Note

As Punishment for Arrests: Involuntary Servitude Under the Housekeeping Exception to the Thirteenth Amendment

*Elissa Bowling**

The Thirteenth Amendment reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Yet, in contemporary American jails and prisons, pretrial detainees have been forced to perform work for these carceral facilities despite not being convicted of a crime. When tasked with assessing the constitutionality of such pre-conviction labor policies, courts employed a narrow reading of the Thirteenth Amendment and ruled that jails and prisons can compel pretrial detainees to perform maintenance and operational tasks under the judicially-created "housekeeping exception." In this Note, the author delves into the historical development and courts' modern applications of the housekeeping exception and analyzes how the exception undermines the purpose and text of the Thirteenth Amendment. The author then advocates for both judicial and legislative action to overturn or, alternatively, limit the housekeeping exception, thereby preventing further Thirteenth Amendment violations within the U.S. penal system.

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INTRODUCTION

Jorge Valenzuela walked out of a San Francisco club and moments later found himself on the ground with two black eyes, a broken nose, and handcuffed wrists.[1] Valenzuela had unintentionally wandered into a crime scene and a police officer tackled and arrested him, believing him to be connected to a stabbing that had just taken place.[2] Valenzuela was charged with battery and assault of a police officer and spent the next six days in the local jail, where he was "assaulted, taunted, and threatened by jailers" and feared for his life.[3] While Valenzuela was released after that week, his case was still pending three years later.[4]

Valenzuela was able to make bail and was released.[5] Had he been unable to post bail, he would have been detained for those three years and likely forced to work for no or sub-minimum wage while awaiting trial.[6] The detention facility could have

1. Matt Keyser, *'I Just Felt So Violated': Pretrial Detention's Devastating Effects*, ARNOLD VENTURES (Mar. 22, 2021), https://www.arnoldventures.org/stories/i-just-felt-so-violated-pretrial-detentions-devastating-effects [https://perma.cc/47JY-P8S9] (describing Dr. Sandra Smith's study on the impacts of pretrial detention, including case studies such as Valenzuela's).

2. *Id.*

3. *See id.* (detailing how Valenzuela was attacked by another man in the cell and how Valenzuela stayed up at night focusing on "trying not to die").

4. *Id.*

5. *See id.* (noting how Valenzuela "incurred more than $3,600 in debt from bail and other fees").

6. *See* Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1127 (2018) (noting that if a person is unable to pay bail, the state will jail them until the case ends or the bond is ultimately paid); Katherine E. Leung, Note*, Prison Labor as a Lawful Form of Race Discrimination*, 53 HARV. C.R.-C.L. L. REV. 681, 685 (2018) (noting that wages for prison work frequently only amount to one dollar per hour).

compelled Valenzuela to prepare and serve meals,[7] clean restrooms,[8] or scrub the housing unit multiple times a day,[9] all under threat of segregation or loss of privileges,[10] until his release, like other pretrial detainees have experienced.[11] Valenzuela, like hundreds of thousands of other pretrial detainees in the United States, would have been legally required to work even though he had not been convicted of any crime.[12]

In 1865, the Thirteenth Amendment to the U.S. Constitution outlawed slavery and involuntary servitude, supposedly

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7. *See* Channer v. Hall, 112 F.3d 214, 219 (5th Cir. 1997) (holding that the federal government does not violate the Thirteenth Amendment by requiring a communal contribution by an immigration detainee, which can come in the form of housekeeping tasks including kitchen and food services); *see also* Ford v. Nassau Cnty. Exec., 41 F. Supp. 2d 392, 401 (E.D.N.Y. 1999).

8. *See* Jackson v. Siringas, No. 12-15474, 2013 WL 3810301, at *10 (E.D. Mich. July 23, 2013) (observing that requiring a pretrial detainee to help clean their living unit, including toilets, "does not amount to involuntary servitude as prohibited by the Thirteenth Amendment" (citing Bijeol v. Nelson, 579 F.2d 423, 424 (7th Cir. 1978))); Mendez v. Haugen, Civil 14–4792, 2015 WL 5718967, at *1 (D. Minn. Sept. 29, 2015) (noting that pretrial detainees can be required to perform a variety of general housekeeping tasks in housing units and communal areas, including cleaning communal restrooms (citing Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992))).

9. *See Jackson*, 2013 WL 3810301, at *10 (citing *Bijeol*, 579 F.2d at 424); Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993) (noting that daily general housekeeping responsibilities, such as cleaning and scrubbing housing units, are not punitive and do not infringe upon the Thirteenth Amendment's prohibition of involuntary servitude (citing *Bijeol*, 579 F.2d at 424)).

10. Segregation is the housing of inmates separate from the general inmate population, often as punishment for disciplinary infractions. *Segregated Inmates*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/spotlight-on-the-standards/segregated-inmates [https://perma.cc/RRF3-B7WZ]. Detainees in segregated housing experience significantly fewer interactions with detention staff and other inmates. *See id.* (discussing how the degree of isolation depends on the type of segregation).

11. Statistical reports on labor in detention centers focus primarily on prisons rather than jails, and reports of pretrial detainees forced to work at jails are primarily anecdotal. *But see* Andrea C. Armstrong, *Unconvicted Incarcerated Labor*, 57 HARV. C.R.-C.L. L. REV. 1, 8–9 (2022) (describing incentives for coerced labor in jails specifically, including how detainees in jail have more frequent and longer "periods of idleness in their cell" and how jails receive less state funding than prisons).

12. *See infra* Part II.B (discussing the general upholding of the housekeeping exception and the Department of Justice's regulation that supports it).

marking the end of slavery and its "badges and incidents."[13] However, the Amendment reserved an exception for continued slavery and involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted."[14] Several states had already passed similar state constitutional amendments, and today about half of states' constitutions still outlaw slavery and involuntary servitude but reserve the "punishment for crime" exception.[15] States that do not have this language in their constitutions fall back on the Federal Constitution's permission for forced prison labor.[16] To this day, this exception enables jails and prisons to constitutionally continue the practice of involuntary servitude and force anyone convicted of a crime to

13. U.S. CONST. amend. XIII, § 1; Anita Sinha, *Slavery by Another Name: "Voluntary" Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. C.R. & C.L. 1, 41 (2015) (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968)).

14. U.S. CONST. amend. XIII, § 1. Scholars debate whether the punishment exception in the Amendment includes all people who have been convicted of a crime *or* only people who have been convicted *and* sentenced specifically to labor as part of their punishment and rehabilitation. *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) (distinguishing sentences of "hard labor" and exploring how the Thirteenth Amendment's punishment exception has been interpreted broadly in the context of penal forced labor); Wafa Junaid, Note, *Forced Prison Labor: Punishment for a Crime?*, 116 NW. U. L. REV. 1099 (2022) (analyzing the conflicting interpretations of "punishment" in Eight and Thirteenth Amendment jurisprudence and concluding that the Thirteenth Amendment's punishment exception should only extend to those expressly sentenced to labor). This Note covers pretrial detainees who have been neither convicted of a crime nor sentenced to prison time or hard labor and thus does not address the meaning of the punishment exception.

