

# SLAVERY AS PUNISHMENT: ORIGINAL PUBLIC MEANING, CRUEL AND UNUSUAL PUNISHMENT, AND THE NEGLECTED CLAUSE IN THE THIRTEENTH AMENDMENT

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*In relatively specific constitutional language that courts and scholars have long neglected, the Thirteenth Amendment authorizes slavery as a punishment for crime. This Article shows that the original public meaning of the slavery-as-punishment clause leads to abhorrent outcomes, including the emasculation of many modern protections grounded on the Eighth Amendment. This conclusion challenges those who assert that steadfast originalism will not produce grossly objectionable results. It also challenges the view that steadfast originalism finds justification as an effort to preserve a core of legitimacy-enhancing features in the Constitution. The Article thus reminds us why the original meaning, even when clear, is not conclusive in constructing the modern meaning of the Constitution.*

## INTRODUCTION

The Eighth Amendment (1791):

*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Thirteenth Amendment (1865):

*Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*

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*Section 2. Congress shall have the power to enforce this article by appropriate legislation.*

Constitutional scholars who profess a commitment to originalism have not often written at length about when, if ever, a Supreme Court Justice should depart from the original meaning of constitutional text because the results of following it would be “too bitter.”<sup>1</sup> In his famous 1989 Taft Lecture at the University of Cincinnati, Justice Scalia confronted that question and admitted that, despite his commitment to originalism, he would sometimes avoid the bitter outcomes, if possible, by employing the doctrine of stare decisis, or, if necessary, by temporarily abandoning originalism.<sup>2</sup> To exemplify the problem, he posed a hypothetical involving a new statute that authorized the whipping and branding of criminals. He also assumed an unequivocal demonstration that “these were not cruel and unusual measures in 1791”<sup>3</sup> and, thus, in his view, that they would be permissible under the original meaning of the Eighth Amendment. In addition, he assumed an absence of Supreme Court precedent on the question. Nonetheless, Justice Scalia said that he would not vote to permit whipping or branding against an Eighth Amendment challenge, confessing himself a “faint-hearted” originalist.<sup>4</sup> He defended this view with the claim that most federal judges who consider themselves originalists would act the same way.<sup>5</sup> He also urged that “any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality.”<sup>6</sup>

Few have taken up Justice Scalia’s challenge to explain how to reconcile originalism as a theory of interpretation while avoiding outcomes that are “too bitter.” Many originalists surely fear that conceding the propriety of such exceptions could hint that judges only use originalism when it supports their preferred outcomes or, at least, that the original understanding is only “one source of constitutional meaning among several.”<sup>7</sup> Those perceptions do not square easily with the notion that originalism can provide a coherent “general theory of constitutional interpretation, much less the exclusive legitimate theory.”<sup>8</sup> They square much easier with the notion that constitutional law is not “an expression of values written into the Constitution by the framers, but . . . the product of a continuing process of valuation carried on by those to whom the task of constitutional interpretation has been entrusted.”<sup>9</sup> At the same time, many self-professed originalists may also reject the challenge and dismiss the issues that it raises simply by concluding that originalism, properly employed, does not produce

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1. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

2. See *id.*

3. *Id.*

4. See *id.* at 862.

5. See *id.* at 861.

6. *Id.*

7. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997).

8. *Id.*

9. See Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1033–34 (1981).

a conclusion that the Constitution allows whipping and branding or any other similarly horrible outcome.

Since the originalism movement began to take serious hold among conservative constitutional scholars in the 1980s, many progressive and libertarian scholars have joined in.<sup>10</sup> This influx of non-conservatives has continued as Justice Scalia has moved conservative originalists away from a problematic focus on the drafters' original intentions to a focus on original public meaning.<sup>11</sup> (A movement that recently culminated outside of the academy when the Supreme Court endorsed original-public-meaning originalism in *District of Columbia v. Heller*.<sup>12</sup>) As a result, significant disagreement exists among self-professed originalists over how to identify original public meaning, particularly for the more abstract clauses. Conservatives like Justice Scalia tend more than liberals and libertarians to be "narrow originalists."<sup>13</sup> These "narrow originalists" tend to argue that, even for an abstract provision like the cruel and unusual punishments clause, we should aim to "go back in a time machine and ask . . . very specific questions about how we ought to resolve very particular problems."<sup>14</sup> They tend to "view original expected applications as very strong evidence of original meaning."<sup>15</sup> In contrast, liberals and libertarians who see themselves as originalists are usually "broad originalists,"<sup>16</sup> for whom it also "matters very much what history shows," but who will find the original meaning of abstract clauses at a higher level of generality.<sup>17</sup> Broad originalists apply those more general principles in ways that the current generation would implement them, although the Framers clearly would have implemented them differently. Some broad originalists also acknowledge that certain vague clauses require a fair amount of construction, rather than interpretation alone.<sup>18</sup> Consequently, while narrow originalists might fear that Justice Scalia's call for pragmatic exceptions hints that constitutional fidelity allows more than the implementation of original meaning, broad originalists can

10. See Fleming, *supra* note 7, at 1344.

11. See Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 444–49 (2007). For more on the problems posed by a focus on the drafters' original intentions, see *infra* text at notes 346–47.

12. 128 S. Ct. 2783, 2788 (2008).

13. Fleming, *supra* note 7, at 1336.

14. Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 312 (1996).

15. See Balkin, *supra* note 11, at 449. Although Justice Scalia has moved the focus of modern originalism from original intentions to original public meaning, he has not drawn a sharp distinction between original public meaning and original expected application. See *id.* at 442–43. But see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1266 (1993) (arguing for an originalist reading characterized not as "the original application," but as "the best translated application in light of the many changes in context between the original time and now").

16. See Fleming, *supra* note 7, at 1337.

17. Sunstein, *supra* note 14, at 313.

18. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–30 (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7–14 (1999); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1191 (1987).

easily dismiss that point. They may believe that their approach “does not lead to the types of grossly objectionable results that leads Justice Scalia to be faint of heart.”<sup>19</sup> On this view, they can easily conclude that adherence to the original meaning is normatively justified.

When it comes to the Eighth Amendment, broad originalists surely do have grounds to reject Justice Scalia’s view of its original meaning. The clause on punishments is vague and its historical meaning obscure.<sup>20</sup> Moreover, modern Supreme Court doctrine under the Eighth Amendment clause comprises two major areas, and the doctrine in both areas coincides with notions of evolving decency.<sup>21</sup> One area concerns the sentences handed down by courts and includes particularly robust protections against the use of the death penalty.<sup>22</sup> The other concerns the regulation of prison conditions and the treatment of prisoners.<sup>23</sup> In this second area, the modern Court has provided significant protections for inmates against harsh prison conditions<sup>24</sup> and excessive force by prison guards.<sup>25</sup> Although none of

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19. Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 7 (2006).

20. Compare, e.g., Harmelin v. Michigan, 501 U.S. 957, 976 (1991) (Scalia, J., joined by Rehnquist, C.J.) (Eighth Amendment originally proscribed only particular forms of punishment, not disproportional punishments), with Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 136 (2004) (clause was originally meant to prohibit certain instances of invidious discrimination, in particular, efforts “to single out an offender on a morally insufficient basis for more punishment than was customarily imposed”), with Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 510 (2005) (“[T]he ban was meant to outlaw punishments that, while permissible in some circumstances, are disproportionate for the offense and the offender at hand.”), with John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) (contending that “unusual” meant “government practices that are contrary to ‘long usage’ or ‘immemorial usage’”).

21. The Court has frequently declared: “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

22. See generally LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW (2d ed. 2008); RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS (3d ed. 2006); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

23. See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS (1998); MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS (3d ed. 2002); DAVID RUDOVSKY ET AL., THE RIGHTS OF PRISONERS (rev. ed. 1983); Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211 (1980).

24. The Court has held that state officials engage in cruel and unusual punishment if they act with “deliberate indifference” regarding conditions that deprive a prisoner of an “identifiable human need, such as food, warmth, or exercise,” *Wilson v. Seiler*, 501 U.S. 294, 304–05 (1991), or that expose him to “an unreasonable risk of serious damage to his future health.” *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

these particular safeguards existed for convicts in 1791, the Court has explained that we assess what is cruel and unusual punishment differently today than did those in the Framers' era. As Justice Kennedy has asserted, "The standard itself remains the same, but its applicability must change as the basic mores of society change."<sup>26</sup> Based on this view (and the assumption that the Eighth Amendment clause is the only one in the Constitution that governs punishments), broad originalists can reject any notion that the original meaning of the Constitution would authorize whipping and branding today.<sup>27</sup> They might also feel reassured to ignore the implications of Justice Scalia's Taft lecture and to urge steadfast originalism.<sup>28</sup>

This Article aims, however, to challenge whether a commitment to the original meaning of constitutional text—even understood as broad originalism—will avoid abhorrent outcomes. The Article focuses on a central battlefield over originalism—the constitutional limits on punishment for crime. However, the Article points to relatively specific constitutional language that courts and scholars have generally neglected.<sup>29</sup>

In resolving the constitutional limits on punishment, originalists have failed to take adequate account of the Thirteenth Amendment. Abraham Lincoln called the Thirteenth Amendment "a King's cure for all the evils" caused by slavery.<sup>30</sup> He did not mention that the amendment authorized as a punishment for crime the very horror that it otherwise prohibited. Courts and scholars have only rarely discussed the slavery-as-punishment clause as it relates to the prohibition on cruel and unusual punishments in the Eighth Amendment.<sup>31</sup> As a matter of

25. Regarding claims of excessive force by prison guards, the Court has concluded that, while force may be used in "a good faith effort to maintain or restore discipline," *Hudson v. McMillian*, 503 U.S. 1, 6 (1992), it becomes cruel and unusual punishment if used "maliciously and sadistically to cause harm." *Id.* at 7. The Court has concluded that an act of force may sometimes meet this latter standard even if the inmate does not suffer serious injury. *See id.* at 9.

26. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

27. For a professedly non-originalist but, nonetheless, "historicist" account of the doctrine, see William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355 (2005).

28. The clearest articulation of this perspective came in the 2006 Taft Lecture delivered by Professor Randy Barnett, a libertarian and self-identified originalist. Barnett, *supra* note 19, at 22–23. *Cf.* Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 297 (2007) ("Scalia's originalism must be 'faint-hearted' precisely because he has chosen a[n] unrealistic and impractical principle of interpretation . . ."). For another example of a broad originalist view of the Eighth Amendment that implicitly rejects Justice Scalia's view, see Scott W. Howe, *Furman's Mythical Mandate*, 40 U. MICH. J.L. REFORM 435 (2007).

29. For an article that focuses in part on discerning the original understanding of the punishment clause by federal legislators who "drafted and passed the [Thirteenth] [A]mendment," see Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 629 (2008).

30. WILLIAM CHARLES HARRIS, *LINCOLN'S LAST MONTHS* 133 (2004).

31. *See* Ghali, *supra* note 29, at 638–42 (discussing the meaning of the term "punishment" in the two clauses). For a judicial opinion that at least acknowledges that the

originalism, however, any effort to determine the limits of permissible punishment under the Constitution must take account of the slavery-as-punishment clause in the Thirteenth Amendment.

The original public meaning of the slavery-as-punishment clause is unpleasant. The natural reading of the clause allowed for slavery, and no voices during the promulgation of the amendment in Congress proclaimed otherwise. Part I of the Article makes that point. The “ordinary meaning” of “slavery” for the “ordinary citizen”<sup>32</sup> in 1865 also contemplated severe abuse. Part II demonstrates that antebellum slave law authorized the brutal treatment of slaves in their living conditions and in the force used to compel their hard labor. This Part also demonstrates that the lawful conditions of slavery in the antebellum South were widely known in 1865.<sup>33</sup> Therefore, this history informs the original public meaning of the clause.

Post-amendment practices, discussed in Part III, confirm an original public meaning that allowed the imposition of slavery conditions on convicts. After the passage of the amendment, southern states for decades leased convicts as slaves on a large-scale basis to private parties who, as was widely known, severely abused them. Later, southern states relied heavily on state-run penal plantations, industrial prisons and chain gangs to more directly exploit prisoners, and, in the process, abused them almost as badly. Yet, before the 1960s, these practices were almost never legally challenged or condemned, except on rare occasions under nonconstitutional state law.<sup>34</sup> Thus, this post-amendment history confirms an original public meaning for the slavery-as-punishment clause that gave states a broad immunity against claims under the main prohibition in the Thirteenth Amendment of improper treatment of prisoners.

In light of the evidence discussed in Parts I through III, Part IV demonstrates that originalists of all stripes have neglected an important part of history in identifying constitutional limits on punishment. Part IV explains why the passage of the Thirteenth Amendment challenges the story that broad originalists offer about limitations on the treatment of convicts that they see in the Eighth Amendment. This Part shows that, as a matter of original public meaning, the slavery-as-punishment clause should have confined rather than subserved an expansion in the application of the Eighth Amendment. Part IV also shows that an original-public-meaning account of the Thirteenth Amendment calls for allowing more abuse of convicts than even Justice Scalia would allow in applying the Eighth Amendment. Many of the outcomes allowed by an original-public-meaning approach to the Thirteenth Amendment are abhorrent.

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slavery-as-punishment clause would undermine much of the modern constitutional protection of prisoners unless understood as superseded by the expanded application of the Eighth Amendment clause, see *Morales v. Schmidt*, 489 F.2d 1335, 1338 (7th Cir. 1973).

32. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (concluding that the words in a constitutional text should be understood as they would have been understood at the time of ratification by the “ordinary citizens”).

33. See *infra* text at notes 212–14.

34. See John J. DiIulio, *Introduction: Enhancing Judicial Capacity, in COURTS, CORRECTIONS, AND THE CONSTITUTION* 3–4 (John J. DiIulio, Jr. ed., 1990).

Part V considers the implications of abhorrent outcomes for the normative case for originalism. Traditionally, the normative case has rested on a theory of democratic consent—that “We the People” approved of the Constitution.<sup>35</sup> Many originalists now reject that justification, since citizens alive today have not adequately consented to the Constitution.<sup>36</sup> However, libertarian and liberal originalists have offered an alternative, consequentialist justification. They assert, in essence, that a core of original meanings in the document created a “legitimate” system of government that adequately protects our rights and that, to promote respect for those core written provisions, we should follow the original meanings throughout the document.<sup>37</sup> Part IV demonstrates, however, that this rationale rests on an assumption that an originalist approach will produce, at worst, some modestly “[un]happy endings,”<sup>38</sup> an assumption that the slavery-as-punishment clause undermines.

In the end, the slavery-as-punishment clause poses one of the great challenges in our Constitution to all who see themselves as original-public-meaning originalists. Even for broad originalists, an original-public-meaning approach to the clause would allow torturous punishments such as whipping and inhumane prison conditions. Those who favor, on that basis, permitting the reimposition of slavery conditions on convicts will fail, according to Justice Scalia, in their efforts to offer a normative theory of originalism with any hope of gaining currency. If Justice Scalia is correct, most originalists will either call for an exception to the implementation of the original public meaning of the clause or will simply fashion an argument—but one that does not comport with original-public-meaning originalism—that reaches the same end. They will have come to a conclusion consistent with the notion that, even for text that is relatively “concrete and specific,”<sup>39</sup> the original public meaning can be a beginning, but is not necessarily the end, in determining the meaning of the constitution.

## I. A CONSTITUTIONAL SAFE HARBOR FOR SLAVERY

The text of the Thirteenth Amendment forbids both slavery and involuntary servitude, except as a punishment for crime. The natural reading of the punishment exception permits both slavery and involuntary servitude. The text could have said something very different, such as that “slavery is prohibited; and involuntary servitude shall be permitted only as a punishment for crime.” Such language would have allowed only involuntary servitude. The actual language

35. See Balkin, *supra* note 11, at 531.

36. E.g. Barnett, *supra* note 19, at 10.

37. Barnett, *supra* note 19, at 16–19; BARNETT, *supra* note 18, at 109–13. Cf. Balkin, *supra* note 11, at 532 (asserting that, because the Constitution adequately “secures our rights and defends our values,” we should be faithful to the original meaning of the text); WHITTINGTON, *supra* note 18, at 150 (arguing that the original meaning of the Constitution “continues to enjoy authority over us, who did not ratify it, by virtue of its own commitment to self-government”).

38. Balkin, *supra* note 11, at 436 (quoting Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 560–61 (2003)).

39. Balkin, *supra* note 28, at 305.

purports to allow both, however, and there were no voices in Congress that proclaimed for it during the promulgation period any other meaning. According to *District of Columbia v. Heller*, the provision must be understood as carrying its “normal and ordinary” meaning to “ordinary citizens” at the time.<sup>40</sup> On that view, the clause permitted slavery.

