Barry Law Review

Volume 18
Issue 2 *Spring 2013*

Article 3

2013

'You are Hereby Sentenced to a Term of . . . Enslavement?': Why Prisoners Cannot be Exempt from Thirteenth Amendment Protection

Alvaro Hasani

'YOU ARE HEREBY SENTENCED TO A TERM OF . . . ENSLAVEMENT?': WHY PRISONERS CANNOT BE EXEMPT FROM THIRTEENTH AMENDMENT PROTECTION

Alvaro Hasani *

TABLE OF CONTENTS

"Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim."[1]

–U.S. Supreme Court Justice Harry Blackmun, 1980.

* B.A. Rutgers University, 2007; J.D. Seton Hall University School of Law, 2012. The author is a litigation associate in New Jersey practicing in the areas of complex commercial litigation and public entity law. He writes on an array of legal issues, including but not limited to, Constitutional Law, Civil Rights, Evidence and Employment Law. As always, he extends a warm appreciation and gratitude to his parents, Besim and Mimoza, for all that they have done and continue to do.

1. United States v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting).

I. INTRODUCTION

Slavery inside United States' prisons, sexual slavery in particular, has become an unfortunate reality. Judges, legal scholars, and human rights organizations have all confirmed its existence.[2] But because prisoners are generally incapable of eliciting society's sympathy, their effort to combat slavery inside prisons has gone virtually unnoticed. Arguably for the same reasons, many have turned a blind eye to available legal remedies. For instance, the Thirteenth Amendment to the United States Constitution, along with the statutes passed to enforce it, should be instrumental in abolishing this particular type of slavery. Yet, some courts have held, incorrectly so, that prisoners are completely barred from bringing Thirteenth Amendment claims as a result of the "Punishment Clause" contained therein.[3]

This Article argues that, notwithstanding one's moral perspective toward prisoners, it is undeniable that the Thirteenth Amendment not only affords prisoners its full protection but should be instrumental in abolishing the atrocities of prison slavery.[4] Furthermore, the notion of providing relief to prisoners by way of the Thirteenth Amendment is admittedly not wholly altruistic. The truth is, as will be more fully discussed herein, curtailing sexual slavery inside prison walls has significant benefits for society at large. This Article will thoroughly describe the societal benefits of ending prison slavery and comprehensively explore the inherent conflict between the Eighth and Thirteenth Amendments to the United States Constitution.

Part II of this Article will describe the existence of prison slavery as corroborated by prisoners, judges, columnists, and human rights organizations. It will then illustrate the societal benefits of abolishing its existence. Part III will attempt to demonstrate that the evidence of dominance and coercion inside prison walls does indeed meet the general definition of slavery as defined historically and jurisprudentially under both United States and international law. Part IV will chronicle the history of the Thirteenth Amendment and provide a survey of cases dealing with "punishment" under the Eighth Amendment in order to assess how courts should interpret the "Punishment Clause" in the Thirteenth Amendment. Part V will argue that prisoners are not exempt from the Amendment's full protection because, pursuant to its textual interpretation as well as case law, prison slavery cannot be considered a form of punishment. Otherwise, the claim would be inconsistent with our developed theories of punishment. In carefully considering all of these arguments, Part VI will expose an apparent conflict between the Eighth Amendment and the Thirteenth Amendment to the United States Constitution. This conflict, however, should not prove fatal for enslaved inmates seeking legal

2. *See infra* Part II.

3. *See infra* Part III.

4. The premise that prisoners are not exempt from the Thirteenth Amendment protection was the subject of an article by Kamal Ghali in 2008. *See* Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607 92008). This Article, while building on Ghali's novel argument, more thoroughly describes the societal benefits of ending prison slavery and exposes the inherent conflict between the Eight and Thirteenth Amendments to the United States Constitution.

redress. Finally, Part VII will demonstrate why the Thirteenth Amendment, no matter how novel a theory, is best suited to abolish the atrocities of prison slavery and should be fully utilized to serve that purpose.

II. PRISON SLAVERY

As might be expected, the inmate community, notwithstanding their confinement, has established its own culture[5] comprising of values, norms, standards of conduct, and strict procedures for enforcing adherence thereto.[6] Enslavement of inmates by other inmates is regrettably firmly solidified in this culture.

Unfortunately, public awareness regarding slavery in prison is lacking. Indeed, when one contemplates the nature of slavery and its traditional meaning, it is difficult to consider how it would materialize inside prison walls. Yet, because of the media's portrayal of life inside a prison,[7] most people today are aware of the prevalence of sexual assaults among inmates. It is this form of demonstrated dominance and its implications inside the prison culture that leads to enslavement. While the connection between sexual assault and enslavement is not readily apparent to the general public, the quote at the beginning of this Article is illustrative of this phenomenon. As Justice Blackmun explained, an "inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim."[8] Dominance through threat of sexual assault renders the inferior inmate property of his or her assailant. This amounts to slavery and is unfortunately all too common in our prisons.[9]

A. The Story of Roderick Johnson

Roderick Johnson was a prisoner in the Texas prison system.[10]He entered prison in early 2000[11] after bouncing a check for $300,[12] a violation of his probation for a prior nonviolent burglary.[13] Almost immediately upon his arrival,

5. Culture is defined as "the total pattern of human behavior and its products embodied in thought, speech, action, and artifacts and dependent upon man's capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language, and systems of abstract thought." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged 552 (1986).

6. *See generally* E. SUTHERLAND & D. CRESSEY, PRINCIPLES OF CRIMINOLOGY (10th ed. 1978).

7. *See e.g.*, *Lock Up* (MSNBC television broadcast June 3, 2005) (documenting sexual assaults inside U.S. prisons); *OZ* (Home Box Office television broadcast 2002) (providing a fictional portrayal of life inside a U.S. maximum-security prison including the pervasiveness of sexual assaults).

8. United States v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting).

9. For a definition of slavery, see *infra* Part II "Definition of Slavery."

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

11. *Id.* at 512.

12. Daniel Brook, *The Problem of Prison Rape*, LEGAL AFFAIRS (March/April 2004), http://www.legalaffairs.org/issues/March-April-2004/feature_brook_marapr04.msp.

13. *Johnson*, 385 F.3d at 512.

Johnson, a homosexual effeminate black man, was violently raped.[14] Shortly thereafter, a prison gang member named Hernandez proclaimed ownership of Johnson and forced him to become his sexual servant, even renting him out to perform coerced sexual acts for other inmates.[15] Johnson's sexual services, which included oral and anal sex,[16] would cost other inmates anywhere from $3 to $7 in cash,[17] cigarettes, or reciprocal favors.[18] Johnson believed that if he refused to perform these sexual services, his health would be put in jeopardy on account of Hernandez having previously beaten him to the point where medical attention was required.[19] Even when Johnson was moved to a different building, he was bought and sold by other gang members, and beaten and raped on a daily basis.[20] He was simply "property" in the plain sense of the meaning of the term.[21]

Prison officials ignored Johnson's cry for help.[22] Instead of taking remedial measures to protect Johnson from his torment, certain officials advised him to stand up to the gang members, noting that "[t]here's no reason why Black punks can't fight and survive in general population if they don't want to fuck."[23] Officials also remarked that because Johnson was a homosexual, he probably enjoyed the sexual assaults he experienced.[24] Johnson's ordeal lasted the entire eighteen months of his incarceration.[25] Subsequent to his incarceration, Johnson brought a section 1983 claim against the prison officials asserting violation of his Eighth Amendment rights and the Equal Protection Clause.[26] No Thirteenth Amendment claims were brought.[27] The case was ultimately dismissed for failure to exhaust administrative remedies.[28]