15. *See* Erin McCullough, *These States Still Have Slavery Language in Their Constitutions*, WKRN (Nov. 5, 2022), https://www.wkrn.com/news/your-local-election-hq/these-states-still-have-slavery-language-in-their-constitutions [https://perma.cc/6D8S-2RYA] (stating that twenty-one states, Washington, D.C., and Puerto Rico still have language regarding slavery and involuntary servitude in their constitutions or laws).

16. *See* U.S. CONST. art. VI, cl. 2. (establishing the supremacy of the Constitution regardless of whether state law addresses the same issue as the Constitution).

work for no or sub-minimum wage.[17] Inmate labor is both contracted out to private companies and used to offset the detention centers' own operating costs.[18]

Textually, the Constitution does not allow detention facilities to compel pretrial criminal detainees to work; these individuals have been charged with a crime but not convicted and thus do not fall within the Amendment's punishment exception.[19] The Supreme Court has iterated time and again that anyone charged with a crime is presumed innocent.[20] Nevertheless, like convicted inmates, pretrial detainees are forced to work for no or sub-minimum wages and face punishment if they refuse their work assignment.[21]

Courts have allowed this violation of the Thirteenth Amendment's plain text through the judicially-created "housekeeping"

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17. *See Captive Labor: Exploitation of Incarcerated Workers*, ACLU (June 15, 2022), https://www.aclu.org/news/human-rights/captive-labor-exploitation-of-incarcerated-workers [https://perma.cc/ZR2N-LT8X] (stating that in 2022, seventy-six percent of incarcerated workers were forced to work under the threat of losing privileges such as family visitation or being placed in solitary confinement).

18. *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 966–68 (2019) (stating that federal and state prisoners are employed in a variety of industries including clothing, electronics, furniture, and farming, with federal prisoners in UNICOR generating $498 million in sales in 2016 alone); *id.* at 966 ("Most inmates work internally by maintaining the state prisons through landscaping, cleaning, and kitchen work . . . ." (footnote omitted)).

19. *See* U.S. CONST. amend. XIII, § 1.

20. *E.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); Taylor v. Kentucky, 436 U.S. 478, 485 (1978) ("[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial."); Nelson v. Colorado, 137 S. Ct. 1249, 1255 (2017) (finding that petitioners' "presumption of . . . innocence was restored" when their convictions were erased).

21. *See, e.g.*, Martinez v. Turner, 977 F.2d 421, 422 (8th Cir. 1992) (noting how prison officials placed a pretrial detainee in segregation because he refused to work).

exception.[22] The housekeeping exception to the Thirteenth Amendment allows detention centers to compel pretrial detainees to "perform general housekeeping duties without pay" in their own cell and communal areas.[23] The Seventh Circuit established this exception for pretrial criminal detainees in *Bijeol v. Nelson* in 1978.[24] While the Supreme Court has not yet commented on the housekeeping exception, six circuit courts have recognized it; the Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits have implemented the exception using different standards to determine the scope of the exception.[25] The remaining circuit courts have not commented on the housekeeping exception, but many of their district courts have upheld it.[26]

The housekeeping exception now exists as a federal regulation as well.[27] In 1991, the Bureau of Prisons in the Department of Justice (DOJ) promulgated a federal regulation cementing the

22. *See* Bijeol v. Nelson, 579 F.2d 423, 424–25 (7th Cir. 1978) (establishing the first instance of the housekeeping exception in the pretrial detention setting).

23. *See id.*

24. *Id.* at 424 & n.1 (holding that a detention center did not violate the Thirteenth Amendment by compelling a pretrial detainee to clean up cigarette butts, clean windows, wash walls, and vacuum between forty-five and 120 minutes per day under the threat of disciplinary segregation because "[d]aily general housekeeping responsibilities are not punitive in nature and for health and safety must be routinely observed in any multiple living unit").

25. *E.g.*, *id.*; McGarry v. Pallito, 687 F.3d 505, 514 (2d Cir. 2012); Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999); Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993); Channer v. Hall, 112 F.3d 214, 218–19 (5th Cir. 1997); *Martinez*, 977 F.2d at 423.

26. *See, e.g.*, Palermo v. Merrimack Cnty. Dep't of Corr., Civil No. 08–cv–139–PB, 2008 WL 4596230, at *2–3 (D.N.H. Oct. 12, 2008); Treadway v. Rushing, No. 4:10 CV 2283, 2010 WL 5230865, at *2 (N.D. Ohio Dec. 16, 2010); Gibson v. Satz, No. 19-63169-CV-SMITH, 2020 WL 5519198, at *4 (S.D. Fla. July 31, 2020); *cf.* Novoa v. GEO Grp., Inc., No. EDCV 17-2514, 2022 WL 2189626, at *18 (C.D. Cal. Jan. 25, 2022) (acknowledging that detainees may permissibly be required to perform limited personal housekeeping tasks without compensation under the Trafficking Victims Protection Act of 2000 § 112, 18. U.S.C. § 1589, but finding that an operator of several immigration detention facilities had an overexpansive definition of the types of tasks that could be required of detainees); Menocal v. GEO Grp., Inc., 635 F. Supp. 3d 1151, 1174 (D. Colo. 2022) (indicating that an operator of several immigration detention facilities stretched the meaning of "living area" so that its forced labor policies fit within the ICE Performance Based National Detention Standards). The Federal Circuit Court and the D.C. Circuit Court have not yet commented on the housekeeping exception to the Thirteenth Amendment.

27. *See* 28 C.F.R. § 545.23(b) (2023).

housekeeping exception nationally, establishing that pretrial inmates may not be compelled to work "other than housekeeping tasks in the inmate's own cell and in the community living area."[28] However, no *elected* legislature, state or federal, has passed legislation allowing the exception.

The now-ubiquitous housekeeping exception has allowed individuals who have not been convicted of a crime to be coerced into involuntary servitude in direct violation of their Thirteenth Amendment rights.[29] This impacts a large and growing number of people in the United States; in 2019, 480,700 people detained in local jails had not been convicted of a crime.[30] The United States incarcerates more pretrial detainees than any other country in the world.[31] Between 1970 and 2015, the pretrial criminal detainee population increased 433%.[32] The U.S. jail population has tripled in the last forty years, with the pretrial population representing the bulk of that growth.[33] The explosion of pretrial

28. Control, Custody, Care, Treatment and Instruction of Inmates; Inmate Work and Performance Pay Program, 56 Fed. Reg. 23,477, 23,478 (May 21, 1991) (codified as amended at 28 C.F.R. § 545.23(b) (2023)). The regulation is still in effect at the time of writing.

29. Unlike convicted prison labor, there is no current nationwide data on labor performed by pretrial detainees. Armstrong, *supra* note 11, at 2–3 (noting that in a 1996 survey of jail detainees, sixteen percent of pretrial detainees reported performing janitorial, food preparation, facility maintenance, and other operational services).

