Unconvicted Incarcerated Labor

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Introduction

While the Thirteenth Amendment's textual exception for involuntary servitude after conviction is infamous, little attention has been paid to forced labor by people detained but not convicted. Courts have created an additional exception to the Thirteenth Amendment's prohibition on involuntary servitude, commonly known as the "housekeeping" exception. Under this judicially created exception, people being held pretrial, who are innocent unless found guilty, are also forced to labor behind bars.

A growing body of scholarship addresses captive labor in prison and immigration detention,[1] but less attention has been paid to labor performed pretrial in local jails.[2] In my visits to local jails across the country, I often see incarcerated people working various jobs, including food preparation and custodial services. To date, however, scholars have not focused on why courts have allowed compelled "housekeeping" labor prior to conviction or whether, in fact, such labor is constitutional.

There is no current national data on labor performed by people incarcerated pending trial. In a 1996 survey of people detained in jails, one in four people reported working in the prior week, including approximately 16% of unconvicted people.[3] Of those, the majority of people detained pre-

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[1] For immigration detention labor, see Anita Sinha, *Slavery by Another Name: "Voluntary" Immigrant Detainee Labor and the Thirteenth Amendment*, 11 Stan. J. C.R. & C.L. 1, 39 (2015); Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, from 1943 to Present*, 29 Geo. Immigr. L.J. 391, 485 (2015); Seth H. Garfinkel, *The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers*, 67 Case W. Resrv. L. Rev. 1287, 1289 (2017). For prison labor, see generally 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 (2009); Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 Seattle Univ. L. Rev. 869, 876 (2012); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. Rev. 1465 (2019); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 Cornell L. Rev. 899 (2019).

[2] Debtors' jails, where people are convicted for failure to pay debts to the government and therefore must either "pay or stay," are also receiving more scrutiny of late. However, in those cases, [a person is arguably] convicted and therefore within the ambit of the conviction exception to the Thirteenth Amendment. *See generally* Bell v. Jackson, No. 3:15-cv-00732-TSL-RHW (S.D. Miss. 2016); Jenkins v. Jennings, No. 4:15-cv-00252-CEJ (E.D. Mo. 2017).

[3] Caroline Wolf Harlow, *Profile of Jail Inmates 1996*, U.S. Dep't of Justice, Bureau of Justice Statistics, 12 (June 1998), https://bjs.ojp.gov/content/pub/pdf/pji96.pdf, *archived at* https://perma.cc/94JD-JY2X.

trial engaged in general janitorial work and food preparation. Other work assignments included building maintenance and repair; groundskeeping; working in the laundry, library, and the barbershop; and providing office services, among others.[4] Then and now, incarcerated labor is usually uncompensated and unprotected by law in terms of workplace safety, wages, and remedies for injuries sustained while working.[5] In some cases, jails provide "incentives," such as extra meal portions, instead of wages to pretrial laborers.[6] In others, the only "incentive" is avoiding cell lockdown or discipline.[7]

This Article examines the court-created "housekeeping" exception to the Thirteenth Amendment's ban on slavery and involuntary servitude for people detained pending trial. Through a deeper understanding of the origin and evolution of the doctrine, I identify and discuss the criteria courts have employed to create and expand the "housekeeping" exception. These cases also illustrate the slippery slope of the exception after creation—namely, the potential for expansion to chores beyond "personally related housekeeping" and to other settings, such as immigration detention.

Part I provides an overview of contemporary pretrial detention in America and discusses how financial and penological incentives have historically contributed and continue to contribute to the expropriation of labor in jails. Part II traces the evolution of the court-created "housekeeping" exception in non-carceral spaces. The expansion of exceptions to involuntary servitude is rooted in courts' perceptions of people within specific spaces and the duties these individuals "owe" to the state. Part III analyzes the doctrinal difficulties in transplanting the housekeeping exception to carceral spaces. Courts have misapplied the Due Process Clause to claims of involuntary servitude and have relied on doctrinally irrelevant perceptions of character, "choice" and duty to deny claims of coerced labor by people detained pretrial. Part IV discusses the "slippery slope" of the court-created exception, particularly for immigration detention, as well as factors that might influence future expansion. The Article concludes by identifying some of the harms from the expansion of the "housekeeping" exception to people detained in

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[4] *Id.*

[5] *See* Andrea Armstrong, *Beyond the Thirteenth Amendment — Captive Labor*, 82 OHIO ST. L.J. 1039, 1054 (2022) (noting that the Fair Labor and Standards Act does not include "prisoners" in its definition of "employees." 29 U.S.C. § 203(4)(a)–(5)). Moreover, courts have not interpreted the FLSA to protect incarcerated workers. *See* Reimonenq v. Foti, 72 F.3d 472, 476–77 (5th Cir. 1996); Morgan v. MacDonald, 41 F.3d 1291, 1292–93 (9th Cir. 1994); Bennett v. Frank, 395 F.3d 409, 409–10 (7th Cir. 2005). Finally, incarcerated workers' ability to seek redress for workplace injuries that occurred in state facilities may be limited by state laws. *See* ARK. CODE ANN. §11-9-102(9)(B)(iii) (West 2021); TEX. LAB. CODE ANN. §501.024(3) (West 1999); VT. STAT. ANN. tit. 21, § 601(12)(O)(iii) (West 2018); DEL. CODE ANN. tit. 19, § 2301(10) (West 2015).

[6] *See, e.g.*, Ford v. Nassau Cnty. Exec., 41 F. Supp. 2d 392, 395 (E.D.N.Y. 1999).

[7] *See, e.g.*, Harris v. Clay Cnty., No. 1:18-cv-167-MPM-RP, 2021 WL 2004111, at *30 (N.D. Miss. May 19, 2021) (noting assigned work of food service and laundry and testimony indicating the incarcerated plaintiff could work or remain locked in his cell).

jails and urges courts to rethink the justification for subjecting millions of people to forced labor pretrial.

I. American Jails & Labor

America leads the world in incarceration rates, but that single statistic encompasses a wide variety of types of incarceration. People are held behind bars by an array of actors, including local, state, and federal officials, in facilities that are managed by either public authorities or private corporations. People are also held for a variety of reasons, such as a post-conviction sentence, potential threats to public safety pursuant to an arrest, arrest for a misdemeanor or felony crime, immigration violations, or simply inability to afford bail pending trial. Within this ecosystem of incarceration, there are significant variations across the types of facilities in which people are housed, including youth detention centers, local jails, and state and federal prisons.

This Article focuses solely on jails, an important but oft-neglected area of scholarly inquiry and research.[8] There are over 3,100 jails in America,[9] each its own fiefdom with its own unique policies and practices. The sheer number of jails, in combination with the lack of common oversight or reporting typically associated with state and federal prisons, complicates rigorous analysis of jail practices and conditions. In some cases, the terms prison and jail are even used interchangeably, even though there are significant differences between the two types of carceral spaces.

Jails are typically locally operated by an elected sheriff or law enforcement official. In most jurisdictions, sheriffs are responsible for the operational management of the jail and have broad explicit and implicit authority to impact criminal justice policies and practices locally.[10] Sheriffs, however, must also work in partnership with municipal leaders, such as city councils and mayors, who control the purse strings for the jail's operation. Jails traditionally house people awaiting trial who either cannot afford bail or for whom bail is not available.[11] However, jails also house people serving sentences for misdemeanor convictions (usually up to a year), as well as people accused, but not yet adjudged, of violating certain conditions of their probation or parole post-conviction. Jails also have higher suicide and drug-

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[8] Peter Wagner, *Jails Matter. But Who Is Listening?*, Prison Pol'y Initiative (Aug. 14, 2015), https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/, *archived at* https://perma.cc/K43F-54SK.

[9] Zhen Zeng & Todd D. Minton, *Jail Inmates in 2019*, U.S. Dep't of Justice, Bureau Of Justice Statistics, 11 (Mar. 2021), https://bjs.ojp.gov/content/pub/pdf/ji19.pdf, *archived at* https://perma.cc/2FVD-QT8E.

[10] *See* Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 Vand. L. Rev. 861, 864 (2021).

[11] U.S. Advisory Comm'n on Intergovernmental Rel., *Jails: Intergovernmental Dimensions of a Local Problem: A Commission Report*, 2 (May 1984).

related mortality rates than prisons,[12] in part due to inadequate intake processes and staffing.

Prisons, in contrast, are spaces of punishment and rehabilitation, beyond simple detention. Prisons hold people who have been convicted of a crime and are serving a judicially determined sentence following their trial or guilty plea. Prisons are operated by a statewide correctional agency or through government contracts with private corporations. State correctional agencies are led by political appointees, who answer to the head of the state's executive branch, i.e. the governor. Prisons generally have higher mortality rates than jails,[13] primarily due to illness.

While there are significant differences between jails and prisons, there are also important similarities between the two types of facilities. Both types of facilities rely on the labor of incarcerated people to operate. Both jails and prisons can be deadly due to lack of adequate health care, suicide, violence, and drugs.[14] And while the conditions in prison are evaluated under a different legal standard[15] than conditions in jails, courts have adopted extensive deference to decision makers in both types of facilities.[16] That deference extends to their disciplinary decisions regarding, for example, the use of solitary confinement or strip-searches and the denial of visitation or other privileges.

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[12] *Compare* E. Ann Carson, *Mortality in Local Jails 2000-2018*, U.S. Dep't of Justice, Bureau of Justice Statistics, 7 (Apr. 2021), https://bjs.ojp.gov/content/pub/pdf/mlj0018st.pdf (mortality rates of 46 (suicide) and 24 (drug/alcohol-related) per 100,000 in jails in 2018), *with* E. Ann Carson, *Mortality in State and Federal Prisons 2001–2018*, U.S. Dep't of Justice, Bureau of Justice Statistics, 8 (Apr. 2021), https://bjs.ojp.gov/content/pub/pdf/msfp0118st.pdf, *archived at* https://perma.cc/Q29N-KCBU (mortality rates of 26 (suicide) and 21 (drug/alcohol-related) per 100,000 in jails in 2018).

[13] *Compare* E. Ann Carson, *Mortality in Local Jails 2000–2018*, *supra* note 12, at 7 (mortality rates of 154 (all causes) and 71 (medical illness) per 100,000 in jails in 2018), *with* E. Ann Carson, *Mortality in State and Federal Prisons 2001–2018*, *supra* note 12, at 8 (mortality rates of 344 (all causes) and 273 (medical illness) per 100,000 in jails in 2018).

[14] *See, e.g.*, Andrea Armstrong, *Louisiana Deaths Behind Bars 2015–2019*, Incarceration Transparency (June 2021), https://www.incarcerationtransparency.org/wp-content/uploads/2021/06/LA-Death-Behind-Bars-Report-Final-June-2021.pdf, *archived at* https://perma.cc/5N2N-SK4N.

[15] For claims by people serving convictions in prisons, courts will examine whether prison officials acted with "deliberate indifference" to a person's safety, health, or well-being under the Eighth Amendment's ban on cruel and unusual punishment. *See* Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (applying deliberate indifference standard to claim of inadequate medical care under the cruel and unusual punishment clause of the Eighth Amendment). For claims by people incarcerated pretrial, courts look to the due process guarantees of the Fifth Amendment (for federal detention); *see* Bell v. Wolfish, 441 U.S. 520, 530, 537–41 (1979) (analyzing federal pretrial detainee's claims of unconstitutional conditions under the due process guarantee of the Fifth Amendment). Courts also look to the Fourteenth Amendment (for state or local detention); *see Kingsley v. Hendrickson*, 576 U.S. 389, 391–92 (2015) (applying objective reasonableness standard to evaluate pretrial detainee's excessive force claim under the due process guarantee of the Fourteenth Amendment).

[16] *See, e.g.*, Turner v. Safly, 482 U.S.78, 90 (1987); Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 566 U.S. 318, 330 (2012) (applying *Turner* to jail strip search case).

Both prisons and jails have internal disciplinary systems to adjudicate and punish violations of internal rules.[17] Prisons and jails may lawfully punish behavior that "threatens the order or security" of the facility.[18] Jail disciplinary codes usually include violations for "failure to follow orders" and/or "disobedience," either of which could apply when a person held pretrial refuses an order to work. The New Orleans jail handbook, for example, lists three major rule violations related to labor: "inmates shall work as instructed," "inmates shall obey any lawful order from any staff member," and "inmates shall not fail to report to work or any assignment without an excused absence."[19] In addition, "failure to keep . . . cells/sleeping areas clean and free of debris" constitutes a minor rule violation, which typically involves a lesser punishment.[20] Similarly, in Missouri, Lawrence County's jail handbook warns that any person "who does not participate equally [in cleaning the day room] is subject to disciplinary action."[21] Those tasks include wiping and cleaning tables, desks, chairs, mirrors, and walls of the detention center and scrubbing and cleaning showers and toilets.[22] Failure to equally participate (or to keep oneself and one's cell clean) constitutes a minor rule violation, for which a person could be put in lockdown (solitary confinement) or lose visitation, TV, or recreation privileges.[23]

Beyond the formal disciplinary process, people refusing to work are also vulnerable to informal uses of power by individual deputies. In California, deputies allegedly informed women detained pretrial that they would be denied meals if they refused to work.[24] People within these facilities are uniquely vulnerable to individual, discretionary decisions by security staff.[25]

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[17] *See generally* Andrea Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759 (2015) (applying implicit bias research to internal carceral disciplinary systems).

[18] *See Bell*, 441 U.S. at 546 (noting "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees").

[19] Orleans Parish Sheriff's Office, *Inmate Handbook*, 9–10 (May 28, 2016), https://www.incarcerationtransparency.org/wp-content/uploads/2020/03/2016-OPP-Inmate-Handbook.pdf, *archived at* https://perma.cc/K7BK-Q4AT.

[20] *Id.* at 10.

[21] Lawrence Cnty. Sheriff, *Inmate Handbook*, 3 (Nov. 1, 2012), https://www.lawrencecosheriff.com/plugins/show_image.php?id=483, *archived at* https://perma.cc/QA7C-XNY7.

[22] *Id.*

[23] *Id.*

[24] Ruelas v. Cnty. of Alameda, No. 19-CV-07637-JST, 2021 WL 475764, at *2 (N.D. Cal. Feb. 9, 2021).

[25] Armstrong, *supra* note 17 at 768, 771–73 (discussing discretion in enforcing disciplinary rules).

A. Modern Pretrial Detention in the U.S.

Of the almost 2.3 million people held behind bars in the United States, over half a million are "pre-trial,"[26] i.e., they have not yet had a trial on their guilt or innocence.[27] A person is jailed pretrial if they cannot pay bail, which acts as a surety for the court that the person will return to court to face charges and will not pose a threat to public safety.[28] The overwhelming majority of people held pretrial (85%) are housed in local jails, with others housed in youth detention centers, Indian jails, mental health hospitals, and federal detention centers.[29] Approximately five million people nationwide spend at least one day in jail in a calendar year.[30] People detained in jails tend to have higher rates of mental illness and drug-related issues than those in state and federal prisons.[31]

The average length of stay for jails nationwide was twenty-six days in 2019, with larger facilities holding people on average 2.5 times longer than smaller facilities.[32] However, the average stay of twenty-six days obscures the fact that the majority of jail beds are occupied by a relatively small percentage of people who are detained for significantly longer amounts of time. An analysis by Pew Charitable Trusts indicates that 62% of people admitted to jails with populations over 500 are detained for less than a week and

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[26] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html, *archived at* https://perma.cc/ZB5Y-PVVF.