B. The Story of Michael Blucker

Not all instances of prison slavery involve gay men. Michael Blucker was a straight 24-year-old married man when he was imprisoned in an Illinois state correctional facility for a nonviolent crime.[29] Shortly after his arrival, Blucker was

14. *Id.*
15. *Id.* at 512–13.
16. Adam Liptak, *Ex-Inmate's Suit Offers View Into Sexual Slavery in Prisons*, N.Y. TIMES (Oct. 16, 2004), http://www.nytimes.com/2004/10/16/national/16rape.html?_r=0.
17. Adam Liptak, *Inmate Was Considered 'Property' of Gang, Witness Tells Jury in Prison Rape Lawsuit*, N.Y. TIMES (Sept. 25, 2005) [hereinafter Liptak, *Rape Lawsuit*], http://www.nytimes.com/2005/09/25/national/25rape.html?_r=0.
18. Brook, *supra* note 12.
19. *Johnson*, 385 F.3d at 513.
20. *Id.*
21. Liptak, *Rape Lawsuit*, *supra* note 16, (noting that when a gang member testified in Johnson's trial, he explained that Johnson was "property" and that even if he refused to engage in sexual acts, he would have been beaten or stabbed until he obliged).
22. *Johnson*, 385 F.3d at 513.
23. *Id.*
24. *Id.*
25. Liptak, *Rape Lawsuit*, *supra* note 16.
26. *Johnson*, 385 F.3d at 512.
27. *Id.*
28. *Id.*
29. Ghali, *supra* note 4, at 614; J.C. Oleson, *The Punitive Coma*, 90 CALIF. L. REV. 829, 857 (2002);

beaten, raped, and forced into sexual slavery by his fellow inmates and even prison guards.[30] The first time he was raped, Blucker was alone in his cell when three inmates, including his cellmate, encircled him, choked him with an electrical cord, and proceeded to sodomize him while threatening him with two makeshift knives.[31] All three took turns.[32] Following the ordeal, Blucker's "cellmate rented him out" as a sex slave to other inmates in the prison.[33] Astonishingly, even prison guards were alleged to have participated in this ordeal.[34] It was asserted that, in at least two instances, prison guards paraded Blucker from cell to cell, where he was raped and forced to perform sexual services for inmates who would pay his prison guard pimps.[35] As a result of the reoccurring rapes, Blucker ultimately contracted HIV.[36] In Blucker's suit for damages, the jury was unable to reach a verdict.[37]

C. The Story of T.J. Parsell

In his memoir entitled FISH: A Memoir of a Boy Inside a Man's Prison, T.J. Parsell describes his experience with prison slavery as a straight man entering the Michigan prison system at the age of 17.[38] Parsell was imprisoned in an adult facility for robbing a store with a toy gun, the result of a "stupid prank."[39] His first day there, he was drugged and gang raped.[40]As if that was not enough, when they were done, the inmates, who had violently raped him, flipped a coin to see to whom he would belong throughout the remainder of his sentence.[41] Parsell described his experience while testifying at a hearing in front of the National Prison Rape Elimination Commission:

> I didn't last 24 hours before an inmate spiked my drink with Thorazine and then ordered me down to his dorm. Even with the drug's heavy effect, it was the most agony I had ever experienced. They knocked me out of the bed and nearly suffocated me as they shoved my head into a pillow to muffle my screams. . . . One of them grabbed my hair and smacked me and pulled my head down

30. Ghali, *supra* note 4, at 614.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. Ghali, *supra* note 4, at 614.
37. Tom Kuntz, *Word for Word/ Prison Rape; From Thief to Cellblock Sex Slave: A Convict's Testimony*, N.Y TIMES (Oct. 19, 1997), http://www.nytimes.com/1997/10/19/weekinreview/word-for-word-prison-rape-thief-cellblock-sex-slave-convict-s-testimony.html?pagewanted=all&src=pm.
38. *See generally* T.J. PARSELL, FISH: A MEMOIR OF A BOY IN A MAN'S PRISON (Carroll & Graf eds., 2006).
39. *Id.* at 115; *see also At Risk: Sexual Abuse and Vulnerable Groups Behind Bars: Hearing Before the National Prison Rape Elimination Comm.* 109th Cong. (2005) [hereinafter Statement of T.J. Parsell], *available at* http://cybercemetery.unt.edu/archive/nprec/20090820160605/http://nprec.us/docs/sf_tjparsell_statement.pdf (describing his personal experience with sexual assaults inside prisons).
40. Statement of T.J. Parsell, *supra* note 39.
41. *Id.*

> while the others took turns sodomizing me. When I choked on my own vomit and gasped for air, it only made them laugh. . . . My rectum bled for several days, but I was too afraid to come forward, even to see a doctor. . . . I just wanted to do my time and get out alive. Everyone knew that snitches were killed. . . . It takes only one or two violent rapes before you start compromising.[42]

The agony experienced by Parsell extended beyond the physical.[43] He went on to explain that the inmates involved in the rape had "stolen [his] manhood, [his] identity and part of [his] soul."[44] Subsequently, he became a drug addict in an effort to "'drown out the memories and pain.'"[45] Naturally, being gang raped and enslaved scarred him in ways that could not be seen or imagined.[46]

Sadly, the stories of Johnson, Blucker, and Parsell are far from unique. Consider Kendall Spruce, a bisexual man who was raped by more than twenty different inmates during his incarceration at the Arkansas Department of Corrections between January of 1991 and December of 1991.[47] After reporting the first rape, officials placed Spruce in protective custody, though this transfer did nothing to protect him from further attacks.[48] Spruce was labeled a "faggot" as a result of this victimization, and prison officials blamed the rape on Spuce's sexual orientation, claiming that he probably enjoyed being raped.[49] There is also Keith Deblasio, a gay man incarcerated for fraud at a federal prison in West Virginia.[50] After filing several claims against prison officials, Deblasio was transferred to a higher-security prison in Michigan in retaliation for his actions.[51] While there, he contracted HIV as a result of being repeatedly raped by gang members who threatened to stab him.[52]

And there is Stephen Donaldson, an activist who in 1973 was placed in a Washington D.C. jail for two days as a result of trespassing at the White House in order to protest U.S. policy in Southeast Asia.[53] During those two days, Donaldson was gang-raped approximately sixty times and passed on to numerous inmates, ultimately contracting HIV.[54] He died of complications from AIDS in 1996.[55]

---

42. *Id.*
43. *Id.*
44. *Id.*
45. Carolyn Marshall, *Panel on Prison Rape Hears Victims' Chilling Accounts*, N.Y. TIMES (Aug. 20, 2005), http://www.nytimes.com/2005/08/20/politics/20rape.html.
46. *Id.*
47. Spruce v. Sargent, 149 F.3d 783, 785 (8th Cir. 1998).
48. *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars, Hearing Before the National Prison Rape Elimination Comm.*, 109th Cong (Aug. 13, 2005) [hereinafter Testimony of Kendall Spruce], *available at* http://www.wcl.american.edu/endsilence/documents/AUG2005FULLHEARING.pdf (discussing prison rape and his individual experience).
49. *Id.*
50. Darryl M. James, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L 465, 472 (2011).
51. *Id.*
52. *Id.*
53. *See* Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity As A Backdrop for "Deliberate Indifference"*, 92 J. CRIM. L. & CRIMINOLOGY 127, 128 (2002).
54. *Id.*

D. Enslavement of Female Inmates

It is important to note that while the aforementioned cases of prison slavery involved only men, females are by no means immune. In fact, 46% of all sexual abuse victims in state prisons are women.[56] One study has shown that in female correctional facilities, sexual coercion is prominent and varies in rates of 6% to 27%.[57] Females are especially vulnerable due to the risk of being sexually harassed, molested, fondled, pressured and forced into sexual intercourse by prison guards—the very people entrusted to protect their wellbeing.[58] For instance, female inmates in a California federal penitentiary have alleged that they were beaten, sexually assaulted, and sold by prison guards as sex slaves to male inmates.[59] Likewise, many female inmates in the District of Columbia testified that they too had been sexually assaulted by prison guards.[60] Incredibly, for female inmates, allegations of sexual enslavement and abuse extend beyond the walls of prisons. For example, female inmates at a Hawaiian correctional facility alleged that prison guards conducted a prostitution ring at the nearby hotels and forced inmates to serve as call girls.[61] It appears that the prison culture of enslavement and sexual abuse does not discriminate between the sexes.