30. ZHEN ZENG, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 307086, JAIL INMATES IN 2022 – STATISTICAL TABLES 11 (2023); *see also* Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. OF JUST. 1, 10 (Apr. 2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf [https://perma.cc/TKE5-7BUL] (stating that two-thirds of the local jail population were pretrial detainees and "the number of people in jail awaiting trial has grown precipitously, even with crime rates at historic lows").

31. *See* Sandra Susan Smith et al., *Mass Incarceration and Criminalization*, SOC. POL'Y DATA LAB, https://www.socialpolicylab.org/mass-incarceration [https://perma.cc/9QTB-ZQM9] ("At around 150 people per 100,000 population, the U.S.'s pretrial detention rate is 50% higher than Russia, a distant second.").

32. Digard & Swavola, *supra* note 30, at 1.

33. *See* Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL'Y INITIATIVE (May 31, 2017), https://www.prisonpolicy.org/reports/jailsovertime.html [https://perma.cc/EH8M-A58T] (stating that while "[t]raditionally, the main role of jails was to detain people who have been convicted of minor crimes," jail growth over the last twenty years has been "driven by the rise in pre-trial detention and in the holding of people for other agencies").

detainees is a major driver of mass incarceration in the United States.[34]

Not everyone who is charged with a crime waits in jail for their trial and is forced to work in the meantime. When making pretrial release decisions, most courts consider how likely it is that the defendant is a flight risk or danger to the community.[35] Racial bias plays an impactful role in courts' evaluations of whether defendants pose such a risk; judges tend to consider Black defendants to be more dangerous to the community or less likely to appear for court than their white counterparts.[36] This, in combination with disproportionate rates of arrests in Black communities and other factors, leads to disproportionate pretrial detention and forced labor of Black people in the United States.[37] While the Bureau of Justice Statistics has not collected national data on the racial demographics of the pretrial population since

34. *See id.* (describing recent pretrial policies that have resulted in "local jails [being] filled with people who are legally innocent, marginalized, and overwhelmingly poor," as well as more guilty pleas and jail sentences).

35. *See* United States v. Salerno, 481 U.S. 739, 748–49 (1987) (asserting that pretrial defendants may be detained if they present a flight risk or pose a danger to witnesses or the public). Not all states include an assessment of danger to the community in their pretrial detention decision. *See, e.g.*, Ames Grawert & Noah Kim, *The Facts on Bail Reform and Crime Rates in New York State*, BRENNAN CTR. FOR JUST. (Jan. 26, 2024), https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-and-crime-rates-new-york-state [https://perma.cc/8AAF-KY7G] (noting how New York courts, in an "attempt to preserve the presumption of innocence and reduce racial biases," may not consider the defendant's "dangerousness" in bail and pretrial detention decisions).

36. *See, e.g.*, Jennifer Skeem et al., *Understanding Racial Disparities in Pretrial Detention Recommendations to Shape Policy Reform*, 22 CRIMINOLOGY & PUB. POL'Y 233, 234 (2023) (citing Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 KAN. L. REV. 879, 885, 890 (2009)) (stating that Black defendants were detained pretrial 1.77 times more than white defendants for drug trafficking cases, with a total of sixty-eight percent of Black defendants being detained).

37. *See* Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race [https://perma.cc/UJ62-6NC2] (stating that people of color, and especially Black defendants, are more likely to be held pretrial than white defendants and that this trend is exacerbated by the fact that the pretrial population has more than doubled over the past fifteen years); Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 69–70 (2020) (describing factors leading to biased pretrial release decisions, including the prominent factor of indigency).

2002,[38] recent local studies found that Black and brown defendants are ten to twenty-five percent more likely than white defendants to be detained pretrial or offered release conditioned on posting bail.[39] Black defendants also receive median bail amounts that are, on average, $10,000 *higher* than those of white defendants.[40] One study found that Black people arrested on drug crimes in a Pennsylvania county were "80 percent less likely to be granted release on recognizance than white people" arrested for the same crimes.[41] If a Black defendant and a white defendant are charged with the same crime, the white defendant is more likely to be released on recognizance or receive a lower bail amount while the Black defendant is more likely to be forced to await trial behind bars.[42] Since Black defendants are more likely to be detained pretrial, they are also more likely to be compelled to work in jail during the pretrial period.[43]

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38. *See* Sawyer, *supra* note 37 (noting that, in 2002, 43% of the pretrial detainee population was Black and 19.6% was Hispanic, despite Black individuals making up only 12.2% of the U.S. population and Hispanic individuals making up 13.4% of the U.S. population).

39. *Id.*; *see also* Armstrong, *supra* note 11, at 9 (noting that in urban jails particularly, Black and Latinx defendants are more likely than white defendants to be detained pretrial).

40. *See* Sawyer, *supra* note 37 (noting that at least one study showed that the median bond courts set for Black defendants was double the median bond set for their white counterparts).

41. Digard & Swavola, *supra* note 30, at 7 (citing Tina L. Freiberger et al., *The Impact of Race on the Pretrial Decision*, 35 AM. J. CRIM. JUST. 76, 82 (2010)). Release on recognizance is pretrial release without bail or other conditions like pretrial supervision. *See* Sawyer, *supra* note 37. Bail reforms to the state and federal bail systems may reduce racial disparities in pretrial detention. *See* Lydette S. Assefa, *Assessing Dangerousness Amidst Racial Stereotypes: An Analysis of the Role of Racial Bias in Bond Decisions and Ideas for Reform*, 108 J. CRIM. L. & CRIMINOLOGY 653, 672–77 (2018) (discussing several bail reforms to alleviate racial disparities in pretrial detention and decrease overall incarceration including eliminating monetary bail, promoting judicial oversight and accountability, creating publicly accessible demographic detainee reports, and providing training and feedback for judges).

42. *See* Digard & Swavola, *supra* note 30, at 7 (citing Freiberger, *supra* note 41, at 79–80) (noting that the study that yielded this racially disparate result "controlled for factors such as offense severity, criminal history, age, and the person's employment status").

43. *See* Armstrong, *supra* note 11, at 10 (detailing how Black individuals are disproportionately subject to forced labor in jails because of their inability to secure bail); Sawyer, *supra* note 37 (explaining that given the rapidly increasing pretrial population, which disproportionately consists of Black individuals,

While the seemingly race-neutral housekeeping exception allows detention centers to compel all pretrial detainees to labor under the threat of segregation and loss of privileges, the exception disproportionately impacts Black people.[44] The racism pervading the pretrial detention and labor system flies in the face of the purpose of the Thirteenth Amendment to end slavery and involuntary servitude.[45] While compulsory pretrial labor is not directly equivalent to the horrors of chattel slavery,[46] the racial makeup of the pretrial and prison population creates a system of forced labor sufficiently reminiscent to be a badge or incident of slavery.

Thus, this Note argues that the housekeeping exception violates the Thirteenth Amendment. Part I explains the historical and legal background of the Thirteenth Amendment and the housekeeping exception. This Part explains the urgency and intention behind Congress enacting the Thirteenth Amendment. It will also describe the Supreme Court's initial narrow treatment of the Thirteenth Amendment, setting the stage for courts to create unwritten exceptions and chip away at the Amendment's clear language, followed by the Court's slightly more expansive view of the Amendment in the early and mid-twentieth century. Part II presents the circuit split regarding the application and scope of the housekeeping exception. This Part provides three categories of circuit court analyses of the housekeeping exception. One category considers only whether the work is a housekeeping task,[47] another asks whether the housekeeping

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a significantly higher number of Black defendants are being exposed to the harms of pretrial detention).