[27] Bell v. Wolfish, 441 U.S. 520, 536 (1979) ("A person lawfully committed to pretrial detention has not been adjudged guilty of any crime.").

[28] *See* Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Inst. for Justice, 2 (Apr. 2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf, *archived at* https://perma.cc/CML5-TE6K (critiquing efficacy of monetary bail); *see also* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. Crim. L. & Criminology 701 (2018) (providing overview of three waves of bail reform litigation).

[29] *See* Sawyer & Wagner, *supra* note 26.

[30] There is a difference between the number of people admitted to a jail in a year and the number of "unique" admissions per year, since some individuals may be arrested and detained multiple times in a given year, particularly for certain "quality of life" crimes. *See generally* Wanda Bertram & Alexi Jones, *How Many People in Your State Go to Jail Every Year?,* Prison Pol'y Initiative (Sept. 18, 2019), https://www.prisonpolicy.org/blog/2019/09/18/state-jail-bookings/, *archived at* https://perma.cc/83BS-MBFL.

[31] *See* Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Academy of Sciences, 204 (2014); *see also* Craig Haney, Joanna Weill, Shirin Bakhshay & Tiffany Lockett, *Examining Jail Isolation: What We Don't Know Can Be Profoundly Harmfu*l, 96 Prison J. 126, 133 (2015) (noting prevalence of substance abuse and mental illness in jails and differences from prison populations generally); Kirksey v. Kenosha Cnty. Det. Ctr., No. 19-CV-602-JPS, 2019 WL 3766533, at *2 (E.D. Wis. Aug. 9, 2019) (plaintiff claimed he was put in disciplinary segregation for three days after refusing an order to clean and that continued threats of solitary led him to commit acts of "self-harm").

[32] *See* Zeng & Minton, *supra* note 9, at 8.

account for only 4% of jail bed space.[33] However, 21% of releases from these same jails were detained for a month or longer. In Cook County jail in Chicago, the average length of stay increased from 2007 to 2011 to an average of 54.1 days in jail.[34] In New York, which has an average pretrial population of approximately 7,100 people, the average stay is 63.4 days, with 33.7% of the population detained for four or fewer days and 18.5% of the population detained for three months or more.[35]

1. Incentives for Jail Labor

Two structural aspects of American jails incentivize forcing people detained pretrial to work behind bars. First, American jails are designed for "churn," i.e., the constant influx and release of people. In 2018, jails processed 10.7 million bookings into their facilities.[36] As the majority of admissions to jails are short-term, jails are not equipped or designed for long-term stays. Thus, the services, including healthcare and programming, are usually less robust than in prisons, which exclusively hold people serving a court-imposed sentence. People held pretrial may have less access to law libraries, educational programs, and daily recreational activities by virtue of being held in a jail. As a result, people detained pretrial may have significant periods of idleness in their cell, which is correlated with higher risks of bad behavior.[37] Work by detained people, whether compelled or voluntary, may be perceived as a low-cost activity that reduces the potential for misconduct.

Second, jails are also usually funded by municipal or local authorities, whereas prisons receive funding from the state. As a result, jails usually receive smaller shares of total correctional funding statewide compared to prisons, impacting staffing and resources available for jail maintenance, ser-

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[33] Jake Horowitz & Tracy Velázquez, *Small but Growing Group Incarcerated for a Month or More Has Kept Jail Populations High*, Pew Charitable Trusts (June 23, 2000), https://www.pewtrusts.org/en/research-and-analysis/articles/2020/06/23/small-but-growing-group-incarcerated-for-a-month-or-more-has-kept-jail-populations-high, *archived at* https://perma.cc/6XFH-2LZE.

[34] Chicago Appleseed, *Pretrial Delay & Length of Stay in the Cook County Jail: Executive Summary*, at 1 (June 2012), http://www.chicagoappleseed.org/wp-content/uploads/2012/06/CAFFJ-Pret-Trial-Delay-and-Length-of-Stay-Executive-Summary.pdf, *archived at* https://perma.cc/BU6M-GTEQ.

[35] *NYC Department of Corrections at a Glance*, City of N.Y. Corr. Dep't (Apr. 27, 2017), https://www1.nyc.gov/assets/doc/downloads/pdf/DOC_At-Glance-4-27-17.pdf, *archived at* https://perma.cc/BL8G-SFPQ.

[36] Zhen Zeng, *Jail Inmates in 2018*, U.S. Dep't of Just., Bureau of Just. Statistics 1 (Mar. 2020), https://bjs.ojp.gov/content/pub/pdf/ji18.pdf, *archived at* https://perma.cc/HDK3-BZAT.

[37] Mateja Vuk & Dalibor Dolez?al, *Idleness and Inmate Misconduct: A New Perspective on Time Use and Behavior in Local Jails*, Deviant Behavior 16 (2019).

vices, and cleaning.[38] Administrators of jails may then turn to detained populations to fulfill these critical tasks.

Taken together, the lack of meaningful activities for large numbers of people and the lack of funding lead jail officials to rely on detained people to maintain and operate the facilities that cage them. However, as discussed in more detail in Parts II and III, other subjective factors, such as perceptions about the character of people detained pretrial, may also play a role in our collective willingness to coerce labor.

2. Racial Impact

Jails are also a critical piece of broader patterns of overrepresentation of racial minorities within incarcerated populations. Particularly in urban jails, like in New Orleans, African American and Latinx people are more likely to be detained pretrial, compared to white defendants, with significant repercussions for their communities.[39] Research from Miami-Dade County indicates that Black and Latinx people spend more time in pretrial detention relative to white people.[40] Pretrial detention jeopardizes the ability of an individual to keep their employment, potentially impacting their family's housing and access to certain public benefits.[41] Some studies indicate that detention pretrial is also correlated with a higher probability of conviction and prison sentence.[42]

There are some indications nationally that the percentage of racial minorities in jails is declining. Since 2005, jailed populations have become whiter nationwide, from 44.3% white in 2005 to 49.4% white in 2019.[43] Simultaneously, the share of Black people has declined from 38.9% in 2005 to 33.6% in 2019, with the Hispanic, Native, and Asian American popula-

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[38] *See* Jake Horowitz, Tracy Velázquez & Kyleigh Clark-Moorman, *Local Spending on Jails Tops $25 Billion in Latest Nationwide Data*, Pew Charitable Trusts 3 (Jan. 29, 2021), https://www.pewtrusts.org/-/media/assets/2021/01/pew_local_spending_on_jails_tops_25_billion.pdf, *archived at* https://perma.cc/72KJ-M46M (analyzing jail spending nationwide compared to historical funding patterns and relative to spending for prisons).

[39] *See, e.g.*, Jon Wool, Alison Shih & Melody Chang, *Paid in Full: A Plan to End Money Injustice in New Orleans*, The Vera Institute (2019), https://www.vera.org/downloads/publications/paid-in-full-report.pdf, *archived at* https://perma.cc/K32F-L5EF; *Justice Can't Wait: An Indictment of Louisiana's Pretrial System*, ACLU Louisiana (Feb. 10, 2020), https://www.laaclu.org/sites/default/files/field_documents/aclu_la_justicecantwaitreport_02102020_online.pdf, *archived at* https://perma.cc/2B7M-7P97; *Resolution for Recommended Reforms to Pretrial Practices*, LSBA Crim. Just. Comm. (Dec. 14, 2018), https://www.lsba.org/documents/HOD/Jan19Res1.pdf, *archived at* https://perma.cc/4KHD-KLTS.

[40] Brandon P. Martinez, Nick Petersen & Marisa Omori, *Time, Money, and Punishment: Institutional Racial-Ethnic Inequalities in Pretrial Detention and Case Outcomes*, 66 Crime & Delinq. 837, 847 (2019).

[41] Digard, *supra* note 28, at 2–3.

[42] Mark Gius, *The Determinants of Pretrial Detention and Its Effect on Conviction and Sentencing Outcomes*, 16 Just. Pol'y J. 1, 8 (2018).

[43] Zeng & Minton, *supra* note 9, at 6.

tions remaining relatively steady.[44] Despite the recent "whitening" of jails, racial minorities—and African Americans in particular—are still disproportionately impacted relative to their share of the population. The Bureau of Justice Statistics estimated in 2019 that "Blacks were incarcerated at a rate (600 per 100,000) more than three times the rate for whites (184 per 100,000)" in local jails.[45]

While every person detained pretrial is subject to forced labor under the "housekeeping" exception, Black people are disproportionately impacted. They are subject to these rules by virtue of their arrest and their inability to secure bail, even though none have had their day in court. If they fail to comply with assigned work, they can face severe repercussions such as solitary confinement.[46] These modern-day policies, which disproportionately impact Black people and other racial minorities, have roots in our historical use of jails.

B. Historical Context: Forced Labor & Detention

Historically, jails have been sites of forced or compelled labor since colonial times. During the era of the Framers, jails housed people awaiting trial, as well as debtors and people convicted of misdemeanors.[47] "Maintenance of the jails was one of the permanent fiscal burdens on the colonial communities, one which both taxpayers and public officers were particularly loathe to discharge."[48] Local sheriffs, whose jails increasingly housed larger populations and were simultaneously denied larger budgets, found other sources to supplement income, including forcing detained people to work, either for private employers who paid wages to the jail or on public works.[49] In addition, some early English and American jails functioned both as work-

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[44] *Id.*

[45] *Id.* at 1.

[46] *See* Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*,]47 Crime & Just. 365 (2018).

[47] Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 Seton Hall L. Rev. 1, 23 (1997). Prisons, or penitentiaries, emerged later in the 19th century. *Id.* Prior to confinement as a sentence post-conviction, standard punishments included "various forms of corporal punishment, including branding and removal of an ear . . . or execution." *See* Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. Crim. L. & Criminology 405, 437 (2016) (reviewing early penal reform efforts in the eighteenth century); *see also* Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L.J. 437, 450 (2005) (explaining that imprisonment was not a legal punishment after conviction in early American history and instead was primarily for debtors and people awaiting trial or sentencing).

[48] Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1106 (1994).

[49] *See, e.g.*, Gilles Vandal, *Regulating Louisiana's Rural Areas: The Functions of Parish Jails, 1840-1885*, 42 La. Hist: J. La. Hist. Ass'n 59, 61; *see also* Dolovich, *supra* note 47, at 450 (explaining how jails were funded and became profit-oriented); Seán McConville, *Local Justice: The Jail*, *in* The Oxford History of the Prison: The Practice of Punishment in Western Society 297, 300 (Norval Morris & David J. Rothman eds., 1995) (noting jail income through use of fees and control of people's bodies).

houses (or "houses of correction") for the poor as well as pretrial detention.[50] People without "apparent means of subsistence" could be summarily convicted of vagrancy and sentenced to the workhouse.[51] At the workhouse, they could be hired out to private employers (with wages paid directly to the jail, instead of to the laborer) or forced to labor on public works.

The relationship between jails and labor is also clear in the role jails played enforcing and upholding slavery. Jails held African Americans alleged to be enslaved under local and state "fugitive slave" laws prior to the Civil War, acting as "clearinghouses" for claims of ownership.[52] Each day of incarceration incurred a fee, payment of which was required prior to release. If determined to be enslaved, the purported owner would pay the fee. For those determined to be "free people" and unable to pay the debt, their labor would be hired out or assigned to a white employer to satisfy the debt.[53] Jails also provided discipline, through extreme deprivation and whippings, for enslaved people (often for a fee) at the owner's behest.[54] Some jails, like in New Orleans, also paid owners for the "lease" of enslaved people.[55] Owners, by "leasing" enslaved people to the city, could convert their capital assets to more accessible liquid assets. The people "leased" were housed in the jail and were part of work crews that built levees and roads in the early history of the city.[56]

Similarly, in Los Angeles, the city jail held primarily Native American men in the mid-1800s due to discriminatory laws and police practices. The city's jailer ran a "chain gang" that cleaned and maintained the streets of Los Angeles: the jailer was "authorized to use chains, balls, and other means" to "keep good order" and "compel them to work."[57] During this time, the city jail also held regular auctions of newly arrested Native Americans to the "highest-bidding white employer."[58]

There are also direct linkages between the history of coerced labor in jails and the convict lease system that emerged after the Civil War. Professor Taja-Nia Henderson, an expert on the enforcement of slavery through local jails, argues that "the system of convict leasing that was institutionalized in Southern prisons in the wake of the Civil War was tested in local jails more than a century earlier."[59] After emancipation, Southern states in particular

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[50] *See* McConville, *supra* note 49, at 315 (noting the gradual assimilation of houses of correction into jails).

[51] Reuben Oppenheimer, *Infamous Crimes and the Moreland Case*, 36 HARV. L. REV. 299, 304 (1923) (reviewing punishments in the thirteen colonies).

[52] Taja-Nia Y. Henderson, *Property, Penality, and (Racial) Profiling*, 12 STAN. J. C.R. & C.L. 177, 196–98 (2016).

[53] *Id.* at 200–01.

[54] *Id.* at 182–86; Michele Goodwin, *supra* note 1, at 931.

[55] ANDREA ARMSTRONG, THE IMPACT OF 300 YEARS OF JAIL CONDITIONS 2–3 (2018).

[56] *Id.*

[57] KELLY L. HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965, 36–37 (2017).

[58] *Id.* at 38.

[59] Henderson, *supra* note 52, at 205.

turned to the criminal justice system to re-enslave African Americans through the creation and enforcement of "Black Codes."[60] These codes, which designated harsher punishments and created new "offenses," were drafted with the explicit intention of making cheap labor available to agricultural and industrial interests by selling the labor of people convicted of crimes.[61] Those "sold" into the convict lease system were subject to the same forms of discipline, such as whipping, meted out by jails and plantations prior to the Civil War.[62]

The historical relationship between jails, racial prejudice, and labor is also visible in contexts of involuntary confinement outside of jails. Though not formally called a "jail," the internment camps for Japanese-Americans during the second World War functioned similarly. The U.S. government forcibly relocated and detained approximately 120,000 people, 70,000 of whom were also U.S. citizens.[63] The people forcibly relocated and held in government-operated "camps" had not been convicted of a crime; thus, their status is similar to those held pretrial and people civilly detained. Ostensibly, Japanese-Americans were given a choice about whether to work, but "[e]mployment outside the centers was not permitted."[64] Thus, the only way for those interned to support themselves and their families was through working within the detention center at wages set by the U.S. government. These wages were set artificially low: Japanese-Americans staffed the relocation centers and did agricultural, industrial, and professional work for wages from $12–19 per month.[65] People forced to work in these camps received meager compensation (in comparison to rates paid for free labor at the time), and actual payment was often delayed.[66] Unemployment payments

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[60] Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE UNIV. L. REV. 869, 876 (2012).

[61] DAVID OSHINSKY, WORSE THAN SLAVERY 20–22 (1997).