E. Statistics

The aforementioned anecdotal evidence of prison slavery is not uncommon and its existence can be corroborated by statistical evidence. Admittedly though, accurate and factual statistics relating to prison rape are "notoriously difficult to generate."[62] Feelings of shame and disgust contribute to difficulties in collecting vital data,[63] And because of these factors, victimized inmates are hesitant to disclose their ordeal to prison officials or through sexual violence studies.[64] Indeed, one such study based on the inmate population of Nebraska State prisons found

---

55. *Id.*

56. Allen J. Beck & Timothy A. Hughes, U.S. Dep't of Justice, *Sexual Violence Reported by Correctional Authorities, 2004*, NCJ 210333, 8 (July 2005), *available at* http://bjs.gov/content/pub/pdf/svrca04.pdf.

57. David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, J. SEX RESEARCH (Aug. 1, 2002), *available at* http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=94130318.

58. *Id.*

59. Dennis J. Opatrny, *3 Women Sue, Allege Sex Slavery in Prison*, S.F. EXAMINER (Sept. 29, 1996) http://www.sfgate.com/bayarea/article/3-women-sue-allege-sex-slavery-in-prison-3121303.php.

60. Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia, 93 F.3d 910, 914 (D.C. Cir. 1996), *cert. denied*, 416 U.S. 940 (1997).

61. Michael Meyer, *Coercing Sex Behind Bars*, NEWSWEEK MAGAZINE (Nov. 8, 1992), http://www.dailybeast.com/newsweek/1992/11/08/coercing-sex-behind-bars.html (discussing allegations of prison guards renting rooms at the Pagoda Hotel in downtown Honolulu and using female inmates as call girls).

62. Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2 (2011) (citing Gerald G. Gaes & Andrew L. Goldberg, *Prison Rape: A Critical Review of the Literature* 1–2, NAT'L INST. OF JUSTICE (Mar. 10, 2004), http://www.ncjrs.gov/pdffiles1/nij/grants/213365.pdf).

63. Ghali, *supra* note 4, at 616.

64. *See generally* Gerald G. Gaes & Andrew L. Goldberg, *Prison Rape: A Critical Review of the Literature*, NAT'L INST. OF JUSTICE (Mar. 10, 2004), http://www.ncjrs.gov/pdffiles1/nij/grants/213365.pdf.

that approximately 50% of inmates who are raped do not confide in anyone and only one out of ten inmates actually tells the medical staff.[65]

Another reason for not disclosing rape incidents has to do with the prison code and the potentially deadly result of its breach.[66] Many prisoners choose not to disclose the fact that they have been raped out of fear of retaliation.[67] In fact, it was stated by Judge Seiler of the Missouri Supreme Court in *State of Missouri v. Green* that an inmate's "life wouldn't be worth 'a plugged nickel'" if he reports to prison authorities the fact that he has been raped and upon report "he . . . 'was as good as dead.'"[68]

The lack of reliable prison records also adds to the uncertainty of the data that is collected.[69] Accordingly, any data that purports to represent the existence of rape and slavery inside prisons is undoubtedly skewed and does not fully express the gravity and nature thereof. Thus, the rate of sexual assaults inside prisons is probably higher than current estimates.[70]

Nevertheless, with this caveat in mind, the United States Congress has conservatively estimated that at least 13% of all inmates in the United States have been sexually assaulted.[71] The figure suggests an estimated 200,000 inmates, presently incarcerated, have been or will, in all likelihood, be victims of rape.[72] The figures, as Congress found, further suggest that over one million inmates have been raped in the past two decades.[73] When considering these rates annually, 4.4% of prison inmates and 3.1% of jail inmates of both sexes reported one or more incidents of rape involving either inmates or prison guards.[74] While these statistics are alarming, other studies have concluded that when considering an inclusive definition of sexual assault, reported victimization rates actually increase up to

65. James E. Robertson, *The "Turning-Out" of Boys in A Man's Prison: Why and How We Need to Amend the Prison Rape Elimination Act*, 44 IND. L. REV. 819, 825 (2011) (citing Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 74 (1996)).

66. Raymond G. Kessler & Julian B. Roebuck, *Snitch*, *in* ENCYC. OF AMERICAN PRISONS 449 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (discussing the existence of inmate subcultures and codes). "One aspect of prison subculture is an inmate code that, like the code of criminals outside prison, forbids informing." *Id.* "[I]nformants are generally scorned and live in fear . . . ." *Id.* at 450.

67. Robertson, *supra* note 65, at 839.

68. State v. Green, 470 S.W.2d 565, 569 (Mo. 1971) (Seiler, J., dissenting); *see also* Withers v. Levine, 615 F.2d 158, 160 (4th Cir. 1980) ("There was evidence, however, that many more such [sexual] assaults go unreported because the victim is usually threatened with violence or death should the incident be reported."); Smith v. Ullman, 874 F. Supp. 979, 985 (D. Neb. 1994) (noting that reporting one's assailant amounts to snitching, an act that is "often brutally discouraged in the general population"); Kessler & Roebuck, *supra* note 66, at 449 (noting that snitches are "hated and despised . . . and may be the object of violent reprisal[s]").

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

70. *Id.*

71. *See* Ghali, *supra* note 4, at 615 (citing 42 U.S.C. § 15601(2) (Supp. III 2004)).

72. *Id.* at 615–16.

73. *Id.* at 616.

74. *See* Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09*, at 5, U.S. DEP'T OF JUSTICE (Aug. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf; *see also* Robertson, *supra* note 65, at 827.

20%.[75] So the numbers are even higher than those previously reported. Therefore, these numbers are astonishing particularly when considering that only 50% of rape victims actually report the incident.[76]

While these statistics pertain specifically to rape and make no express reference to slavery, reports have shown that "'sexual slavery following rape is . . . an ordinary occurrence.'"[77] Scholars have noted that the "initial rape commonly serves as the first step in what prisoners refer to as 'turning out' the victim, which frequently resembles a form of slavery."[78] Therefore, the available evidence of sexual assaults inside prisons is indicative of the prevalence of slavery since they are existentially linked to one another.[79] Simply put, sexual slavery inside prison walls is an epidemic.

F. Benefits of Curtailing Prison Slavery

It is indeed difficult to sympathize with individuals that society has deemed to be too dangerous or unfit to roam about freely. It is certainly understandable to question any effort that would attempt to give effect to the rights of prisoners. Yet, we should not be too quick to disregard the forsaken. After all, the function and ultimate goal of our correctional facilities is to "correct" the behavior of its inmates.[80] Indeed, some have suggested that we ought to regard our prisoners as having a disease and use our correctional facilities as a place for treatment:

> We shall look on crime as a disease, and its physicians shall displace the judges, its hospitals displace the galleys. Liberty and health shall be alike. We shall pour balm and oil where we formerly applied iron and fire; evil will be treated in charity, instead of in anger. This change will be simple and sublime.[81]

The treatment of criminals, some have argued, may even be the true measure of a nation:

75. *See* Robertson, *supra* note 65, at 826–27 (citing Tonisha R. Jones & Travis C. Pratt, *The Prevalence of Sexual Violence in Prison: The State of the Knowledge Base and Implications for Evidence-Based Correctional Policy Making*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 280, 289 (2008)).