### A. *The Passage of the Thirteenth Amendment in Congress*

The events surrounding the Civil War spurred passage of the Thirteenth Amendment. As part of the war effort, President Lincoln issued the Emancipation Proclamation on January 1, 1863, announcing that the United States would recognize as free any slaves in those areas not under Union control.<sup>41</sup> The proclamation did not apply to all slaves, because slave-holding continued to exist in some areas outside of Confederate control.<sup>42</sup> As a war powers action, the proclamation also would not prohibit slavery after the war.<sup>43</sup> As a result, some of the radical Republicans in Congress concluded that a constitutional amendment was essential to ensure immediate abolition everywhere and to make abolition permanent.<sup>44</sup> The absence in Congress of most of the legislators from the Confederate states also made the necessary two-thirds approval in both houses more feasible.<sup>45</sup> Lincoln had not pushed for such an amendment in the months after the proclamation.<sup>46</sup> In December, 1863, however, Republican James Ashley, of Ohio, first introduced an anti-slavery amendment in the House of Representatives.<sup>47</sup> Republicans in the Senate introduced a similar proposal a few weeks later.<sup>48</sup>

The version of the amendment that ultimately prevailed came from the Senate Judiciary Committee, chaired by Senator Lyman Trumbull from Illinois.<sup>49</sup> Senator Charles Sumner, from Massachusetts, who was not a member of the Judiciary Committee, proposed an amendment that would make all people “equal before the law,” language taken from the French Declaration of Rights of 1791.<sup>50</sup> The Judiciary Committee, however, rejected that approach and, instead, built on the suggestion of a former slave-holding senator from Missouri, John Brooks Henderson. He suggested the use of language similar to that in the Northwest Ordinance in 1787, which had included language to govern the question of slavery in the Northwest Territory. The committee ultimately chose language that closely

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40. 128 S. Ct. 2783, 2788 (2008).

41. ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 36 (2004).

42. *Id.*

43. *See id.* at 36–37; MICHAEL VORENBERG, *FINAL FREEDOM, THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 47 (2001).

44. *See* VORENBERG, *supra* note 43, at 49.

45. *See* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 444 (1989).

46. VORENBERG, *supra* note 43, at 47–48.

47. *See id.* at 49–51; Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CAL. L. REV. 171, 173 (1951).

48. VORENBERG, *supra* note 43, at 51–53.

49. *See* VanderVelde, *supra* note 45, at 449.

50. VORENBERG, *supra* note 43, at 51.



paralleled the slavery provision in the Ordinance.<sup>51</sup> However, no record of the committee's deliberations survives.<sup>52</sup>

The proposal process in Congress took more than a year. Approval came relatively quickly in the Senate, on April 8, 1864, by a vote of thirty-eight to six.<sup>53</sup> At that point, Lincoln let it be known that he also supported the amendment.<sup>54</sup> However, the House rejected it on June 15, 1864.<sup>55</sup> Support for the amendment was part of the Republican platform of 1864, although the issue largely fell by the wayside in the presidential campaigns that fall.<sup>56</sup> In October, Maryland, a border state, abolished slavery on its own.<sup>57</sup> Likewise, the Republican victories in November changed the dynamics regarding the quest for passage in the House. Buoyed by these events and his own lopsided reelection win, President Lincoln threw his full public support behind the amendment.<sup>58</sup> Although some Democrats decided to support the amendment out of moral conviction or personal political calculations, Republicans in the House also worked hard to gain Democrat support. After much cajoling, vote swapping, and patronage dealing,<sup>59</sup> the House approved the amendment on January 31, 1865, by a vote of 119 to 56, with 8 members not present.<sup>60</sup>

### *B. Ratification by the States*

Ratification by three-fourths of the states occurred relatively quickly, but not before the defeat of the Confederacy, the tragedy of Lincoln's death, and an intense campaign by federal officials to pressure officials of the ex-Confederate states. The war ended with the surrender at Appomattox on April 9, 1865.<sup>61</sup> Two days later, in his last public address, Lincoln announced that he favored a ratification process that would include the eleven ex-Confederate states,<sup>62</sup> which meant that twenty-seven of the thirty-six total states would have to ratify the amendment for it to succeed.<sup>63</sup> Despite Lincoln's assassination only three days later,<sup>64</sup> his successor Andrew Johnson continued to call for ratification by all of the states.<sup>65</sup> Johnson's reconstruction terms required that ex-Confederate states abolish

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51. *Id.* at 52–55.

52. *Id.* at 53.

53. *Id.* at 112.

54. PHILLIP SHAW PALUDAN, *THE PRESIDENCY OF ABRAHAM LINCOLN* 300 (1994).

55. VORENBERG, *supra* note 43, at 144.

56. *Id.* at 136, 174.

57. *See* FAWN M. BRODIE, *THADDEUS STEVENS: SCOURGE OF THE SOUTH* 202 (1959).

58. *See* 4 CARL SANDBURG, *ABRAHAM LINCOLN, THE WAR YEARS* 5–6 (1939).

59. *See* VORENBERG, *supra* note 43, at 199–203.

60. *Id.* at 207.

61. *See* ULYSSES S. GRANT, *PERSONAL MEMOIRS* 575–87 (Modern Library, 1999) (1885).

62. *See* TESIS, *supra* note 41, at 47.

63. *See* VORENBERG, *supra* note 43, at 222–23.

64. *See* BRUCE CATTON, *NEVER CALL RETREAT* 462 (1965).

65. VORENBERG, *supra* note 43, at 227.

slavery in their new state constitutions.<sup>66</sup> He soon demanded that they likewise ratify the federal amendment, although he also tried to cajole their approval with assurances of the amendment's restrictive scope in assuring civil rights.<sup>67</sup> Some of the southern states—including South Carolina, Florida, Alabama, and Louisiana—ratified the federal amendment only on the written condition that the federal Congress could not use the second section to legislate on freed persons' civil liberties.<sup>68</sup> In any event, eight of the eleven ex-Confederate states approved the amendment, at least conditionally, when Georgia on December 6, 1865, became the twenty-seventh state to ratify it.<sup>69</sup> Secretary of State William Seward declared the amendment adopted on December 18, 1865.<sup>70</sup>

### C. The Punishment Clause

The focus of the original debate about the Thirteenth Amendment was not on its punishment clause but on its central prohibition and its second section on enforcement. Did the amendment prohibit only a “condition of enforced compulsory service” or also certain “badges, incidents and indicia” that accompanied the racially-based chattel slavery that had existed in the antebellum South?<sup>71</sup> If the latter, just which of the incidents were prohibited and how broad was the authority of Congress to enact civil rights legislation under Section 2? Debate about those issues, which continues today, had little to do with the contours of the punishment exception. Understanding the term “slavery” for purposes of the punishment clause required not a sense of what were the minimum features of slavery or involuntary servitude, but of what were the maximum features, and the latter only required a knowledge of the conditions of antebellum slavery.<sup>72</sup> The absence of discussion on that score only implies the existence of common knowledge, even if many legislators gave little thought to the question at that time.

The language of the Thirteenth Amendment was, in some sense, the work of Thomas Jefferson, who had authored an early version of the slavery provision that appeared in the Northwest Ordinance of 1787. Jefferson had advocated for generally prohibiting slavery after 1800 but allowing slavery as a punishment for crime. His proposal had stated: “That, after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said states

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66. *Id.*

67. *See id.*

68. *See* TESIS, *supra* note 41, at 48.

69. *See* VORENBERG, *supra* note 43, at 233.

70. *See id.*

71. TenBroek, *supra* note 47, at 172. *See also* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 437 (4th ed. 2008) (noting that “the framers were not at all clear about the extent to which the amendment would prohibit legal discriminations that were the result of the slavery experience”).

72. Regarding the main prohibition, the question is whether incidents of slavery, such as racial discrimination, can violate the amendment when the defendant has not significantly restrained the alleged victim's physical freedom.

*otherwise than in the punishment of crimes* whereof the party shall have been duly convicted to have been personally guilty.”<sup>73</sup>

With the punishment clause, Jefferson built on an idea of Cesare Beccaria, the famous Italian criminologist. Beccaria’s short volume, *On Crimes and Punishments*, appeared in 1764, and Jefferson was an early admirer, copying twenty-six extracts from the work in his *Commonplace Book*<sup>74</sup> around 1775.<sup>75</sup> While Beccaria generally receives credit for having exercised through this work great influence “in the long campaign against barbarism in criminal law and procedure,”<sup>76</sup> one of his proposals contemplated brutality. He advocated perpetual slavery as an alternative to the death penalty.<sup>77</sup> Beccaria conceded that making the offender a perpetual “beast of burden”<sup>78</sup> might well be “more cruel” than death,<sup>79</sup> and he also acknowledged the historic “use of torture” against slaves—because they were seen as property and not persons—even in societies that otherwise prohibited torture.<sup>80</sup> His primary argument was not about decency, however, but about deterrence. He contended that slavery would produce greater “terror in the spectator”<sup>81</sup> and, thus, would have a greater effect on other potential criminals. He contended that while “[m]any men are able to look calmly . . . upon death,” they would not resist fear over the example of one forced to “subsist among fetters or chains, under the rod, under the yoke, in a cage of iron, where the desperate wretch does not end his woes but merely begins them.”<sup>82</sup> Unlike Beccaria, Jefferson did not advocate the abolition of the death penalty altogether.<sup>83</sup> However, when he proposed language for the Northwest Ordinance generally prohibiting slavery and indentured servitude but allowing them as punishment for crime, he apparently accepted Beccaria’s argument for slavery as an effective deterrent.

The history surrounding the adoption of Jefferson’s language by the Confederation Congress when it produced the Northwest Ordinance of 1787 suggests that the clause was not misunderstood. Jefferson had proposed the language for the earlier Northwest Ordinance of 1784, which Congress had adopted but never implemented, and the drafters had rejected his anti-slavery

73. WAGER SWAYNE, *THE ORDINANCE OF 1787 AND THE WAR OF 1861*, at 31, 32 & n.\* (1892) (emphasis added).

74. See *THE COMMONPLACE BOOK OF THOMAS JEFFERSON* 298–316 (Gilbert Chinard ed., 1926).

75. See Marcello Maestro, *A Pioneer for the Abolition of Capital Punishment: Cesare Beccaria*, 34 *J. HIST. IDEAS* 463, 467 (1973).

76. HOWARD BECKER & HARRY ELMER BARNES, *2 SOCIAL THOUGHT FROM LORE TO SCIENCE* 551–52 (Dover Publ’ns, Inc., 3d ed. 1961) (1938).

77. See *CESARE BECCARIA, ON CRIMES AND PUNISHMENTS* 45–52 (Henry Paolucci trans., Prentice Hall 1963) (1764).

78. *Id.* at 47.

79. *Id.* at 48.

80. *Id.* at 36.

81. *Id.* at 48.

82. *Id.*

83. 1 HENRY S. RANDALL, *THE LIFE OF THOMAS JEFFERSON* 227–28 (New York, Derby & Jackson 1853) (noting that he had advocated changes in Virginia to permit capital punishment only for murder and treason).

clause at that time.<sup>84</sup> The anti-slavery language in the 1787 Ordinance incorporated Jefferson's proposal in slightly different terms, which suggests that the unknown drafter carefully considered the language.<sup>85</sup> The absence of discussion in Congress<sup>86</sup> also implied that the proposal was not thought unduly vague.<sup>87</sup> People knew that the clause allowed slavery as a criminal sanction and knew what slavery entailed.<sup>88</sup>

Recorded debate over the punishment clause when the House of Representatives promulgated the Thirteenth Amendment was also minimal, although the legislative history clarifies that the clause clearly contemplated slavery. Representative Ashley's original proposal in December, 1863, stated: "Slavery, being incompatible with a free Government, is forever prohibited in the United States; and involuntary servitude shall be permitted only as a punishment for crime."<sup>89</sup> This proposal implied that there was a difference between slavery and involuntary servitude and that only the latter would be allowed as a punishment. Iowa and Kansas had included similar provisions in amendments to their constitutions in 1857 and 1859 respectively.<sup>90</sup> The change by those states may only have been an effort to disguise the practice of convict slavery.<sup>91</sup> Still, the use of this language in the Thirteenth Amendment would have provided a textual basis to conclude that prisoners, even when sentenced to hard labor, were protected in

84. William G. Merkel, *Jefferson's Failed Anti-Slavery Proviso of 1784 and the Nascence of Free Soil Constitutionalism*, 38 SETON HALL L. REV. 555, 581–82 (2008).

85. The final language stated: "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." 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).

86. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 39–40 (2001).

87. Slavery, without conviction for crime, already existed in the territory, particularly in the areas that would become Indiana and Illinois. See *id.* at 46–48. However, the document did not contain an enforcement clause, and slaves in the territory could not enforce their rights. *Id.* at 44. Slavery, without conviction, continued in the territory until 1848, when Illinois adopted its second constitution. *Id.* at 55.

88. Congress used variations on the punishment language from the 1787 Ordinance in subsequent legislation, but these actions also provide little illumination on the contours of the clause. Similar language appeared, for example, in the Missouri Compromise, banning slavery in the upper regions of the Louisiana Purchase. Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548. Such language also appeared in legislation in 1862 prohibiting slavery in the nation's capital, Act of Apr. 16, 1862, ch. 54, § 1, 12 Stat. 376, and in U.S. territories, Act of June 19, 1862, ch. 111, 12 Stat. 432.

89. SWAYNE, *supra* note 73, at 71.

90. BARBARA ESPOSITO & LEE WOOD, *PRISON SLAVERY* 212 (Kathryn Bardsley ed., 1982) (quoting IOWA CONST. art. 1, § 23 (1857) ("There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime.") and KAN. CONST. bill of rights, § 6 (1859) ("There shall be no slavery in this State; and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted.")).

91. *Id.* at 96.

some ways by the general prohibition on slavery.<sup>92</sup> However, Ashley's proposal was soon eclipsed by the proposal from the Senate Judiciary Committee allowing both slavery and involuntary servitude as a punishment for crime, which promptly passed in the Senate and became the focus of attention in the House.

Debate in the Senate during early 1864 provides the most noteworthy mentions of the punishment clause. Most of the criticisms of the Thirteenth Amendment came from a small group of legislators who believed that it "would give vast power to Congress and replace the states as the prime entity for dealing with personal rights."<sup>93</sup> Charles Sumner, an avowed abolitionist, objected to the inclusion of the punishment exception:

I understand that it starts with the idea of reproducing the Jeffersonian ordinance. I doubt the expediency of reproducing that ordinance. It performed excellent work in its day; but there are words in it which are entirely inapplicable to our time . . . . They are the limitation, "otherwise than in the punishment of crimes whereof the party shall have been duly convicted." Now, unless I err, there is an implication from those words that men may be enslaved as a punishment of crimes whereof they shall have been duly convicted.<sup>94</sup>

Sumner criticized the slightly different punishment provision in the proposed amendment not only as verbose and unstylish but as a "feature which . . . if the Senators apply their minds to it, they will see is clearly objectionable."<sup>95</sup> He was opposed to any statement that slavery might continue in any context. He had earlier urged the Senate to "clean the statute-book of all existing supports of slavery, so that it may find nothing there to which it may cling for life."<sup>96</sup> His arguments only underscored to anyone who had not already noticed the obvious, that the punishment provision allowed enslavement as a criminal sanction.

Discussion in response to Sumner's statement continued but did not focus specifically on the punishment clause. Senator Trumbull, the Chair of the Judiciary Committee, noted that the committee had carefully considered Sumner's proposals but had decided against them, although he did not clarify the reasons.<sup>97</sup> Discussion also arose over a contention by Senator Doolittle that Sumner previously had agreed to language very similar to the committee language and that Sumner seemed to be changing positions.<sup>98</sup> Further argument arose when Senator Howard criticized Sumner's alternative language providing that all persons are "free" or "equal" before the law. Howard contended that Sumner's proposal was highly

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92. See Ghali, *supra* note 29, at 627.

93. 3 ROTUNDA & NOWAK, *supra* note 71, at 437. See generally VORENBERG, *supra* note 43, at 89-114.

94. CONG. GLOBE, 38th Cong., 1st Sess. 1487-88 (1864).

95. *Id.* at 1488.

96. *Id.* at 1482.

97. *Id.* at 1487-88.

98. *Id.*

ambiguous, so much so that a wife might claim to be equal to her husband.<sup>99</sup> After these distractions, the discussion did not return to the punishment clause. Apparently, there was clarity that it allowed slavery and a common knowledge, derived from an awareness of conditions in the South, of what slavery entailed. At least, no one claimed to the contrary.

In the end, the history of the passage of the Thirteenth Amendment does not indicate that the legislators proclaimed for the punishment provision some unusual meaning. The clause on its face meant that the federal government and state governments could force duly convicted criminals to live the life of a slave. Little debate arose about what it meant to be a slave. However, the public meaning of the term "slavery" for the ordinary citizen of the time was informed by commonly recognized conditions of slavery in the antebellum period. Therefore, the Article now turns to that history.

## II. LEGAL LIMITS ON ABUSE BY SLAVE OWNERS IN ANTEBELLUM AMERICA

In the South, in the decades leading up to the Civil War, the authority of a slaveholder or his agents or family members to decide how to treat his slave was in theory regulated modestly by law, but in practice was almost without legal limits. The slave had a dual character, which caused tension in how the law viewed the master-slave relationship.<sup>100</sup> On the one hand, the slave was property and subject to the owner's discretion about how to use him and even abuse him.<sup>101</sup> On the other hand, the slave was also a person, and that meant that his owner carried not only rights but also some obligations, at least in theory, to act humanely.<sup>102</sup> The way that the law accommodated these seemingly conflicting conceptions of slave identity was by setting limits, generally vague, on harsh treatment, sanctioned usually by only small fines, and then rarely acknowledging violations. This history reveals an original public meaning for the slavery-as-punishment clause that allowed for extremely onerous living and working conditions, including a requirement of hard labor enforced by severe and intentionally inflicted corporal pain.

### *A. Legally Permitted Abuse*

Slaves in the South in the mid-1800s were commonly abused in ways that shock us today. The relationship between slaves and their owners was complex and usually governed by the views and sentiments of the owner, by the economic self-interest of the owner, and by social convention; these considerations often

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99. *Id.*

100. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 192 (1956).