[62] For similarities between punishments for convict leasing and slavery, see DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 67–68 (2008); BARBARA ESPOSITO & JOE WOODS, PRISON SLAVERY 101–03 (1982); Henderson, *supra* note 52, at 205.

[63] *Commission on Wartime Relocation and Internment of Civilians: Hearing Before the Comm. on Governmental Affs.*, 96th Cong. (1981) (statement of Stanley Mark, Staff Attorney, Asian American Legal Defense and Education Fund).

[64] Hohri v. United States, 586 F. Supp. 769, 775 (D.D.C. 1984), *aff'd in part, rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986), *vacated*, 482 U.S. 64, 107 S. Ct. 2246, 96 L. Ed. 2d 51 (1987), *and aff'd,* 847 F.2d 779 (Fed. Cir. 1988).

[65] COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, 98TH CONG., PERSONAL JUSTICE DENIED 166 (Dec. 1982). The report also notes "[t]he WRA retained the portion of its early plan that called for large-scale agricultural programs in which evacuees would clear, develop, and cultivate the land." *Id.* at 156. The wages were also insufficient to provide for people's basic needs in the centers, much less to satisfy any existing debt obligations, such as the mortgage for their house. *Id.* at 167.

[66] *Commission on Wartime Relocation and Internment of Civilians*, *supra* note 63 (noting that "[The] wage scale of Japanese American internees ranged from $12-16 per month, while U.S. military wages ranged from $21-50 per month . . . Similarly, private employers frequently requested Japanese Americans as laborers, paying them unconscionably low salaries. For example, as one Congressional report indicated, one farmer had been paying $ 1.80 per 100 pounds of crops harvested but indicated he would pay the 'going wage' to the Japanese internees—'probably 45¢ per hour.'").

of $1.50–4.75 per month were allowed but only paid if a person could not find work behind the barbed wire of the detention center through no fault of their own.[67]

Compelled labor in jails and other forms of involuntary confinement are not new. Jails have historically relied on incarcerated labor to address budgetary deficits, either as a source of income generated through fees, discipline, and auctions or as a means of saving operational costs through using unpaid incarcerated labor. In doing so, jails have extracted resources from communities by shifting the value of the labor from the person and their family to the facility itself. Moreover, racial minorities are disproportionately impacted within this context, replicating historical patterns of labor exploitation through the criminal justice system. Beyond these financial incentives, the next section explores how penological rationales, which require exclusion and decreased autonomy to justify enhanced control of detained people, also contribute to current practices.

C. "Housekeeping" as Essential to Modern Carceral Logic

Carceral logic, at its simplest, is a punishment mindset motivated by control.[68] Professors Jenness and Calavita, two criminologists who conducted a seminal study on prison grievance experiences, identify two key components of carceral logic. First, carceral logic demands the "expropriat[ion] [of] much of the captive's autonomy."[69] Beyond the obvious lack of autonomy by virtue of being held involuntarily behind bars, incarceration—as a routine matter—deprives people of the ability to make certain individual choices, such as when and what to eat or how to dress. In the context of the "housekeeping" exception, carceral logic requires depriving people of the autonomy to determine when and if their personal living spaces, i.e., their cells, need to be cleaned and how they should be cleaned. In the cases reviewed later in this Article, not a single court questions the underlying idea that people detained are not capable of making these decisions themselves and must in fact be ordered to keep their areas clean or orderly.

A second core element of carceral logic identified by Professors Jenness and Calavita is extended managerial authority in support of safety and security, the core goals of any carceral facility.[70] Safety and security, broadly

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[67] Comm'n on Wartime Relocation and Internment of Civilians, *supra* note 65, at 176.

[68] *See, e.g.*, Mariame Kaba & Erica R. Meiners, *Arresting the Carceral State*, Jacobin (Feb. 24, 2014), https://www.jacobinmag.com/2014/02/arresting-the-carceral-state/, *archived at* https://perma.cc/25QG-VJ65; *see generally* Michel Foucault, Discipline and Punish: The Birth of the Prison (1977).

[69] Kitty Calavita & Valerie Jenness, Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic 110 (2014).

[70] *Id.* at 112.

defined, become trump cards for other equally reasonable facility goals. For example, a jail may have a stated policy of restricting a pretrial individual's liberty as little as possible, but that policy would always be secondary to broader claims of control under the carceral goals of safety and security. In the context of "housekeeping" work, carceral logic dictates that cleanliness is simply another way of assuring safety and security within the facility. But as parents of small children are aware, not all levels of messiness implicate the safety and security of our progeny. Writing on a cell wall, assuming the message is not a threat of violence, does not in and of itself threaten safety or security. But as the cases reviewed later in this Article demonstrate, failure to clean writing on a cell wall can be punished (sometimes severely) as a threat to the security of the facility.

Carceral logic operates to diminish the humanity of people who are incarcerated, making it easier to justify their coerced labor. Professor Sharon Dolovich, who has both documented and theorized "American-style" incarceration, argues "[t]here can be no carceral project, no physical banishment from society, without the simultaneous, unremitting control of the excluded by the State."[71] Although Professor Dolovich is primarily addressing prisons and the conditions therein, she also notes that this same logic extends to other spaces of carceral control, including jails. The exclusion she describes is not just the physical removal from general society. It also functions to exclude people from "the category of moral subjects to whom respect and consideration are owed just by virtue of their shared humanity."[72]

Amidst the financial and penological incentives for compelled jail labor and within a long historical context of exploitation of confined labor, it may appear inevitable that courts would allow jails to compel labor from people held pretrial. And yet, as a textual and legal matter, such compelled labor violates the Thirteenth Amendment, which prohibits slavery and involuntary servitude. The next section explores how courts have created extratextual exceptions to the Thirteenth Amendment, which ultimately lay the foundation for forced labor in American jails.

II. The Origin and Evolution of the Court-created "Housekeeping" Exception to the Thirteenth Amendment

> Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.[73]

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[71] Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 Berkeley J. Crim. L. 259, 268 (2011).

[72] *Id.* at 275.

[73] U.S. Const. amend. XIII, § 1 (emphasis added).

The Thirteenth Amendment only contains one textual exception to the prohibition of public and private slavery and involuntary servitude: it allows for involuntary servitude as a punishment for a legally valid conviction.[74] As a result, people convicted of a crime may be forced to work while serving their judicially determined sentence behind bars.

This single, narrow textual exception to involuntary servitude, however, has spawned additional court-created exceptions, including the "housekeeping" exception. The size and ambit of these exceptions grew over time, as courts relied on prior judicial decisions to justify new and expanded exceptions. These judicially created exceptions have been applied to people forced to work at sea, on road construction, in the military, in mental health institutions, and pretrial and immigration detention settings, among others.

One of the first federal cases to adopt a housekeeping exception for people detained in jail pretrial arose in the Seventh Circuit in *Bijeol v. Nelson*,[75] decided in 1978. However, *Bijeol* was rooted in other judicially made exceptions to the Thirteenth Amendment from cases, beginning in 1897, unrelated to prisons and jails. Tracing the rationales of these cases reveals courts repeatedly employing similar justifications to create interpretive exceptions to the Thirteenth Amendment.

A. Origin Story: Sailors in Robertson v. Baldwin

The earliest interpretive exception to the Thirteenth Amendment concerned government enforcement of a contract for sailors, who wished to terminate their employment before the end of the contract. The U.S. Supreme Court, in *Robertson v. Baldwin*, held that the Thirteenth Amendment "was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments" and, accordingly, found that the Thirteenth Amendment was not a barrier to government enforcement of the sailor's contracts, even if achieved through imprisonment.[76]

The *Robertson* Court made several moves to reach this outcome. First, the Court reasoned that the purpose of the Bill of Rights was simply to codify "certain guaranties and immunities"[77] from English law, which nevertheless had been subject to exceptions "from time immemorial."[78] For example, the Court argued that the Second Amendment's right to bear arms was subject to an unstated exception prohibiting the carrying of concealed weapons, and the Fifth Amendment's prohibition on double jeopardy nevertheless al-

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[74] *See generally* Armstrong, *supra* note 60 (arguing that slavery and involuntary labor are distinct terms, both historically and currently, and should be treated as such in interpreting the amendment).

[75] 579 F.2d 423 (7th Cir. 1978).

[76] Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

[77] *Id.* at 281.

[78] *Id.*

lowed for a second trial where the first jury failed to reach a decision. [79] The Court extrapolated that subsequent amendments, such as the Thirteenth Amendment, were also subject to the same manner of unstated but historical exceptions.

Second, the Court argued that historically, sailors were always required to finish their contracts of employment. Here, the Court drew on historical and more contemporary examples, citing examples of mandatory sailor contracts from the Rhodians (900 years "before the birth of Christ"), Henry III, Louis the XIV, and laws in Argentina, Germany, and Holland.[80] Sailors could be forced to complete their contracts, the Court argued, because otherwise, sailors could singlehandedly end the voyage of the entire ship, and employers reasonably rely on the contracts.[81] The Court only narrowly addressed, however, the purpose and import of the Thirteenth Amendment, citing a narrow reading of the *Slaughterhouse Cases*.[82]

Moreover, the Court failed to grapple with how the abolition of slavery—as a gradual and global event—might have impacted the historical precedents for mandatory sailor contracts. Had it done so, the Court would have seen that several aspects of maritime law governing sailors provided templates for federal laws upholding slavery, including the Fugitive Slave Act.[83] The Merchant Seamen's Act was passed two and a half years before the Fugitive Slave Act of 1793.[84] Both included provisions for recovery of deserting individuals, including government enforcement of their status.[85] Both provided for monetary recovery to the owner-employer.[86] And both provided for imprisonment until the person could be returned to their master.[87]

This similarity in treatment between sailors and the enslaved did not escape the Court's notice. In his dissent in *Robertson*, Justice Harlan noted how the sailors at issue had been "seized, somewhat as runaway slaves were in the days of slavery, and committed to jail without bail . . . ."[88] Later in his dissent, he lambasted the majority's departure from a plain text reading of the Thirteenth Amendment and its refusal to recognize how the Thirteenth Amendment, as the last adopted and most recent law, trumped prior laws historically governing sailors:

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[79] *Id.* at 281–82.
[80] *Id.* at 283–84.
[81] *Id.*
[82] *Robertson*, 165 U.S. at 282 (citing Slaughterhouse Cases, 83 U.S. 36, 72 (1872)).
[83] Jonathan M. Gutoff, *Fugitive Slaves and Ship-Jumping Sailors: The Enforcement and Survival of Coerced Labor*, 9 U. PA. J. OF LAB. & EMP. L., 87, 90–98 (2006).
[84] Act for the Government and Regulation of Seamen in the Merchants Service, 1 Stat. 131 (1790); Fugitive Slave Act, 1 Stat. 302 (1793). Congress also passed a second Fugitive Slave Act in 1850. 9 Stat. 462 (1850).
[85] Gutoff, *supra* note 83, at 96–97.
[86] *Id.*
[87] *Id.*
[88] Robertson v. Baldwin, 165 U.S. 275, 288 (1897) (Harlan, J. dissenting).

> The [T]hirteenth [A]mendment, although tolerating involuntary servitude only when imposed as a punishment for crime, of which the party shall have been duly convicted, has been construed, by the decision just rendered, as if it contained an additional clause expressly excepting from its operation seamen who engage to serve on private vessels. Under this view of the [C]onstitution, we may now look for advertisements, not for runaway servants as in the days of slavery, but for runaway seamen. In former days, overseers could stand with whip in hand over slaves, and force them to perform personal service for their masters. . . . [W]e can but be reminded of the past, when it is adjudged to be consistent with the law of the land for freemen, who happen to be seamen, to be held in custody, that they may be forced to go aboard private vessels, and render personal services against their will.[89]

Despite important legal differences in their status, both enslaved people and sailors were also legally subject to physical coercion, including whippings and beatings.[90] Ships, similar to the plantations of the time, were seen as unique spaces where masters needed ultimate and final authority, including the authority to physically discipline recalcitrant sailors.[91] Sailors, like the enslaved, were also perceived at the time as "foreign" (and therefore lacking in English cultural civility).[92] Like the enslaved, sailors were also seen as personally irresponsible.[93] The *Robertson* Court characterized congressional views of sailors as "deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults."[94] Race and ethnicity may also have played a role, as maritime industries were "more open" to hiring free people of color than other industries at the time.[95]

Robertson was the first Supreme Court case to add an unstated exception to the Thirteenth Amendment. In doing so, the Court failed to employ common maxims of legal interpretation, including that constitutional provisions are superior to statutory laws,[96] that the last enacted measure trumps previously enacted laws,[97] and that the plain meaning of the text governs.[98] The Court placed common-law historical practices above the actual constitutional text. The *Robertson* opinion also seems to suggest that certain places (ships) and groups of people (sailors) are, by definition, deserving of differ-

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[89] *Id.* at 303.
[90] Gutoff, *supra* note 83, at 101.
[91] *See, e.g.*, *id.* at 110–11.
[92] *Id.* at 113.
[93] *Id.*
[94] *Robertson*, 165 U.S. at 287.
[95] Gutoff, *supra* note 83, at 113.
[96] U.S. CONST. art. VI, § 2.
[97] *See, e.g.*, Bassett v. United States, 137 U.S. 496, 504 (1890) (applying the rule of "last expression" to Utah statutes).
[98] *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 867 (1930) (citing cases beginning in 1838).

ent legal rules. By ignoring the fundamental legal changes wrought by adoption of the Thirteenth Amendment, the *Robertson* Court opened the door to additional, extratextual exceptions to the prohibition on slavery and involuntary servitude.

B. Development of Rationales Underlying the Future "Housekeeping" Exception

The *Robertson* Court may have created the first extratextual exception to the Thirteenth Amendment, but subsequent Court decisions on compulsory road construction and military conscription provide additional justifications for the eventual turn toward involuntary servitude by people detained pretrial. As in *Robertson*, the Supreme Court continued to ignore the racial implications of relying on historical precedent. Chattel slavery was embedded in American and English customs and historical practices,[99] and thus, the Court's reliance on historical examples re-enshrined those practices in post-Civil War decisions. The Court amplified the role of "duty" and the idea that labor was part of the reciprocal obligations of citizens. The Court's elevation of "duty" ultimately suggests that forced labor benefiting the State is less constitutionally suspect than when that labor benefits a private party.

1. Compulsory Road Construction

The Supreme Court relied on the *Robertson* rationales to uphold a Florida law that required able-bodied men to work on public road and bridge construction sixty hours a year. In *Butler v. Perry*,[100] the Supreme Court upheld the conviction and thirty day sentence of Jake Butler[101] for failure to complete road work.[102] The Florida law required male residents who were able-bodied and between the ages of twenty-one and forty-five to work on road construction or pay a fee to escape the work requirement.[103] This same law also included a provision authorizing the use and/or lease of "convicts" for the same purpose.[104]

The *Butler* Court specifically acknowledged that forced labor was within the ambit of the Thirteenth Amendment but nevertheless relied on English common law to uphold the unpaid work requirement because,

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[99] *See generally* Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811, 1816–24 (2012) (describing the law and custom of slavery in England and the United States).