44. *See* Armstrong, *supra* note 11, at 10 (describing the disproportionate impact of the housekeeping exception on Black pretrial detainees because they are disproportionately arrested and unable to post bail compared to their share of the national population).

45. *See* discussion *infra* Part I.A.1 (discussing the legislative background and overall purpose of the Thirteenth Amendment).

46. *See Modern Abolition*, NAT'L UNDERGROUND R.R. FREEDOM CTR., https://freedomcenter.org/learn/modern-day-abolition [https://perma.cc/K84L-WMNQ] (defining "chattel slavery" as a system in which people are treated as legal property "to be bought, sold and owned forever" while identifying slavery in the United States as an example of chattel slavery).

47. The Seventh, Eighth, and Fifth Circuits take this approach. *See infra* Part II.C.1.

work was onerous,[48] and the third considers whether the housekeeping work is for the personal benefit of the plaintiff.[49] Part III advances two solutions to the problems posed by the housekeeping exception. First, this Part argues that the Supreme Court and circuit courts that have not yet ruled on the housekeeping exception should hold that it is unconstitutional or, in the alternative, should follow the Second Circuit's analysis by contemplating the personal benefit of the plaintiff. Second, this Part recommends that federal and state legislatures enact statutes barring or narrowing the housekeeping exception and any kind of forced labor for pretrial detainees within their jurisdictions.

I. FAILED REALIZATION OF THE THIRTEENTH AMENDMENT'S PROMISE

At the tail end of the Civil War, Congress established new ground rules to improve and maintain a recently reassembled country. The Thirteenth Amendment was the cornerstone of Congress's efforts. Section A discusses Congress's development of and broad intentions for the Thirteenth Amendment, the Amendment's subsequent narrowing by the Reconstruction-era Supreme Court, and the Court's slightly broader construction in the early and mid-1900s. Section B describes the Court's judicially-created exceptions to the Thirteenth Amendment and illustrates the origins of the housekeeping exception which would eventually apply in the pretrial detention setting.

A. THE HISTORICAL DEVELOPMENT OF THIRTEENTH AMENDMENT

While the Thirteenth Amendment momentously freed millions of people from slavery, Congress intended its impacts to stretch even further. However, the Supreme Court was not aligned with Congress's vision. Subsection 1 describes the legislative history of the Thirteenth Amendment in the Civil War Congress and Congress's intent that the Amendment reinvent the American economy based on freedom and autonomy. Subsection 2 discusses the Supreme Court's Reconstruction-era decisions ignoring Congress's broad and sweeping intent for the

48. The Third and Fourth Circuits take this approach. *See infra* Part II.C.2.

49. The Second Circuit alone takes this approach. *See infra* Part II.C.3.

Thirteenth Amendment and narrowing its application. Subsection 3 discusses the Court's later decisions addressing state peonage statutes where the Court expanded its construction of the Amendment.

1. The Legislative History of the Thirteenth Amendment

Even as the Civil War continued to rage, the Union began laying plans for an improved and sustainable United States.[50] Representative James Ashley of Ohio introduced the Thirteenth Amendment to the House of Representatives in December 1863, eleven months after President Abraham Lincoln's Emancipation Proclamation and a year and a half before the Union's victory.[51] At this time, four million Black people were enslaved in the Confederate states.[52]

Representative Ashley's original proposal completely prohibited slavery but allowed involuntary servitude as punishment for a crime.[53] After several proposals and iterations in both congressional houses,[54] Senator John Brooks Henderson of Missouri wrote the prevailing amendment proposal containing a punishment clause allowing both slavery *and* involuntary servitude as punishment of a crime.[55] The Senate Judiciary Committee produced the final version of the Thirteenth Amendment, largely

50. For example, one such plan entailed cementing the abolition of slavery. *See* Goodwin, *supra* note 18, at 923–24 (discussing the Civil War Congress's efforts to "enforce the abolition of slavery with a constitutional amendment").

51. *Id.* (noting that with the Civil War still raging, Confederate legislators were absent from Congress, making the necessary two-thirds majority to pass an Amendment more plausible); *Civil War Timeline*, NAT'L PARK SERV. (Oct. 6, 2022), https://www.nps.gov/gett/learn/historyculture/civil-war-timeline.htm [https://perma.cc/E64X-DYZT].

52. *See* Amelia Raines, *More Places in Civil War History,* LIBR. OF CONG. BLOGS (Sept. 14, 2023), https://www.loc.gov/rr/geogmap/placesinhistory/archive/2011/20110318_slavery.html [https://perma.cc/C8RG-HX59] (noting the 1860 census recorded 3,952,838 slaves in the United States).

53. Goodwin, *supra* note 18, at 924 (noting how Ashley was a known "radical Republican" seeking to ensure people convicted and sentenced to hard labor were not "doomed to lifelong enslavement").

54. *See id.* at 924–25 (describing commentary and alternative proposals by abolitionist Senator Charles Sumner of Massachusetts and Senator Lyman Trumbull of Illinois, among others).

55. *Id.* at 925 (describing Henderson as a slave owner who therefore favored adopting a slavery regulation which included a punishment exception). Henderson's proposal was modeled off the 1787 Northwest Ordinance, which read:

incorporating Senator Henderson's proposed language: "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."[56] The second section of the Amendment gave Congress the authority to "enforce this article by appropriate legislation."[57]

Congress continued to debate the Amendment. In November 1864, voters re-elected President Lincoln in a landslide victory and elected a Congress dominated by Republicans.[58] Abolitionist and moderate Republicans were both committed to advancing a free labor ideology and rejected slavery and involuntary servitude.[59] Slavery was inimical to Republican ideals of free labor; it denied enslaved people the ability to reap benefits of their own work and therefore diminished the free labor values of self-reliance, hard work, and discipline necessary to implement a "superior economic system."[60] To Republicans in control of Congress, the Thirteenth Amendment concerned much more than freeing the four million enslaved Black individuals.[61] It was about "completely reconstitut[ing] the degrading and destructive Southern way of life and start[ing] the country anew in the Northern, free

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"There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT art. VI; *see* Goodwin, *supra* note 18, at 925, 932 (discussing Henderson pulling language from the Northwest Ordinance and the prevalence of most nineteenth century white citizens' "desire to preserve penal slavery").

56. U.S. CONST. amend. XIII, § 1; *see* Goodwin, *supra* note 18, at 925 (discussing the Amendment's sanction of penal slavery).

57. U.S. CONST. amend. XIII, § 2.

58. *See* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1008–09 (2002) (describing the Republican congressmen in 1864 as being made up of career abolitionists and moderates concerned with "securing practical freedom and civil equality for freedmen").

59. *See id.* at 1009 (describing this overlap as centering around "opposition to 'slave labor' and all that it entailed").