101. See William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, in *SLAVERY & THE LAW* 43, 44–45 (Paul Finkelman ed., 1997).

102. See PETER KOLCHIN, *AMERICAN SLAVERY 1619–1877*, at 112 (rev. 10th anniversary ed. 2003).

weighed against extreme cruelty.<sup>103</sup> However, the life of a slave virtually always involved degradation and a denial of basic freedoms and submission and subservience, if not severe physical punishment or deprivation. Slaveholders also were not required to pass a test of intelligence, sanity, temperament, temperance, or maturity, and neither were their agents or family members. As a result, even by the denigrating standards of slavery in the mid-1800s, a significant number of slaves faced a life of special horror. This Section highlights four kinds of slave abuse that the law in slave states clearly permitted.

### *1. Intentional Infliction of Severe Corporal Pain*

A salient aspect of slave life was the fear and suffering of intentionally inflicted extreme corporal pain.<sup>104</sup> The threat of harsh physical pain was deemed essential to produce subservience in the face of the oppressive conditions that slavery otherwise imposed. The most commonly accepted method of causing pain was by whipping, frequently on the bare body.<sup>105</sup> During the seventeenth and eighteenth centuries, whipping was commonly used to punish even free men.<sup>106</sup> However, by the middle of the nineteenth century, its use had significantly declined, except on slaves, in part because of its cruelty.<sup>107</sup> Slaveholders preferred whipping because it could be inflicted rapidly and conveniently and because it would not keep the slave from working for long while it was carried out.<sup>108</sup>

Slavemasters used three types of whips. "The 'rawhide' or 'cowskin' was a savage instrument requiring only a few strokes to provide a chastisement that a slave would not soon forget."<sup>109</sup> This whip was made of about three feet of untanned cowhide that was about an inch wide at the base and that tapered to a spongy point. It would easily tear the flesh and produce permanent scarring. Less mutilating alternatives included whips that were made of wider leather straps, like belts, or plaited whips with flexible buckskin crackers at the end. While causing great pain, these alternatives did not so easily rip and scar the skin.<sup>110</sup> A badly scarred slave was generally worth less on the slave market.<sup>111</sup>

A whipping, particularly with a rawhide whip, was so torturous that it had to be carefully limited so as not to kill or permanently disable the slave.<sup>112</sup> "Usually, the slave was stripped to the waist, hands tied, and flogged on the

103. See *id.* at 73–74; Robert William Fogel & Stanley L. Engerman, *Punishment and Rewards*, in *AMERICAN NEGRO SLAVERY: A MODERN READER* 76, 77 (Allen Weinstein et al. eds., 3d ed. 1979).

104. See Jacob Manson, *Narrative*, in *BULLWHIP DAYS: THE SLAVES REMEMBER* 219 (James Mellon ed., 1988).

105. See STAMPP, *supra* note 100, at 185–86; Fogel & Engerman, *supra* note 103, at 76.

106. See Fogel & Engerman, *supra* note 103, at 77.

107. See STAMPP, *supra* note 100, at 186.

108. See Fogel & Engerman, *supra* note 103, at 78.

109. STAMPP, *supra* note 100, at 175–76.

110. *Id.* at 176.

111. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 65 (1974).

112. See Fogel & Engerman, *supra* note 103, at 76.

back.”<sup>113</sup> Drivers chosen from among the slaves were often obligated to discipline the other slaves. Plantation owners often restricted the number of lashes that drivers and white overseers could inflict, but the numbers were hardly low. For example, “[o]n Pierce Butler’s Georgia plantation each driver could administer twelve lashes, the head driver thirty-six, and the overseer fifty.”<sup>114</sup>

The frequency with which a slave was whipped depended not only on the slave’s attitude but also on the temperament and views of the master and overseer. On some plantations, whipping occurred only sporadically, while on others its use was constant.<sup>115</sup> “Some overseers, upon assuming control, thought it wise to whip every slave on the plantation to let them know who was in command.”<sup>116</sup> Some flogged the last slave who got in line for work every morning.<sup>117</sup> The failure to work vigorously and effectively in the eyes of the overseer was also grounds for a whipping.<sup>118</sup> A majority of slaveholders preferred to keep a check on their use of brutality.<sup>119</sup> However, “the prevalence of whipping was such a stark reminder of slave dependence that to the [slaves] (and abolitionists) the lash came to symbolize the essence of slavery.”<sup>120</sup>

Slaveholders also commonly inflicted physical pain through other means, some less extreme than whipping but some even more barbaric. These included the deprivation of food, chained restraint, the iron collar, the stocks and small hot boxes.<sup>121</sup> Although less routine, particularly by the middle of the nineteenth century, mutilation, by branding or other means, also had not disappeared. For example, a North Carolina slaveholder recorded in 1838 that his slave, Betty, was “burnt . . . with a hot iron on the left side of her face; I tried to make the letter M.”<sup>122</sup> Likewise, a Kentucky slaveholder in 1848 noted that his slave Jane had “a brand mark on the breast something like L blotched.”<sup>123</sup>

Evidence of corporal abuse of slaves commonly made it into southern newspapers. “If it was cruel to flog slaves so frequently and severely that their backs were permanently scarred, southern newspapers provided evidence of an abundance of this variety of inhumanity.”<sup>124</sup> The reports appeared not out of concern for the cruelty but because the nature and location of scars from whipping or branding were helpful in describing fugitive slaves whose capture and return

113. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 85 (1993).

114. STAMPP, *supra* note 100, at 175.

115. *Id.* at 176–77. See also Herbert G. Gutman, *Slave Work Habits and the Protestant Ethic*, in AMERICAN NEGRO SLAVERY: A MODERN READER 94, 104 (Allen Weinstein et al. eds., 3d ed. 1979).

116. STAMPP, *supra* note 100, at 177.

117. *Id.*

118. See GENOVESE, *supra* note 111, at 65.

119. See *id.* at 64; STAMPP, *supra* note 100, at 178.

120. KOLCHIN, *supra* note 102, at 121.

121. See *id.* at 121; GENOVESE, *supra* note 111, at 67.

122. STAMPP, *supra* note 100, at 188 (internal quotation marks omitted).

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

124. *Id.* at 186.



were sought through advertisements or sheriffs' notices.<sup>125</sup> When concern arose that northern abolitionists were reviewing southern newspapers for "atrocities," the newspapers suppressed the more graphic and specific descriptions of marks of abuse. At the same time, the number of fugitive slaves "identified more vaguely as having 'scars' or 'burns' increased."<sup>126</sup>

### 2. *Sexual Abuse*

Some female slaves were regularly subject to another form of abuse.<sup>127</sup> They were forced to have sexual intercourse with the owner or his overseers or family members.<sup>128</sup> "Sex between white men and black women was a routine feature of life on many, perhaps most, slaveholdings, as masters, their teenage sons, and on large holdings their overseers took advantage of the situation to engage in the kind of casual, emotionless sex on demand unavailable from white women."<sup>129</sup> One former slave woman reported in her autobiographical novel: "I cannot tell how much I suffered in the presence of these wrongs, nor how I am still pained by the retrospect."<sup>130</sup>

### 3. *Non-Consensual Lease or Sale*

The lease or sale of slaves, against their will, was a special form of abuse, and these transactions were "a pervasive feature of the slave South."<sup>131</sup> "Whatever its cause, the forced separation of men, women, and children from their relatives and friends constituted the most devastating experience of bondage" for them.<sup>132</sup> The separation caused by leasing was bad enough. But a sale "was one of the most dreaded events in the life of a slave."<sup>133</sup>

Renting of slaves for lengthy periods, often for work too far away for the slave to maintain contact with family and friends, was common.<sup>134</sup> The typical lease term was from "hiring day," held in communities throughout the South in early January, until the following Christmas.<sup>135</sup> Many larger businesses obtained workers by renting slaves.<sup>136</sup> Southern railroad companies, for example, generally did not own the many slaves they employed for building projects but leased them

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125. See *id.* at 186–87.

126. *Id.* at 187.

127. See generally GENOVESE, *supra* note 111, at 413–29.

128. See, e.g., Manson, *supra* note 104, at 219–22; Mary Boykin Chesnut, *A Southern White Woman Deplores Sexual Abuse*, in *THE COMPLETE HISTORY OF AMERICAN SLAVERY* 358, 358–59 (James Miller ed., 2001).

129. KOLCHIN, *supra* note 102, at 125.

130. HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF* 28 (Jean Fagin Yellin ed., 1987).

131. KOLCHIN, *supra* note 102, at 125.

132. *Id.* at 126.

133. *Id.* at 97.

134. See STAMPP, *supra* note 100, at 67–68.

135. *Id.*

136. See EUGENE D. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY* 223–24 (1965).

from their owners, sometimes from other states.<sup>137</sup> Likewise, sugar growers commonly rented slaves to help with the arduous tasks of grinding.<sup>138</sup> Even some small farmers who could not afford to keep slaves permanently sometimes rented them during years of need.<sup>139</sup> Significant increases in lease prices in the 1850s revealed a surging demand for rented slaves in the years leading up to the Civil War.<sup>140</sup>

Slaveholders also commonly sold one or more of their slaves.<sup>141</sup> Professional slave traders bought and sold slaves throughout the South. Regular auctions also existed to facilitate these transactions, some private and some conducted by courts.<sup>142</sup> One historian has estimated that, in the Upper South, slave sales disrupted about one in three first marriages among slaves and that about half of all slave children experienced separation by sale from at least one of their parents.<sup>143</sup> Often these transactions meant a lifetime absence of further contact between the family members.<sup>144</sup>

These practices not only caused painful separations but also fed into the system of corporal abuse. Lessees typically had less incentive than slaveholders to take good care of slaves, and they were more likely to subject slaves to corporal punishments and dangerous or onerous work.<sup>145</sup> The lessee's interest was in extracting as much labor from the slave during the lease term as possible without causing problems with the primary slaveholder. Also, slave leases and sales sometimes occurred because a slaveholder encountered a problem slave and wished to rid himself of the difficulty.<sup>146</sup> Some slaveholders did not relish the idea of regularly inflicting severe corporal pain. In these cases, lessees and buyers who took on the slave were usually prepared to try to induce subservience through physical force.<sup>147</sup>

#### 4. Oppressive Living and Working Conditions

Many slaves in the mid-1800s endured horrible living conditions and onerous work routines. This situation was not the convention. A majority of slaveholders, preferring that their slaves remain healthy and productive, provided

137. STAMPP, *supra* note 100, at 71–72.

138. *Id.* at 70–71.

139. *Id.* at 71.

140. Robert S. Starobin, *The Leasing of Slaves Ensured the Institution's Continuance*, in *THE COMPLETE HISTORY OF AMERICAN SLAVERY* 266, 267–68 (James Miller ed., 2001).

141. *See generally* STAMPP, *supra* note 100, at 237–78.

142. *See* Thomas D. Russell, *Slave Auctions on the Courthouse Steps: Court Sales of Slaves in Antebellum South Carolina*, in *SLAVERY AND THE LAW* 329 (Paul Finkelman ed., 1997).

143. *See* KOLCHIN, *supra* note 102, at 126.

144. *See id.* at 125–26.

145. *See* Starobin, *supra* note 140, at 267–68.

146. *See, e.g.*, STAMPP, *supra* note 100, at 154–55; Delia Garlic, *Being Sold: An Ex-Slave's Narrative*, in *THE COMPLETE HISTORY OF AMERICAN SLAVERY* 277, 278 (James Miller ed., 2001).

147. *See* GENOVESE, *supra* note 111, at 64.

them with adequate food, shelter, and clothing and did not dangerously overwork them.<sup>148</sup> However, a significant number of slaves were less fortunate. “On countless farms and plantations,” slaves received an inadequate diet of mostly corn with some salted pork; they “never tasted fresh meat, milk, eggs or fruits, and rarely tasted vegetables.”<sup>149</sup> Slave cabins were typically “cramped, crudely built, scantily furnished, unpainted, and dirty,” with open floors and unlined walls.<sup>150</sup> “[L]eaky in wet weather, drafty in cold,” they “usually did not much exceed the minimum requirements for survival” and were a serious source of disease.<sup>151</sup> Slaves also typically had insufficient clothing that turned to “tatters before the next allotment was distributed.”<sup>152</sup> The clothing did not keep them warm when the temperature dropped below freezing,<sup>153</sup> and many slaves had no shoes at all or wore them out too soon, forcing them to “limp[] about” during cold months “on frostbitten feet.”<sup>154</sup> About 75% of the adult slaves labored in agriculture as field hands,<sup>155</sup> and the convention was that they should work vigorously from “day clean” to “first dark.”<sup>156</sup> Particularly on the larger plantations, overseers often drove slaves even harder, causing them to “suffer[] physical breakdowns and early deaths because of overwork.”<sup>157</sup>

### *B. A Narrow and Ill-Enforced Duty of Care by Slave Owners*

While slave law permitted much abuse of slaves by their owners, it also purported to provide some limits. The slave was property but also a human,<sup>158</sup> even if the racially-based nature of American slavery assisted whites in viewing slaves as different—as somehow inferior persons.<sup>159</sup> If a slave committed a crime, for example, the law imposed criminal liability, “justifying this by noting that slaves were human beings with all the moral responsibility any human being would have.”<sup>160</sup> Because slaves so obviously were persons, the law could not fail to acknowledge that the owner had at least some obligations to take care of them. But the law provided only minimal protection even in theory and, in any event, the very existence of a duty of care was usually not taken seriously.

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148. See KOLCHIN, *supra* note 102, at 113–16.

149. STAMPP, *supra* note 100, at 284–85.

150. *Id.* at 294.

151. *Id.* at 294–95.

152. *Id.* at 292.

153. See GENOVESE, *supra* note 111, at 550.

154. STAMPP, *supra* note 100, at 292.

155. KOLCHIN, *supra* note 102, at 105.

156. STAMPP, *supra* note 100, at 81.

157. *Id.* at 81–82.

158. *Creswell’s Ex’r v. Walker*, 37 Ala. 229, 236 (1861).

159. See, e.g., J.H. VAN EVRIE, *Preface* to WHITE SUPREMACY AND NEGRO SUBORDINATION, OR, NEGROES A SUBORDINATE RACE, AND, SLAVERY ITS NORMAL CONDITION (2d ed. 1870), *reprinted in* A HOUSE DIVIDED 268 (Mason I. Lowance, Jr. ed., 2003).

160. MARK V. TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH 14 (2003) [hereinafter TUSHNET, SLAVE LAW].

### 1. Limited Liability of Slaveholders

Slave law purported to allow recognition of a slave's humanity to trump the slaveholder's powers of dominion and control only in narrow circumstances. Slave law sometimes allowed the common law of criminal homicide or mayhem to condemn a slaveholder who killed or maimed one of his slaves.<sup>161</sup> Slave law, through statutes, also purported to prohibit other forms of extreme though non-fatal abuse by the slaveholder.<sup>162</sup> However, by interpreting prohibitions in ways that favored slaveholders, slave law could countenance the abuse that slaveholders commonly inflicted on their human property. Generally, slave law countenanced even homicide of the slave by his owner.

#### a. Fatal Abuse

By the mid-1800s, the view was widespread, even in the South, that a slaveholder committed common-law criminal homicide if he intentionally, rather than accidentally, killed a slave who had not resisted his authority. Two relatively well-known cases exemplify this principle. In *State v. Hoover*,<sup>163</sup> the North Carolina Supreme Court upheld a murder conviction and death sentence imposed on a slaveholder, John Hoover, for intentionally killing by torturous punishment his female slave, named Mira, when she was in the late stages of pregnancy. According to the court:

He beat her with clubs, iron chains, and other deadly weapons, time after time; burnt her; inflicted stripes over and often, with scourges, which literally excoriated her whole body; forced her out to work in inclement seasons, without being duly clad; provided for her insufficient food; exacted labour beyond her strength, and wantonly beat her because she could not comply with his requisitions.<sup>164</sup>

The final beating that caused her death included a fatal blow to the head. Likewise, in *Souther v. Commonwealth*,<sup>165</sup> the Virginia Supreme Court upheld a manslaughter conviction on a slaveholder, Simeon Souther, for the killing of his male slave, Sam. The opinion reveals that Souther, along with the help of two other slaves who he enlisted, continuously beat, whipped, burned, kicked, stomped and strangled Sam for hours until they finally killed him. In both *Hoover* and *Souther*, the slaveholder intentionally killed a slave who had done nothing to challenge or resist his lawful authority, and that was criminal homicide.<sup>166</sup>

161. MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810–1860*, at 103–04 (1981).

162. See, e.g., GEORGE M. STROUD, *SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 16–19* (2d ed. 1856).

163. 20 N.C. (3 & 4 Dev. & Bat.) 500 (1839).

164. *Id.* at \*3.

165. 48 Va. (7 Gratt.) 673 (1851).

166. For another example of a slaveholder convicted of murdering his slave, see *State v. Robbin*, 48 N.C. (3 Jones) 249 (1855). See also ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 81–82* (1992) (discussing similar cases from South Carolina and Alabama).

The rule was also clear, however, that a master was free to inflict corporal pain on his slave through the commonly used methods employed against slaves and that an accidental killing that resulted from such an episode was not criminal homicide. In *Hoover*, for example, the court took pains to clarify that a “master may lawfully punish his slave; and the degree must, in general, be left to his own judgment and humanity, and cannot be judicially questioned.”<sup>167</sup> If Hoover’s beating had not been so extended and extreme, he would not have been guilty of criminal homicide even if Mira had died, as long as a court could say that the death was accidental rather than intentional.