[100] 240 U.S. 328 (1916).

[101] Mr. Butler's race is never specifically noted in pleadings filed in the transcript of record for the U.S. Supreme Court. It does appear that Mr. Butler was illiterate. In pleadings, his signature is denoted as "X," described as "his mark." Petition for Habeas Corpus at 2, Butler v. Perry, 240 U.S. 328 (1916).

[102] *Butler*, 240 U.S. at 329.

[103] *Id.* at 330 (quoting 1913 Fla. Laws 475).

[104] *Id.* (quoting 1913 Fla. Laws 475–76).

"[f]rom Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads."[105] By 1889, the *Butler* Court noted, twenty-seven states had similar laws for mandatory labor on public roads, continuing a tradition started in Roman times.[106] The practice of compulsory road labor, however, was also tied to slavery. Before the Civil War, several states allowed enslavers to send able-bodied substitutes (i.e., enslaved people) to fulfill their individual obligation for roadwork.[107]

Using language similar to that in *Robertson*, the Court held that the Thirteenth Amendment "introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc."[108] Thus, the *Butler* Court drew on *Robertson*'s exception analysis and then expanded that "sailor" exception to include work performed to benefit the State.

And, as in *Robertson*, the Court in *Butler* did not engage with the monumental shifts in power and freedom heralded by the end of the Civil War in 1865, nor did it engage with repeated attempts by state and local governments to enshrine slavery by other means, through the adoption of "Black Codes" and other discriminatory labor laws.[109] The *Butler* Court could have, but did not, temper its recitation of historical precedent, by acknowledging the formal end of chattel slavery and the implications for relying on historical precedent. Instead, the Court generally noted that the new states, where involuntary servitude had been prohibited, had also allowed compulsory road labor, with the possible exception of Wisconsin.[110]

However, claims regarding race and involuntary servitude were clearly before the Court at the time *Butler* was decided. Contemporaneous with *Butler*, the Supreme Court had ruled that state laws enforcing peonage for private actors (compelled work to pay off a debt) were unconstitutional in *Bailey v. Alabama*[111] in 1911 and in *U.S. v. Reynolds*[112] in 1914. Both of

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[105] *Butler*, 240 U.S. at 331.

[106] *Id.*

[107] *See, e.g.*, Woolard v. McCullough, 23 N.C. 432, 432 (1841).

[108] *Butler*, 240 U.S. at 333. The Court subsequently held that all of these named tasks were allowed under a "civic duty" exception to the Thirteenth Amendment. *See generally* Arver v. United States (*Selective Draft Law Cases)*, 245 U.S. 366 (1918) (military conscription); *see also* Hurtado v. United States*,* 410 U.S. 578, 589 n.11 (1973) (jury service) (noting there is "no substance" to the argument that jury service compensation of one dollar would constitute "involuntary servitude" under the Thirteenth Amendment). Relatedly, courts have found that it is immaterial that many of these forms of labor are compensated because involuntary servitude is not confined to situations where payment is absent. *See, e.g.*, Doe v. Siddig, 810 F. Supp. 2d 127, 134 (D.D.C. 2011) (denying, in part, defendant's motion to dismiss statutory claims of involuntary servitude where plaintiff was paid $200/month during the relevant time period).

[109] *See, e.g.*, Douglas Blackmon, Slavery By Another Name (2008); *see also* Goodwin, *supra* note 1, at 933–41.

[110] *Butler*, 240 U.S. at 332.

[111] Bailey v. State of Alabama, 219 U.S. 219, 245 (1911). Mr. Butler also specifically quoted *Bailey* in his brief to the U.S. Supreme Court. Transcript of Record at 34–36, Butler v.

those cases marked the Court's pivot away from one element of *Robertson*, namely state enforcement of involuntary servitude for *private* actors. But these decisions did not address state efforts to reinstitute slavery or involuntary servitude to benefit itself. *Butler* presented, and the Court declined, an opportunity to affirm these historical changes with regard to coerced labor for the State.

In *Butler*, forced labor was upheld as an expression of a broader philosophical contract with the State itself. For the first time in Thirteenth Amendment jurisprudence, the Court introduced the idea of "duty" to justify forced labor. What had been an almost absolute proposition—the prohibition of slavery and involuntary servitude—became much more relative once the Court introduced "duty" as a potential variable. Thus, *Butler* invited states to *balance* the need for the labor as a duty to the State against the individual freedoms guaranteed by the Thirteenth Amendment.

The concept of "duty" may have also been appealing in the absence of historical records that explain the reasons for adopting the one textual exception to the Thirteenth Amendment. During discussions on adopting the Thirteenth Amendment, there was very little debate about the convicted labor exception.[113] Without a clear legislative record on the exception's purpose to guide them, courts may have supplied their own purpose and intent, as in other constitutional law cases.[114] Involuntary servitude is allowed for people convicted of crimes, it could be argued, because the person committing the crime violated their broader duty as a member of the body politic. Thus, the State, as the representative of the body politic, is then owed the "duty" of compelled labor.

The idea that the State, and only the State, could require forced labor as a result of the Thirteenth Amendment was prevalent after the Civil War. In 1871, the Virginia Supreme Court famously declared that a person convicted of a crime was "civilly dead" and a "slave of the State."[115] By relying on duties owed to our government, the *Butler* Court planted the seeds for both the "civic duty" exception and, ultimately, the "housekeeping exception."[116]

Perry, 240 U.S. 328 (1916) (No. 182). In *Bailey*, the Court noted Bailey's race (African American) but stated it was irrelevant to the purpose of the Thirteenth Amendment. According to the Court, the purpose of the Thirteenth Amendment was, in part, "to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." *Bailey*, 219 U.S. at 231, 241.

[112] United States v. Reynolds, 235 U.S. 133, 150 (1914). In *Reynolds*, the Court rejected state involvement—through imprisonment—in the enforcement of a private contract. *Id.* While reaffirming the ability of the state to impose involuntary servitude after conviction under the Thirteenth Amendment, the Court denounced Alabama's attempt to allow private individuals to perform a similar function if the private individual paid a defendant's court-ordered fees and costs. *Id.* at 149–50.

[113] Armstrong, *supra* note 60, at 874–76.

[114] *See, e.g.*, Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 486–87 (1955) (allowing court to supply a legitimate state interest or purpose when none is stated for rational basis); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993).

[115] Ruffin v. Commonwealth, 62 Va. (1 Gratt) 790, 796 (1871).

[116] Butler v. Perry, 240 U.S. 328, 333 (1916).

2. Military Conscription

The "civic duty" exception to the Thirteenth Amendment is grounded in cases addressing conscription for military service. During World War I, in what came to be known as the *Selective Draft Law Cases*, Joseph F. Arver and Otto H. Wangerin challenged their criminal convictions for failing to register for the military draft. They argued that the law was beyond Congress' constitutional power and that the law violated the Thirteenth Amendment's prohibition of involuntary servitude.[117] The Supreme Court upheld the draft and traced the long history of conscription to support its conclusion that Congress had the constitutional power to order conscription.[118] However, the Thirteenth Amendment claim was dismissed with one sentence refusing to equate "performance of [a citizen's] supreme and noble duty" to defend the U.S. with involuntary servitude.[119] One interpretation of this case notes two key distinctions between military conscription and involuntary servitude.[120] First, coerced labor benefited the state, not a private party as in *Bailey* and *Reynolds*. Second, people conscripted to service followed the orders of a democratically elected representative, rather than a private individual. Thus, the person had a "voice" in the process.[121] Subsequent challenges to the draft during later wars were similarly rejected.[122] Courts also upheld mandatory service for conscientious objectors to the military draft.[123]

Though these military draft and conscientious objector cases do not provide detailed analysis on the Thirteenth Amendment, they do provide a solid foundation for future cases by enshrining several concepts within Thirteenth Amendment analysis. First, these cases double down on the "duty" concept articulated in *Butler*. The Supreme Court describes the "duty" of

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[117] Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1495 (1969); *see also Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

[118] *Selective Draft Law Cases*, 245 U.S. at 377.

[119] *Id.* at 390.

[120] James Gray Pope, *The Thirteenth Amendment at the Intersection of Class and Gender:* Robertson v. Baldwin's *Exclusion of Infants, Lunatics, Women, and Seamen*, 39 SEATTLE U. L. REV. 901, 910 (2016).

[121] *See id.*

[122] *See, e.g.*, Howze v. United States, 272 F.2d 146, 148 (9th Cir. 1959) (regarding draft during the Korean War and holding that the compulsory civilian draft was not limited by the Thirteenth Amendment); Badger v. United States, 322 F.2d 902, 908 (9th Cir. 1963) (quoting *Howze*, 272 F.2d at 148) ("[c]ompulsory civilian labor does not stand alone, but is the alternative to compulsory military service," which is understood to be constitutional); United States v. Fallon, 407 F.2d 621, 624 (7th Cir. 1969), *cert. denied*, 395 U.S. 908 (1969) (holding induction was not involuntary servitude); *see also* United States v. Holmes, 387 F.2d 781, 784–85 (7th Cir. 1967) (adopting the rule from *Howze* and affirming conviction for failing to report for civilian service).

[123] *See, e.g.*, United States v. Berrier, 434 F.2d 572, 574–75 (4th Cir. 1970) (noting Berrier's claim of involuntary servitude "totally devoid of merit"); Heflin v. Sanford, 142 F.2d 798, 799 (5th Cir. 1944) ("Thirteenth Amendment has no application to a call for service made by one's government according to law to meet a public need, just as a call for money in such a case is taxation and not confiscation of property.").

military service to be part of the "reciprocal obligation" owed by citizens in return for a "just government."[124] Just as citizens benefit from government protection of individual rights, citizens must also contribute to the expenses associated with that protection.[125] But in contrast to later cases discussed in the next section, the "duty" owed is a thing to be celebrated. Military service is described as a "supreme and noble duty" to "contribut[e] to the defense of rights and honor of the nation."[126] The duty of military service is considered to be an honor, not a burden. For Arver and Wagnerin, the Court's summary and one-sentence dismissal of their Thirteenth Amendment claim also implies that because they are unwilling to perform their "supreme and noble duty," they are also unworthy of protection.[127]

Second, the military draft cases focus attention on the public benefit from the coerced labor, further strengthening a theme in *Butler*. Involuntary servitude is implicitly denoted as an act between private parties, whereas compelled public service is an act between the individual and broader public. In terms of military service, the relationship between the compelled service and the benefit to the public is direct: the compelled participation in the military provides the clear public service of protecting U.S. interests abroad.

The emphasis on duty and public benefit in *Butler* and the *Selective Draft Law Cases* does not eclipse the importance of *Robertson*, the compelled sailor case. In *Robertson*, the Supreme Court upheld compelled labor by sailors for private, not public, entities. In contrast, *Butler* and the *Selective Draft Law Cases* upheld compelled labor for government entities. Despite this difference in who benefits, the cases remain similar in their rationalizations.

First and foremost, *Robertson* invited extratextual exceptions to the Thirteenth Amendment, an invitation accepted by *Butler* and the *Selective Draft Law Cases*. Second, *Robertson* provided at least two criteria for when an extratextual exception is appropriate. The Court approved of compelled sailor labor because it was consistent with historical practices and because it was justified by the necessity of the space in which the labor occurred, i.e. ships. *Butler* and the *Selective Draft Law Cases* are consistent with these elements of *Robertson*, as both activities, forced road construction and forced participation in the military, were rationalized as historically consis-

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[124] *Selective Draft Law Cases*, 245 U.S. at 378. This same "duty" concept is later used to distinguish certain civic activities, including jury service and providing evidence in a criminal trial, from involuntary servitude by focusing on the obligation of the person laboring. *See, e.g.*, Hurtado v. United States, 410 U.S. 578, 588–89 (1973) (addressing claim that compensation of one dollar a day for material witnesses who are incarcerated compared to 20 dollars a day for non-incarcerated material witnesses is a taking under the Fifth Amendment). *Hurtado* was also approvingly cited for the proposition that the government can compel performance of certain civil duties including jury service in *United States v. Kozminski*, 487 U.S. 931, 944 (1988).

[125] *Selective Draft Law Cases*, 245 U.S. at 380 (quoting the Pennsylvania Constitution of 1776 and citing to similar provisions in eight other state constitutions).

[126] *Id.* at 390.

[127] *Id.*

tent and necessary for effective government. These same rationales—historical practices, necessity, characteristics about the place or people within those spaces—appear in the first iterations of the "housekeeping" exception to the Thirteenth Amendment. More broadly, *Robertson*'s implicit devaluation of marginalized individuals as "rights-holders" is consistent with American carceral logics.[128]

C. Emergence of the Modern "Housekeeping" Exception in Non-carceral Settings

Prior to its application in the pretrial context, the "housekeeping" exception was initially developed and applied to people involuntarily committed to mental institutions. One of the first federal cases to address involuntary servitude in this context was the Second Circuit's *Jobson v. Henne*.[129] The court offered two potential justifications for involuntary servitude in mental institutions. First, that the labor has a therapeutic value to the incarcerated patient, and second, that the labor defrays the cost to the state of operating the institution.

Jobson v. Henne concerned Warren Jobson, "an inmate at the New York State Newark State School for Mental Defectives," who was forced to work in the institution's boiler room and complete clerical tasks in the village of Newark.[130] Mr. Jobson was paid one cent an hour for his nightly eight hour shifts in the boiler room and between thirty-seven and a half to fifty cents an hour for his daily eight hour shifts in the village.[131] The district court dismissed Mr. Jobson's complaint at the summary judgment stage based on claims of immunity by state officials, assuming that the institution could in fact require some amount of labor from the patient.[132] The Second Circuit remanded the case, holding that Mr. Jobson's allegations might constitute a violation of the Thirteenth Amendment for which defendants would not be entitled to immunity. In dicta, the court outlined the contours of a potential claim for violation of the Thirteenth Amendment.[133]

In *Jobson*, the Second Circuit assumed, without deciding, that a state institution may require "inmates" at the mental institution to work without violating the Thirteenth Amendment, so long as the assigned work is not

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[128] *See generally* Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665 (2020) (examining how incarcerated people, through their own advocacy, became "rights-holders" and how law and politics have frustrated exercise of those rights).

[129] Jobson v. Henne, 355 F.2d 129, 130–31 (2d Cir. 1966).

[130] *Id.* at 130.

[131] *Id.* at 132 n.5.

[132] *Id.* at 131–32.

[133] *Id.*; *see also* McGarry v. Pallito, 687 F.3d 505, 513 (2d Cir. 2012) (characterizing *Jobson*).