60. *See id.* at 1009–10 (highlighting how slavery is diametrically opposed to the core Republican value that entitled men can "enjoy 'the fruits of their own labor'").

61. *See id.* at 983–84 (explaining that the Amendment was designed to restore the natural rights ideals that encompass the Declaration of Independence).

labor image."[62] To achieve this end, the formerly enslaved must experience true freedom to choose their work and benefit directly from it.[63]

During congressional debates, Senator Charles Sumner of Massachusetts asserted that "[s]lavery must be abolished not in form only, but in substance."[64] In the eyes of Senator Sumner and the other proponents, the Thirteenth Amendment went beyond the promise of the Emancipation Proclamation and provided an affirmative guarantee that all men shall equally enjoy their fundamental rights.[65] In the House, Representative John Farnsworth of Illinois similarly asserted that abolition of slavery and involuntary servitude centered on inalienable autonomy: a "man's right to himself."[66] Another representative from Illinois, Ebon C. Ingersoll, asserted an end to slavery and involuntary servitude meant enjoying and profiting from one's labor.[67] This legislative history strongly suggests that the Thirteenth Amendment created positive rights to free labor and autonomy, not only an end to chattel slavery.

Northern Democrats also understood and opposed the forward-looking impact of the Thirteenth Amendment to reinvent the South's economy.[68] These Democrats pushed back against the Amendment because they believed the Republicans' free labor agenda would effect a socioeconomic revolution and dissuade Confederate states from rejoining the Union.[69] Representative William S. Holman of Indiana, an opponent of the Amendment,

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62. *Id.* at 1010.

63. *See id.*

64. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865) (statement of Sen. Charles Sumner).

65. Azmy, *supra* note 58, at 1013.

66. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865) (statement of Rep. John Farnsworth); *see also* Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1339 (2009) (stating Farnsworth's view that ending slavery included ensuring individuals' inalienable right to build their family without state or private interference).

67. *See* Tsesis, *supra* note 66, at 1339.

68. Azmy, *supra* note 58, at 1010.

69. *Id.* at 1011 & n.168 (discussing the Amendment's opponents' argument that the Amendment would threaten the peace achieved after the Civil War (first quoting CONG. GLOBE, 39th Cong., 1st Sess. 258 (1865) (statement of Rep. George W. Julian); then quoting CONG. GLOBE, 38th Cong., 1st Sess. 2960–61 (1864) (statement of Rep. William S. Holman); and then quoting *id.* at 2987 (statement of Rep. Joseph K. Edgerton))).

warned the freedom the Amendment bestowed upon formerly enslaved people was not only release from servitude but also "the right to participate in government."[70] Both congressional houses and political parties understood the purpose of Thirteenth Amendment went beyond outlawing the ability for one person to own another to a complete reinvention of American society and economy based upon autonomy for all men.

2. The Supreme Court Initially Narrowly Construed the Thirteenth Amendment

With this common understanding that the Thirteenth Amendment would bring about sweeping and comprehensive change to the country's economic and social structures, Congress passed the Amendment on January 31, 1865.[71] On December 6, 1865, Georgia became the twenty-seventh state to ratify the Thirteen Amendment, completing the necessary three-fourths of the states for the Amendment to become part of the Constitution.[72]

The Supreme Court took the opportunity to interpret the Thirteenth Amendment eight years later in the *Slaughter-House Cases*.[73] In both this decision and the *Civil Rights Cases* ten years later,[74] the Supreme Court severely narrowed the application of the Thirteenth Amendment, whittling it down to something much smaller and less powerful than Congress's intent to create a free labor society based on self-reliance and autonomy.

The *Slaughter-House Cases* Court narrowly construed "slavery" in the Thirteenth Amendment to include only "shades and conditions of African slavery," and understood the Amendment's purpose as to free the four million enslaved people.[75] While recognizing that "involuntary servitude" in the Amendment had a

70. CONG. GLOBE, 38th Cong., 1st Sess. 2962 (1864) (statement of Rep. William S. Holman).

71. *Ratifying the Thirteenth Amendment, 1866*, GILDER LEHMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-resources/spotlight-primary-source/ratifying-thirteenth-amendment-1866 [https://perma.cc/SNG3-AWK4] (describing the timeline for the ratification of the Thirteenth Amendment).

72. *Id.*

73. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

74. The Civil Rights Cases, 109 U.S. 3 (1883).

75. 83 U.S. at 69, 72. In this case, butchers challenged a Louisiana statute that required them to slaughter and process animals in a single location downriver from the water mains. The butchers claimed in part that forcing them to

broader meaning than slavery, the Court provided only limited examples of involuntary servitude including long-term apprenticeships and land-based serfdom.[76] In doing so, the Court did not acknowledge Congress's vision for the Thirteenth Amendment to proactively create conditions for autonomy and free labor.

However, the Court was not unanimous.[77] In his dissent, Justice Field pushed back on the Court's simplistic and narrow construction, asserting that the Thirteenth Amendment established freedom for everyone born in the United States and provided them "the right to pursue ordinary avocations of life without restraint" and to enjoy "the fruits of his labor."[78] Unfortunately, Justice Field's more accurate understanding of Congress's intent for the Thirteenth Amendment remained in the minority.

Ten years later, the Supreme Court continued its narrow construction of the Thirteenth Amendment in the *Civil Rights Cases*.[79] It held that while the Thirteenth Amendment ended chattel slavery and authorized Congress to pass laws prohibiting all of its "badges and incidents,"[80] the Amendment did *not* give Congress authority to modify "the social rights of men and races in the community."[81] The Court affirmed Congress's authority to pass laws under the Thirteenth Amendment but limited those laws' impacts to prohibiting bondage and deprivation akin to pre–Civil War slavery.[82]

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move their operation to a new, collective facility constituted "involuntary servitude" under the Thirteenth Amendment. *Id.* at 57, 59, 66.

76. *Id.* at 69.

77. *See generally id.* (noting the case was a 5-4 decision).

78. *Id.* at 90 (Field, J., dissenting).

79. 109 U.S. 3 (1883). Petitioners brought five separate claims under the Civil Rights Act of 1875, which prohibited private individuals and entities from denying any citizen "full enjoyment of any accommodations" based on race or color. *Id.* at 8–10.

80. *Id.* at 20.

81. *Id.* at 22.

82. *See* Azmy, *supra* note 58, at 1005–06 (citing 109 U.S. at 20–22) (describing the Court's conclusion that badges and incidents of slavery were "related only to those deprivations suffered during enslavement").

Justice Harlan penned a dissent admonishing the majority for failing to give full effect to the broader intent behind the Thirteenth Amendment.[83] He recounted the trajectory of Congress's relationship with slavery, from supporting it through the Fugitive Slave Laws of 1793 and 1850 to abolishing it with the Thirteenth Amendment, showing Congress's intent to create a foundational shift in the law to both abolish slavery and "establish universal freedom."[84] In doing so, Justice Harlan asserted that the Thirteenth Amendment did more than ban the institution of slavery; it also established positive fundamental rights for all citizens to contract, sue, and own property.[85] Justice Harlan was alone in his dissent properly grounded in the Thirteenth Amendment's purpose and legislative history.