76. Robertson, *supra* note 65, at 625.

77. Ghali, *supra* note 4, at 615 (citing Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE.COM (Oct. 1, 2003), http://www.slate.com/id/2089095).

78. Man & Cronan, *supra* note 53, at 154.

79. *See* Ghali, *supra* note 4, at 607 (explaining that prison slavery is not limited to sexual slavery; inferior inmates may be subjected to forced labor such as washing his masters clothes, preparing his food, or cleaning his cell).

80. *See e.g.*, THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, at 12 (1967) (noting that the major task of the correctional apparatus is rehabilitation of criminals).

81. Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 631 (2004) (citing VICTOR HUGO, THE LAST DAY OF A CONDEMNED MAN, *in* THE DEATH PENALTY: A LITERARY AND HISTORICAL APPROACH 103, 105 (Edward G. McGehee & William H. Hildebrand eds., 1964)).

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation [sic] of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State . . . these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.[82]

Nevertheless, even if one is not fully persuaded by this humanitarian narrative of the treatment of prisoners, it is the close proximity between the free society and the incarcerated that should justify the advocacy for prisoners' rights. As Judge Posner has explained:

> [W]e should have a realistic conception of the composition of the prison and jail population before deciding that they are scum entitled to nothing better than what a vengeful populace and resource-starved penal system choose to give them. We must not exaggerate the distance between 'us,' the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.[83]

Whether we like it or not, prisoners are part of our society and when freed, they become part of our community. As previously explained by the story of T.J. Parsell, the effects of prison slavery go far beyond physical consequences and may lead to antisocial behavior that will undoubtedly have an overall effect on the community.[84] Naturally, many inmates victimized by sexual abuse become violent aggressors.[85] Some of them rape other prisoners preemptively out of fear of being raped or they may even kill their initial assailants.[86] This aggressive behavior will undeniably spill over into our community. Even lawmakers have recognized that "often non-violent first time offenders, come out of a prison rape experience severely traumatized and leave prison not only more likely to commit crimes, but far more likely to commit violent crimes than when they entered."[87] Therefore it is

82. Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize to End Prison Rape*, 32 J. LEGIS. 129, 138 (2006) (citing 6 PARL. DEB., H.C. (5th ser.) (1910)).

83. Johnson v. Phelan, 69 F.3d 144, 152 (7th Cir. 1995).

84. Statement of T.J. Parsell, *supra* note 39.

85. DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 98–101 (1980).

86. *See generally* James E. Robertson, *"Fight or F . . ." and Constitutional Liberty: An Inmate's Right to Self-Defense When Targeted by Aggressors*, 29 IND. L. REV. 339 (1995) (discussing how target inmates, victims of violence, often initiate violence as a preemptive measure).

87. H.R. REP. NO 108-219, Prepared Statement of the Hon. Robert C. Scott, a Rep. in Congress From the State of Virginia, at 35 (Jul. 18, 2003), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr219&dbname=108&; *see also* Prison Rape Elimination Act, 42 U.S.C. § 15601(8) ("Prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released—as 600,000 inmates are each year.").

in society's best interest to curtail prison slavery if only to prevent its adverse impact on our community.

Curtailing prison slavery would have an even larger impact on our community. It has been noted that AIDS is rampant among U.S. prisons.[88] It constitutes the second leading cause of death for prisoners after natural causes.[89] An estimated 25% of the U.S. population living with HIV passes through the correctional system annually.[90] In the year 2000 alone, New York prisons held one-quarter of all known HIV-positive prisoners.[91] The reason why there is a high concentration of HIV-positive individuals in prison has to do with their lack of access to preventative measures.[92] For instance, because inmates have no access to latex barriers for practicing safe sex, they often relegate to using makeshift barriers from rubber gloves or plastic bags.[93] This leads to the contraction of HIV. And, because HIV is not readily detected, when HIV-positive prisoners are released into the community they transmit the virus without even knowing they had contracted it.[94] Accordingly, putting an end to prison slavery is essential to ensure the health and safety of not only inmates but also society at large.

III. DEFINITION OF SLAVERY

In presenting the evidence of sexual assaults and the subsequent sexual coercion of inferior inmates, this Article has reflexively categorized the conduct as slavery. However, because slavery has a long and complex legal pedigree that can result in draconian legal consequences, we must be sure that any conduct described as slavery satisfies the elements of the crime as it has been defined, both historically and jurisprudentially. Therefore, in order to get the full protection of the Thirteenth Amendment, one must first demonstrate that the sexual coercion and dominance that occurs in prisons amounts to slavery as contemplated by the Thirteenth Amendment.

Black's Law Dictionary defines slavery as "[a] situation in which one person has absolute power over the life, fortune, and liberty of another."[95] Some have argued that pursuant to this definition an inmate cannot be considered a slave

88. HUMAN RIGHTS WATCH, PREFACE TO NO ESCAPE: MALE RAPE IN U.S. PRISONS 110 (2001) (Part VI. Body and Soul: The Physical and Psychological Injury of Prison Rape), *available at* http://www.hrw.org/reports/2001/prison/report.html.

89. *Id.*

90. Anne Spaulding et al., *Human Immunodeficiency Virus in Correctional Facilities: A Review*, CLINICAL INFECTIOUS DISEASES 305 (2002), *available at* http://cid.oxfordjournals.org/content/35/3/305.full?maxtoshow=&hits=10&RESULTFORMAT=1&author1=spaulding%252C+anne+&author2=stephenson%252C+becky+&title=human+immunodeficiency+virus+in+correctional+facilities%253A+a+review+&andorexacttitle=and&andorexacttitleabs=and&andorexactfulltext=and&searchid=1&FIRSTINDEX=0&sortspec=relevance&resourcetype=HWCIT.

91. Laura M. Maruschak, U.S. Dep't of Justice, *HIV in Prisons, 2000*, NCJ 196023, 1 (Oct. 2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp00.pdf .

92. Human Rights Watch, *supra* note 88.

93. Nancy Mahon, *New York Inmate's HIV Risk Behaviors: The Implications for Prevention Policy and Programs*, 86(9) AM. J. PUB. HEALTH 1211, 1212–13 (1996).

94. *See id.* at 1213.

95. BLACK'S LAW DICTIONARY 1515 (9th ed. 2009).

because he or she was not captured and restrained by his or her assailants.[96] Indeed, it is the government that has denied his or her freedom through due process.[97] However, this argument ignores the fact that within the correctional facility an inmate's freedom of movement is further limited by his or her masters, *i.e.*, the inmates that exert dominance over them.[98] Therefore, pursuant to this definition, an inmate who is subjected to sexual coercion by another inmate and whose rights, no matter how inherently limited, are further restricted, amounts to a slave. A slave is also "a person who is wholly subject to the will of another, one who has no freedom of action and whose person and services are wholly under the control of another, and who is in a state of enforced compulsory service to another."[99] Certainly this definition applies to those cases previously discussed where an inmate in an inferior position, because of the use or threat of physical injury, is wholly subject to the will of other inmates and forced to provide compulsory services, such as sex or labor.[100] Even under international law, inmates in such situations can be considered slaves.[101] For instance, the 1926 Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[102] Clearly, this encompasses prison slavery.