"excessive."[134] *Jobson*'s addition to the jurisprudence in this area, beyond the formal recognition of the "housekeeping" exception in mental health hospitals, concerns the purpose of the inmate's work. The court hypothesized two potential appropriate purposes for coerced labor by people committed to mental institutions. First, the work may be justified by its therapeutic purpose. The appellate court noted, "[n]evertheless, there may be some mandatory programs so ruthless in the amount of work demanded, and in the conditions under which the work must be performed, and *thus so devoid of therapeutic purpose*, that a court justifiably could conclude that the inmate had been subjected to involuntary servitude."[135] However, almost any type of work can be deemed therapeutic.[136] In another context involving the Fair Labor Standards Act, a different court found "the work of most people, inside and out of institutions, is therapeutic at least in the sense that work provides a person with a sense of accomplishment and a means to occupy time."[137]

The idea that compelled labor can be beneficial for the forced worker echoes one of the themes from *Robertson*, namely that the sailors, as a group, benefit from the labor because of their assumed inferiority. Though not relevant to the civil rights claims advanced in *Jobson*, the Second Circuit nevertheless shares that Mr. Jobson had been committed to the Newark State School for Mental Defectives at age twelve in 1935. Following a brief home stay, he was recommitted after being arrested and pleading guilty "to crimes of petty larceny and burglary in the third degree."[138] The opinion also repeatedly refers to Mr. Jobson as an "inmate," instead of as a patient. The gratuitous inclusion of both his criminal history and his nearly thirty-year history of institutionalization is reminiscent of descriptions of sailors as "deficient in that full and intelligent responsibility for their acts" in *Robertson*.[139] Implicit in these descriptions is the idea that forced labor is not involuntary servitude if it actually benefits the laborer.

As to the second purpose, the *Jobson* court identified financial savings to the public institution as an appropriate purpose, even if the labor was not necessarily therapeutic. The appellate court indicated that

> states are not thereby foreclosed from requiring that a lawfully committed inmate perform without compensation certain chores

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[134] *Jobson*, 355 F.2d at 132; *accord* Dale v. State, 44 A.D. 2d 384, 390 (1974) (denying claims of involuntary servitude in mental hospital); Wyatt v. Stickney, 344 F. Supp. 373, 381 (M.D. Ala. 1972) (providing minimum standards for labor by involuntarily committed patients, including allowing "personal housekeeping" tasks).

[135] *Jobson*, 355 F.2d at 132 (emphasis added).

[136] *See* Peter E. Gelhaar, *Institutionalized Patient Workers and Their Right to Compensation in the Aftermath of* National League of Cities v. Usery, 22 B.C.L. Rev. 511, 511–12 (1981) (discussing different viewpoints on compensated versus non-compensated work by people in mental institutions); *see also id.* at 521.

[137] *Id.* at 521 (citing *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973)).

[138] *Jobson*, 355 F.2d at 130.

[139] *Robertson* v. Baldwin, 165 U.S. 275, 287 (1897).

> designed to *reduce the financial burden placed on a state by its program of treatment for the mentally retarded*, if the chores are reasonably related to a therapeutic program, or if not directly so related, chores of a normal housekeeping type and kind.[140]

In a footnote, the court tries to limit the scope of this new exception to the Thirteenth Amendment. Work that was ordered solely to defray public expense and is not therapeutic and is not personally related, the court noted, would appear to violate the constitutional prohibition on involuntary servitude.[141] Such conduct would violate the Thirteenth Amendment, even if hospital patients received compensation for the work.[142] This financial benefit to the state justification is reminiscent of the *Butler/Selective Draft* line of cases by positing public benefit as an important criteria for determining whether or not work can be considered "involuntary servitude."

Moreover, patients in government mental hospitals seemingly owe the public this benefit. The *Jobson* court characterizes the government hospitals as a "financial burden" to the state.[143] This is a significant contortion of the "duty" concept elaborated in *Butler* and the *Selective Draft Law Cases*. In *Butler*, compulsory road labor was considered a civic duty, a contribution enabled by belonging to the rights-bearing class of residents. Every able-bodied male within a certain age range was required to contribute, either their own or enslaved labor or through a monetary fee, by virtue of their belonging. The same is true in the *Selective Draft Law Cases*, where military service is celebrated as a protection of rights and honor. In contrast, *Jobson* focuses on the obligation or duty to pay down an existing debt. Duty is shorn of its noble intention and instead becomes a debt owed for individual failings with none of the concomitant rights. Duty also loses the accompanying recognition that the duty is part of the assumption of rights.

Traversing the history and expansion of exceptions to the Thirteenth Amendment reveals a series of justificatory criteria. First, people in certain settings or spaces, like ships or mental institutions, are deemed less worthy of protection from involuntary servitude. The characteristics of the place, including a stated need for higher levels of control, discipline, and order, weigh in favor of expansion. Second, expansion of the exceptions was often linked to characteristics of the people inhabiting those spaces. Where residing individuals are perceived as inferior, due to their moral character, acts, or ability, courts are more likely to expand the exception. This includes sailors,

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[140] *Jobson,* 355 F.2d at 131–32 (emphasis added).

[141] *Id.* at 132 n.3. The opinion posits housekeeping chores both as an exception to Thirteenth Amendment's prohibition of involuntary servitude and also suggests that because such work is typically personally related, it does not constitute involuntary servitude as it does not involve service to another.

[142] *Id.* ("It would appear that this would be so even if the inmates were compensated for their labor, for the mere payment of a compensation, unless the receipt of the compensation induces consent to the performance of the work, cannot serve to justify forced labor.").

[143] *Id.* at 131.

involuntarily committed patients, and even so-called draft dodgers, who are perceived as shirking their patriotic duty. Third, expansion of the exception is more likely when the compelled labor benefits the government, particularly when people compelled are perceived to owe a debt to the state.

III. The "Housekeeping" Exception in the Carceral Context

The court-created "housekeeping" exception to the Thirteenth Amendment allows jails to compel people detained pending trial to engage in "personally related housekeeping chores."[144] While the U.S. Supreme Court has not yet addressed the constitutionality of the "housekeeping" exception for pretrial labor, beginning in the 1970s, other federal courts have adopted the exception when rejecting claims that compelled pretrial labor constitutes involuntary servitude.[145] In some cases, the "housekeeping" exception is characterized as part of a broader "civic duty" exception to the Thirteenth Amendment, but in others, the "housekeeping" exception is treated as a stand-alone exception.[146] In addition, two circuit courts of appeals have explicitly applied *Jobson,* the Second Circuit case concerning involuntary labor in mental institutions,[147] to other confinement settings including pretrial detention and immigration detention.[148] The "housekeeping" exception has also been codified in the Code of Federal Regulations for people charged with, but not tried for, federal offenses and is part of jail handbooks nationwide.[149]

In transplanting the "housekeeping" exception to carceral settings, these courts have failed to grapple with the differences between confinement in a mental institution, which is ostensibly for treatment, and jail detention, which is designed to secure appearance at trial and minimize threats to public safety. While *Jobson*'s therapy rationale is inapposite in the carceral context, the underlying idea that the person forced to work somehow benefits

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[144] McGarry v. Pallito, 687 F.3d 505, 514 (2d Cir. 2012).

[145] *See, e.g.*, Bijeol v. Nelson, 579 F.2d 423, 425 (7th Cir. 1978); Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993); Tourscher v. McCullough, 184 F.3d 236, 242 (8th Cir. 1999); Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992).

[146] *Compare* Owino v. CoreCivic, Inc., No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at *8–11 (S.D. Cal. May 14, 2018) (rejecting Thirteenth Amendment claim under the "civic duty" exception), *with Martinez*, 977 F.2d at 423 (rejecting the claim under the "housekeeping" exception).

[147] *Jobson*, 355 F.2d at 131. Notably, the first federal appellate opinion, *Bijeol v. Nelson*, 579 F.2d at 425, to apply the "housekeeping" exception to people detained pretrial did not cite *Jobson*, or any other legal authority related to the Thirteenth Amendment to support its decision.

[148] *McGarry*, 687 F.3d at 513; Channer v. Hall, 112 F.3d 214, 219 (5th Cir. 1997).

[149] 28 C.F.R. § 545.23(b) ("A pretrial inmate may not be required to work in any assignment or area other than housekeeping tasks in the inmate's own cell and in the community living area, unless the pretrial inmate has signed a waiver of his or her right not to work."); *see* Lawrence County Sheriff, Inmate Handbook 3, 5, 12, 17 (Nov. 1, 2012); Orleans Parish Sheriff's Office, Inmate Handbook 10, 23 (May 28, 2016), https://www.incarcerationtransparency.org/wp-content/uploads/2020/03/2016-OPP-Inmate-Handbook.pdf *archived at* https://perma.cc/2MNN-SX3S.

from the labor is reminiscent of the character deficiencies of sailors noted in *Robertson*.[150] In *Bijeol v. Nelson*, the Seventh Circuit merges these various strands of justification—from *Robertson* to *Butler* to *Selective Draft Law Cases* to *Jobson*—to justify compelled labor by people detained pretrial.[151]

A. Applying the "Housekeeping" Exception to People Detained Pretrial

In *Bijeol v. Nelson*, the Seventh Circuit upheld a federal detention center practice of requiring people detained pretrial to engage in daily housekeeping activities.[152] The *per curiam* opinion, affirming the district court's grant of summary judgment in favor of the Metropolitan Correctional Center ("MCC"), located in Chicago, Illinois, was a scant two-page opinion. The Seventh Circuit did not cite to any specific law or cases to establish this exception, beyond general caselaw on the legal restriction of rights for people detained pretrial.

Jail officials at the MCC required all people detained pretrial to "maintain the cleanliness" of their cell.[153] In addition, each person was assigned a cleaning duty for common areas, with tasks including "dusting, vacuuming, or emptying ashtrays in the television area three times daily; setting up and cleaning tables before meals; taking down and cleaning tables after meals; and vacuuming the general purpose area after each meal and prior to retiring."[154] Staff could order additional cleaning outside of the regular schedule as needed and time spent cleaning ranged from 45 to 120 minutes daily.[155] MCC also used people serving convictions for other labor in the facility, including work in the "kitchen, laundry, or mechanical services department."[156] When he refused to work, Mr. Bijeol was put in "disciplinary segregation," more commonly known as solitary confinement.[157] While in solitary, he was ordered to clean his cell with scouring powder and refused.[158] Later in his detention, he was again sent to solitary for allegedly not completing the assigned labor correctly, i.e., bumping into furniture with the vacuum.[159] The district court held, and the Seventh Circuit affirmed, that a

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[150] Robertson v. Baldwin, 165 U.S. 275, 287 (1897).

[151] Bijeol v. Nelson, 579 F.2d 423, 424–25 (7th Cir. 1978).

[152] Lower courts had implied that the "housekeeping" exception applied in the carceral context before *Bijeol,* often without analysis or case citation. *See, e.g.*, Barnes v. Gov't of Virgin Islands, 415 F. Supp. 1218, 1235 (D.V.I. 1976) (setting out guidelines for jail officials to implement to address significant and wide-ranging issues identified by judicial commission receiving complaints from incarcerated people). That court advised "[d]etainees shall be eligible to participate in any of the programs available to sentenced offenders, but shall not be required to do any work except to keep their cell area in a sanitary condition."

[153] Brief of Appellees at 3, Bijeol v. Nelson, 579 F.2d 423 (7th Cir. 1978) (No. 77-2195).

[154] *Id.*

[155] *Id.*

[156] *Id.* at 4.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 5.

"pretrial detainee may constitutionally be compelled to perform simple housekeeping tasks in his or her own cell and community areas."[160]

Instead of addressing the substance of his Thirteenth Amendment claim, the Seventh Circuit adopted a mocking tone diminishing plaintiff's constitutional claims. The Seventh Circuit declared "[a] pretrial detainee has no constitutional right to order from a menu or have maid service."[161] To be clear, Mr. Bijeol did not claim he had a constitutional right to restaurant or hotel service while incarcerated. Instead, he argued that he was ordered to clean the jail under the threat, and then actual imposition, of disciplinary action by jail officials, in violation of the Thirteenth Amendment.[162] The Seventh Circuit's contortion of Mr. Bijeol's constitutional claim into a request for "maid service" can be interpreted as a characterization of Mr. Bijeol as arrogant, lazy, and entitled. It suggests the court had a dim view of Mr. Bijeol's character, similar to *Robertson* and the *Selective Draft Law Cases*. In trivializing his claim, the court implied Mr. Bijeol was simply lazy or wrongly believed he deserved special treatment or privileges.

Similarly, the Seventh Circuit invokes unique aspects of the place in which Mr. Bijeol is coerced to work. The court notes "that pretrial detention centers must maintain some stability and discipline."[163] It also points to jails as congregate living spaces by noting that "some of [the people detained] may tend to be neater than others."[164] Like the mental institutions in *Jobson* and the ships in *Robertson*, the obligation to labor is dictated by the space inhabited.

Bijeol also raises more questions than answers. The Seventh Circuit did not actually address whether the assigned work was "involuntary servitude" or explicitly invoke the "housekeeping" exception. This distinction matters. If the tasks are not considered involuntary servitude, then the "housekeeping" exception is unnecessary because the Thirteenth Amendment is not implicated. If, however, the tasks assigned did constitute involuntary servitude, then, and only then, would the "housekeeping" exception analysis be necessary. That analysis would require considering whether the tasks assigned to Mr. Bijeol—washing windows, vacuuming, cleaning walls, keeping books in order, and picking up cigarette butts in common areas—were personally related.[165] But the Seventh Circuit doesn't identify whether the tasks assigned to Mr. Bijeol were related to his cell and common areas, such as the dayroom for his tier, or if they were performed in other sections of the facility, such as other housing tiers or areas reserved for staff.

The Seventh Circuit in 1978 certainly had working definitions of "involuntary servitude" from Supreme Court precedent, even before the U.S.

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[160] Bijeol v. Nelson, 579 F.2d 423, 425 (7th Cir. 1978).
[161] *Id.* at 424.
[162] *Id.*
[163] *Id.* at 425.
[164] *Id.* at 424.
[165] Brief of Appellees at 4, Bijeol v. Nelson, 579 F.2d 423 (7th Cir. 1978) (No. 77-2195).

Supreme Court provided the modern definition in *U.S. v. Kozminski* in 1988.[166] As early as 1905, the U.S. Supreme Court distinguished peonage (a form of involuntary servitude) from services to pay down a debt by focusing on the compulsion that attaches to the labor.[167] In 1911 in *Bailey*, the U.S. Supreme Court described involuntary servitude as when the "personal service of one man is disposed of or coerced for another's benefit."[168] Later, in 1944, the Court in *Pollock* described involuntary servitude as "[w]hen the master can compel and the laborer cannot escape the obligation to go on," even while acknowledging exceptions for certain civic duties and for people convicted of a crime.[169] The availability of court precedent makes the Seventh Circuit's decision to side-step whether or not Mr. Bijeol's work constituted involuntary servitude even more bewildering.

Instead, *Bijeol* appears more focused on whether the assigned work is excessive or burdensome. The Seventh Circuit also repeatedly characterized the work as "fair."[170] Whether or not the work is excessive or fair is doctrinally irrelevant for Thirteenth Amendment analysis. In *Robertson*, the Court recognized that criminal enforcement of private contracts with sailors was within the letter, but not the spirit, of the prohibition of involuntary servitude.[171] Accordingly, the Court crafted an exception based on necessity and historical practices. Never once did the Court opine on the excessiveness of the services required by the ship owners. Similarly, in *Butler*, the Court rationalized excepting compulsory road labor based on history and duty. Again, the Court did not analyze whether the road work was particularly excessive or burdensome. It may be that the Seventh Circuit focused on the lack of burden in *Bijeol* as a proxy for determining whether the work was involuntary. But it may also be that the Seventh Circuit was applying Fourteenth Amendment due process analysis, which typically concerns government burdens on individual rights, to Mr. Bijeol's Thirteenth Amendment claim.