In the initial aftermath of the Civil War, the Supreme Court narrowly interpreted the Thirteenth Amendment in the *Slaughter-House Cases* and the *Civil Rights Cases* to only address badges and incidents of chattel slavery. The Court either misunderstood or refused to accept Congress's more expansive intent that the Amendment establish rights of autonomy and the ability to choose one's vocation and benefit directly from one's labor.[86] In doing so, the Court created precedence based on a false premise that would impact courts' analyses of the Thirteenth Amendment: if the Amendment was only meant to prohibit slavery and involuntary servitude like that of the antebellum era, it surely was not meant to apply to other instances of forced labor that bore no direct relation to chattel slavery. This faulty logic would continue to play out in lower court decisions, eventually leading to the housekeeping exception, despite the Supreme Court subsequently broadening its construction of the Thirteenth Amendment.[87]

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83. *See The Civil Rights Cases*, 109 U.S. at 27 (Harlan, J., dissenting) (arguing that the broader intent behind the Thirteenth Amendment was to decree universal freedom).

84. *Id.* at 34.

85. *Id.* at 35.

86. *See* discussion *supra* Part I.A.1.

87. *See, e.g.*, Robertson v. Baldwin, 165 U.S. 275 (1897); Butler v. Perry, 240 U.S. 328 (1916); *see also* discussion *infra* Part I.A.3.

3. The Supreme Court Slightly Broadened Its Construction of the Thirteenth Amendment in Response to State Statutes Enabling Peonage

Thirty years after deciding the *Civil Rights Cases*, the Supreme Court began to slightly expand its narrow interpretation of the Thirteenth Amendment.[88] This shift in the Court's analysis began with two cases involving the Antipeonage Act of 1867, passed by Congress under its authority provided in the Thirteenth Amendment.[89] The Act abolished peonage, a system where people who have taken on debt to another can voluntarily or involuntarily perform labor to work off that debt.[90]

In *Bailey v. Alabama* and *Pollock v. Williams*, the Supreme Court struck down state statutes that criminalized non-performance of employment contracts because they conflicted with the Thirteenth Amendment and the Antipeonage Act.[91] The Alabama and Florida statutes avoided the word "peonage" but created a system in which defendants who entered a contract for service, obtained some small sum of money for that service, then failed to perform the contracted service or refund their employer, would be treated by criminal court as if they had committed fraud.[92] In *Bailey*, the Court recognized this as a system of peon-

88. *See, e.g.*, Bailey v. Alabama, 219 U.S. 219, 240–41 (1911) (finding that the Thirteenth Amendment was not limited only to the enslavement of African Americans).

89. Antipeonage Act of 1867, 42 U.S.C. § 1994 (originally enacted as the Peonage Abolition Act of March 2, 1867, ch. 187, § 1, 14 Stat. 546); U.S. CONST. amend. XIII, § 2; *see Bailey*, 219 U.S. at 244 ("The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other [t]erritory or [s]tate of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other [t]erritory or [s]tate, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void." (quoting 24 Rev. Stat. § 1990 (current version at 42 U.S.C. § 1994))).

90. 42 U.S.C. § 1994.

91. *Bailey*, 219 U.S. at 244; Pollock v. Williams, 322 U.S. 4, 18 (1944).

92. *See Bailey*, 219 U.S. at 227–29 (stating that Bailey was detained after being charged with obtaining fifteen dollars under an employment contract and subsequently failing to perform the contracted labor or refund his employer); *Pollock*, 322 U.S. at 6 (stating that Pollock was similarly charged and detained

age, finding that the State may not criminally punish the defendant for failing to serve or refund his small advance payment because this statutory punishment coerces workers to labor involuntarily to pay off their debts in violation of the Thirteenth Amendment and Antipeonage Act.[93] In *Pollock*, the Court cited its *Bailey* decision and reiterated that states may not criminalize quitting a job or refusing to work.[94]

To arrive at its conclusion that the Thirteenth Amendment applied to *Bailey* and *Pollock*, the Court expanded its construction of the Amendment beyond its restrictive interpretations in the *Slaughter-House Cases* and the *Civil Rights Cases*.[95] In *Bailey*, the Court interpreted Congress's inclusion of "involuntary servitude" in the Amendment to not only abolish slavery but also to enforce free labor and prohibit coercing people to work for another's benefit.[96] Similarly, in *Pollock*, the Court held that "[t]he undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."[97] This more expansive construction, much more reflective of Congress's intent in enacting the Thirteenth Amendment,[98] is a far cry from the Court's initial interpretations of the Amendment limiting its application to the badges and incidents of slavery.[99]

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after obtaining a five dollar advance for his subsequently unperformed and unrefunded labor).

93. *Bailey*, 219 U.S. at 244–45.

94. *Pollock*, 322 U.S. at 9, 18 (citing *Bailey*, 219 U.S. 219).

95. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873) (providing limited examples of involuntary servitude); The Civil Rights Cases, 109 U.S. 3, 23 (1883) (finding that the scope of the Thirteenth Amendment is limited to slavery).

96. *Bailey*, 219 U.S. at 241.

97. *Pollock*, 322 U.S. at 17.

98. *See supra* Part I.A.1.

99. *See supra* Part I.A.2. Curiously, the Court acknowledged that both Bailey and Pollock were Black men, likely formerly enslaved or immediate descendants of the formerly enslaved, but declined to include their race in its analysis. *See Bailey*, 219 U.S. at 231; *Pollock*, 322 U.S. at 15. It seems the Court could just as easily have included the state statutes as perpetuating a system that was a "shade[] and condition[] of African slavery" or a "badge[] and incident[] of slavery," more in line with its precedent. *See The Slaughter-House Cases*, 83 U.S. at 69; *The Civil Rights Cases*, 109 U.S. at 20. For a discussion on the Court's decision to remove race from its analysis in the *Peonage Cases*, see Azmy, *supra* note 58, at 1029–30.

The *Slaughter-House Cases*, the *Civil Rights Cases*, *Bailey*, and *Pollock* set the Supreme Court precedent that the circuit courts later used to create and shape the housekeeping exception in their jurisdictions. Unlike the earlier cases, in *Bailey* and *Pollock* the Court implemented a more expansive construction of the Thirteenth Amendment that included defining involuntary servitude as, in part, personal service compelled for another's benefit.[100] However, *Bailey* and *Pollock* did not overturn the prior cases, and lower courts felt free to adopt the Court's narrow or broader construction of the Thirteenth Amendment. Most circuit courts failed to include the broader construction in their application of the housekeeping exception in pretrial detention settings, despite its stronger foundation in the Amendment's legislative history.[101]

B. THE HISTORICAL DEVELOPMENT OF THE HOUSEKEEPING EXCEPTION

The Supreme Court's initial narrowing of the Thirteenth Amendment laid the groundwork for future decisions poking holes in the Amendment's coverage. Subsection 1 discusses Supreme Court decisions where the Court created exceptions to the Thirteenth Amendment beyond its explicit punishment exception. Subsection 2 describes the first recorded instance of the housekeeping exception to the Thirteenth Amendment.