Notwithstanding these definitions, the Supreme Court of the United States has explained that the purpose of the Thirteenth Amendment is to "abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit."[103] Clearly, even if one is not fully convinced that sexual slavery in prison is actual "slavery", the Supreme Court's assertion that all incidents of slavery are prohibited should suffice to establish that the Thirteenth Amendment prohibits the existence of slavery as it has materialized in United States' prisons.

Having thus far illustrated the existence of slavery within prison walls and the critical need to abolish it, the following sections assess whether the Thirteenth Amendment could be instrumental in achieving this goal.

IV. THE THIRTEENTH AMENDMENT

The Thirteenth Amendment to the United States Constitution provides in part:

96. James Joyner, *Prison Rape and the 13th Amendment*, OUTSIDE THE BELTWAY (Apr. 12, 2008), http://www.outsidethebeltway.com/prison_rape_and_the_13th_amendment.

97. *Id.*

98. *Id.*

99. United States v. Ingalls, 73 F. Supp. 78 (S.D. Cal. 1947).

100. *See* United States v. Kozminski, 487 U.S. 931, 952 (1988) (defining slavery as involuntary servitude, which means "a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process").

101. United Nations Slavery Convention art. 1, Sept. 25, 1926, 46 Stat. 2183, 212 U.N.T.S. 17.

102. *Id.*

103. Bailey v. State of Ala., 219 U.S. 219, 241 (1911). Admittedly, this definition does not consider the "punishment clause" of the Amendment. Nevertheless, it is being proffered to illustrate that what occurs inside prisons is indeed slavery, or at the least, that it exhibits the badges and incidents of slavery.

> 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.[104]

It was first introduced in the House of Representatives on December 14, 1863 and then in the Senate on January 13, 1864.[105] The Amendment was ultimately ratified by the required number of states and recorded by the Secretary of State on December 18, 1865.[106] "'The version of the amendment that ultimately prevailed' was written by the Senate Judiciary Committee using 'language that closely paralleled the slavery provision in the [Northwest] Ordinance [of 1787],' which prohibited slavery 'in areas north of the Ohio River.'"[107] Despite the Amendment's significant implications and objectives, little consideration was given to its actual text.[108] As one scholar explained, "'[i]n the end, the amendment's text was selected more for its symbolic significance than for its ability to state the members' intention with exactness.'"[109] The Supreme Court echoed this sentiment when it remarked that the Amendment's "two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated."[110] This lack of specificity, however, has previously contributed to misapplication and may be responsible for the current misinterpretation of the Amendment.[111]

For example, two years after the ratification, Congressman John Kasson urged Congress to clarify the scope of the "Punishment Clause" because it had become evident that states were taking advantage of this clause in order to maintain slavery.[112] One scholar explained, "judges across the country were evading the requirements of the Thirteenth Amendment by enslaving blacks 'as a punishment for crime.'. . . [and that] these 'inferior tribunals [would] order that a man shall be sold at a public auction, and call that an execution of a legitimate sentence.'"[113] In fact, according to Kasson, one advertisement contained the following bold caption: "NEGROES TO BE SOLD AS A PUNISHMENT FOR CRIME."[114] As a result,

104. U.S. CONST. amend. XIII, § 1.

105. Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 419 (2009) (citing Alexander Tsesis, *The Thirteenth Amendment's Revolutionary Aims, in Promises of Liberty* (forthcoming) (manuscript at 8 n.70), *available at* http://ssrn.com/abstract=1023762).

106. *Id.* at 421 (citing Scott Howe, *Slavery As Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 991 (2009)).

107. *Id.* at 419 (citing Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 626 (2008)).

108. *Id.* at 420.

109. *Id.* (citing Lea VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 448 (1989)).

110. Slaughter-House Cases, 83 U.S. 36, 69 (1873).

111. *See id.* at 70–71.

112. Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 292 (2010) (citing CONG. GLOBE, 39th Cong., 2d Sess. 344, 345).

113. Ghali, *supra* note 4, at 627–28 (citing CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867)).

114. *Id.* at 627 (citing CONG. GLOBE, 39th Cong., 2d Sess. 324, 345 (1867)).

Kasson introduced the following joint resolution in hopes of clarifying the Amendment:

> [T]he true intent and meaning of [the Thirteenth Amendment] prohibits slavery or involuntary servitude forever in all forms, except in direct execution of a sentence imposing a definite penalty according to law, which penalty cannot, without violation of the Constitution, impose any other servitude than that of imprisonment or other restraint of freedom . . . according to the usual course thereof, to the exclusion of all unofficial control of the person so held in servitude . . . .[115]

Kasson further attempted to clarify that "punishment" under the Amendment:

> [T]here must be a direct condemnation into that condition under the control of the officers of the law like the sentence of a man to hard labor in the State prison in the regular and ordinary course of law, and that is the only kind of involuntary servitude known to the Constitution and the law.[116]

While Kasson's joint resolution passed in the House of Representatives, it was postponed indefinitely in the Senate.[117] The failure to clarify the Amendment should not, however, be construed as establishing Kasson's interpretation to be incorrect or that the Senate did not agree with it. Indeed, there is evidence from the floor debates in the House that the Senate's inaction could have resulted from the difficulty in determining whether Congress actually had the authority to change constitutional provisions without the Supreme Court's approval or whether the Court was the more appropriate venue to interpret the Amendment.[118]

A. The "Punishment Clause"

Because Kasson's resolution was not adopted, the "Punishment Clause" remained ambiguous. Courts have taken it upon themselves to interpret its meaning. Evidently there is widespread consensus among the judiciary that the Thirteenth Amendment does not provide prisoners protection from hard labor, since it expressly authorizes involuntary servitude as punishment for a crime.[119] This is understandable. After all, Congress, in adopting the Amendment, sought to

115. *Id.* at 628 (citing CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867)).
116. *Id.* (citing CONG. GLOBE, 39th Cong., 2d Sess. 324, 345–46 (1867)).
117. *Id.* (citing CONG. GLOBE, 39th Cong., 2d Sess. 324, 1600 (1867)).
118. *See* Zietlow, *supra* note 112, at 292 (explaining that there was real uncertainty as to Congress' power to expand constitutional provisions and that the uncertainty could have led to inaction).
119. *See e.g.*, Villarreal v. Woodham, 113 F.3d 202, 206 (11th Cir. 1997); Wendt v. Lynaugh, 841 F.2d 619, 620 (5th Cir. 1988); Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977); Smith v. Dretke, 157 F. App'x 747, 748 (5th Cir. 2005); Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992) (all rejecting Thirteenth Amendment Challenges to sentences of hard labor).

abolish antebellum slavery but was cautious not to curtail the power of the states to punish criminals.[120] That appears to be the limited purpose of the clause, although some courts have lost sight of Congress' aim and have consequently misinterpreted the Amendment.[121] These courts have erroneously held that prisoners are completely exempt from Thirteenth Amendment protection.[122]

For instance, in *Van Hoorelbeke v. Hawk*, the plaintiff brought a Thirteenth Amendment challenge claiming that the denial of medical care and lack of recreation rendered him a slave to the institution.[123] Plaintiff brought a Thirteenth Amendment challenge claiming that the denial of medical care and lack of recreation rendered him a slave to the institution. The court held that even assuming that the plaintiff's injuries were recognized by the Thirteenth Amendment, "prisoners are explicitly excepted from that amendment's protection. Thus [the plaintiff] has no rights under the Thirteenth Amendment and cannot claim any violation."[124] Likewise, the Second Circuit in *Jobson v. Henne*, unequivocally held that prisoners "are explicitly excepted from the [Thirteenth] Amendment's coverage."[125] Seemingly, these courts have determined that the plaintiffs' claimed injuries were inflicted as part of their punishment. Anything different would suggest that the claimed injuries, while not expressly a component of the punishment, are in fact incidental to punishment and still within the bounds of the Thirteenth Amendment exception. Regardless, in either instance, the ultimate result is misguided.