A slaveholder could also kill a slave who resisted his lawful authority, which was another broad ground of exoneration.<sup>168</sup> At least one southern court defined the triggering conduct as any act by the slave that demonstrated “a hostile attitude” toward the master or otherwise reflected a “resist[ance toward] his dominion and control.”<sup>169</sup> Under this view, if a slave tried to resist corporal chastisement, the slave owner could kill him, and the act was not deemed criminal homicide.

These rules reveal that slave law would only rarely render the slaveholder guilty of criminal homicide for killing one of his slaves. *Hoover* and *Souther* presented extraordinary scenarios. In both cases, the torture continued for such a long period and was so violent that the intention to kill was clear. At the same time, the slave did not resist the violence. In most such killings, the slaveholder could successfully claim that the death was accidental or that the slave had resisted.

#### b. Non-Fatal Abuse

The one situation in which slave states, at least in theory, applied common-law criminal liability to non-fatal action by the master was for mayhem. This crime applied to dismemberment and maiming. In *Worley v. State*, the Tennessee Supreme Court upheld a conviction and two-year prison sentence for mayhem imposed on a slaveholder, Gabriel Worley, for castrating his twenty-one-year-old slave Josiah.<sup>170</sup> Josiah reportedly was unruly and troublesome, and Worley had tied him down and castrated him to help effect his “moral reform.”<sup>171</sup> The court was careful to note the absence of “present and immediate provocation” that would purportedly have eliminated a basis for finding “malice.” The implication was that, even in Tennessee, mayhem would not apply if the master castrated the slave in immediate response to some resistance or insurrection.<sup>172</sup> Likewise, according to one legal historian, *Worley* is the only reported case in

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167. 20 N.C. at \*3.

168. This notion was embodied in the constitution or statutes of Georgia and Tennessee. See STROUD, *supra* note 162, at 23.

169. *Dave v. State*, 22 Ala. 23, 33 (1853).

170. 30 Tenn. (11 Hum.) 172, 176 (1850).

171. *Id.* at 175.

172. See FEDE, *supra* note 166, at 115.

which an appellate court upheld a slaveholder's conviction for common-law mayhem,<sup>173</sup> raising questions about the law on this issue in other states.<sup>174</sup>

As for other non-fatal abuse, the law in all of the slave states probably exonerated the master from liability for common-law crimes. The most famous case to explain the master's expansive immunity in this context is *State v. Mann*, in which the North Carolina Supreme Court reversed an assault conviction imposed on a master for his treatment of a slave.<sup>175</sup> Mann had leased a female slave for a year, and during that time, she committed some small offense for which he chastised her, causing her to run away. Mann yelled at her to stop and when she continued to run, he shot her. The trial judge instructed the jury that a slave hirer could be liable for assault for "a cruel and unreasonable battery" on the slave, and the jury found Mann guilty. However, the North Carolina Supreme Court rejected this view and reversed the trial court's decision. In doing so, it concluded that a slave-renter had the same authority over a slave as the owner—he became, in effect, a master—although the renter might remain civilly liable to the owner for harm inflicted on the slave.<sup>176</sup> Further, the court concluded that a master could not be prosecuted for assault on his slave for two reasons. First, the court believed that "the power of the master must be absolute, to render the submission of the slave perfect."<sup>177</sup> As one commentator has noted, the goal was for slaves to think "that they were subject to their owner's complete and total control and that they had no place to appeal when they believed their owners had abused them."<sup>178</sup> Second, the court explained that even if some limits ought to exist on abuse by the master, they would have to be arbitrarily narrow and, therefore, should come from the legislature, not the courts.<sup>179</sup>

The reasoning used in *Mann* helps clarify why slaveholders, their family members, or agents were not liable for common-law rape for having forcible sexual intercourse with female slaves. In the context of the master-slave relation, sexual intercourse could not be against the will of the slave because the law viewed the slave, according to the *Mann* court, as without "will of [her] own."<sup>180</sup> This fictional perspective, although conveniently ignored when the slave was a criminal defendant, was deemed necessary to the survival of slavery. Slaves should not believe that they had grounds to question the dominance of their masters. Thus, in the view of the law, forced sex with a female slave that occurred without the

173. *See id.*

174. Constitutional provisions in some slave states, however, also stated that a master could be liable for mayhem against his slave. *See, e.g., Callihan's Ex'r v. Johnson*, 22 Tex. 596, 603 (1858); STROUD, *supra* note 162, at 23 (Georgia).

175. 13 N.C. 263 (1829). For another case in which a court held that a master could not be prosecuted for a cruel and excessive but, nonetheless, non-fatal assault on his slave, see *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678 (1827).

176. *Mann*, 13 N.C. at 265.

177. *Id.* at 266.

178. TUSHNET, SLAVE LAW, *supra* note 160, at 1.

179. *Mann*, 13 N.C. at 268.

180. *Id.* at 266.

consent of the owner was at most a trespass and was not even a trespass if the owner was the abuser.<sup>181</sup>

While common-law criminal liability provided almost no protection for the slave against the master, all southern states, except Virginia and North Carolina, passed statutes that purported to provide some minimal protections against corporal abuse.<sup>182</sup> These measures provided for only modest fines and, by legitimizing certain forms of brutality, hid behind the law's façade of purported interest in humane treatment.<sup>183</sup> In 1740, South Carolina passed the first such statute, which imposed a fine "[i]n case any person shall willfully cut out the tongue, put out the eye, castrate, or cruelly scald, burn, or deprive any slave of any limb or member."<sup>184</sup> The statute also prohibited "any other cruel punishment, other than whipping, or beating with a horsewhip, cowskin, switch, or small stick, or by putting irons on, or confining or imprisoning."<sup>185</sup> Georgia later passed a similar statute.<sup>186</sup>

Some of the slave states had statutes that did not specify the prohibited or permitted punishments of slaves by their masters except in vague terms. For example, Alabama's statute stated that "no cruel or unusual punishment shall be inflicted on any slave," and provided for a fine for any violation of from \$50 to \$1000, depending on the severity of the punishment.<sup>187</sup> Mississippi had the same statute except that it provided for a fine not to exceed \$500.<sup>188</sup> Louisiana passed a statute, enforced by a fine, providing that: "The slave is entirely subject to the will of his master, who may correct and chastise him, though not with unusual rigour, nor so as to maim or mutilate him, or to expose him to the danger of loss of life, or to cause his death."<sup>189</sup> A Texas statute, enforced by a fine, stated that the master had authority "to inflict any punishment upon the slave, not affecting life or limb, and not coming within the definition of cruel treatment, or unreasonable abuse, which he may consider necessary for the purpose of keeping him in . . . submission and enforcing such submission to his commands."<sup>190</sup> These statutes seemed designed to legitimize the use of commonly accepted, though brutal, methods of slave chastisement—such as whipping—as much as to prohibit more barbaric and unusual methods.<sup>191</sup>

Slave law also required the master to provide minimal food, shelter, and clothing for slaves and often limited the master's authority to abandon them

181. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 140–41* (8th ed. 2000).

182. See FEDE, *supra* note 166, at 111.

183. COLIN DAYAN, *THE STORY OF CRUEL AND UNUSUAL 13* (2007).

184. STROUD, *supra* note 162, at 25 (quoting statute).

185. *Id.* at 25–26 (quoting statute).

186. See LUCIAN LAMAR KNIGHT, *A STANDARD HISTORY OF GEORGIA AND GEORGIANS 225–26* (1917) (quoting statute).

187. *Turnipseed v. State*, 6 Ala. 664, 665 (1844) (quoting statute).

188. See STROUD, *supra* note 162, at 26–27.

189. LA. CIV. CODE art. 173, *quoted in* STROUD, *supra* note 162, at 26.

190. *Callihan's Ex'r v. Johnson*, 22 Tex. 596, 603 (1858) (quoting statute).

191. See DAYAN, *supra* note 183, at 12.

through manumission.<sup>192</sup> These restrictions were sometimes imposed under common-law theories of nuisance<sup>193</sup> and, in some states, under statutes that specifically imposed a minimal duty of care of this kind.<sup>194</sup> For example, a South Carolina statute required the master to provide “sufficient clothing, covering [and] food”<sup>195</sup> and a Georgia statute prohibited “withholding proper food and sustenance,” and “not affording proper clothing.”<sup>196</sup> These common-law rulings and statutes aimed to target those extreme cases where slave property had become “a threat to the health, safety, and welfare of society.”<sup>197</sup>

## 2. Pervasive Non-Enforcement

The legal duty of care owed by slaveholders to their slaves was not only narrow but also weakly enforced.<sup>198</sup> The legal systems in the slave states only rarely secured a criminal conviction against a slave owner for violating the minimal obligations that they purported to impose.<sup>199</sup> The situation was different regarding harm to a slave by a stranger or a lessee. In those cases, the systems more often imposed civil and criminal liability, because slave law sought to protect the principal owner’s property interest in the slave.<sup>200</sup> Likewise, when a slave owner so completely abandoned the care of his slaves that they became a public nuisance, the law would step in to recover the cost of care from the owner.<sup>201</sup> Otherwise, the legal systems of the slave states almost never imposed liability on slave owners for abuse.

The enforcement problems stemmed from both procedural rules and social biases favoring slaveholders. First, legal systems in slave states held that slaves could not be parties to a suit against their owners<sup>202</sup> and also could not testify against them.<sup>203</sup> Slaves were allowed to testify in some contexts, such as in certain criminal prosecutions of another slave.<sup>204</sup> However, they could not testify against a white person. Because slaves were often the crucial witnesses to illegal abuse of a slave by the owner, prosecutors could not go forward.<sup>205</sup> Second, non-slave witnesses typically refused to cooperate in such prosecutions, either because they were accomplices or were otherwise biased for the slaveholder.<sup>206</sup> A code of silence usually prevailed. Third, law-enforcement officials in slave states generally

192. See FEDE, *supra* note 166, at 131.

193. See *id.*

194. See STROUD, *supra* note 162, at 16–19.

195. *Id.* at 17 (quoting statute).

196. *Id.* at 18 (quoting statute).

197. FEDE, *supra* note 166, at 131.

198. See EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 134–35 (1984).

199. See STAMPP, *supra* note 100, at 222.

200. See FEDE, *supra* note 166, at 70–77, 100–05.

201. See *id.* at 131.

202. See STROUD, *supra* note 162, at 38.

203. See Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, in *SLAVERY AND THE LAW* 209 (Paul Finkelman, ed. 2002).

204. See *id.* at 209–10.

205. FRIEDMAN, *supra* note 113, at 91.

206. See STAMPP, *supra* note 100, at 222–23.



lacked interest in pursuing claims of slave abuse against slave owners. While southern white elites frequently extolled the slaveholder's duty to care for his slaves, little support existed in the white community for slaves in abuse cases, except in highly extraordinary circumstances.<sup>207</sup> Finally, only white males could serve as jurors,<sup>208</sup> and in cases in which a prosecutor went forward on seemingly overwhelming evidence, juries often still acquitted the slaveholder.<sup>209</sup> As a result, the laws limiting slave abuse by owners—although they represented very minimal demands—usually went unenforced.<sup>210</sup>

In the years leading up to the Civil War, it was widely known throughout the country that the law essentially left unregulated slaveholders' treatment of their slaves. Harriet Beecher Stowe had aroused abolitionist sentiment in the North and the ire of the South with her phenomenally successful 1852 novel, *Uncle Tom's Cabin*. The book depicted many of the common abuses, concluding with the dramatic fatal whipping of Tom, by Quimbo and Sambo, at the behest of their sadistic owner, Simon Legree, who was never prosecuted for criminal homicide or otherwise held liable.<sup>211</sup> In a country of only twenty-four million people, the book sold 300,000 copies in its first year, was the first novel in America to sell one million copies, and was estimated during that decade to have been read by ten persons for every copy sold.<sup>212</sup> Stowe followed the novel with a non-fiction book (also a best-seller) that discussed the reality of slave abuse and the ineffectiveness of southern laws purporting to limit it.<sup>213</sup> Abraham Lincoln was rumored to have said, only partly in jest, that Stowe was "the little woman who made the great war."<sup>214</sup> Whatever the truth of that rumor or of Lincoln's purported statement, partly because of Stowe's work, the abuses of slavery were well-known to the public at the time of the passage of the Thirteenth Amendment.

This history of the legal boundaries on owners' treatment of slaves in the Antebellum Era illuminates the original public meaning of the slavery-as-punishment clause in the Thirteenth Amendment. The antebellum evidence supports an original meaning that allowed for extremely harsh treatment of prisoners, including intentionally inflicted corporal pain, such as whipping on the bare skin, leasing to private parties, forced labor in dangerous environments, and

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207. See FRIEDMAN, *supra* note 113, at 91.

208. *Id.* at 242.

209. See STAMPP, *supra* note 100, at 223.

210. Appellate courts also sometimes reversed convictions for slave abuse on spurious grounds. See, e.g., *Turnipseed v. State*, 6 Ala. 664 (1844).

211. See HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* 406–09 (Amanda Claybaugh ed., Barnes & Noble Classics 2004) (1852).

212. See Amanda Claybaugh, *Introduction* to HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* xiii (Amanda Claybaugh ed., Barnes & Noble Classics 2004) (1852).

213. HARRIET BEECHER STOWE, *A KEY TO UNCLE TOM'S CABIN* (Inkling Books 2005) (1853). Well-known legal treatises on slave law from the era also explained why southern laws purporting to limit abuse were ineffectual. See also STROUD, *supra* note 162, at 16–28; WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* 165 (1853).

214. Claybaugh, *supra* note 212, at xvii.

subjugation to unhealthy and miserable living conditions. On these points, the history of antebellum slavery is clear.

### III. TREATMENT OF CONVICTS IN THE SOUTH AFTER 1865

The treatment of convicts, especially in the South, in the decades immediately after the passage of the Thirteenth Amendment confirms that the original meaning of the amendment did little to protect prisoners from abuse.<sup>215</sup> Convict treatment quickly regressed to the point that many “black prisoners would suffer and die under conditions far worse than anything they had ever experienced as slaves.”<sup>216</sup> Some of the initial exploitation and abuse stemmed from political and economic uncertainties that immediately followed the war<sup>217</sup> and a desire by concerned southern whites to “subordinat[e] a volatile black population.”<sup>218</sup> However, the depravations continued for many decades, fueled by the prospects of extracting large economic benefits from convict labor.<sup>219</sup> Throughout this period, widespread criticism of southern punishment practices arose, not only in the North, where penological practices had progressed,<sup>220</sup> but in the South as well.<sup>221</sup> Yet, humane reform did not come about until the middle of the twentieth century,<sup>222</sup> and throughout this period virtually the only legal condemnations of these practices arose through rare and isolated actions under nonconstitutional state laws.<sup>223</sup> The practices were not challenged under the main prohibition in the Thirteenth Amendment, despite jurisdiction in the federal courts to hear such claims,<sup>224</sup> or specifically restricted by federal legislation, although section two of

215. See JAMES Q. WHITMAN, *HARSH JUSTICE* 176–77 (2003).

216. DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* 35 (1996).

217. AYERS, *supra* note 198, at 191.

218. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 198 (1988).

219. See, e.g., AYERS, *supra* note 198, at 186; J. THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* 145–46, 162 (1976).

220. Blake McKelvey, *Penal Slavery and Southern Reconstruction*, 20 *J. NEGRO HIST.* 153, 178–79 (1935).

221. See, e.g., AYERS, *supra* note 198, at 197, 211–14, 218; SELLIN, *supra* note 219, at 148–49.

222. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 375–82 (2008).

223. For reported cases, see, for example, *Wiegel v. Brown*, 194 F. 652 (8th Cir. 1912) (prison contractor liable for illegal whipping); *Tillar v. Reynolds*, 96 Ark. 358 (1910) (farm owner in charge of leased convict liable for whipping death); *Dalheim v. Lemon*, 45 F. 225 (Cir. Ct. D. Minn. 1891) (contractor liable for inmate injuries); *Edwards v. Pocahontas*, 47 F. 268 (Cir. Ct. W.D. Va. 1891) (municipal corporation liable for injuries due to harmful jail conditions); *Boswell v. Barnhart*, 96 Ga. 521 (1895) (contractor liable for inmate death); *Dade Coal Co. v. Haslett*, 83 Ga. 549 (1889) (contractor liable for inmate injuries). See also *Hall v. O’Neil Turpentine Co.*, 56 Fla. 324 (1908) (contractor and subcontractor liable to municipality for escaped prisoner). Although rare, several of these decisions support the absence of common-law immunity of private lessees for harm to convicts. See *Richardson v. McKnight*, 521 U.S. 399, 405–06 (1997).

224. See *infra* text at notes 334–35.

the amendment provided broad authorization for federal enforcement legislation. This history supports an original public meaning for the slavery-as-punishment clause that gave states expansive immunity from claims that their abuse of convicts violated the principal prohibition in the Thirteenth Amendment.