B. Doctrinal Confusion: Thirteenth Amendment v. Fourteenth Amendment

Doctrinally, at the time *Bijeol* was decided, the operative question in determining "involuntary servitude" under the Thirteenth Amendment was

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[166] United States v. Kozminski, 487 U.S. 931, 952 (1988) (finding "the term 'involuntary servitude' necessarily 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" for purposes of criminal prosecution).

[167] Clyatt v. United States, 197 U.S. 207, 215–16 (1905) (noting voluntary services to pay debt, a person "can elect at any time to break it, and no law or force compels performance or a continuance of the service.").

[168] Bailey v. State of Alabama, 219 U.S. 219, 241 (1911).

[169] Pollock v. Williams, 322 U.S. 4, 18 (1944).

[170] *Bijeol*, 579 F.2d at 424–25.

[171] Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

whether or not the labor was compulsory.[172] In *Bailey*, which prohibited debt peonage, the Court found that one of the purposes of the Thirteenth Amendment, including the prohibition on involuntary servitude, was to "make labor free" by "prohibiting . . . control" of another person's labor.[173] So why did Seventh Circuit focus on the burden (or lack of) for Mr. Bijeol's claim?

The doctrinal confusion stems, at least in part, from transplanting the "housekeeping" exception to pretrial incarceration. Conditions of confinement for people detained pretrial, including claims regarding excessive use of force[174] or cell searches,[175] are usually analyzed under the Fifth and Fourteenth Amendment's guarantees of due process. In a 1979 case, *Bell v. Wolfish*, the U.S. Supreme Court held that people detained pretrial should not be subject to the same restriction of rights as people convicted of a crime, due to the presumption of innocence.[176] Bell allows for some restrictions on the rights of people detained pending trial, in part, to assure the safe, secure, and orderly operation of the jail. For due process challenges to conditions pretrial, an incarcerated plaintiff must prove the conditions are "punishment," defined as not "reasonably related to a legitimate government objective"[177] or purpose.

Indeed, the rule announced in *Bell* was already a part of Seventh Circuit jurisprudence. In 1976, two years before *Bijeol* and three years before *Bell*, the Seventh Circuit in *Duran* held that

> [s]ince they are convicted of no crime for which they may presently be punished, the state must justify any conditions of their confinement solely on the basis of ensuring their presence at trial. Any restriction or condition that is not reasonably related to this sole stated purpose of confinement would deprive a detainee of

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[172] *See, e.g.*, Slaughterhouse Cases, 83 U.S. 36, 90 (1872) (Field, J., dissenting) (discussing involuntary servitude as prohibiting "*compulsory* service for the mere benefit or pleasure of others") (emphasis added); Clyatt v. United States, 197 U.S. 207, 215 (1905) (equating "compulsory service" with "involuntary servitude").

[173] *Bailey*, 219 U.S. at 241.

[174] Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015).

[175] Block v. Rutherford, 468 U.S. 576, 591 (1984).

[176] Bell v. Wolfish, 441 U.S. 520, 535 (1979). Though *Bell* was decided after *Bijeol*, the Seventh Circuit had already decided *Duran v. Elrod*, which announced a similar rule for assessing conditions of confinement claims by people detained pretrial; *see also* Duran v. Elrod, 542 F.2d 998, 1000 (7th Cir. 1976).

[177] *Bell*, 441 U.S. at 538–39 (examining claims by people pretrial that jail practices of double-bunking, strip searches, cell searches, and limits on packages and reading material were unconstitutional). The Due Process test for pretrial conditions continues to evolve. Most recently, in *Kingsley*, the Supreme Court applied an objective "reasonable person" standard to determining whether a jail officer used excessive force against a person held pretrial. 576 U.S. 389, 396 (2015) (rejecting application of "deliberate indifference," i.e., subjective awareness and disregard, standard for proving excessive force in pretrial detention settings). For a deeper exploration of the meaning and implications of *Kinglsey*, see Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L. Rev. 357, 402–17 (2018).

> liberty or property without due process, in contravention of the Fourteenth Amendment.[178]

It may be that the district court, given the recent Seventh Circuit *Duran* decision concerning challenges to pretrial conditions of confinement, was simply confused about which doctrine to apply to Mr. Bijeol's claim. The district court opinion in *Bijeol* relied on both Thirteenth and Fourteenth Amendment analysis in its opinion upholding the pretrial work assignment. The district court held that housekeeping work can be compelled. In other words it was involuntary servitude but allowed under exception. At the same time, the district court found that the work was "not overly burdensome in the amount of time or labor required and [did] not preclude the inmate from effectively participating in his defense to pending criminal charges."[179] In other words it was not a "punishment" or a burden on other constitutional rights, and therefore allowed.

The focus of the Fourteenth Amendment inquiry is whether the work was so *burdensome* on a person's rights that the government act constituted an extralegal punishment. In the compelled work context, a due process analysis will ask whether the work is reasonably related to the jail's objective of safe, healthy, and secure operation of the facility. Since many of the pretrial work assignments involve taking care of the facility and its involuntary residents, certain work assignments, even if not personally related, could pass muster under the Fourteenth Amendment, but nevertheless fail under the Thirteenth Amendment.

The Thirteenth Amendment analysis is different than the Fourteenth Amendment. The focus of the Thirteenth Amendment inquiry is *compulsion*.[180] Under the Thirteenth Amendment, lower courts first determine whether it is "involuntary servitude" and if it is, then whether the assigned work fits within the bounds of the "housekeeping" exception. In 1988, the U.S. Supreme Court decided *U.S. v. Kozminski*, which defined involuntary servitude as "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."[181]

The lack of clarity was apparent in *Hause v. Vaught*, a Fourth Circuit case alleging a claim of compelled labor pretrial.[182] Stephen Hause was assigned to repeatedly clean "the common areas of the detention center mod-

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[178] Duran v. Elrod, 542 F.2d 998, 1000 (7th Cir. 1976). This idea was also later adopted one year after *Bijeol* in the U.S. Supreme Court's decision *Bell*, 441 U.S. at 538 (concerning conditions for people detained pretrial).

[179] Brief of Appellees at 5, Bijeol v. Nelson, 579 F.2d 423 (7th Cir. 1978) (No. 77-2195).

[180] *See, e.g.*, Channer v. Hall, 112 F.3d 214, 218 (5th Cir. 1997) ("A showing of compulsion is thus a prerequisite to proof of involuntary servitude") (quoting *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990)).

[181] *See* United States v. Kozminski, 487 U.S. 931, 952–53 (1988) (requiring a finding of involuntary servitude to include evidence of physical or legal coercion).

[182] 993 F.2d 1079 (4th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994).

ule in which he was confined" several times over the course of two days, which he alleges was in retaliation for grievances he filed.[183] He specifically did not challenge the jail's requirement to keep his personal cell clean, but did challenge orders to clean the "the whole 'module'" as a violation of his Thirteenth Amendment rights.[184] He was not given extra privileges like others assigned the same tasks. Instead, he claimed he was threatened with forty-eight hours of lockdown if he refused to work. The district court held that "requiring an inmate to clean his housing unit is not punishment" because "it is reasonably related to the legitimate goals of protecting the health, safety, and security of the detainees and the guards."[185] In briefs prepared for the Fourth Circuit, neither party referred to the Thirteenth Amendment, though both cited *Bijeol* to support their arguments.[186] The Fourth Circuit upheld summary judgment against the incarcerated plaintiff, noting he failed to provide additional facts on the assigned "cleaning," which the court concludes could have only required "dusting," thus implying it did not constitute a significant burden.[187]

The Fourth Circuit ultimately appeared to rely on both Thirteenth and Fourteenth Amendment rationales to deny plaintiff's claim. Citing *Bijeol*, the Fourth Circuit held that the assigned tasks were "general housekeeping responsibilities," and appeared to adopt the *Bijeol* holding that such duties were not in conflict with the Thirteenth Amendment.[188] The Fourth Circuit also decided that the work was not a punishment since it related to the "legitimate, non-punitive governmental objective of prison cleanliness" and similarly appeared to adopt *Bijeol*'s holding that the assigned work did not violate the due process clause.[189]

Hause is not the only case to confuse the two standards and the associated concepts of coercion and burden. In *Ford*, a New York district court noted the various ways that working as a "food cart worker" was not overly

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[183] Brief for Appellants at 6, Hause v. Vaught, 1992 WL 12125482 (4th Cir. 1992). Neither the brief nor the opinion defines what the "module" is and whether it contains more than cells and a dayroom typical of a jail.

[184] *See* Hause v. Vaught, 993 F.2d 1079,1085 (4th Cir. 1993) (quoting complaint). Specifically, Hause's complaint stated:

> On at least 2 different occasions I was intentionally threatened with *punishment,* without Due Process, in the form of 48 hours lock-down in my cell if I refused to work as a Pre–Trial Detainee[.] This violated my 13th Amendment Rights . . . The work I was forced to do by defendants did not entail cleaning up my cell, which I did willingly, but involved cleaning up the whole 'module' several times a day . . . .

Id.

[185] Brief for Appellants at 8, Hause v. Vaught, 993 F.2d 1079 (4th Cir. 1993) (No. 92-6328), 1992 WL 12125482.

[186] *See id.; see also id.* at 23, Hause v. Vaught, 993 F.2d 1079 (4th Cir. 1993) (No. 92-6328), 1992 WL 12125481; Reply Brief of Appellants at 12-13, Hause v. Vaught, 993 F.2d 1079 (4th Cir. 1993) (No. 92-6328), 1992 WL 12125480 (4th Cir. 1992).

[187] *See* Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993).

[188] *See id.*

[189] *See id*; *see also id.* at n.15 (discussing due process standards as applied to federal facilities (Fifth Amendment) and state and local facilities (Fourteenth Amendment)).

burdensome. For example, the opinion notes that the cart was "already loaded," implying Mr. Ford was not required to lift or load items onto the cart.[190] The court describes his job as simply being asked to push a cart "100 to 125 yards" with scare quotes around the word "working."[191] Guards would then hand the food to other detained people, the court notes, without identifying that courts have also been suspicious of the use of unsupervised "trusty" systems for the delivery of constitutionally required services, such as meals, safety, and healthcare.[192] The *Ford* court also noted that meal service lasted two to two and a half hours and Ford was not always required to work all three meals.[193] Taken together, the *Ford* court concludes that the work assigned was "reasonable housekeeping duties," which did not violate the Fourteenth Amendment.[194]

For Mr. Ford's Thirteenth Amendment claim, the district court adopted a "contextual approach, considering such factors as the nature and amount of work demanded, and the purpose for which it is required."[195] Drawing on its prior analysis of Mr. Ford's Fourteenth Amendment claim, the court concluded that the coerced work "[did] not rise to the level of indignity and degradation that accompanied slavery" and therefore did not violate the Thirteenth Amendment.[196] The fact that the work was not deemed burdensome, notably a Fourteenth Amendment concept, appears to be dispositive to determining the indignity associated with his coerced labor for purposes of the Thirteenth Amendment.

C. Additional Factors in Carceral Housekeeping

The Fourth, Fifth, and Seventh Circuits have all explicitly recognized a "housekeeping" exception to the Thirteenth Amendment in the carceral context. The Third and Eighth Circuits have favorably cited the Seventh Circuit's opinion that "housekeeping" tasks by a person detained pretrial are not necessarily prohibited.[197] Although the doctrinal analysis is at times confused, these cases embody many of the rationales courts employed leading

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[190] *See* Ford v. Nassau Cty. Exec., 41 F. Supp. 2d 392, 394 (E.D.N.Y. 1999).

[191] *See id.* at 394–95.

[192] *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 682 n.6 (1978).

[193] *See Ford*, 41 F. Supp. 2d at 395.

[194] *See id.* at 397 (internal quotation marks omitted).

[195] *See id.* at 401 (internal quotation marks omitted); *accord* Tourscher v. McCullough, 184 F.3d 236, 242 (8th Cir. 1999) (holding that more information was needed on the "the nature of the services that Tourscher was required to perform during that period and the amount of time they took" to determine whether plaintiff's work in the cafeteria while detained pretrial violated the Thirteenth Amendment.) Ford cited *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 459–60 (2d Cir. 1996) which concerned a claim that mandatory community service for purposes of graduation violated the Thirteenth Amendment. Notably, the district court did not analyze the lack of choice and the potential for exploitation in assessing Mr. Ford's claim, factors that were highly relevant to the Second Circuit's decision in *Immediato.*

[196] *See Ford*, 41 F. Supp. 2d at 401.

[197] *See* Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992); Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999).

up to the "housekeeping exception," namely the character of the plaintiff, the needs of the space, and the public duty/benefits of the labor. In addition, courts have also challenged whether coerced labor is even considered involuntary servitude.

1. Character of the Detained Plaintiff

The character of the incarcerated worker continues to matter in modern cases addressing pretrial labor. In *Ford*, the New York district court case challenging the assignment as a "food cart worker," the Court made clear its opinion of the plaintiff.[198] Though irrelevant to his civil rights claim, the court recited why he was detained (warrants and traffic violations), that he pled guilty, and that he had been incarcerated at least nineteen times prior.[199] The fact that "Ford is no stranger to the correctional facility"[200] was used to demonstrate his ongoing familiarity with incarceration. In so doing, the district court implied that he is not worthy of protection. In *Stebbins v. Boone County*, the court specifically—and unnecessarily—noted the jail staff's nickname for the plaintiff, "Mr. Lawsuit."[201] There, the district court found his claim that he was threatened with pepper spray if he did not clean both his cell and the common areas "wholly without merit."[202] In the same opinion, the court admonishes Mr. Stebbins, proceeding pro se, to not include "profane" statements in his pleadings and to behave with "decorum and civility."[203] In this case, the court's opinion of Mr. Stebbins' character is used to trivialize his claim of labor coerced by threat of a chemical weapon. Thus, the negative character ascribed to the incarcerated worker acts to deprive that person of the full protection of the Thirteenth Amendment.