1. Prison Conditions as Incidental to Punishment

Nevertheless, however misguided the logic may appear, courts have previously relied on this "incidental to punishment" theory to determine what constitutes punishment under the Eighth Amendment.[126] For example, in *United States ex rel. Smith v. Dowd*, the plaintiff challenged his imposed sentence as a violation of the Thirteenth Amendment.[127] Apparently, the trial court had imposed a ten-year sentence for carjacking but added the penalty of life imprisonment because of the plaintiff's status as a habitual offender.[128] The plaintiff appealed his life sentence because it included a term of involuntary servitude.[129] Thus, he argued that because the life sentence was a punishment for his status as a habitual offender, and not a

120. *See* Ghali, *supra* note 4, at 607.

121. *See e.g.*, *Villarreal*, 113 F.3d at 206; *Wendt*, 841 F.2d at 620; *Ray*, 556 F.2d at 882; *Smith*, 157 F. App'x at 748; *Vanskike*, 974 F.2d at 809.

122. *Villarreal*, 113 F.3d at 206; *Wendt*, 841 F.2d at 620; *Ray*, 556 F.2d at 882; *Smith*, 157 F. App'x at 748; *Vanskike*, 974 F.2d at 809.

123. Van Hoorelbeke v. Hawk, 70 F.3d 117 (7th Cir. 1995).

124. *Id.* (internal citations omitted).

125. Jobson v. Henne, 355 F.2d 129, 131 (2d Cir. 1966).

126. Because the meaning of "punishment" has not been evaluated as relating to the Thirteenth Amendment, this Article will assess how the Court has interpreted "punishment" in the Eighth Amendment. Arguably, "punishment" in the Eighth Amendment should not be treated differently from that in the Thirteenth Amendment. *See* Ghali, *supra* note 4, at 623.

127. 271 F.2d 292, 293 (7th Cir. 1959).

128. *Id.* at 294.

129. *Id.*

punishment for a specific crime, any forced labor would violate his Thirteenth Amendment right.[130] The court disagreed.[131] It held that the "penalty is imposed as an incident to a conviction of crime and in our opinion is punishment for crime excepted from the prohibition of the Thirteenth Amendment."[132]

Similarly, in *Estelle v. Gamble*, the U.S. Supreme Court established that one's punishment is not limited to one's actual sentence since prison conditions are inherently part of the punishment.[133] The Court held that the government was obligated to care and provide for those whom it is punishing by incarceration and concluded that claims of deliberate indifference in the administration of the inmate's medical care were sufficient to state an Eighth Amendment claim.[134] In so holding, the Court presumed that prison conditions were a component of one's punishment.[135] This line of reasoning continued in *Rhodes v. Chapman*, where the Court noted that "[i]t is unquestioned that '[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards.'"[136]

2. Punishment Requires Intent

In *Wilson v. Seiter*, the U.S. Supreme Court suggested that punishment requires some form of intent.[137] Justice Scalia explained that "[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."[138] Justice Scalia then quoted Judge Posner as noting:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century. . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.[139]

Under the Court's jurisprudence, punishment always requires a mental state: It is imposed intentionally by a legislature or a sentencing judge, or by a prison official through her deliberate indifference. Prison conditions, no matter how harsh, can never qualify as punishment without inquiring into the mental state of a prison official because the Eighth Amendment outlaws not "cruel and unusual 'conditions,'" but "cruel and unusual 'punishments.'"[140] Ultimately, the Court held

130. *Id.* at 295.
131. *See id.*
132. *Id.*
133. *See generally* 429 U.S. 97 (1976).
134. *Id.* at 104.
135. *See* Ghali, *supra* note 4.
136. 452 U.S. 337, 345 (1981).
137. 501 U.S. 294 (1991).
138. *Id.* at 300.
139. *Id.*
140. *See Seiter*, 501 U.S. at 294.

that in order for prison conditions to constitute punishment pursuant to the Eighth Amendment, one must prove intent to inflict punishment on the part of the prison official.[141]

3. Punishment is Limited to the Sentence Imposed

Certain Justices, Clarence Thomas in particular, have advocated for a very narrow understanding of the meaning of "punishment" in the context of the Eighth Amendment. In *Hudson v. McMillian*, Justice Thomas dissented from the majority and noted that "punishment" in the context of the Eighth Amendment only applies "to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration."[142] Justice Thomas, therefore, believed that prison conditions that may befall a prisoner are not part of the prisoner's punishment because those conditions were not part of the initial sentence.

In a later case, Justice Thomas used Congressional intent to bolster his point of view. In *Helling v. McKinney*, the majority held that inmates' involuntary exposure to tobacco smoke could form a basis for Eighth Amendment relief.[143] In his dissent, Justice Thomas reasoned that during the ratification of the Eighth Amendment, the term "punishment" only "referred to the penalty imposed for the commission of a crime."[144] He noted that there was no "historical evidence indicating that the framers and ratifiers of the Eighth Amendment had anything other than this common understanding of 'punishment' in mind."[145] Justice Thomas further explained that the term "cruel and unusual punishment" was derived from the English Declaration of Rights of 1689, which was exclusively enacted to prohibit "sentencing abuses of the King's Bench" and nothing more.[146] "Just as there was no suggestion in English constitutional history that harsh prison conditions . . . [were considered to be part of]'punishment,' the debates surrounding the . . . Bill of Rights were silent" on the issue of whether the Eighth Amendment was concerned with more than sentencing abuses.[147]

V. PRISON SLAVERY IS NEITHER A FORM OF OR INCIDENTAL TO PUNISHMENT

A. Textual Interpretation

When considering the text of the Thirteenth Amendment and recent interpretations of "punishment," it becomes abundantly evident that decisions holding that prisoners are unequivocally exempt from the protection of the Thirteenth Amendment are fundamentally erroneous.

141. *Id.* at 300.
142. 503 U.S. 1, 18 (1992) (Thomas, J., dissenting).
143. 509 U.S. 25 (1993).
144. *Id.* at 38 (Thomas, J., dissenting).
145. *Id.*
146. *Id.*
147. *Id.* at 38–39.

The Thirteenth Amendment to the United States Constitution prohibits the existence of slavery or involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted."[148] Obviously, inmates subjected to slavery inside the prison walls were not sentenced to this form of punishment. The title of this Article conveys the absurdity of this notion. Therefore, the literal and logical reading of the Amendment does not bar prison inmates who have been victims of sexual slavery or any form of slavery from asserting the Amendment's full protection.

B. Requirement of Intent

Arguably, these prisoners also retain the Amendment's full protection if we embrace the interpretation of "punishment" as suggested by Justice Scalia in *Seiter* or Justice Thomas in *McMillian* and *McKinney*. For instance, in *Seiter*, Justice Scalia noted that "punishment" requires some element of intent by either the sentencing judge or the prison official.[149] As Judge Posner explained, "if [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word. . . . [because punishment] is imposed intentionally by a legislature or a sentencing judge, or by a prison official."[150] Under this legal framework,[151] a victimized inmate is barred from raising a Thirteenth Amendment challenge only if the onslaught of sexual assaults and coercion was an intended consequence of the imposed sentence. Certain outcomes are indeed intended consequences of any imposed prison sentence.[152] Those include the restriction of freedom, the restriction of movement, and the restriction of certain choices to name a few.[153] This is obviously not the case with prison slavery since sexual assaults and slavery cannot be said to be an intended consequence of an imposed sentence.