### *A. Convict Lease Systems*

In the years immediately following the Civil War, the southern states came to rely heavily on convict-lease systems to handle their prisoners, and those systems led to a dark history of savagery that matched the worst abuses of slavery.<sup>225</sup> Some convict leasing had occurred in the decades before the war in both slave and free states.<sup>226</sup> Sporadic leasing of prisoners also occurred outside of the South after the passage of the Thirteenth Amendment.<sup>227</sup> However, the southern leasing systems that arose after 1865 were unprecedented in the number of prisoners involved,<sup>228</sup> in the heavy use of black prisoners<sup>229</sup> and in the nearly unfettered control given to the leasing parties.<sup>230</sup> The result was that widespread corporal abuse, torture, and prisoner killings swept into the systems.<sup>231</sup>

Virginia was the only ex-Confederate state that avoided a heavy reliance on convict leasing in the two decades after 1865, but even Virginia did not avoid leasing entirely.<sup>232</sup> Most southern penitentiaries had been destroyed by Union troops or had otherwise fallen apart during the war.<sup>233</sup> At the same time, many thousands of poor African-Americans quickly came into southern criminal justice systems, some after legitimate convictions and others after the application of newly enacted “Black Codes” designed primarily to ensnare and control them.<sup>234</sup> For a variety of political, social, and economic reasons, southern officials felt justified in leasing these ex-slaves in the effort to rebuild the southern infrastructure, including its railroads and many of its major enterprises.<sup>235</sup>

The pattern of prisoner leasing caught on quickly after the war. In 1866, Alabama governor Robert Patton leased 374 state prisoners for six years to a company controlled by the Alabama and Chattanooga Railroad, of which Patton soon became president.<sup>236</sup> That same year, Louisiana leased 45 prisoners to the

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225. See, e.g., MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928*, at 36–38 (1996); McKelvey, *supra* note 220, at 171, 179.

226. See AYERS, *supra* note 198, at 66–69.

227. See MANCINI, *supra* note 225, at 5.

228. See generally McKelvey, *supra* note 220, at 165–72 (discussing conditions in prisons and lease camps during Reconstruction).

229. See, e.g., BLACKMON, *supra* note 222, at 20.

230. McKelvey, *supra* note 220, at 175.

231. See, e.g., FRIEDMAN, *supra* note 113, at 95.

232. See MANCINI, *supra* note 225, at 5–9.

233. AYERS, *supra* note 198, at 186–87.

234. KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865–1877*, at 79–81 (1972).

235. McKelvey, *supra* note 220, at 178.

236. BLACKMON, *supra* note 222, at 54.

Baton Rouge, Grosse Tete and Opelousas Railroad.<sup>237</sup> Later in 1866, Texas leased 250 prisoners to local railroad concerns.<sup>238</sup> Arkansas began leasing its prisoners in 1867 to a firm know as Hodges, Peay, and Ayliff, which set them to work on a plantation.<sup>239</sup> In early 1868, Georgia leased 100 prisoners to one local railroad company and soon sent additional groups of 139 and 109 prisoners to two other rail lines.<sup>240</sup> Mississippi rented 241 prisoners in 1868 to the state's largest cotton planter.<sup>241</sup> In 1869, Florida leased half of its prisoners, and Florida convicts soon found themselves working in railroad construction and in swampy turpentine forests infested with alligators and serpents.<sup>242</sup> In 1871, Tennessee leased its nearly 800 state prisoners to a founding partner in the Tennessee Coal, Iron & Railroad Company.<sup>243</sup> North Carolina began leasing its prisoners in 1872 and South Carolina in 1877. By 1880, every former Confederate state except Virginia was renting a large proportion of its state prisoners to lessees interested in exploiting their labor for private gain.<sup>244</sup>

Usually the lessee assumed complete custody and control of the prisoners. The lessee agreed to provide the prisoners with food, shelter, and clothing and to ensure that they did not escape.<sup>245</sup> In return, the lessee could exploit their labor and use force as necessary to make them work.<sup>246</sup> Although the agreements contemplated that the lessee assumed both rights and obligations, the state generally "paid no attention to the prisoners whatever" after the transfer of custody, thus undermining the lessee's sense of obligation.<sup>247</sup>

The results were "closer to the experience of the concentration camps than [to] slavery."<sup>248</sup> "The lessees . . . worked black bodies as hard as they could."<sup>249</sup> "Using shackles, dogs, whips, and guns, they created a living hell for the prisoners."<sup>250</sup> Punishment was usually with the whip. Lessees, however, also came up with more insidious methods. For example, one form of "torture," known as

237. See MANCINI, *supra* note 225, at 145.

238. BLACKMON, *supra* note 222, at 54.

239. See MANCINI, *supra* note 225, at 117–18.

240. BLACKMON, *supra* note 222, at 54.

241. See *id.* at 55.

242. See MANCINI, *supra* note 225, at 183–85; J.C. POWELL, THE AMERICAN SIBERIA, OR FOURTEEN YEARS' EXPERIENCE IN A SOUTHERN CONVICT CAMP 7–11, 27 (Patterson Smith 1970) (1891).

243. BLACKMON, *supra* note 222, at 55.

244. SELLIN, *supra* note 219, at 147–62. See also William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 55 (1976).

245. See, e.g., OSHINSKY, *supra* note 216, at 35 (discussing Mississippi lease agreement under which lessee agreed "to feed them, clothe them, guard them, and treat them well").

246. E.g. McKelvey, *supra* note 220, at 160 (noting that states generally "entrusted discipline to the lessees").

247. See MANCINI, *supra* note 225, at 15.

248. *Id.* at 37.

249. FRIEDMAN, *supra* note 113, at 95.

250. Cohen, *supra* note 244, at 55.

“watering,” became “quite notorious because of its dangerous consequences.”<sup>251</sup> Guards held the prisoner on his back and poured a stream of water over his face, some of which got into the lungs, producing a drowning-like experience.<sup>252</sup> Another technique was to hang a prisoner by his thumbs, pulling them from their joints and, in some cases, permanently deforming them “so that they were quite as long as [the] index fingers,” giving the prisoner’s hands the appearance of “the paws of certain apes.”<sup>253</sup> Stocks were also used but were raised so that the inmate had to stand for long periods on his toes, endangering both his health and his life.<sup>254</sup> Many of the punishments bore “no discernible connection to production or even security” but seemed to be “mere expressions of hatred, self-disgust, and a will to power.”<sup>255</sup>

Under antebellum slavery, slaveholders or lessees typically had economic incentives to take some care of their slaves or, if nothing else, perhaps some sense of duty instilled by southern social conventions not to destroy them.<sup>256</sup> By contrast, lessees under convict-lease systems had little incentive to preserve the working value or even the lives of the prisoners. The lessees almost never faced liability for killing a prisoner,<sup>257</sup> lease rates for prisoners were low,<sup>258</sup> and states could provide a relatively abundant supply of new convicts once those previously leased had died.<sup>259</sup> Lessees could maximize profits by working prisoners onerously, often to disability or death, or by killing them through punishment if they failed to produce.

A legislative committee in Mississippi in the 1880s discovered the conditions of one group of convicts leased by the owners of a railroad to build tracks through the Canay swamps, south of Hattiesburg. The area was infested with malaria,<sup>260</sup> and contractors of free labor would not build through it.<sup>261</sup> Rented convicts had no choice. The prisoners worked in swamp muck up to their knees, while virtually nude and chained together at their bare feet.<sup>262</sup> They had to urinate and defecate as they worked, “their thirst driving them to drink the water in which they were compelled to deposit their excrement.”<sup>263</sup>

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251. McKelvey, *supra* note 220, at 175 & n.57; MARY ELLEN CURTIN, *BLACK PRISONERS AND THE THEIR WORLD, ALABAMA, 1865–1900*, at 69 (2000) (discussing use of this “torture” on Alabama lease convicts).

252. This technique, known as “waterboarding” in the modern era, was revived by United States government officials after the bombing of the World Trade Center to coerce certain terrorist suspects during interrogations. See Scott Shane, *An Elusive Starting Point on Harsh Interrogations*, N.Y. TIMES, June 11, 2008, at 16.

253. POWELL, *supra* note 242, at 15.

254. GEORGE W. CABLE, *THE SILENT SOUTH* 160 (1907).

255. MANCINI, *supra* note 225, at 75.

256. See McKelvey, *supra* note 220, at 171.

257. BLACKMON, *supra* note 222, at 56.

258. AYERS, *supra* note 198, at 193.

259. See MANCINI, *supra* note 225, at 37.

260. See OSHINSKY, *supra* note 216, at 44–45.

261. AYERS, *supra* note 198, at 193.

262. See OSHINSKY, *supra* note 216, at 45.

263. *Id.* (quoting *Report of the House Investigating Committee*, MISS. HOUSE J. app. at 3–4 (1888)).

In Florida, in the 1870s, a railroad owner leased convicts to build through the virgin tropical marshes east of Lake Eustace. As reported by J.C. Powell, a former convict-lease supervisor, the prisoners were sent in with no provisions for shelter and few supplies.<sup>264</sup> They attempted to make huts of anything they could find, but during heavy rains, they would wake up already submerged in “mud and slime.”<sup>265</sup> They soon consumed the food supplies and “were driven to live as the wild beasts, except that they were only allowed the briefest intervals from labor to scour the woods for food.”<sup>266</sup> They were forced to dig up and eat roots or anything else they could find. To maintain order, guards “tortured” them “for minor infractions,” and some “were whipped to death.”<sup>267</sup> Soon, they were ravaged by disease, including dysentery, which reduced them “to a point of emaciation difficult to describe.”<sup>268</sup> They suffered “skin maladies,” and “scurvy and pneumonia ran riot.”<sup>269</sup> Of the seventy-two convicts sent in, only twenty-seven survived.<sup>270</sup>

In Alabama, lessees put rented convicts to work not only in railroad construction and agriculture but in dangerous coal mines. In the 1870s, the Eureka mine, owned by Daniel Pratt, was the most important coal mine in the state.<sup>271</sup> In 1877, Pratt began leasing prisoners to operate a separate set of mines at Eureka. Prisoner Ezekiel Archey recounted a daily struggle to survive.<sup>272</sup> Convicts lived and worked in chains. Although the inadequately shored-up mines were constantly collapsing, the prisoners had little choice but to toil to their death. Guards whipped those who failed to submit and, if that didn’t work, they tortured them with the “water punishment.”<sup>273</sup> Prisoners who tried to escape were frequently tortured to death. A nearby resident reported that dogs were allowed to maul one helpless escapee long after he begged to have them taken off. A supervisor then took a leather strap, wet it and beat the naked inmate unmercifully for over half an hour. He died a few hours later.<sup>274</sup>

Mortality rates of leased convicts throughout the South were generally high and often shocking. As many as three-quarters of southern convicts in the late 1800s were in their twenties or younger; many were under age fifteen.<sup>275</sup> Nonetheless, they often did not last more than a year or two in the lease systems. For example, in 1870, 41% of Alabama’s leased convicts died.<sup>276</sup> In South Carolina, between 1877 and 1880, 44.9% perished.<sup>277</sup> “Tennessee boasted a model

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264. See POWELL, *supra* note 242, at 12.

265. *Id.*

266. *Id.*

267. OSHINSKY, *supra* note 216, at 56.

268. POWELL, *supra* note 242, at 12.

269. *Id.*

270. See OSHINSKY, *supra* note 216, at 56.

271. CURTIN, *supra* note 251, at 68.

272. *Id.* at 69.

273. *Id.*

274. *Id.*

275. AYERS, *supra* note 198, at 199.

276. *Id.* at 200.

277. Cohen, *supra* note 244, at 56.

leasing program, but during the biennium 1884–1885, when she had an average of 600 prisoners, there were 163 deaths.<sup>278</sup> In Louisiana, in 1881, the death rate was 14%, and, in Mississippi, in 1887, it was 11%.<sup>279</sup> In Virginia, among a group of 260 inmates leased to a railroad in 1881, the death rate was also 11%.<sup>280</sup> In Mississippi, “[n]ot a single leased convict ever lived long enough to serve a sentence of ten years or more.”<sup>281</sup> In contrast, annual death rates among prisoners in New Hampshire, Ohio, Iowa, and Illinois from 1881 through 1885 were just over 1%.<sup>282</sup>

Public opposition to the convict-lease systems arose almost from the start,<sup>283</sup> but criticism was insufficient to bring about their end for many years. Members of the 39th Congress attempted to pass a resolution in 1867 articulating a limited purpose for the slavery-as-punishment clause that disallowed convict leasing. Although their efforts ultimately failed, the resolution certainly underscored the fact that many legislators regretted the language of the Thirteenth Amendment, which they wished said something other than what it actually said.<sup>284</sup> In subsequent years, northern newspapers, including the *New York Times*, often

278. *Id.*

279. *See* MANCINI, *supra* note 225, at 67.

280. CABLE, *supra* note 254, at 170.

281. OSHINSKY, *supra* note 216, at 46.

282. Cohen, *supra* note 244, at 56.

283. *See* MANCINI, *supra* note 225, at 219.

284. Representative John Kasson, of Iowa, proposed the resolution after noting that some states were taking advantage of the clause to reinstitute slavery on those convicted of crime, particularly blacks, by auctioning them as slaves to the highest bidder. CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867). He urged passage of a resolution stating that the purpose of the amendment was to:

[P]rohibit 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 under the immediate control of officers of the law and according to the usual course thereof, to the exclusion of all unofficial control of the person so held in servitude . . . .

*Id.* In the 39th Congress, the seats of the former Confederate states in both the House and the Senate remained vacant, thus, reducing the number of voices in opposition. As a result, the resolution passed easily in the House of Representatives, with 121 in favor, 25 against and 45 not voting. *Id.* at 348. However, the resolution was postponed “indefinitely” in the Senate. *Id.* at 1600.

Although the original public meaning of the punishment clause, not the intent of the federal legislative proponents, should be the important measure for originalists, see *infra* text at notes 347–48, abandonment of the resolution in the Senate raises doubt that the actual authors of the Thirteenth Amendment agreed with the resolution. The discussion and vote in the House may provide evidence that many House members had not thought very carefully about the effects of the language of the amendment. However, even that conclusion would have little, if any, bearing on the original public meaning. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2805 (2008) (noting the relative unimportance of post-enactment statements of legislators regarding their purposes in determining the public understanding of the constitutional text).

wrote of the horrors facing southern prisoners.<sup>285</sup> Southern black newspapers also frequently decried the systems.<sup>286</sup> From time to time, a particularly outrageous series of abuses would also arouse enough concern to spur a state legislative hearing or a grand jury investigation.<sup>287</sup> Even some southern white newspapers sometimes called for the end of leasing, and they did so with increasing frequency over time.<sup>288</sup> Despite the criticisms, however, there were also over-abundant efforts through much of the late 1800s in state government reports and in the southern press to whitewash the picture of prisoner conditions and extol the public revenue benefits of leasing.<sup>289</sup> States gained too much financially from the systems to abandon them easily.

Eventually, objections to convict leasing forced its demise. South Carolina became the first state to abolish the practice in 1885,<sup>290</sup> and other states began abandoning their systems in the 1890s,<sup>291</sup> although the last state, Alabama, did not end its program until 1928.<sup>292</sup> The opposition was not based entirely, or even principally, on humanitarian concerns.<sup>293</sup> Free labor groups launched some of the most influential opposition.<sup>294</sup> A desire by elected officials in some states to neuter the opposing political power of the wealthy lessees was a primary cause.<sup>295</sup> Concern over the large number of convict escapes also provoked a stir.<sup>296</sup> The declining costs of free but essentially indentured black laborers also contributed.<sup>297</sup> In some cases, the desire to avoid northern criticisms may also have played a part.<sup>298</sup> The proof that the explanation for abolition was not entirely or even mostly humanitarian finds support in the practices that replaced leasing, which were “essentially a reallocation of forced labor from the private to the public sector,” and which were only modestly less cruel to prisoners.<sup>299</sup>

### ***B. Penal Plantations, Industrial Penitentiaries, and Chained Road Gangs***

As southern states abandoned convict leasing, they moved toward three other plans to exploit the labor of state prisoners, all of which also often involved great cruelty. States in the southwestern section—Mississippi, Louisiana, Arkansas, and, to a lesser extent, Texas—made farming operations on penal

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285. See, e.g., CURTIN, *supra* note 251, at 70.  
 286. *Id.* at 71.  
 287. See OSHINSKY, *supra* note 216, at 48–49; ROBERT DAVID WARD & WILLIAM WARREN ROGERS, *CONVICTS, COAL, AND THE BANNER MINE TRAGEDY* 39–41 (1987).  
 288. AYERS, *supra* note 198, at 217–18.  
 289. See, e.g., CURTIN, *supra* note 251, at 67–68.  
 290. See SELLIN, *supra* note 219, at 158.  
 291. AYERS, *supra* note 198, at 221–22.  
 292. See MANCINI, *supra* note 225, at 116.  
 293. See Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 607–08 (1989).  
 294. AYERS, *supra* note 198, at 211–16.  
 295. See MANCINI, *supra* note 225, at 221.  
 296. See OSHINSKY, *supra* note 216, at 51.  
 297. BLACKMON, *supra* note 222, at 352.  
 298. See AYERS, *supra* note 198, at 219 (“Southerners could not stand to hear their penal practices denounced by Northerners.”).  
 299. MANCINI, *supra* note 225, at 221.



plantations the core of their systems.<sup>300</sup> States in the upper South—West Virginia, Kentucky, and Tennessee, along with Virginia, which had largely avoided convict leasing—focused heavily on industrial prisons operating on contract arrangements.<sup>301</sup> States in the Southeast—Georgia, North Carolina, South Carolina, Florida, and Alabama—spurred by a good-roads movement, focused on chained road gangs.<sup>302</sup> The requirement that able prisoners stay busy at productive labor was not the evil of these systems. The “enforced idleness” of convicts in northern prisons was hardly better in its influence on character.<sup>303</sup> Instead, it was the “fearful brutalities” that typically infected these systems that cast a pall over their existence.<sup>304</sup>

Mississippi offered the penal plantation system that other plantation states modeled, and prisoners there were typically abused as badly as antebellum field slaves. Just after the turn of the century, the Mississippi legislature purchased 20,000 acres of swamp land for penal plantations, with the biggest tract—known as the Parchman place—covering forty-six square miles in the Yazoo-Mississippi delta.<sup>305</sup> The state cleared and drained the area, and then divided it into fifteen field camps, each with a long wooden “cage” where prisoners ate and slept. The camps were separated by race and sex, but rape of both female and male convicts was common.<sup>306</sup> First offenders mixed with the worst recidivists and boys—some as young as twelve and thirteen—mixed with adults. By the early 1900s, the state began sending most of its felony convicts, about 90% of whom were black, to Parchman.<sup>307</sup> The goal was to produce as much cotton as possible.

