no need, as all 13 circuits appear to be in agreement; prisoners have no Thirteenth Amendment right to wages, at least not when working for the government. *Miller v Dukakis*, 961 F.2d 7 (1st Cir 1992); *Jobson v Henne*, 355 F.2d 129 (2nd Cir 1966); *Tourscher v McCullough*, 184 F.3d 236 (3rd Cir. 1999); *Newell v Davis*, 563 F.2d 123 (4th Cir. 1977); *Ali v. Johnson*, 259 F.3d 317 (5th Cir. 2001); *Erdman v Martin*, 52 Fed.Appx. 801 (6th Cir. 2002); *Pischke v Litscher*, 178 F.3d 497 (7th Cir. 1999); *Ray v Mabry*, 556 F.2d 881 (8th Cir. 1977); *Bennett v Clark County School Dist*, 24 F.3d 244 (9th Cir. 1994); *Dmytryszyn v Hickenlooper*, 527 Fed.Appx. 757 (10th Cir. 2013); *Holt v Givens*, 757 Fed.Appx. 915 (11th Cir. 2018); *Shipley v Woolrich Inc.*, 428 Fed.Appx. 4 (D.C. Cir. 2011). The question becomes less clear when the prisoners are working for private parties, and when claims are not based on the Constitution.

A number of prisoners have attempted to file claims, not under the Thirteenth Amendment, but under the Fair Labor Standards Act (FLSA). Fair Labor Standards Act, 29 U.S.C. Ch. 8 (2007). FLSA imposes minimum wage requirements, as well as standards for working conditions, which the prisoners claim are being violated. *Id*. And most appellate courts have been receptive to the idea of FLSA rights for prisoners working with private employers. Susan Prince, Prisoners, *Employer’s Guide to the Fair Labor Standards Act*, 244 (2021). Whether a prisoner is covered by FLSA is usually decided by an economic reality test. *Id*. Courts will consider whether the employer controlled the prisoner’s employment, schedule, supervision, pay, and records, among other factors. *Id*.If the employer exercises too much control over the prisoner, they will be considered an employee under FLSA and entitled to minimum wage. Though this is unusable for the vast majority of prisoners who work internally for the prison, it does at least give hope that a few will be paid a decent wage.

Potential Solutions

A number of solutions have been proposed to deal with the issue of prisons underpaying their employees. None are very plausible. Regardless, there is always room to attempt to create change. And one solution is slightly more plausible than the others.

The story of prison labor has one thing going for it: it is a fantastic story. As an idea, it can spark the imagination of those who hear it, and hold the attention of those who are bored of politics. Because of this, prison law has an inherent potential to change. Bills are frequently being submitted and passed to modify the prison system. *Prison Camera Reform Act of 2021*, Congress (2021) <https://www.congress.gov/bill/117th-congress/senate-bill/2899/text>. While the private prison industry would no doubt lobby heavily against it, it is plausible that a bill could be passed to close the loophole created by the Percy Amendment. Or to lump prisoners into FLSA standards. Or to make any other change to improve prisoner’s working conditions. It is a sad state of affairs to say that a change in legislation is the most likely solution to this problem. But compared to the alternatives, such as getting a highly unlikely reversal by the Supreme Court, or redefining the Thirteenth Amendment, it is the most plausible option.

Conclusion

The American prison system has had a turbulent history. Shaped in the fires of war and expansion, then solidified and left to function for decades at a time before being altered again. It is filled with relics of the past which need removal. Remnants of slavery yet to be stamped out, outdated ideas never rethought, and stains of greed left for the next generation to clean. This cannot stand. Regardless of what else they have done, the prisoners in those institutions deserve just treatment, including wages commensurate with their labor and decent working conditions. Change will not come through the Thirteenth Amendment. Or the Fourteenth, or the Fifth or the Eighth, or the courts, or FLSA. Change will have to come from the government for once. And until that change comes, America cannot truly call itself the land of the free.