Even if we accept the interpretation of punishment as contemplated by Justice Thomas in *McMillian* and *McKinney*, victimized inmates should still retain the Thirteenth Amendment's full protection.[154] As Justice Thomas explained, punishment is limited to one's sentence and prison conditions cannot be considered a component of the imposed punishment.[155] Again, no one convicted in modern history has ever been sentenced to a term of enslavement. Certainly, no current inmate is serving any type of sentence to justify his enslavement by other inmates. The mere difference between Justices Scalia and Thomas' interpretation of

148. U.S. CONST. amend. XIII, § 1.
149. Wilson v. Seiter, 501 U.S. 294 (1991).
150. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).
151. It is important to bear in mind that this is the most recent interpretation of "punishment" by the U.S. Supreme Court.
152. Doris Mackenzie, *Sentencing and Corrections in the 21st Century: Setting the State for the Future*, DEP'T OF CRIMINOLOGY & CRIMINAL JUSTICE UNIV. MD. (July 2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf.
153. *Id.*
154. Hudson v. McMillian, 503 U.S. 1 (1992); Helling v. McKinney, 509 U.S. 25 (1993).
155. *McMillian*, 503 U.S. at 1.

"punishment" is that Justice Scalia believes that even prison officials have the power to impose punishment, whereas Justice Thomas believes that only the legislature and judges are capable of imposing punishment. In either instance, inmates should retain their Thirteenth Amendment protection against prison slavery. Remarkably, the irony of Justices Scalia and Thomas' decisions is that while their holdings were meant to restrict inmates' legal rights for purposes of the Eighth Amendment, the holdings at the same time expand or at least clarify inmates' rights under the Thirteenth Amendment.

C. Incidental to Punishment

The only plausible explanation for prohibiting prisoners from bringing Thirteenth Amendment claims has to do with the notion that prison conditions that may befall a prisoner, be it rape, slavery, or involuntary servitude, are all incidental to their initial punishment and fully contemplated to be a component of their sentence. As we saw in *Gamble* and *Chapman*, the Court established that one's punishment may exceed one's actual sentence since prison conditions are inherently part of the punishment.[156] Again, as evident with Justices Scalia and Thomas' opinions, while the holdings in *Gamble* and *Chapman* attempted to expand inmates' rights under the Eight Amendment, the holdings restrict their rights under the Thirteenth Amendment since prison conditions that befall an inmate are considered part of the inmate's punishment. However, the "incidental to punishment" rational should not apply to prison slavery since it would render superfluous certain text of the exception clause of the Thirteenth Amendment. Clearly, if prison conditions were a part of a prison sentence, the framers of the Amendment would have simply excluded prisoners from its full protection without specifically referring to "punishment for crime." Arguably, the framers included the phrase "punishment for crime" because they only contemplated the actual sentence of the prisoner and not necessarily any condition that may befall him as a consequence of his incarceration. Otherwise, the "punishment for crime" text would be superfluous since they could have simply referred to prisoners being categorically exempt from the Amendment's protection.

Moreover, the "incidental to punishment" framework cannot apply to prison slavery because it is inconsistent with our fundamental principles of punishment.

In the U.S. judicial system, justification for punishment is based on the Utilitarian and Retributive theories.[157] The Utilitarian theory of punishment suggests that there is a societal benefit served through punishment by incorporating the principles of deterrence, rehabilitation, and isolation.[158] In considering prison slavery, the purpose of the utilitarian theory of punishment cannot be served and is inconsistent with the notion of prison slavery as punishment. Certainly, the purpose of rehabilitation would not be served. There is no conceivable scenario where an

156. Estelle v. Gamble, 429 U.S. 97 (1976); Rhodes v. Chapman, 452 U.S. 337 (1981).

157. *See* U.S. v. Brown, 381 U.S. 437 (1965) (explaining the theories and purposes of punishment).

158. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 26 (1968); *see also,* Murray Schwartz, Book Review, 21 STAN. L. REV. 1277 (1969).

inmate will become rehabilitated as a result of sexual assaults and sexual coercions. If anything, the enslavement of inmates will cause more harm than good as was evidenced by the story of T.J. Parsell, wherein because of his enslavement and the resulting emotional scars, a former inmate became a drug addict in order to cope with his torment.[159] The same could be said with respect to isolation and deterrence. One does not need to enslave an inmate in order to isolate him from society. Indeed, the mere incapacitation as served by the inmate's actual imprisonment is sufficient to achieve the objective. Some may argue that prison slavery would indeed serve the purpose of deterrence. Certainly, some would be deterred from committing crimes based solely on their concern that they will be enslaved once they are imprisoned. However, this is a weak argument at best. First, there are legitimate concerns as to whether deterrence actually works since we currently have a high rate of recidivism.[160] Second, if deterrence works, the mere fact of incapacitation, restriction of movement and freedom, should be sufficient to deter the general public without having to rely on a regime of enslavement of inmates. Accordingly, using the utilitarian calculus, prison slavery does not seem to advance the principles of punishment.

The retributive theory of punishment is not concerned with societal benefit but merely attempts to inflict punishment just because the individual has committed the offense.[161] Using this approach, the punishment inflicted must be equal to that of the moral gravity of the offense.[162] This simply means if punishment is greater or more severe than what is deserved for the offense, then injustice has resulted.[163] Seemingly therefore, retributive theory of punishment is also inconsistent with prison slavery as an imposed form of punishment. This is so because, as already discussed, the enslavement of inmates is an unfortunate occurrence to even those inmates that are imprisoned for minor crimes. Consider, for example, the story of Roderick Johnson who was imprisoned after bouncing a $300 check and subsequently forced into sexual slavery for the remainder of his eighteen-month sentence.[164] Consider also the story of Stephen Donaldson who was jailed for trespassing and subsequently raped over sixty times during his two days in jail.[165] Surely, the rape and enslavement of these young men could not be said to have been equal to their offenses, *i.e.* bouncing a $300 check or trespassing. For this reason, slavery in prison cannot be consistent with our retributive theories of punishment, particularly when considering most enslaved inmates are usually weaker inmates who committed minor offenses as opposed to hardened criminals

159. Statement of T.J. Parsell, *supra* note 39.

160. *See* Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 955 (1966) (citing BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 338 (2d ed. 1951)) (providing evidence that deterrence may not work).

161. Schwartz, *supra* note 158. This notion is also known as "*just deserts.*"

162. IMMANUEL KANT, THE PHILOSOPHY OF LAW 194–98 (W. Hastie transl. 1887).

163. ALFRED C. EWING, MORALITY OF PUNISHMENT 39–40 (1929); *see also* Graham v. Florida, 130 S. Ct. 2011 (2010) (holding that while retribution is a legitimate purpose of punishment, the sentence must relate to the level of culpability of the defendant).

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

165. *See* Man & Cronan, *supra* note 53.

who have the capacity to murder and rape. Unfortunately, while prison slavery may be considered an equal punishment for these hardened criminals, they are in all likelihood not subjects of enslavement because they can protect themselves and fight back.

All of the aforementioned theories of punishment have now been codified in a federal statute known as the Sentencing Reform Act:

> [In a federal prosecution, a] court . . . shall consider . . . the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[166]

The court must impose a sentence sufficient, but not greater than necessary, to comply with these purposes.[167] Again, prison slavery is inconsistent with any of these goals. As the Supreme Court has explained, "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objectiv[e]', any more than it squares with the 'evolving standards of decency.'"[168]

VI. CONFLICTING AMENDMENTS

In considering how "punishment" has been interpreted under the Eighth Amendment and attempting to apply it in the context of the Thirteenth Amendment, it has become apparent that a conflict may exist between these two very important Amendments to the United States Constitution. For example, as previously mentioned, while Justices Scalia and Thomas' framework was meant to restrict inmates' legal rights for purposes of the Eighth Amendment, it at the same time expanded their rights under the Thirteenth Amendment since prison conditions are not considered a part of their punishment. Thus, the "Punishment Clause" would not apply, permitting the Amendment's full protection. Similarly, while the holdings in *Dowd*, *Gamble* and *Chapman* attempted to expand inmates' rights under the Eighth Amendment, the holdings restricted inmate rights under the Thirteenth Amendment because prison conditions that befall an inmate are considered part of the inmate's punishment. The "Punishment Clause" being fully applicable would, therefore, theoretically not afford inmates protection of the Amendment.