The organizational approach built on the antebellum slave system. Each camp had a white sergeant who lived on the grounds. The pay was very poor, but extra benefits accrued from the sergeants’ personal use of convict servants, and many sergeants occupied the job for life. The camps were largely isolated, and the sergeants were almost entirely unsupervised. “Some of them were alcoholics; a few were sadists.”<sup>308</sup> Just as in the slavery era, these sergeants selected “drivers” from among the convicts and organized work groups in gangs. The sergeant also chose trustees from among the prisoners, based on both their reliability and their willingness to intimidate and brutalize other inmates. During the field work, trustees stood guard, with guns, and would shoot any inmates who tried to escape. The drivers and trustees lived separately from the regular convicts, and their survival depended on their continuing ability to please the white sergeant, because the regular convicts hated them.<sup>309</sup>

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300. See Blake McKelvey, *A Half Century of Southern Penal Exploitation*, 13 SOC. FORCES 112, 115–16 (1935).

301. See *id.* at 120–21.

302. See *id.* at 117–20.

303. See *id.* at 122.

304. *Id.*

305. See OSHINSKY, *supra* note 216, at 109, 137.

306. See *id.* at 172, 250.

307. *Id.* at 137–38.

308. *Id.* at 150.

309. See *id.* at 139–41.

The life of the regular convict depended on the particular sergeant under whom he served, but often was a dangerous struggle to survive.<sup>310</sup> The work quotas were high, and the heat was often extreme, without escape from the sun. Convicts "routinely collapsed from sunstroke and overwork," and some died.<sup>311</sup> Nonetheless, the goal of the plantation was cotton production above all else, and the sergeants tended to push the prisoners to exhaustion despite the dangers to their health. Prisoners generally worked from dawn until sundown with a thirty-minute lunch break in the field. According to one inmate, the food "was full of bugs and worms."<sup>312</sup> The drivers also carried whips and used them on lagging inmates. The failure to meet quota, along with other common offenses, such as showing disrespect, was grounds for a whipping of up to fifteen lashes. Escape attempts typically resulted in death by shooting, with the trustee shooter quickly pardoned. Other escape attempts carried the "unspeakable penalty" of a whipping without limits.<sup>313</sup> At Parchman, the favored instrument was a leather strap, about three feet long. The inmate was stripped and held on the ground. Typically the sergeant carried out the torture.<sup>314</sup>

The industrial penitentiaries that took hold in the Upper South after the turn of the century were typically no less brutal than the prison plantations. Tennessee, for example, established a prison for coal mining at Brushy Mountain. Prisoners were forced through the threat and infliction of the lash to work in a dangerous and "unsanitary fire trap."<sup>315</sup> Soon, Tennessee also sent prisoners to its "seriously overcrowded" industrial prison near Nashville. The prisoners were contracted out to work at various tasks and were pushed relentlessly. In 1911, the governor, Malcolm Patterson, admitted that the prisons were "inhuman, unchristianlike, and not becoming to a great State and progressive people."<sup>316</sup> While Virginia provided more progressive and thoughtful institutions, West Virginia and Kentucky had industrial prison systems that were as degrading and brutal as those in Tennessee.<sup>317</sup>

Chain gangs in the southeast may have been the most brutal form of convict exploitation that followed the lease systems. North Carolina counties began using them shortly after the Civil War to exploit the labor of prisoners convicted of less serious crimes to build and maintain county roads.<sup>318</sup> After the demise of convict leasing of state prisoners, southeastern states also began sending their state prisoners to chain gangs as part of statewide efforts to improve roads.<sup>319</sup>

The convicts typically lived in rolling cages that resembled those used for animals in a circus, except that convicts were crowded into them in much greater

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310. *See id.* at 140–52.

311. *Id.* at 144.

312. *Id.* at 144.

313. *Id.* at 150.

314. *See id.* at 149–50.

315. *See McKelvey, supra* note 300, at 120.

316. *See id.*

317. *See id.* at 120–21.

318. *See SELLIN, supra* note 219, at 164.

319. Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict is a Slave,"* 59 J.S. HIST. 85, 85–86 (1993).

numbers.<sup>320</sup> Often a wheeled cage that was only nine feet wide by twenty feet long contained eighteen bunks with thin, dirt-encrusted mattresses.<sup>321</sup> "These . . . cages, constructed with two layers of bunks so that it was impossible to stand erect in them, . . . were filthy enough for sleeping purposes, but as living quarters from Saturday noon until Monday morning they were unspeakably vile."<sup>322</sup>

Reports from the 1920s through the 1940s revealed that convicts on chain gangs also confronted many other cruelties. They faced hard and continuous labor from dawn until dusk.<sup>323</sup> The food was often meager, not to mention rotten and bug-ridden. Bathing facilities were typically no more than a bucket of water. Medical treatment was often unavailable.

And above all, corporal punishment and outright torture—casual blows from rifle butts or clubs, whipping with a leather strap, confinement in a sweatbox under the southern sun, and hanging from stocks or bars—was meted out for the most insignificant transgressions, particularly to African Americans who were the majority of chain-gang prisoners.<sup>324</sup>

Better treatment could hardly have been expected from the unsupervised guards, who were typically uneducated white men from the rural South, with racist attitudes and often of doubtful character.<sup>325</sup>

For many years after the abandonment of the lease system, investigators complained that the chain gangs were no more humanitarian than the lease systems.<sup>326</sup> The focus under both systems on the financial benefits of exploiting forced labor tended to make them similar regarding the treatment of convicts.<sup>327</sup> The financial benefits also helped explain why the abuses continued for many decades.

The brutalities of southern penal exploitation did not significantly diminish until the second half of the twentieth century. The chain gangs did not disappear until the 1950s. Whipping and other torturous punishments in the less publicly conspicuous settings of the penal plantations and prisons did not disappear in all states until even later. For example, in 1966, a state investigation of the Tucker penal plantation in Arkansas revealed brutal conditions and practices that smacked of antebellum slavery, except that the prisoners at Tucker were white.<sup>328</sup> Arkansas was the last state to allow the use of whips in its prisons, and convicts at Tucker were still constantly whipped with a leather strap.<sup>329</sup> Many were tortured, "wire pliers being used to pinch fingers, toes, noses, ears, or genitals, and

320. See McKelvey, *supra* note 300, at 117.

321. Lichtenstein, *supra* note 319, at 93.

322. See McKelvey, *supra* note 300, at 117.

323. Lichtenstein, *supra* note 319, at 93.

324. *Id.*

325. See FRANK TANNENBAUM, DARKER PHASES OF THE SOUTH 78–79 (1924).

326. See Lichtenstein, *supra* note 319, at 93. See generally ROBERT E. BURNS, I AM A FUGITIVE FROM A GEORGIA CHAIN GANG! (1932).

327. Lichtenstein, *supra* note 319, at 107.

328. See SELLIN, *supra* note 219, at 172–75.

329. See *id.* at 175.

needles inserted under the fingernails."<sup>330</sup> The worst torture was an electricity-generating device hooked up to the inmate's big toe and penis to deliver shocks that would make the prisoner all but pass out.<sup>331</sup> The plantation administrators apparently concluded that using these corporal punishments was essential to force convicts to engage in hard labor. Moreover, the focus at Tucker, as throughout most of the South after the Civil War, was labor exploitation and retribution. "Systems which looked upon the convict as a slave did not offer much room for programs of rehabilitation."<sup>332</sup>

This history of the treatment of southern prisoners in the century after 1865 supports the conclusion that the original public meaning for the Thirteenth Amendment was to permit slavery as a punishment for crime despite the main prohibition on slavery. The long and continuous history of brutalities against prisoners across most of the South went unchallenged in the courts under the main prohibition in the amendment, although the Civil Rights Act of 1871<sup>333</sup> enabled federal courts to hear claims for money damages or equitable relief for a violation committed by persons acting under color of state authority.<sup>334</sup> Likewise, the brutalities went unrestricted by specific federal legislation, despite the authorization under section two for Congress to enforce the amendment with legislation. This history supports an original public meaning for the slavery-as-punishment clause that shielded states and their agents from claims that abusive or dangerous treatment of prisoners violated the main prohibition in the amendment.<sup>335</sup>

From an originalist perspective, how does this original meaning of the Thirteenth Amendment bear on the modern limits on criminal punishment? Part IV

330. *Id.*

331. *See id.*

332. *Id.* at 176.

333. Civil Rights Act of 1871, 17 Stat. 13, § 1 (1871) (codified at 42 U.S.C. § 1983).

334. Although the 1871 Act was designed primarily to enforce the Fourteenth Amendment, and the Supreme Court, in the *Slaughter-House Cases*, 83 U.S. 36 (1873), interpreted the rights protected by the Fourteenth Amendment narrowly, the Court also made clear that "the rights secured by the thirteenth . . . amendment" were part of the privileges and immunities "of a citizen of the United States" protected by the Fourteenth Amendment. *See id.* at 80.

335. Some voices at times contended that the main prohibition against slavery in the amendment should impose restrictions on the abuse of convicts. *See, e.g., supra* note 285; *infra* note 366. However, in the face of the extreme cruelties that went virtually unchallenged for decades under the amendment, these voices reflected only noteworthy dissent rather than the consensus about the meaning of the measure as it related to the treatment of convicts. Courts have almost never viewed the Thirteenth Amendment as protective of the convicted prisoner. *See Robbins, supra* note 293, at 606–07. An exception concerns the invalidation of criminal laws directed at the failure to pay a debt or to perform a contract for labor. *See, e.g., Bailey v. Alabama*, 219 U.S. 219 (1911). The "peonage" cases hold that the person who merely breaches a duty of this sort is not appropriately convicted of a crime and, thus, is not within the punishment exception. *See id.* at 243–44. *See generally* 2 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1214–16 (2d ed. 1929).

turns to this question and shows that the Thirteenth Amendment undermines both the prevailing view championed by broad originalists and the competing view of leading narrow originalists about the protections afforded convicts under the Eighth Amendment.

#### IV. THE THIRTEENTH AMENDMENT AND ORIGINALIST ACCOUNTS OF THE CONSTITUTIONAL LIMITS ON PUNISHMENT

The slavery-as-punishment clause leads to unpleasant outcomes for originalists attempting to define the constitutional limits on the punishment of criminals. From an originalist perspective, the Thirteenth Amendment means that there are only minor constitutional restrictions on the treatment of convicted prisoners. This view obviously frustrates the story of broad originalists that the Eighth Amendment provides a robust protection for those convicted of crime. However, this view would even undermine protections proposed by leading narrow originalists, who have also neglected the Thirteenth Amendment. From an originalist perspective, the slavery-as-punishment clause allows torture and prison conditions that modern courts have found uncivilized under the Eighth Amendment.

##### *A. Problems with Broad-Originalist Arguments for Expansive Convict Protections*

Modern interpretations by broad originalists of the prohibition on cruel and unusual punishment deserve skepticism. The broad originalist contends that the cruel and unusual punishments clause originally revealed a general value about the limits on punishment that can justify the fairly broad protections against severe treatment that criminal convicts enjoy today.<sup>336</sup> The problem is the lack of grounding in originalist history for understanding the Eighth Amendment in such expansive ways while ignoring the Thirteenth Amendment.

##### *1. Failure of the Originalist Case for Incorporation of the Eighth Amendment Clause*

Initial problems for the broad originalist arise over the application of the Eighth Amendment against the states. The Supreme Court's rulings on the cruel and unusual punishments clause have virtually all involved claims against a state rather than against the federal government.<sup>337</sup> States adjudicate most criminal cases and, therefore, incarcerate or otherwise punish most convicted criminals. However, the prohibition on cruel and unusual punishments, like the rest of the Bill of Rights, has always applied directly only against the federal government.<sup>338</sup> In contrast, the Thirteenth Amendment, by its terms, applies directly against both the federal and state governments. The Supreme Court concluded for the first time in 1962 that the due process clause in the Fourteenth Amendment, which became

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336. See *supra* text at notes 20–28.

337. For an exception, however, see *Trop v. Dulles*, 356 U.S. 86 (1958).

338. See *O'Neil v. Vermont*, 144 U.S. 323, 332 (1892); *Pervear v. Massachusetts*, 72 U.S. 475, 479–80 (1866).

effective in 1868, incorporated the Eighth Amendment against the states.<sup>339</sup> Yet, if incorporation of the Eighth Amendment clause lacks a grounding in originalism, the broad originalist cannot avoid the Thirteenth Amendment in describing the constitutional limits on punishment. In that scenario, the Thirteenth Amendment is the principal statement about the constitutional limits on punishment for the vast majority of persons convicted of crime.

The broad originalist account does not overcome this obstacle. Due process incorporation of the Eighth Amendment, like due process incorporation of many other provisions in the Bill of Rights, lacks a solid foundation in original public meaning. The explanation for due process incorporation is essentially non-originalist—that the due process clause had no original public meaning and is best viewed as a “delegation[] of authority to the courts to create a common law of due process.”<sup>340</sup> Yet, even under this view, incorporation of the Eighth Amendment would seem to violate the minimal parameters of an originalist approach to this common-law-like enterprise. First, the appearance of the term “due process” not only in the Fourteenth Amendment but in the Fifth Amendment suggests that the term connoted something separate from the other protections listed in the Bill of Rights and was also not thought to embody all of them.<sup>341</sup> Second, “due process” on its face limits the law-making authority to matters of “process” and should not include a substantive provision, like the prohibition on cruel and unusual punishments, because there is no strong historical basis for this broader view.<sup>342</sup> Thus, due process incorporation of the Eighth Amendment clause fails as originalism, whether narrow or broad.

Broad originalists also cannot solve the incorporation problem by turning to the privileges and immunities clause in the Fourteenth Amendment. Some of the principal proponents of the Fourteenth Amendment in Congress, particularly Senator Jacob Howard and Representative John Bingham, who wrote section one, stated that the privileges and immunities clause would make the Bill of Rights applicable against the states.<sup>343</sup> Bingham stated specifically that the proposed amendment would forbid cruel and unusual punishments, which he argued had continued in the South after the war.<sup>344</sup> For this reason, some scholars have

339. See *Robinson v. California*, 370 U.S. 660, 666 (1962).

340. Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 2 (2007).

341. Isolated dicta from one majority opinion and one dissenting opinion from the Supreme Court before the Civil War indicated that the due process clause in the Fifth Amendment embodied at least some of the process provisions in other parts of the Bill of Rights. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 194 n.52 (1980). This evidence does not conflict with the view that “due process” was not commonly understood to embody all of the other Bill of Rights protections and is hardly dispositive even as to whether a common understanding existed that it embodied some of them.

342. See, e.g., *id.* at 18.

343. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard); CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham).

344. See CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). *But see* 3 ROTUNDA & NOWAK, *supra* note 71, at 441 (“Even when the intent of the drafters seems clear, one must

contended that the privileges and immunities clause provides a better foundation than the due process clause for an originalist account of Bill of Rights incorporation.<sup>345</sup> Indeed, if the central question for the originalist concerned the intent of the principal congressional drafters, some of the statements by Howard and Bingham would provide strong evidence for incorporation of the Eighth Amendment clause. However, leading originalists now generally agree that the proper focus of originalist inquiry is ultimately not on the intent or purpose of the congressional drafters but on the original public meaning of the constitutional provision.<sup>346</sup> A focus on the original intentions of the drafters confronts compelling objections that such evidence does not translate into a collective intention, which either may not exist or may elude identification. Further, the eighteenth- and nineteenth-century Framers themselves construed legal texts “according to the ordinarily understood meaning of their terms without regard to the subjective intentions of the drafters.”<sup>347</sup> The Supreme Court itself recently endorsed a focus on original public meaning.<sup>348</sup> Moreover, when the inquiry turns to the original public meaning of the privileges and immunities clause, the originalist argument for incorporation loses steam. Professor Lawrence Rosenthal has demonstrated that the historical evidence, including the statements of other legislators and nineteenth century treatise writers, along with the post-amendment decisions of the Supreme Court, are “conflicting, if not tilted against incorporation.”<sup>349</sup> Recent scholarship by Professor George Thomas, focusing on newspaper articles discussing the Fourteenth Amendment in the late 1860s, further undermines the incorporation claim.<sup>350</sup>

## 2. *Obstacles to Narrow Understandings of the Thirteenth Amendment Clause*

Assuming broad originalists could overcome the incorporation problem, they would still face trouble in providing an original-public-meaning account for why the slavery-as-punishment clause warrants a narrow interpretation that allows free rein to evolving views about the Eighth Amendment clause. Broad originalists would prefer to shunt aside the Thirteenth Amendment clause by interpreting it restrictively. The difficulty is that little originalist evidence supports a cramped

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remember that part of the debates focused on the expected immediate impact of the Amendment rather than the principles which were to govern future generations.”).