The deficient character of the coerced worker also influences perceptions of personal benefit to the person detained. In both *Robertson* and *Jobson*, the labor itself was described as potentially beneficial for the plaintiffs. In *Ford*, the benefit came from the extra food provided as a "reward[ ] for his assistance."[204] In *Brooks v. George County, Mississippi*, as discussed in more detail *infra*, the Fifth Circuit even determined that the benefits that accrued to the incarcerated plaintiff, including freedom of movement on jail grounds and work off-site, were greater than he was personally entitled to.[205] In another pretrial labor case, albeit one decided purely on due process grounds, the Eleventh Circuit assumed that "the performance of these [translation] services actually served to occupy Villarreal's time, keep him

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[198] *See Ford*, 41 F. Supp. 2d at 394.
[199] *See id.*
[200] *See id.*
[201] *See* Stebbins v. Boone Cty., Ark., No. 3:12-CV-03022, 2013 WL 5274288, at *1–2 (W.D. Ark. Sept. 18, 2013).
[202] *See id.* at 3.
[203] *See id.* at 4.
[204] *See* Ford v. Nassau Cty. Exec., 41 F. Supp. 2d 392, 397 (E.D.N.Y. 1999).
[205] *See* Brooks v. George County, Miss., 84 F.3d 157, 162–63 (5th Cir. 1996).

out of trouble, and allow him interaction with other inmates and various individuals (e.g., doctors, probation officers, and other court personnel)."[206] In these cases, the deficient character operates to lower the bar of what is considered beneficial. And though courts may silently believe that the assigned work benefits the coerced worker in other ways, such as improved work ethic or skills, courts may not ascribe rehabilitation benefits to pretrial labor.[207]

2. Needs of Carceral Spaces

Jails and prisons are relatively unique spaces within the law. The U.S. Constitution operates differently within these spaces, where individual rights may be limited or curtailed solely due to the needs of the institution.[208] Simultaneous with the minimization of individual rights, facility administrators have increased authority and discretion for their operational decisions.[209] Courts are loath to interfere with the professional judgment of administrators of carceral spaces, particularly when jail officials invoke the order, safety, or security of the facility as justification for their act.[210] Jails and prisons are also distinguished as government operated congregate living facilities, similar to military bases, mental institutions, and some hospitals. These two elements, deference to claims of order, safety, and security and congregate living, combine to make carceral spaces unique in the eyes of the law.

Several courts rely on the linkage first articulated in *Bijeol* between housekeeping chores and facility health and safety.[211] In *Bijeol*, the Seventh Circuit held that "[d]aily general housekeeping responsibilities are not punitive in nature and for health and safety must be routinely observed in any multiple unit living."[212] Alternatively, the failure of jail officials to specify a security-related rationale for coerced laundry duty, may have contributed to the Second Circuit's denial of qualified immunity for an incarcerated plaintiff's Thirteenth Amendment claim.[213]

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[206] *See* Villarreal v. Woodham, 113 F.3d 202, 208 (11th Cir. 1997).

[207] *See* McGinnis v. Royster, 410 U.S. 263, 273 (1973) ("[I]t would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.").

[208] *See* Turner v. Safley, 482 U.S. 78, 93 (1987) (allowing prison limitations on First Amendment rights for personal correspondence between incarcerated people).

[209] *See id.*

[210] *See* Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

[211] *See, e.g.*, Stebbins v. Boone Cnty., Ark., No. 3:12-CV-03022, 2013 WL 5274288, at *9 (W.D. Ark. Sept. 18, 2013) (quoting Bijeol v. Nelson, 579 F.2d 423, 424 (7th Cir. 1978)); Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993) (referring to "prison cleanliness").

[212] *See* Bijeol v. Nelson, 579 F.2d 423, 424 (7th Cir. 1978).

[213] *See* McGarry v. Pallito, 687 F.3d 505, 513 n.7 (2d Cir. 2012).

3. Duty/Benefit to Public

Jails benefit from the labor of people detained pretrial through cost-savings. Some courts have explicitly taken this into account in determining whether a plaintiff has successfully articulated a claim of "involuntary servitude," particularly in the immigration detention context. The Fifth Circuit has held that people detained for immigration purposes can be forced to work in the kitchen as a "communal contribution" to the public fisc.[214] This proposition was approvingly cited in at least one case addressing forced labor in a jail.[215] In *Baker v. Trinity Services Group*, the incarcerated plaintiff was ordered to work eight to nine hour shifts, seven days a week in the kitchen preparing and serving meals.[216] Mr. Baker worked in the kitchen continuously from August to December while awaiting trial, earning two dollars a day, and he alleged that jail policies prohibited him from missing work except for medical issues or court appearances.[217] The court dismissed his Thirteenth Amendment claim noting the work was similar to the nature and type allowed under *Channer*'s "communal contribution."[218]

The range of work allowed under the "housekeeping" exception suggests that courts also consider whether the assigned work fulfills an implicit duty of people detained pretrial to minimize the costs of detention. This was likely an implicit consideration in *Ford*, where the incarcerated plaintiff delivered meal trays.[219] This may also have been the case in *Villareal v. Woodham*, where a person detained pretrial was ordered to provide translation services for the jail.[220] Though the court did not consider Mr. Villareal's Thirteenth Amendment claim, the court did decide that coerced translation did not violate the Fourteenth Amendment since it was not punitive.[221]

4. Involuntariness?

More broadly, courts are increasingly challenging the idea that work ordered by jail officials should be considered "involuntary servitude," re-

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[214] Channer v. Hall, 112 F.3d 214, 219 (5th Cir. 1997); *see also* Novoa v. GEO Grp., Inc., No. EDCV 17–2514 JGB, 2018 WL 3343494, at *13 (C.D. Cal. June 21, 2018) (denying defendant's request to invoke the housekeeping exception because defendant was a private entity operating an immigration detention center, but also noting "[c]ompelling inmates at federally operated facilities to engage in certain cost-defraying actions when these savings accrue to the government fits neatly within the bounds of the civic duty exception.").

[215] Baker v. Trinity Servs. Grp., No. TDC-19-3661, 2021 WL 75160, at *3 (D. Md. Jan. 8, 2021).

[216] *Id.*

[217] *Id.* at *1.

[218] *Id.* at *3.

[219] Ford v. Nassau Cnty. Exec., 41 F. Supp. 2d 392, 394–95 (E.D.N.Y. 1999).

[220] Villarreal v. Woodham, 113 F.3d 202, 204 (11th Cir. 1997).

[221] *Id.* at 208 n.4 (refusing to address the Thirteenth Amendment claim as it was not presented to the district court and therefore not preserved for review). *But see* Brief for Appellant at 8, Villarreal v. Woodham, 113 F.3d 202 (11th Cir. 1997) (No. 96–2146), 1996 WL 33469768, at *8 (arguing pleadings presented Thirteenth Amendment issue).

gardless of the exception. Relying on *Kozminski*'s definition of involuntary servitude as "servitude for another," courts have held that mandatory cleaning assignments are not performed for the benefit of another, but instead for the benefit of the detained person. A state court challenge to a jail policy requiring daily cleaning of cells was upheld against a Jewish plaintiff, who refused to scour his cell walls on a Saturday.[222] Saturday is a day of rest for members of the Jewish faith. Mr. Friedman brought claims under the Utah state constitution, which prohibits involuntary servitude and guarantees the free exercise of religion.[223] The court noted that the work was not performed for "another" as it only concerned walls in his cell.[224] As the work was not for another, the court concluded it was not "involuntary servitude."[225] Similarly, in the Fifth Circuit, the court characterized the incarcerated plaintiff's work building a dog pen and fence off site as a "choice" and therefore not involuntary servitude.[226] The court opined that Mr. Brooks "desired to leave the jail and chose to work as the price for that right . . . the choice . . . cannot be considered coercive because the benefits he received for working were not benefits for which he was otherwise entitled."[227] In *Ford*, the district court concluded that plaintiff's work pushing a food cart for meal service was a choice and not compelled labor.[228] These decisions to elevate "choice" as the determinative element may also have been related to the fact that it is difficult to reconcile the work actually assigned as "personally related housekeeping."

Courts have also dismissed complaints, including pro se complaints based on court forms, for failing to allege that the assigned work was compelled and therefore not involuntary. In *Yates v. Holloway*, the district court judge—based on a bare-bones pro se complaint—dismissed the plaintiff's Thirteenth Amendment claim regarding his work on a supervisor's personal project in the work detail shop, for failure to argue that the work was compelled by threats of physical or legal coercion.[229] Similarly, in *Gibson v. Satz*, the district court dismissed the plaintiff's Thirteenth Amendment claim for work performed while a trustee for failing to provide sufficient details on the

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[222] Friedman v. Salt Lake Cnty., 305 P.3d 162, 164–66 (Utah Ct. App. 2013).

[223] *Id.* at 165–67. The court relied on federal jurisprudence on the Thirteenth Amendment to deny his claim for involuntary servitude. *Id.* at 166 n.5 and accompanying text. The court also denied his free exercise claim due to state precedent that he must plead why equitable relief was inadequate for redress, while also noting that equitable relief is moot as Mr. Friedman was no longer at the jail. *Id.* at 167.

[224] *Id.* at 166.

[225] *Id.* The court noted that to the extent Mr. Friedman sought equitable relief to change the jail policy regarding cleaning on Saturdays, his claim was moot since he was no longer detained at the Salt Lake County Adult Detention Center. *Id.* at 163 n.1.

[226] Brooks v. George Cnty., Miss., 84 F.3d 157, 161 n.1, 162 (5th Cir. 1996).

[227] *Id.* at 162–63.

[228] *See* Ford v. Nassau Cnty. Exec., 41 F. Supp. 2d 392, 401 (E.D.N.Y. 1999).

[229] Yates v. Holloway, No. 5:18-CV-05246, 2019 WL 406156, at *1–3 (W.D. Ark. Jan. 31, 2019).

work performed.[230] Even where the choice is punishment or compelled labor, courts have held that the assigned work was not involuntary servitude.[231]

IV. Potential Expansion and Contraction of the "Housekeeping" Exception

Courts in the reviewed cases appear to have generally taken the position that the coercion of "personally related housekeeping chores" is not, in and of itself, harmful. Requiring detained people to keep themselves and their personal areas clean accords with a general American ethic of "personal responsibility."[232] Moreover, clean and sanitary jails are essential for the safety and health of people incarcerated. Why shouldn't people detained pending trial be compelled to keep clean? This Article, through its review of the historical exploitation of incarcerated labor, the racial impact of pretrial detention, and how carceral logics function to diminish the value accorded to incarcerated people, indicates that the potential dignitary and exploitative harm is more complicated than courts suggest.

Moreover, the existence of the "housekeeping" exception exposes detained people to punishment when they fail to comply. Courts have rebuffed claims of coerced work, even when plaintiffs were threatened with "pepper spray,"[233] solitary confinement,[234] disciplinary reports,[235] loss of recreational time,[236] and cell lockdown for three days.[237] These punishments also occur in

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[230] Gibson v. Satz, No. 19-63169-CV-SMITH, 2020 WL 5519198, at *3–4 (S.D. Fla. July 31, 2020), report and recommendation adopted, 2020 WL 5517568 (S.D. Fla. Sept. 14, 2020).

[231] *See, e.g.*, *Ford*, 41 F. Supp. 2d at 401 (citing Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 459 (2d Cir. 1996)) (holding that a public school mandatory community service program that must be completed in order to graduate is not involuntary servitude).

[232] For a striking example of this American ethic, *see* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title IX, § 911, 110 Stat. 2105, 2353 (codified as amended at 42 U.S.C. § 608(a) (2006)); *see also* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. Crim. L. & Criminology 643, 646–47 (2009) (critiquing the above act and its encouragement of regulation of the behavior of the poor).

[233] *See, e.g.*, Stebbins v. Boone Cnty., Ark., No. 3:12–CV–03022, 2013 WL 5274288, at *9 (W.D. Ark. Sep. 18, 2013); *but see* Lola v. Monroe Cnty., 2020 U.S. Dist. LEXIS 159579 (S.D. Fla. 2020) (allowing Thirteenth Amendment claim to proceed).

[234] *See* Brief of Appellees at 3, Bijeol v. Nelson, 579 F.2d 423 (7th Cir. 1978) (No. 77-2195); *but see* Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) (overturning district court dismissal of complaint where pretrial plaintiff claims he was put in administrative segregation for refusing to work); McGarry v. Pallito, 687 F.3d 505, 509 (2d Cir. 2012) (finding that a pretrial plaintiff had plausibly stated a Thirteenth Amendment claim when he claimed that he had no real choice between working in the laundry or punishment through solitary confinement or disciplinary report); Ruelas v. Cnty. of Alameda, No. 19-cv-07637-JST, 2021 WL 475764, at *14 (N.D. Cal. Feb. 9, 2021) (court notes plaintiffs claim they were threatened with "lengthier sentences and solitary confinement" if they did not work but allowed Thirteenth Amendment claim to proceed).

[235] *See, e.g.*, Smith v. Penzone, No. CV1703892PHXDGCDMF, 2018 WL 3819126, at *2–4 (D. Ariz. Aug. 10, 2018) (plaintiff was ordered to clean walls or "be written up").

[236] *See, e.g.*, *Friedma*n, 305 P.3d at 165.

[237] *See, e.g.*, Hartsfield v. Selma, Case No. 1:16-cv-1135, 2016 U.S. Dist. LEXIS 158941, at *1–4 (W.D. Mich. Nov. 16, 2016).

a context of substantial discretion for jail officials in whether to impose discipline for rule violations.[238]

In addition, some courts have indicated a willingness to further expand the court-created "housekeeping" exception beyond personally related housekeeping chores in pretrial settings. Some courts—but not all—have broadly construed what is considered "personally related." The boundaries of "personally-related" work can be difficult to determine in congregate living spaces and accordingly, easily expanded. Second, some courts—but not all—have expanded the "housekeeping" exception beyond pretrial settings to immigration detention. At the same time, several courts in the immigration context have refused to allow the expansion when the labor is coerced for a private entity.

A. Expansion Beyond Personally Related "Housekeeping"?

As the cases reviewed in this Article make clear, many claims challenging coerced labor concerned work outside of a person's cell, such as cleaning of communal areas, food preparation and service, laundry, translation services, and work on personal projects for jail staff. Even when the work concerned cleaning their assigned cell, the compelled labor wasn't necessarily related to the personal actions of the person detained.[239]

In *Smith v. Penzone*, the court upheld ordering the incarcerated plaintiff to clean the walls of the cell he had just been assigned.[240] In *Smith*, there were no allegations that Bryce Smith was responsible or somehow contributed to the uncleanliness or disorder.[241] The court appeared to assume that the cleaned cell ultimately benefits Mr. Smith. This is a far cry from the Seventh Circuit's denunciation of maid service for people detained pretrial in *Bijeol*. Arguably, under *Smith*, a jail could simply move a person detained to a new cell each day and order it cleaned, even though the mess in the new cell is not personally related to the person ordered to clean it.

More broadly, if cells are simply rooms in involuntary facility homes, then "housekeeping" work could include other tasks unrelated to the incarcerated plaintiff. In *Ford*, the delivery of meal trays was clearly not personally related. When the jail did not need Mr. Ford to run the food cart, he would be assigned other jobs such as "sweeping the guard walk" or "emptying the garbage," none of which are related to Mr. Ford's personal use of his cell or common area.[242] A Michigan district court, considering a claim of

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[238] Armstrong, *supra* note 17, 768, 771–73 (discussing discretion in enforcing disciplinary rules).

[239] Jackson v. Siringas, No. 12–15474, 2013 WL 3810301, at *10 (E.D. Mich. July 23, 2013), aff'd (May 15, 2014) (concerning claim by plaintiff that he was required to clean his cell when the toilets overflowed, which arguably was not caused by his direct actions).

[240] Smith, 2018 WL 3819126, at *1–2.