The conflict between these two Amendments should not come as a surprise. The inherent friction is textually obvious. For example, conduct violates the Eighth

166. 18 U.S.C.A. § 3553.
167. *Id.*
168. Farmer v. Brennan, 511 U.S. 823, 833 (1994) (internal citations omitted).

Amendment only if it amounts to punishment.[169] By contrast, conduct violates the Thirteenth Amendment only if it does not amount to punishment, because of the punishment exception clause.[170] Therefore, such conduct cannot violate both the Eighth and the Thirteenth Amendment. They conflict. However, this conflict may be merely academic. Certainly, it would not adversely impact an inmate's substantive legal rights. Even if an inmate brings a Thirteenth Amendment challenge, thus maintaining that prison conditions were not part of his imposed sentence, he would not forgo his Eighth Amendment rights. Indeed, the inmate's claim may include a Thirteenth Amendment challenge and an alternative Eighth Amendment challenge in the event that the court holds that prison conditions are considered part of the inmate's sentence. Demonstrably, an inmate has a better chance of arguing both claims rather than just one.

VII. THE THIRTEENTH AMENDMENT IS SUPERIOR TO ANY OTHER LEGAL REMEDY FOR PURPOSES OF ABOLISHING SLAVERY INSIDE PRISON WALLS

Some may argue that determining whether or not prisoners may utilize the Thirteenth Amendment's protection is an unnecessary endeavor. They may note that rather than embarking on a novel theory of relief, enslaved prisoners should employ already proven legal theories such as tort claims, Eighth Amendment, and Fourteenth Amendment challenges. However, the Thirteenth Amendment is superior to such legal remedies for purposes of abolishing slavery inside prison walls.

A. Private Tort Claims

With respect to private tort claims, it is plausible that enslaved prisoners may bring actions against their assailants for the sustained injuries or against prison officials for failing to protect them. However, such actions may have fatal consequences as established by prison culture. Truth is, reporting or disclosing the identity of the assailant places the reporter's life in jeopardy. As Justice Blackmun explained, an inmate's life "isn't worth a nickel" if he reports to prison authority the fact that he had been raped.[171] Indeed T.J. Parsell noted that "everyone knew that snitches would get killed."[172] Apparently, any legal remedy that requires an enslaved inmate to initiate the challenge is extremely risky due to the culture's aversion toward "snitches." Effective relief would, therefore, have to be provided

169. Hence, "cruel and unusual punishment."

170. U.S. CONST. amend XIII § 1; Neelam Sharma, *The Triangular Slave Trade*, IT'S ABOUT TIME, http://www.itsabouttimebpp.com/Political_Prisoners/Triangular_Slave_Trade.html (last visited February 15, 2013).

171. State v. Green, 470 S.W.2d 565, 569 (Mo. 1971) (Seiler, J., dissenting); *see also* Withers v. Levine, 615 F.2d 158, 160 (4th Cir. 1980) (noting that "[t]here was evidence, however, that many more such [sexual] assaults go unreported because the victim is usually threatened with violence or death should the incident be reported"); Smith v. Ullman, 874 F. Supp. 979, 985 (D. Neb. 1994) (noting that reporting one's assailant amounts to snitching, an act that is "often brutally discouraged in the general population"); Kessler & Roebuck, *supra* note 66, at 449, 449 (noting that snitches are "hated and despised . . . and may be the object of violent reprisal[s]").

172. Statement of T.J. Parsell, *supra* note 39.

without the efforts of the enslaved inmate. This is precisely why the Thirteenth Amendment is better suited for abolishing prison slavery. Indeed, the Thirteenth Amendment imposes an unequivocal duty upon states to abolish slavery within their borders when they become aware of its existence. As one scholar explains, as soon as a state became aware of the existence of "de facto slavery within its borders," the state has an obligation to end it.[173] This standard obliges the state to take proactive measures rather than reactive ones. These proactive measures will ensure that prison slavery is abolished or at least curtailed. Additionally, because it is the state's burden to abolish slavery, enslaved inmates will no longer have to risk their lives to seek relief in order for their torment to end.

B. Eighth Amendment Challenges

The Eighth Amendment, while it obliges prison officials to protect inmates from harm, is ineffective in curtailing prison slavery. The "deliberate indifference" standard serves as an obstacle to this ultimate objective. Pursuant to Eighth Amendment jurisprudence, liability could be imposed upon a prison official for the deliberate indifferent denial of human conditions of confinement only if it is established that the "official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[174] This specific knowledge requirement fails to properly incentivize prison officials to end prison slavery and in fact may prove as an incentive for them to ignore the matter altogether.[175] Indeed, because liability is imposed only when prison officials are subjectively aware of the incident or threat thereto, they are not encouraged to take proactive measures to prevent enslavement.

Furthermore, the complex nature of prison slavery is not suitable for Eighth Amendment challenges. For instance, the Eighth Amendment requires officials to act only when they know of an "excessive risk to inmate health or safety."[176] However, the nature of sexual slavery, for instance when a weaker inmate "consensually" submits to a stronger inmate out of fear of physical injury and thereby appears to enjoy his master's company, may indicate to a guard that no excessive risk exists.[177] Under these circumstances, the appearance of consent and lack of overt violence may conceal the actual risk.[178]

173. *See* Akhil Reed Amar & David Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1381 (1992) ("[O]nce any arm of the state knows of present, identifiable slavery within its territory, the state must take reasonable steps to end the enslavement."); *see also* City of Memphis v. Greene, 451 U.S. 100, 120 (1981) ("[I]t has long been settled that the Thirteenth Amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." (internal quotation marks omitted)).

174. Farmer v. Brennan, 511 U.S. 823, 837 (1994).

175. Ghali, *supra* note 4 (citing *No Escape: Male Rape in U.S. Prisons*, HUMAN RIGHTS WATCH (2001), http://www.hrw.org/reports/2001/prison/report.html (follow "Slavery" hyperlink under "V. Rape Scenarios").

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

177. Ghali, *supra* note 4 (citing *Farmer*, 511 U.S. 844).

178. *Id.*

Even if we assume the Eighth Amendment is capable of motivating prison officials to take proactive steps in curtailing prison slavery, it imposes no duty to do so on other state actors. Seemingly, the Eighth Amendment does not impose any duty on state actors such as prosecutors.[179] Indeed, prosecutors almost never prosecute inmates who rape or enslave other inmates.[180] The Thirteenth Amendment, however, imposes an affirmative duty on states to abolish slavery and because prosecutors are agents of the State, the Amendment's scope encompasses their prosecutorial discretion. This would undoubtedly lead to more prosecutions of prison enslavement.

VIII. CONCLUSION

This Article has shown that prison slavery is an unfortunate reality in American prisons. Its impact is troubling not only to the victimized inmates but also to the society at large. Accordingly, if not for the condemned, it is imperative that every effort is taken to abolish prison slavery for the benefit of our community. As it has been shown, current available remedies are insufficient and ill-suited to combat this problematic phenomenon. Therefore, the Thirteenth Amendment, no matter how novel a theory, must be fully utilized to alleviate the torment and agony of the forsaken and ensure the health and safety of the free.

179. *Id.*
180. *Id.*