345. See Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 48 & n.247 (2009) (discussing the relevant scholarship of Akhil Amar, Michael Kent Curtis, and William Winslow Crosskey).

346. *Id.* at 53 & n.264.

347. *Id.* at 52.

348. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008).

349. Rosenthal, *supra* note 345, at 69. See also Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2009) (“The evidence of public meaning that emerges from the framing era, in short, is deeply mixed.”).

350. See generally George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2009).

view of the slavery-as-punishment clause or the view that it subserves an expanding Eighth Amendment.

a. The Clause Is Not Limited to “Involuntary Servitude”

Broad originalists surely would prefer to read the clause in the Thirteenth Amendment to allow for “involuntary servitude” but not “slavery.” Antebellum law required indentured servants to endure substantial abuse, although not as severe as that endured by slaves.<sup>351</sup> Therefore, that interpretation could help support an interpretation that states could require convicts to work but could not impose on them many of the more extreme abuses and degradations that antebellum slave law allowed masters to impose on slaves. Since the punishment clause appears as an exception that begins immediately after the term “involuntary servitude,” an interpretation that the clause permitted only the equivalent of involuntary servitude is not necessarily absurd.

The more compelling original-public-meaning view, however, is that the amendment allowed both slavery and involuntary servitude as punishment for crime. Most importantly, that view reflects the natural reading of the measure. Slavery and involuntary servitude appear together both for purposes of the main prohibition and the exception for punishment. An alternative wording to allow only involuntary servitude as punishment was readily available. State constitutions existed before the promulgation of the Thirteenth Amendment that prohibited slavery in one clause and then, in a separate clause, prohibited involuntary servitude, except as punishment for crime. Iowa had amended its constitution to include such a measure in 1857, and Kansas had added such a measure in 1859.<sup>352</sup> Representative Ashley also had framed his original proposal for the Thirteenth Amendment in those terms.<sup>353</sup> The use, instead, of language that treated slavery and involuntary servitude together conveyed to the ordinary citizen that the amendment allowed both of them as punishment for crime. The Virginia Supreme Court accepted that view in 1871 when it characterized a felony prisoner as “the slave of the State.”<sup>354</sup>

Moreover, the subsequent history only confirms this view. The absence of suits brought under the main prohibition in the Thirteenth Amendment or of federal legislation under section two to challenge the slave-like conditions imposed on prisoners in the decades after passage of the amendment squares much more easily with the notion that the punishment clause allowed slavery than that it only allowed something less.

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351. See, e.g., *Mitchell v. Armitage*, 10 Mart. (o.s.) 38, 46 (La. 1821) (upholding right of master to whip apprentice twenty to thirty times with a cow-skin, but noting that undue cruelty would warrant rescission of the indenture).

352. See *supra* note 90 and accompanying text.

353. See *supra* text at note 89.

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



b. The Contemplation of Slavery as Punishment Was Not Viewed in 1865 as Significantly Limited by Protections Perceived in the Eighth Amendment

Broad originalists might alternatively assert an original understanding that the prohibition on cruel and unusual punishment limited the authorization of slavery as punishment. They might contend that, while the idea of cruel and unusual punishments should have provided a boundary on the grant of authority to impose slavery under the Thirteenth Amendment, the Supreme Court simply erred<sup>355</sup> in holding for nearly a century that the Eighth Amendment protection did not apply against the states.<sup>356</sup> According to this view, the Court's failure to recognize Eighth Amendment incorporation prevented legal challenges to the harsh treatment of prisoners. But despite the Court's error, the public understood the harsh treatment of prisoners—beyond the mere requirement that they work—to be cruel and unusual punishment.

The problem with this view, first and foremost, is that it simply does not provide a plausible original public meaning, supported by evidence, for the language of the Thirteenth Amendment. The amendment allowed “slavery []or involuntary servitude” as a punishment for crime, and the conditions of antebellum slavery were well-known at the time. Under those circumstances, the ordinary meaning of the language was that government could impose those conditions as a criminal sanction. Although one could claim that the lack of Eighth Amendment incorporation promptly after 1868 deterred the possible development of some evidence that could have tended to show the contrary, there is little other evidence to get the argument off the ground.

In addition, the lack of incorporation cannot explain the dearth of constitutional challenges or federal legislation against the treatment of prisoners in the South after 1865. First, the relationship between the Eighth and Thirteenth Amendment clauses was immediately in play over the treatment of federal prisoners. Before 1891, there were no federal prisons, and the federal government sent its convicts to state jails and prisons.<sup>357</sup> Supreme Court precedent revealed that the state jailer became the “keeper of the United States,”<sup>358</sup> so that the Eighth Amendment protected federal prisoners in state custody.<sup>359</sup> Also, in the years after the Civil War, until a federal statute in 1887 imposed criminal penalties for leasing federal prisoners (but, notably, not state prisoners),<sup>360</sup> convict-lease states typically leased out their federal prisoners.<sup>361</sup> Nonetheless, there were virtually no challenges brought under the Eighth Amendment to the imposition of slavery conditions on them, although the federal courts, as a matter of jurisdiction, could

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355. *But see supra* text at notes 341–51.

356. *See O'Neil v. Vermont*, 144 U.S. 323, 332 (1892).

357. FRIEDMAN, *supra* note 113, at 269.

358. *Randolph v. Donaldson*, 13 U.S. (9 Cranch) 76, 86 (1815).

359. *See In re Birdsong*, 39 F. 599, 603 (S.D. Ga. 1889).

360. Act of Feb. 23, 1887, ch. 213, 24 Stats. 411.

361. The primary purpose of the federal law was “to relieve law-abiding laborers and producers of this country from the burden of competition” from the convict-lease system. S. REP. NO. 1691, at 1 (1887).

have proceeded against the state jailer, if on no other grounds, by attachment for contempt.<sup>362</sup> The dearth of such claims from these prisoners cannot find explanation in the inapplicability of the Eighth Amendment.

The showing in Part III also undermines the view that a prohibition on “cruel and unusual punishment” limited the authorization to impose slavery. Part III revealed that, after 1865, neither state prisoners through lawsuits nor the federal Congress through legislation acted on the idea that the imposition of harsh, slavery-like conditions violated the main prohibition in the Thirteenth Amendment. To the extent that the slavery-as-punishment clause authorized only limited forms of harsh treatment, the clause would provide only a partial shield for states against claims of unconstitutional slavery brought under the main prohibition in the Thirteenth Amendment. For this reason, even in the absence of incorporation of the Eighth Amendment clause, lawyers could easily have claimed that the concept of cruel and unusual punishment (although not the Eighth Amendment itself) limited what was permissible under the slavery-as-punishment clause and, thus, helped define what was impermissible under the main prohibition in the Thirteenth Amendment. Perhaps prisoners could not have recast every claim of cruel and unusual punishment as a claim of slavery, but the torturous conditions imposed on prisoners in the southern states in the decades after the Civil War were, if understood as cruel and unusual punishment, also understood as slavery recreated. The federal Congress also could have passed federal legislation under section two of the Thirteenth Amendment to protect state prisoners. The absence of such suits or federal legislation, contending that those conditions violated the main clause in the Thirteenth Amendment, casts doubt on the existence of a prevalent view that the notion of cruel and unusual punishments limited the authority in the Thirteenth Amendment to impose the conditions of antebellum slavery as punishment.<sup>363</sup>

c. The Notion of Slavery for Purposes of the Punishment Clause Did Not Have an Original Meaning that Would Contract To Accommodate an Expanding Application of the Eighth Amendment.

The broad originalist might still contend that the slavery-as-punishment clause subserved the prohibition on cruel and unusual punishment even if the idea of cruel and unusual punishment did not restrict the slavery-as-punishment clause in 1865. Under this view, although conditions akin to antebellum slavery were not thought cruel and unusual in the 1860s, some aspects of those conditions could still be viewed as cruel and unusual a century later. As the meaning of the Eighth

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362. For an exceptional ruling that demonstrates the latter point, see *Birdsong*, 39 F. at 603.

363. One of the great legal thinkers of the late nineteenth century, Thomas Cooley, suggested that the slavery-as-punishment clause should only provide a partial shield against claims that punishments constituted improper slavery. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES 364–65 (Boston, Little, Brown, & Co., 5th ed. 1883). Cooley suggested that the clause should not even permit a state to auction a convict to work as a slave to the highest bidder. *Id.* While many might have preferred this nontextual view even in Cooley’s era, there is little evidence that it represents the original public meaning.

Amendment changed, a static application of “slavery” in the slavery-as-punishment clause would have produced conflict between the two clauses. This would mean that “slavery” in the slavery-as-punishment clause must have been capable of contraction to accommodate an expanded notion of cruel and unusual punishment.

The difficulty with this position is that the language and history surrounding the adoption of the clauses does not indicate that the Eighth Amendment prohibition could expand in application while the slavery-as-punishment authorization withered. The argument that, after 1865, the prohibition on cruel and unusual punishments continued to convey a moral proscription that was understood potentially to expand over time does not easily square with the harsh treatment of leased federal and state prisoners in that era. That treatment went essentially unchallenged under the Eighth and Thirteenth Amendments in the courts. Yet, doubt exists that a general view prevailed by the 1870s that the conditions imposed on the many convicts who were swept into the convict-lease systems comported with any notion of desert or humane treatment. The Eighth Amendment clause might be viewed as merely a delegation to courts to construct a constitutional common law of punishment limits.<sup>364</sup> That perspective, because it does not involve any particular idea of justice or guiding principles, would help—ironically—to explain why the harsh treatment of prisoners after the Civil War apparently was not yet widely understood to violate the constitution. That view of the Eighth Amendment, however, is speculative and also non-originalist, because it posits an absence of any original guiding principle about punishment limits. Indeed, broad originalists face trouble explaining how any broad but still originalist understanding of the Eighth Amendment language that would explain modern Eighth Amendment doctrine could have countenanced the punishment practices of the late 1800s.

Whatever broad view one might prefer to ascribe to the Eighth Amendment language, historical evidence also does not support an original public meaning for the Thirteenth Amendment clause that could shrink to subserve it. The Thirteenth Amendment clause is more easily understood as bounding future growth in the application of the Eighth Amendment language than as yielding to it. “Slavery” for purposes of the punishment clause had a common public meaning in the 1860s that contemplated extremely harsh treatment. Moreover, because the punishment clause allows both “slavery” and “involuntary servitude,” to conclude that “slavery” has contracted to mean nothing more than permission to impose a work requirement would be to trump the text. This tactic would be akin to a claim that the statement in Article II that the president must have “attained to the Age of thirty five Years”<sup>365</sup> can be understood as a requirement of “maturity” and, thus, that one who is thirty-four could be declared eligible for possessing it and that one who is thirty-six could be declared ineligible for lacking it. Such a maneuver is anti-originalist.<sup>366</sup> Thus, even if the Eighth Amendment clause originally conveyed a moral or amorphous idea that could expand in application, the broad originalist

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364. See, e.g., ELY, *supra* note 341, at 13–14.

365. U.S. CONST. art II, § 1, cl. 5.

366. See Balkin, *supra* note 28, at 305.

cannot explain why the slavery-as-punishment clause did not confine that expansion.<sup>367</sup>

In the final analysis, the slavery-as-punishment clause confounds the efforts of the broad originalist to justify the protections afforded convicts under the Eighth Amendment today. If slavery, as it existed before 1863, is permitted as punishment for crime, prisoners have few constitutional grounds to complain about their difficult or unhealthy prison conditions or about their harsh treatment at the hands of guards.<sup>368</sup> Likewise, Eighth Amendment restrictions on the death penalty or on the severity of non-capital sentences should disappear to the extent that they rest on principles that would nullify an originalist view of the slavery-as-punishment clause. On this view, much of modern doctrine under the cruel and unusual punishment clause collapses.

### ***B. Narrow Originalists and the Problem of Repugnant Outcomes***

Even most conservative, narrow originalists would conclude that the original public meaning of the slavery-as-punishment clause permits outcomes that today qualify as objectionable. The judgments of Justice Scalia provide a good measure of this perspective. Given his view that the Court has unduly expanded Eighth Amendment protections, he would surely favor some of the limitations that an originalist view of the Thirteenth Amendment would command.<sup>369</sup> At the same time, he has unnecessarily avoided pressing for certain harsh outcomes under the Eighth Amendment—outcomes that appear unavoidable under an originalist view of the Thirteenth Amendment—suggesting that those results trouble him. Moreover, Justice Scalia has openly conceded that some grossly unacceptable punishments at the end of the spectrum (whipping and branding) are probably allowed by an originalist approach to the Eighth Amendment. They are even more clearly authorized by an originalist approach to the Thirteenth Amendment.

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367. This conclusion is even more compelling than the originalist argument that constitutional language outside of the Eighth Amendment limits expansion in the application of the Eighth Amendment clause to proscribe the death penalty altogether. The slavery-as-punishment clause does not merely contemplate the possibility of slavery as punishment but expressly authorizes it.

368. For a non-originalist argument, however, that a historical connection between a particular punishment practice and slavery actually should weigh in favor of finding the practice to violate the Eighth Amendment, see Tessa M. Gorman, Comment, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 477 (1997).

369. An originalist justice on the Supreme Court perhaps can be forgiven for failing to continue to contest Eighth Amendment incorporation at this point. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 138–39 (1997). However, the problem of when non-originalist precedent should be followed vexes originalists. See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437 (2007). In any event, the Court has not previously addressed the role of the Thirteenth Amendment in limiting the application of the Eighth Amendment.

*I. Troubling Outcomes*

The original public meaning of the slavery-as-punishment clause demands conclusions that Justice Scalia has taken steps to avoid when applying the Eighth Amendment. For example, he has not objected to most of the expansion in the application of the Eighth Amendment to protect prisoners from harsh prison conditions. In *Wilson v. Seiler*,<sup>370</sup> he even authored a majority opinion reversing a summary judgment for prison officials on a conditions claim brought under the Eighth Amendment.<sup>371</sup> Only two years later, however, he joined a dissenting opinion authored by Justice Thomas, in *Helling v. McKinney*,<sup>372</sup> asserting that the history of the Eighth Amendment suggests that the word “punishment” does not “proscribe a prison deprivation that is not inflicted as part of a sentence.”<sup>373</sup> On this ground, they rejected McKinney’s claim that the Eighth Amendment could protect him from future harm resulting from exposure in prison to secondhand cigarette smoke. At the same time, they refrained from arguing for the wholesale abandonment of the Court’s prison-conditions doctrine, relying on stare decisis to conclude that the Court should “draw the line at actual, serious injuries.”<sup>374</sup> The *McKinney* dissent thus demonstrates that reliance on stare decisis can help the narrow originalist avoid outcomes under the Eighth Amendment that are “too bitter.”

From an originalist standpoint, however, the *McKinney* dissent rested on the wrong rationale. The historical evidence that the term “punishment” in the Eighth Amendment was inapplicable to jail or prison conditions was unconvincing. Indeed, the evidence as to how that term was understood when used in the slavery-as-punishment clause in the Thirteenth Amendment conflicts with the conclusion that it covers only the sentence imposed in court. After passage of the Thirteenth Amendment, states could force convicts to work or to lease them to work even though a court had not ordered labor as part of their sentences.<sup>375</sup> Hard labor, even when not ordered by a court, was apparently still viewed as part of the “punishment” permitted.<sup>376</sup> Nonetheless, an original-public-meaning account of the Thirteenth Amendment supports the conclusion that the Eighth Amendment would not protect inmates from secondhand cigarette smoke. The explanation is in the original public meaning of “slavery,” which contemplated exposure to numerous dangers to life and health, including many that were more serious than exposure to secondhand cigarette smoke. From an originalist perspective, this account grounded on the Thirteenth Amendment resolves the issue in *McKinney* much more convincingly than an account based on the purportedly narrow meaning of “punishment” in the Eighth Amendment.

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370. 501 U.S. 294 (1991).

371. *Id.* at 305–06.

372. 509 U.S. 25 (1993).

373. *Id.* at 42 (Thomas, J., dissenting).

374. *Id.*

375. *See supra* Part III.

376. Modern courts agree with this view of the Thirteenth Amendment. *See, e.g.,* *Ali v. Johnson*, 259 F.3d 317 (5th Cir. 2001); *Omasta v. Wainwright*, 696 F.2d 1304 (11th Cir. 1983); *Mosby v. Mabry*, 697 F.2d 213, 215 (8th Cir. 1982).

Reliance on the original public meaning of the Thirteenth Amendment, however, would lead to a much harsher conclusion about permissible prison conditions than the one to which the dissenters subscribed under the Eighth Amendment. The narrow originalist who claims that the Thirteenth Amendment limits the Eighth Amendment protection cannot plausibly avoid ugly results on grounds of *stare decisis*. A call for understanding the Thirteenth Amendment to constrain the application of the Eighth Amendment represents an even more foundational change in thinking about the Eighth Amendment than a claim about the proper understanding of the term “punishment.” To argue for such a major reorientation but also for deference to Eighth Amendment precedent would be weirdly incongruous. At the same time, there are no Thirteenth Amendment precedents favorable to duly-convicted convicts. Therefore, viewing “slavery” as the boundary of permissible treatment of convicts would undermine decisions like *Wilson* that Justice Scalia himself had recently endorsed. The *McKinney* dissent suggests that Justice Scalia would find that outcome troubling.