[241] *Id.*

[242] Ford v. Nassau Cnty. Exec., 41 F. Supp. 2d 392, 395 (E.D.N.Y. 1999).

involuntary servitude for an incarcerated plaintiff punished for failing to clean the jail's windows, did not even inquire into whether the assigned chores were personally related.[243]

Other courts have construed "personally related" even more broadly. An Arkansas district court, addressing a pro se complaint, did not take issue with work being performed for the shop supervisor's (and jail employee) personal projects.[244] The personal projects included use of "welder, grinder, and tire machine" to work on a "motorcycle dolly and Volkswag[e]n wheels for a personal project he was restoring at home."[245] Similarly, a Florida district court did not engage with the plaintiff's Thirteenth Amendment claim that he was forced to provide translation services for the Sheriff's department, including translating for other detained people, and medical and court personnel.[246]

However, not all courts are so inclined. The Second Circuit has differentiated between work akin to "hard labor" associated with convictions and labor by people detained pretrial. In *McGarry v. Pallito*, the court was skeptical of defendant's invocation of the "housekeeping" exception because the labor alleged was similar in kind to the type required of people serving convictions.[247] The incarcerated plaintiff was ordered to complete fourteen-hour shifts in the hot laundry without access to protective gear or a restroom, work which was clearly not personally related.[248] The Second Circuit, perhaps reflecting the doctrinal uncertainty about the role of due process analysis, implied that the work was in fact punitive by characterizing the work performed as inappropriate "hard labor" for a person detained pretrial.[249]

B. Expansion to Immigration Detention

Courts have applied the "housekeeping" exception to settings other than pretrial detention and mental institutions, most notably to immigration detention. People may be detained pretrial for alleged criminal immigration violations (such as re-entry after deportation) or pursuant to civil proceedings to determine status, deportation, or other forms of relief such as asylum

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[243] *Hartsfield*, 2016 WL 6775475, at *4.

[244] Yates v. Holloway, No. 5:18-CV-05246, 2019 WL 406156, at *3 (W.D. Ark. Jan. 31, 2019) (the court ultimately denied his Thirteenth Amendment claim based on the fact that plaintiff was not threatened or compelled to do the work).

[245] Complaint at 4, Yates v. Holloway, 2019 WL 406156 (W.D. Ark. Dec. 11, 2018), (Rec. Doc. 1, No. 5:18-CV-05246).

[246] *See* Villarreal v. Woodham, 113 F.3d 202, 204 (11th Cir. 1997) (The appellate court upheld the dismissal of his complaint on the basis that he was not entitled to protection under the Fair Labor Standards Act.).

[247] McGarry v. Pallito, 687 F.3d 505, 513–14 (2d Cir. 2012).

[248] *Id.* at 509.

[249] *Id.* at 514. The assigned work—handling soiled clothing without access to sanitation supplies—also led to medical issues, as Mr. McGarry developed painful lesions due to a staph infection on his neck. *Id.* at 509.

or temporary protection status.[250] At least another 52,000 adults are behind bars related to their immigration status, either pretrial for immigration violations, such as illegal re-entry, or due to their undocumented status.[251] Only a small portion (2,700) are held in facilities operated by the U.S. Immigration and Customs Enforcement, with significant proportions held in local jails and private prisons on behalf of ICE.[252]

In at least one immigration detention case, *Hopper v. Clark*, a magistrate judge dismissed the plaintiff's Thirteenth Amendment claim for the facility's failure to pay him for work performed.[253] The Northwest Detention Center, operated by Geo Corporation, had a "Voluntary Work Program," which paid one dollar a day. Geo also had a policy that if a person claimed they were not properly paid, that person had to submit a claim for nonpayment within fourteen days of the day worked. The plaintiff submitted multiple affidavits to prove that Geo routinely failed to provide the requested accounting within time to receive payment, thus the assigned work—in practice—was unpaid.[254] But despite the fact that the work was not paid, the magistrate judge in *Hopper* concluded "the Thirteenth Amendment does not prohibit involuntary servitude as part of the Plaintiff's detention,"[255] citing *Ford* and *Bijeol*. Moreover, the work that was performed involved "handing out laundry and rearranging books,"[256] i.e., work that had not previously been held to be "personally related."

In these immigration cases, many of the criteria favoring expansion in the pretrial context resurface to justify compelled labor for people under civil detention. In *Channer v. Hall*, the court framed the eight-hour shift in the Food Services Department as part of the person's "communal contribution," i.e., duty while detained.[257] This duty was held to be constitutional, despite Mr. Channer being threatened with solitary confinement if he failed to work. In addition, the Fifth Circuit implied that the work could have been voluntary by noting Mr. Channer was paid for his work. The court, however, does not specify how much Mr. Channer was paid. The court does not similarly hide Mr. Channer's criminal history from public view, noting Mr. Channer had completed his federal prison sentence and was detained at Oakdale awaiting deportation as an "aggravated felon," before being taken into

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[250] *See* Laila Hlass, *No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana*, Tulane University Law School Immigration Rights Clinic (May 2021), https://law.tulane.edu/sites/law.tulane.edu/files/TLS%20No%20End%20In%20Sight%20Single%20Pages%20FINAL.pdf, *archived at* https://perma.cc/6AKV-3UT3.

[251] *Id*. Note this does not include approximately 11,000 people convicted of immigration-related offenses.

[252] *Id*.

[253] 2007 WL 2138755, at *6 (W.D. Wash. July 23, 2007).

[254] Hopper v. Clark, 2007 WL 2138755, at *5 (W.D. Wash. July 23, 2007).

[255] *Id*. at *6.

[256] *Id*. at *5.

[257] 112 F.3d 214, 219 (5th Cir. 1997).

custody by another state to serve a twenty-year sentence for armed robbery.[258]

Similarly, a Mississippi district court upheld dismissal of a Thirteenth Amendment claim for involuntary servitude while detained for an immigration violation. In *Hutchinson v. Reese*, the incarcerated plaintiff was assigned to "the Facilities Department Administrative Detail, . . . [the] Maintenance Detail; and . . . as a Unit Orderly."[259] The court found that these tasks fell within the "housekeeping" exception,[260] though the court failed to explain how they are personally related. As in *Channer*, the court focused on the character of the plaintiff, noting Mr. Hutchinson had served a seventy-eight month sentence for "conspiracy to possess with intent to distribute *one hundred kilos* or more of marijuana."[261] The court also downplayed the seriousness of his allegations by noting that his claims arose in the twenty-one days between the end of his convicted sentence and his transfer to another institution for deportation.[262] Finally, the court doubted his claim that the work was compelled, since he received twelve cents an hour for his work and was allegedly informed that he could go to the recreation yard without pay instead.

Not all courts addressing immigration detention claims, however, have agreed with *Channer* and *Hutchinson*, both of which are in the Fifth Circuit. Nevertheless, some of the same criteria that supported expansion of the exception in *Channer* and *Hutchinson* militated against expansion in *Barrientos*. In the Eleventh Circuit, the court denied a motion to dismiss class action claims under the Trafficking Victim Protection Act's prohibition on coerced labor in *Barrientos v. CoreCivic*.[263] Though the court did not address the merits of the class action claim,[264] the court's opinion seemed sympathetic to the plaintiffs.[265]

CoreCivic, a private corporation operating the facility, ran a "voluntary work program," in which the plaintiffs were assigned to the kitchen and paid up to four dollars for a standard shift and eight dollars if required to work a twelve hour shift.[266] The compulsion, according to the court, was possible through threats of solitary confinement, assignment to a different housing unit, nicknamed "the chicken coop," and the need for income to purchase

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[258] *Id.* at 215.

[259] Hutchinson v. Reese, No. 5:07cv181-DCB-MTP. 2008 WL 4857449, at *4 (S.D. Miss. Nov. 7, 2008) (emphasis added).

[260] *Id.*

[261] *Id.* at *1.

[262] *Id.* at *3.

[263] 951 F.3d 1269 (11th Cir. 2020).

[264] The court only addressed the narrow question raised by defendant CoreCivic, namely that it could not be held liable under the TVPA as a private federal contractor.

[265] *Compare* the Eleventh Circuit's full recitation of the facts and details about the plaintiff *with* the Fifth Circuit's opinion on the very same legal question in *Gonzales v. CoreCivic Inc.*, 986 F.3d 536 (2021).

[266] Barrientos v. CoreCivic, 951 F.3d 1269, 1274–75 (11th Cir. 2020).

basic hygiene and sanitary supplies from the commissary.[267] This compulsion does not appear significantly different from other cases for pretrial labor reviewed in this Article, where courts generally did not find compulsion even where the plaintiff was placed in solitary confinement. The character of the plaintiffs, however, may have been a factor in the court's decision. Two of the three plaintiffs were refugees, detained pending determination of their claims for asylum. The last-named plaintiff was detained pending deportation, but the court notes his wife and children were U.S. citizens. In this case, the plaintiffs' character may have been a factor in their favor.

C. Contraction for Private Entities

Courts may also be loath to expand the "housekeeping" exception when the work is performed for a private corporation. Under California Proposition 139, private corporations are allowed to contract with county jails for labor by people behind bars.[268] In *Ruelas*, Alameda County's jail contracted with Aramark, a private corporation, to prepare and produce food for sale to third parties.[269] Alameda County Jail houses people pretrial, state and federal, as well as people being held on immigration-related proceedings.[270] In *Ruelas*, plaintiffs claimed none of the people detained were paid for their labor (including overtime) and payment of any sort was also not required by the terms of the contract between Aramark and Alameda County.[271] For example, plaintiff Bert Davis alleged that he was detained pretrial for a period of four to five months, during which he worked, on occasion over eight hours a day or over forty hours a week without any compensation. At this early stage in the litigation, the district court has denied defendants' motion to dismiss the Thirteenth Amendment claims but has not yet analyzed plaintiffs' claims on the merits.

Another emerging issue is who may properly invoke the "housekeeping exception." As discussed in Section II, the "housekeeping" exception is closely tied to the development of the "civic duty" exception, as in the *Selective Draft Law Cases*. The Fifth Circuit, in *Channer*, even characterized housekeeping as a form of duty.[272] In *Owino*, a case against CoreCivic's work programs, a California district court accepted the defendant's premise that an exception to the Thirteenth Amendment could apply, despite the statutory basis of the plaintiff's claim under the TVPA.[273] However, the court

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[267] Defendant CoreCivic did not provide those items without cost. *Id*. at 1274.

[268] Ruelas v. Cnty. of Alameda, 519 F. Supp. 3d 636, 642 (N.D. Cal. Feb. 9, 2021); CAL. CONST. art. XIV § 5 (LEXIS, current through 2021).

[269] Ruelas, 519 F. Supp. 3d at 642.

[270] *Id*.

[271] Complaint at 7 ¶ 21, 25, Ruelas v. Cty of Alameda, 519 F. Supp. 3d 636 (N.D. Cal. 2021) (No. 19-cv-07637-JST), 2019 WL 6222197.

[272] *Channer*, 112 F.3d at 219.

[273] Owino v. CoreCivic, Inc., No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at *10 (S.D. Cal. May 14, 2018).

also decided that CoreCivic, as a private corporation, could not invoke the "civic duty" exception for the forced labor of people civilly detained.[274] The court found that the exceptions to the Thirteenth Amendment were an affirmative grant of authority and there was no evidence that Congress delegated that authority to the defendant.[275]

Conclusion

Challenging the "housekeeping" exception means challenging the carceral logic in which it is embedded. The fact that a person arrested, but too poor to afford bail, can be compelled to labor for the government, reflects society's ideological adherence to control, security, and exclusion for incarcerated populations. But as Mariame Kaba, a prominent community advocate and abolitionist, and Kelly Hayes argue, challenging our reliance and practices of incarceration requires reimagining how we address harm in our communities.[276] They envision a "restructured society" that enables everyone to live a dignified life.[277] Part of that restructuring is recognizing the ways in which people behind bars are stripped of their humanity.

One of the ways we deny human dignity in this context is the name that we give compelled labor by people held pretrial. The name of the exception reveals expectations that people involuntarily detained behind bars should consider their six by ten-foot cell a home. It assumes that involuntary residents should treat that cell with the same care as their actual home. It minimizes the type of work that people are required to perform, as if all the labor compelled is equivalent to housework by stereotypical housewives of the 1950s, whose work was also discounted and devalued.[278] The name of the exception ultimately minimizes both the harms and harmful incentives it creates.

Even in its narrowest form, the "housekeeping" exception removes agency from the person incarcerated to make decisions about the space they involuntarily reside in. None of the cases reviewed indicate that a person detained pretrial impacted the health or sanitation of the facility through their failure to keep their cell clean. In this respect, the "housekeeping" exception is a solution without a problem and perpetuates stereotypes of

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[274] *Accord* Novoa v. GEO Grp., Inc., No. EDCV 17-2514 JGB (SHKx), 2018 WL 3343494, at *13 (C.D. Cal. June 21, 2018) (noting "[d]efendant has not provided any authority that the civic duty exception can apply to a privately run facility or an instance where a court did so.").

[275] Owino v. CoreCivic, Inc., No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at *10 (S.D. Cal. May 14, 2018).

[276] Mariame Kaba & Kelly Hayes, *A Jailbreak of the Imagination: Seeing Prisons for What They Are and Demanding Transformation*, *in* We Do This Till We Free Us 18 (2021).

[277] *Id.* at 2.

[278] *See* Noah Zatz, *Opinion: Taking Unpaid Housework for Granted Is Wrong*, N.Y. Times (September 9, 2014), https://www.nytimes.com/roomfordebate/2014/09/09/wages-for-housework/taking-unpaid-housework-for-granted-is-wrong, *archived at* https://perma.cc/V6CG-6S8G.

incarcerated people unwilling or unable to adhere to basic hygiene practices. It also occasions harm by adding yet another item to the long list of disciplinary infractions for which a person could suffer consequences. There is also a broader dignitary harm, one tied to America's history of racialized exploitation of labor and the use of the criminal legal system to coerce labor. The "housekeeping" exception, by virtue of its application behind bars, i.e., racialized sites of control due to the disproportionate representation of racial minorities, is simply a continuation of that long American tradition.

Beyond the immediate harms, the "housekeeping" exception also creates incentives for jail administrators to benefit from the incarceration of people presumed innocent. Even if courts refuse to endorse jail contracts with private corporations for the uncompensated expropriation of labor by people detained pretrial, using their labor for the care, operation, and maintenance of the facility itself still benefits jail administrators and for-profit immigration detention facilities. As budgets tighten and as staff retention declines, sheriffs possess ready labor forces at their command. Detained "housekeeping" labor is cheap—it doesn't require payment of prevailing wages, nor does it require sick or vacation days. Last, the exception creates incentives for jail administrators to further lower the minimal amount of care and services people detained receive to encourage "voluntary" work shifts. In situations of scarcity and control, people detained are hardly in a position to argue that the extra visit or meal they receive by working is their due regardless of whether or not they labor for the jail.

Despite, or perhaps even because of these harms and harmful incentives, the "housekeeping" exception is deeply rooted in our American carceral logic. And it is therefore unlikely to disappear absent a radical reimagining of jails and the role of the state in ensuring justice.