1. The Supreme Court Created Unwritten Exceptions to the Thirteenth Amendment's Clear Prohibition of Slavery and Involuntary Servitude

The Thirteenth Amendment contained a single exception to its otherwise complete ban on slavery and involuntary servitude: "as a punishment for crime whereof the party shall have been duly convicted."[102] When the Amendment was ratified, imprisonment and hard labor had long been common punishments for almost all crimes.[103] Congress's inclusion of a sole exception in

100. *See Bailey*, 219 U.S. at 243–45; *Pollock*, 322 U.S. at 17–18.

101. *See infra* Parts I.B.2, II.C.1–C.2.

102. U.S. CONST. amend. XIII, § 1.

103. *See* Goodwin *supra* note 18, at 932–33 (stating while the Thirteenth Amendment did not create the prison labor concept, former slave states immediately began using the punishment clause to criminalize, incarcerate, and subject Black people to forced labor).

the Amendment to address one common instance of involuntary servitude indicates that if Congress intended any further exceptions, it would have stated them just as clearly.[104] Congress did not include any exception for non-convicted populations.[105] Nevertheless, the Supreme Court created these exceptions anyway, setting the stage for the housekeeping exception that would enable forced labor for pretrial detainees.[106]

Beginning in 1897, just fourteen years after the *Civil Rights Cases* and seventeen years before *Bailey*, the Supreme Court began adding interpretive exceptions to the Thirteenth Amendment's ban on slavery and involuntary servitude.[107] In *Robertson v. Baldwin*, the Court held that the government could force sailors to complete their employment contract against their wishes to terminate the contract under threat of imprisonment.[108] Citing the narrow application of the Thirteenth Amendment in the *Slaughter-House Cases*, the Court found that the Amendment was meant to address slavery as it existed prior to the Civil War and instances of involuntary servitude such as "Mexican peonage" and other potential revivals of the institution of slavery.[109] The Court found that Congress did not intend the Thirteenth Amendment to "introduce any novel doctrine" regarding labor the law has traditionally regarded as exceptional.[110] The Court went on to say that the law has traditionally treated sailors' contracts as exceptional because they involved "the surrender of his personal liberty during the life of the contract."[111]

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104. *See, e.g.*, Bittner v. United States, 143 S. Ct. 713, 720 (2023) (using the canon of statutory construction *expressio unius est exclusio alterius* to find Congress's inclusion of penalties for willful violations of a statute but not for non-willful violations indicates legislative intent that there be no such penalties for non-willful violations).

105. U.S. CONST. amend. XIII, § 1.

106. *See, e.g.*, Robertson v. Baldwin, 165 U.S. 275, 275 (1897) (holding that seamen could be legally compelled to complete their employment contract).

107. *See id.*

108. *Id.* at 275, 281 ("[E]ven if the contract of a seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude.").

109. *Id.* at 282 (citing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872)).

110. *Id.*

111. *Id.* at 282–83 (describing at length sailors' loss of personal liberty throughout history, including in ancient Rhodesia and the reign of Henry the III of England).

The Court provided very little to support its assertion regarding Congress's intent not to introduce novel doctrine with the Thirteenth Amendment.[112] It simply noted that the Bill of Rights amendments "were not intended to lay down any novel principles of government" and concluded that the Thirteenth Amendment must not either.[113] Even if the Court's characterization of the Bill of Rights amendments was accurate, its extension to the Thirteenth Amendment, ratified seventy-four years after the Bill of Rights in a very different post–Civil War America, was tenuous at best. While the Bill of Rights was passed at the establishment of the country, the Thirteenth Amendment was passed in the aftermath of a brutal war fought because the young country's societal, economic, and political environment had become unsustainable and volatile.[114] Contrary to the Court's assertions, the Amendment *was* intended to be a novel doctrine, significantly shifting the country's principles of government and altering how the law treated labor.[115]

Based on precedent set in *Robertson*, the Supreme Court created another exception to the Thirteenth Amendment in *Butler v. Perry*.[116] Here, the Court upheld Jake Butler's criminal conviction under a Florida law requiring all able-bodied men between twenty-one and forty-five years of age to work on public roads and bridges for up to sixty hours per year without compensation.[117] Butler challenged the conviction under the Thirteenth Amendment, asserting that compulsory labor on the roads and bridges constituted illegal involuntary servitude.[118] The Court found that, unless specifically barred by the Constitution, states have the power to conscript able-bodied men for road and bridge

112. *Id.* at 281.

113. *Id.* at 281–82 (describing how the First, Second, and Fifth Amendments were implemented according to existing legal concepts).

114. *See, e.g.*, BRUCE CATTON, THE CIVIL WAR 18–19 (1985) (describing the 1859 violent seizure of a federal arsenal and attempt to lead a slave revolt at Harpers Ferry, Virginia, led by abolitionist John Brown, President Lincoln's election, and South Carolina's secession one year later).

115. *See* discussion *supra* Part I.A.1.

116. Butler v. Perry, 240 U.S. 328, 332–33 (1916) (creating an exception to the Thirteenth Amendment for individuals who owe a service to the State, "such as services in the army, militia, on the jury" and so on).

117. *See id.* at 329–30 (stating petitioner refused to work on the roads and received a thirty-day jail sentence).

118. *Id.* at 330. Note the petitioner also asserted violation of his due process rights under the Fourteenth Amendment. *Id.*

construction as "a part of the duty which he owes to the public."[119] Similar to *Robertson*, the Court based this assertion upon historical existence of this type of conscription to build roads: in America's British Colonial days, England, and Ancient Rome.[120]

The Court also relied on the precedent set in the *Slaughter-House Cases*, finding that the Amendment was adopted simply to outlaw slavery as it existed prior to the Civil War and "those forms of compulsory labor akin to African slavery."[121] The Court distinguished road work from African slavery, failing to recognize that in the pre–Civil War era, states with similar statutes allowed able-bodied men to send enslaved people to work on public roads in their stead.[122] The Court then, using very similar language to that in *Robertson*, stated the Amendment did not introduce novel doctrine regarding labor traditionally treated as exceptional and found compulsory labor on public roads was yet another unwritten exception to the Thirteenth Amendment.[123]

The Supreme Court also upheld conscription for the military in the *Selective Draft Law Cases* in 1918 despite the petitioners' claim that being forced to register for the draft violated the Thirteenth Amendment's ban of involuntary servitude.[124] The Court summarily rejected the petitioners' Thirteenth Amendment claim simply by refusing to consider whether registering for the military draft was involuntary servitude.[125] While the Court did

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119. *Id.*

120. *See id.* at 331–32 (noting similar laws required able-bodied men to construct and maintain public roads in twenty-seven states in 1889, including a 1792 statute in the Northwest Territory).

121. *Id.* at 332.

122. *See* Armstrong, *supra* note 11, at 19 (noting the Court's selective historical references to distinguish the long history of compulsory road construction, slavery and involuntary servitude, and its resulting failure to "engage with the monumental shifts in power and freedom heralded by the end of the Civil War . . . nor did it engage with repeated attempts by state and local governments to enshrine slavery by other means").