Claims concerning execution methods also suggest the lack of appeal for narrow originalists in some of the outcomes that the Thirteenth Amendment would produce. For example, in *Baze v. Rees*,<sup>377</sup> a plurality of the Court upheld lethal injection as an execution method and, further, stated that other methods posing “a substantial risk of severe pain” would no longer satisfy the Eighth Amendment.<sup>378</sup> Justice Thomas, joined by Justice Scalia, concurred in the judgment but dissented from the plurality’s rationale. They contended that the plurality’s standard departed from the original understanding of the Eighth Amendment, which would not prohibit pain that was incidental to an execution method intended to cause death. At the same time, they did not dispute that execution methods that are “intended to produce a penalty worse than death” violate the Eighth Amendment.<sup>379</sup> However, this statement came at a level of generality that provided more protection to convicts than a narrow originalist account of the Eighth Amendment necessarily demanded. At least as it applied in the late 1700s, the Eighth Amendment did not seem to prevent adding some cruelties or indignities to execution to strike additional fear in those contemplating crime. For example, in the first federal criminal statute, passed in 1789, Congress added dissection to the death penalty for murder to increase the dread of punishment,<sup>380</sup> which seems inconsistent with the original meaning identified by Justices Thomas and Scalia.<sup>381</sup> The founders also probably would not have thought that thirty lashes with a rawhide on the bare skin followed immediately by hanging was prohibited, although that procedure would seem also to infringe the original meaning that they identify. These examples demonstrate the ability of even conservative, narrow

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377. 128 S. Ct. 1520 (2008).

378. *Id.* at 1532 (plurality opinion).

379. *Id.* at 1560 (Thomas, J., concurring).

380. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 94–95 (1997).

381. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 81 (2002) (“Burning, hanging in chains, dismemberment, dissection—these were four ways to make a death sentence more severe by destroying the physical body after death.”).

originalists to construct a meaning under the Eighth Amendment that avoids unhappy outcomes.

Under the Thirteenth Amendment, less constructive freedom exists, because “slavery” was not a highly abstract term and its meaning, according to the text, connoted a status worse than “involuntary servitude.” The historical evidence also reveals a common knowledge that masters could intentionally inflict severe corporal punishments on slaves and generally could even kill them without penalty.<sup>382</sup> This history leaves little room under an original-public-meaning approach to the Thirteenth Amendment to claim a proscription on all intentionally painful execution procedures. Yet, the construction given the Eighth Amendment by Justices Thomas and Scalia in *Baze* suggests that the use of intentionally painful execution methods strikes them as unappealing.<sup>383</sup>

## 2. Abhorrent Outcomes

An original-public-meaning interpretation of the Thirteenth Amendment would even allow for outcomes that qualify as repulsive, and this remains true for many conservative, narrow originalists. A truly originalist view of the Constitution would permit gross neglect for the physical and mental health of prisoners. It would also allow for malicious and sadistic brutality against them. Moreover, in light of past history and more modern events, there is no persuasive reason to doubt that, absent federal constitutional proscription, these abuses would have proliferated.

The major prison-reform cases of the modern era reveal some of the degradation that would have gone on. One among many examples is *Ruiz v. Estelle*,<sup>384</sup> in which a federal judge declared prison conditions in Texas in the early 1980s to violate the Eighth Amendment.<sup>385</sup> Texas prison officials had imposed great suffering on inmates through overcrowding, inadequate facilities, inadequate medical care, and a building tender system reminiscent of slavery that allowed the most aggressive and sadistic inmates largely to control the other prisoners.<sup>386</sup> Forcible rape was common.<sup>387</sup> Beatings or similar brutalities occurred almost daily. One former Texas inmate who became suicidal in the face of the degradation described the experience as being “trapped in one of the world’s dark corners.”<sup>388</sup> While such suffering might make us blanch, it is not worse than the agony endured by thousands of slaves in the Antebellum Era or by thousands of prisoners swept into the convict-lease systems after 1865.

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382. See *supra* Part II.

383. The originalist also must confront, at least hypothetically, whether and when the slavery-as-punishment clause would forbid a federal statute enacted under section 2 of the amendment to protect state convicts.

384. 503 F.Supp. 1265 (S.D. Tex. 1980), *aff’d in part and vacated in part*, 679 F.2d 1115 (5th Cir.), *cert. denied*, 460 U.S. 1042 (1982).

385. For an illuminating account of the case from the perspective of the judge, see FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 369–76 (1991).

386. See *Ruiz*, 503 F. Supp. at 1391.

387. See *id.*

388. See KERRY MAX COOK, CHASING JUSTICE: MY STORY OF FREEING MYSELF AFTER TWO DECADES ON DEATH ROW FOR A CRIME I DIDN’T COMMIT 123 (2007).

An original-public-meaning approach to the Thirteenth Amendment would also have authorized the very sorts of intentional corporal abuses of convicts that Justice Scalia has admitted that he could never endorse.<sup>389</sup> Slavemasters commonly whipped and branded slaves in the years leading up to the passage of the Thirteenth Amendment. In subsequent decades, prisoners in the South commonly faced similar tortures. Severe abuses of prisoners were surely deterred by the modern decisions of the Supreme Court expanding Eighth Amendment protections. Perhaps these brutalities eventually would have withered away and not yet returned even without a federal constitutional check. Nonetheless, our history gives reason to doubt that, absent federal constitutional restraint, states would have had sufficient incentives to prevent prison guards from beating an irritating inmate or from using a technique like “waterboarding” on a hated convict. We might also consider whether we could face a future period of national stress, in which, without a federal constitutional restriction, a mixture of favorable public opinion and disinterest could again allow the use of whips, brands, and hotboxes. The Supreme Court’s modern construction of the Constitution has helped guard against such occurrences. However, under an originalist interpretation true to original public meaning, the Thirteenth Amendment would permit them.

## V. THE IMPLICATIONS FOR THE NORMATIVE CASE FOR ORIGINALISM

Some originalists might accept the ugly outcomes that correspond to the original public meaning of the slavery-as-punishment clause. They might conclude that originalism risks its coherence as a method of interpretation if the interpreter can abandon it simply to avoid bad endings. They undoubtedly would defend their position by noting that the Constitution allows for formal amendments when outcomes become too bitter.<sup>390</sup> Yet, they also surely would recognize that accomplishing a formal amendment whose beneficiaries are a small and outcast minority has previously come only after a revolution or civil war. Our history since 1865 also underscores in particular our inability as a nation to amend the language of the slavery-as-punishment clause to protect criminal convicts, despite the abuse that the original meaning encouraged.<sup>391</sup> In these circumstances, pressure exists for the steadfast originalist to offer not simply a nod to the possibility of formal amendment but a normative rationale for adherence to original meaning.

Originalists have offered several kinds of normative justifications for originalism,<sup>392</sup> although they rarely make explicit why original meaning should bind us.<sup>393</sup> The traditional and most common justifications rest on theories of democratic consent.<sup>394</sup> The Constitution begins: “We the People . . . do ordain and establish this Constitution.” Building on the idea that the original “People”

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389. See *supra* note 4 and accompanying text.

390. See U. S. CONST. art V.

391. See FEELEY & RUBIN, *supra* note 23, at 152–53 (noting that the slavery-as-punishment clause encouraged the reinstatement of slavery).

392. See WHITTINGTON, *supra* note 18, at 2–5.

393. Barnett, *supra* note 19, at 11.

394. See Balkin, *supra* note 11, at 531.



consented, originalists commonly assert that the document also binds later generations because we have also agreed in some sense to be bound.<sup>395</sup> Perhaps the second most popular rationale is that originalism provides a means of ensuring judicial restraint.<sup>396</sup> On this view, originalism derives from the role of courts as interpreters of the law, so that the Constitution must be understood as a document for interpretation rather than a starting point for judicial construction.<sup>397</sup> But, libertarian and liberal originalists have effectively challenged these rationalizations. In particular, Professor Randy Barnett, a libertarian originalist, has skillfully skewered both ideas. He has forcefully asserted that “consent morally binds only those who themselves actually consent” and notes that “those alive today . . . have not consented.”<sup>398</sup> As for the rationale of judicial restraint, he has shown that it begs the question of the proper role of the courts. Moreover, it would “justify judicial enforcement of only those passages of the Constitution that are sufficiently rule-like to constitute a determinate command that a judge can simply follow,” although many parts of the Constitution are so obviously abstract that they require judicial choice.<sup>399</sup> Originalists have not effectively answered these rebuttals.

The libertarian and liberal originalists, however, have offered a new kind of justification for originalism. They assert, essentially, that a core of original meanings in the Constitution created a system of government that is legitimate, in that it adequately protects our rights, and that adherence to original meaning throughout the document will ensure respect for those core provisions.<sup>400</sup> The core provisions are not ranked in importance; nor are the most crucial ones specified. The idea, however, is that:

[A] system that combines elements of federalism, separation of powers, a bifurcated legislature, a presidential veto power subject to a supermajoritarian override, judicial review, enumerated and limited powers, and an explicit but limited bill of rights provides confidence that lawful commands emerging from such a system are so likely to respect rights that they merit the benefit of the doubt.<sup>401</sup>

Not all parts of the Constitution serve this “legitimacy-enhancing” function. Nothing crucial rides, for example, on the language that the president be a “natural born Citizen”<sup>402</sup> or that federal judges serve “during good Behaviour”<sup>403</sup> rather

395. Barnett, *supra* note 19, at 11 (discussing and rejecting these theories).

396. See, e.g., Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5, 10–11 (1988).

397. See Scalia, *supra* note 1, at 854.

398. Barnett, *supra* note 19, at 10. See also Balkin, *supra* note 11, at 531–32 (“Later generations do not consent . . .”).

399. Barnett, *supra* note 19, at 11.

400. See *supra* note 37 and accompanying text.

401. Barnett, *supra* note 19, at 17; cf. Charles R. Kesler, *Thinking About Originalism*, 31 HARV. J.L. & PUB. POL’Y 1121, 1128 (2008) (“To defend originalism in the political arena, and to secure the appointment and confirmation of properly originalist judges, will take presidents, legislators, and, yes, even judges, who can explain the goodness of the U.S. Constitution.”).

402. U. S. CONST. art II, § 1, cl. 4.

than for a fixed term of years. Nonetheless, the rationale for originalism that these theorists offer is that following the original meaning throughout the document will ensure that we follow the original meaning for the legitimacy-enhancing provisions.<sup>404</sup>

How does this consequentialist rationale hold up when confronted with the original public meaning of the slavery-as-punishment clause? It collapses. Libertarian and liberal originalists assume that, by employing a broad originalism, all of the prose in our Constitution will carry original meanings that will produce at worst some modestly “[un]happy endings,”<sup>405</sup> but none in which the costs will greatly exceed the benefits.<sup>406</sup> They certainly assume that our Constitution does not contain provisions with an original public meaning that will produce “grossly objectionable results.”<sup>407</sup> Otherwise, they could not plausibly contend that we need not evaluate each clause separately to determine whether to follow the original meaning. Yet, the original public meaning of the slavery-as-punishment clause undermines their assumption. The clause has nothing to do now with the legitimacy enhancement of our government, and its original meaning would produce outcomes that would “shock the conscience of people today.”<sup>408</sup> The legitimacy-enhancing justification, thus, does not clarify why we should honor that original meaning.

## CONCLUSION

The slavery-as-punishment clause in the Thirteenth Amendment ranks among the most neglected provisions in the constitution. Before the 1960s, little need arose for courts or commentators to assess the meaning of the clause or its relation to the prohibition on cruel and unusual punishments in the Eighth Amendment. The view from the late 1800s that prisoners were “slave[s] of the state”<sup>409</sup> with minimal rights developed into a “hands off”<sup>410</sup> approach by courts to

403. U. S. CONST. art III, § 1.

404. *E.g.*, Barnett, *supra* note 19, at 24; BARNETT, *supra* note 18, at 353; *cf.* John O. McGinnis & Michael B. Rappaport, *Originalism and Pragmatism: A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL’Y 917, 934–35 (2008) (“[R]etaining a bad constitutional provision is simply a cost of following a supermajoritarian enactment rule when that rule generates a constitution with benefits that exceed its costs.”).

405. Balkin, *supra* note 11, at 436 (quoting Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 WAKE FOREST L. REV. 553, 560–61 (2003)).

406. Barnett, *supra* note 19, at 22. *See also* WHITTINGTON, *supra* note 18, at 87 (expressing doubt “that any originalist interpretations of the amended aspects of the Constitution fail to meet” a standard of reasonableness).

407. Barnett, *supra* note 19, at 7; *cf.* Balkin, *supra* note 11, at 439 (“[F]idelity to the document requires a leap of faith in the document and the institutions of government based on the document.”).

408. Balkin, *supra* note 28, at 297.

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

410. DiIulio, *supra* note 34, at 3–4.

the regulation of prisons.<sup>411</sup> After the Supreme Court incorporated the Eighth Amendment proscription against the states,<sup>412</sup> judicial application of the Eighth Amendment burgeoned, and it continues to expand today.<sup>413</sup> However, courts and commentators have rarely acknowledged the relevance of the slavery-as-punishment clause to these expanded constructions of the Eighth Amendment. When they have even noted that two punishment clauses exist in the amendments to the constitution, they have assumed that the Thirteenth Amendment yields to the Eighth Amendment.<sup>414</sup> The slavery-as-punishment clause serves only the occasional task of barring an inmate claim that prison regulations concerning work, such as low pay or enforcement penalties, violate the main prohibition on slavery in the Thirteenth Amendment.<sup>415</sup>

The view that the slavery-as-punishment clause subserves the prohibition on cruel and unusual punishments does not comport with original-public-meaning originalism. The Thirteenth Amendment expressly authorizes slavery as punishment for crime. The history of its promulgation between 1863 and 1865 reveals that Congress did not proclaim for it some special meaning.<sup>416</sup> Thus, the endorsement of “slavery” conveyed its ordinary meaning to the citizens at the time about the permissible treatment of convicts. The history of antebellum slavery informs that meaning, and the treatment of convicts in the years after 1865 confirms it.<sup>417</sup> The clause gave states a broad swath of immunity from convict claims under federal law, even in the face of severe abuse and recklessness.

From an originalist perspective, the public meaning of the slavery-as-punishment clause should have blocked much of the expansion in the application of the Eighth Amendment clause. This conclusion holds true whether one endorses a narrow or broad approach to originalism. Broad originalists have contended that originalism allows an expanding application of the Eighth Amendment clause, while leading narrow originalists have argued for a more restricted, but, nonetheless, somewhat expanded construction. However, broad originalists have ignored the Thirteenth Amendment, and they cannot explain why the Thirteenth Amendment should wither in importance while the Eighth Amendment grows. At the same time, leading narrow originalists cannot explain, consistent with a steadfast originalism, their willingness to accommodate even a somewhat expanded application of the Eighth Amendment. An original-public-meaning

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411. See, e.g., *Banning v. Looney*, 213 F.2d 771, 771 (10th Cir. 1954); *Stroud v. Swope*, 187 F.2d 850, 851–52 (9th Cir.), cert. denied, 342 U.S. 829 (1951); *Sarshik v. Sanford*, 142 F.2d 676, 676 (5th Cir. 1944); *Kelly v. Dowd*, 140 F.2d 81, 82 (7th Cir. 1944).

412. See *Robinson v. California*, 370 U.S. 660, 666 (1962).

413. Litigation challenging prison conditions and prisoner treatment also grew in part based on Supreme Court decisions endorsing the availability of 42 U.S.C. § 1983, a provision first enacted in almost identical form as part of the Civil Rights Act of 1871, 17 Stat. 13 § 1 (1871), as a means for enforcing prisoners’ constitutional rights. See, e.g., *Cooper v. Pate*, 378 U.S. 546 (1964).

414. See, e.g., *Morales v. Schmidt*, 489 F.2d 1335, 1338 (7th Cir. 1973).

415. See, e.g., *Mikesea v. Collins*, 900 F.2d 833 (5th Cir. 1990); *Omasta v. Wainwright*, 696 F.2d 1304 (11th Cir. 1983).

416. See *supra* Part I.

417. See *supra* Parts II and III.

account of the Thirteenth Amendment reveals that it was not understood to shrink in meaning to give way to a growing construction of the prohibition on cruel and unusual punishments.<sup>418</sup>

In the end, the Thirteenth Amendment challenges all who profess to believe in originalism as a coherent general theory of constitutional interpretation. We can avoid the test by pretending that the slavery-as-punishment clause is irrelevant when we ascribe meaning to the Eighth Amendment. However, we should not “shrink[] in practice from the implications of a theory”<sup>419</sup> that we defend. For those who would claim to find an originalist way around the Thirteenth Amendment, the challenge is to persuade that the approach serves rather than subverts the original public meaning. For those, like Justice Scalia, who would favor an exception to the use of originalism in applying the slavery-as-punishment clause to avoid outcomes that are “too bitter,” the challenge is to explain why there is not room also to avoid outcomes that would only moderately violate the judge’s moral or political sensibilities. For those who would favor enforcing the original public meaning, the challenge is to explain why we should venerate old language that explicitly enshrines slavery into the document. None of these challenges can be convincingly overcome. Thus, the slavery-as-punishment clause should remind all of us why original public meaning, even when clear, does not resolve the modern meaning of the constitution.

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418. *See supra* Part IV.

419. Barnett, *supra* note 19, at 13.