123. *Butler*, 240 U.S. at 333; *see also* Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

124. The Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

125. *See id.* Refusing to honor the Thirteenth Amendment claim with an analysis, the Court offers one sentence addressing this claim at the end of its opinion:

> Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the

not reference duty in a direct analysis of the petitioners' Thirteenth Amendment claim, it proclaimed the fundamental nature of the relationship between a government and its citizens as including the citizens' obligation to serve in the military if needed and the states' right to force its citizens to so serve.[126] Thus, the concept of forced labor and duty to the state referred to in *Butler* became further entrenched in Thirteenth Amendment Supreme Court precedence.

In *Butler*, the Supreme Court created a consideration of duty in the Thirteenth Amendment analysis that it later harkened back to in the *Selective Draft Cases*.[127] *Butler* differed from *Robertson* in that it upheld forced labor as part of the sociopolitical contract between citizens and the state.[128] While in *Robertson* the Court upheld forced labor of sailors solely based on its historical exceptionalism, in *Butler* the Court used public duty as part of its justification for compulsory labor.[129] Introducing duty into the Thirteenth Amendment analysis opened the door for future courts to balance duty to the state against the Thirteenth Amendment's guarantees of freedom.[130] While the Court does not explicitly go into this balancing act in the *Selective Draft Law Cases* decision, given its total disgust regarding equating the "supreme and noble duty of contributing to the defense" of a nation with involuntary servitude, it is safe to assume duty would have succeeded in that balancing contest.[131]

> nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Id.

126. *Id.* at 378.

127. *Butler*, 240 U.S. at 330.

128. Armstrong, *supra* note 11, at 20.

129. Robertson v. Baldwin, 165 U.S. 275, 275 (1897); *Butler*, 240 U.S. at 330; *see* Armstrong, *supra* note 11, at 20 (noting the lack of congressional debate surrounding the punishment exception in the Thirteenth Amendment, suggesting the Court may have supplied duty as "purpose and intent" behind the exception).

130. *See* Armstrong, *supra* note 11, at 20 (discussing *Butler* altering the Thirteenth Amendment's "almost absolute proposition" to a "relative" proposition with duty as a variable).

131. *The Selective Draft Law Cases*, 245 U.S. at 390.

The Supreme Court decided *Bailey* between *Robertson* (sailors) and *Butler* (road conscription) and decided *Pollock* well after all three cases establishing unwritten exceptions to the Thirteenth Amendment.[132] In *Bailey* and *Pollock*, the Court reconciled the exceptions it had created previously with its broadened construction of the Thirteenth Amendment by referring to *Robertson* and *Butler* as "extreme cases" and "special circumstances" to which their antipeonage analysis did not apply.[133] The Court declined to further explain why these exceptions continued to be valid even as it expanded the application of the Thirteenth Amendment.[134] In doing so, it left it up to the lower courts to determine whether other compulsory labor could be considered "extreme" or "special."

The Thirteenth Amendment began as a ban on slavery and involuntary servitude with the single explicit exception of punishment for a crime.[135] By first narrowing the application of the Thirteenth Amendment and then devising unwritten exceptions to the Amendment based on historical state needs and citizens' duties to the state, the Supreme Court severely weakened the Thirteenth Amendment's power.

2. The Housekeeping Exception Appears First in Non-Carceral Settings

Before the housekeeping exception to the Thirteenth Amendment appeared in carceral detention settings, the Second Circuit first created it for mental institutions in 1966.[136] In

132. *See Robertson*, 165 U.S. 275 (establishing an exception to the Thirteenth Amendment for sailors); Bailey v. Alabama, 219 U.S. 219 (1911) (holding Alabama statute criminalizing non-performance of employment contracts violated the Thirteenth Amendment and Antipeonage Act); *Butler*, 240 U.S. 328 (establishing an exception to the Thirteenth Amendment for state statutes requiring able-bodied men to work on state roads and bridges); *The Selective Draft Law Cases*, 245 U.S. at 366 (establishing an exception to the Thirteenth Amendment for military conscription); Pollock v. Williams, 322 U.S. 4 (1944) (holding that a Florida statute criminalizing non-performance of employment contracts violated the Thirteenth Amendment and Antipeonage Act).

133. *Bailey*, 219 U.S. at 243; *Pollock*, 322 U.S. at 17–18.

134. *See Bailey*, 219 U.S. at 243; *Pollock*, 322 U.S. at 17–18.

135. *See* U.S. CONST. amend. XIII.

136. *See* Jobson v. Henne, 355 F.2d 129, 131 (2d Cir. 1966) ("[S]tates are not . . . foreclosed from requiring that a lawfully committed inmate perform without compensation certain chores designed to reduce the financial burden placed on a state by its program of treatment for the mentally [disabled].").

Jobson v. Henne, Warren Jobson was an involuntarily committed patient who sued the mental institution and its director for forcing him to work in the institution's boiler house eight hours per night, six nights per week, claiming this compulsory labor constituted involuntary servitude under the Thirteenth Amendment.[137]

In its analysis, the Second Circuit assumed the Thirteenth Amendment did not foreclose states from requiring committed inmates to perform chores intended to lighten the state's financial burden of running a mental institution so long as the chores were either "reasonably related to a therapeutic program" or "chores of a normal housekeeping type and kind."[138] In a footnote, the Second Circuit also assumed mental institutions can constitutionally compel inmates to participate in work programs with a therapeutic purpose or sufficient relation to the "inmate's housekeeping or personal hygienic needs."[139] The court pulled this assumption in part from *Hodges v. United States*, in which the Supreme Court found slavery and involuntary servitude in the Thirteenth Amendment to mean "conditions of 'enforced compulsory service *of one to another*.'"[140] So long as the compulsory labor served some benefit to the inmate themself, meeting either their therapeutic or hygienic needs, the work was not solely in service to another and did not violate the Thirteenth Amendment.

The Second Circuit also indicated that courts should look to whether the nature of the required work was "reasonably related to a therapeutic program or to the inmate's personal needs" to

137. *See id.* at 134 (describing the patient as an "inmate" who was first committed to the mental institution at twelve years of age, was discharged twenty years later, and soon after pled guilty to petty larceny and burglary before the charges were dropped and he was involuntarily committed to the mental institution once again).

138. *Id.* at 131 (stating that the Thirteenth Amendment's purpose was to "proscribe conditions of 'enforced compulsory service of one to another.'" (quoting Hodges v. United States, 203 U.S. 1, 16 (1906), *overruled in part on other grounds by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968))).

139. *Id.* at 132 n.3.

140. *Id.* at 131 (emphasis added) (quoting *Hodges*, 203 U.S. at 16). The Supreme Court decided *Hodges* five years before *Bailey*, where the Court reemphasized its definition of the "essence of involuntary servitude" as "that control by which the personal service of one man is disposed of or coerced for another's benefit." Bailey v. Alabama, 219 U.S. 219, 241 (1911).

determine whether those tasks were therapeutic or housekeeping.[141] According to the Second Circuit's assumptions regarding constitutionally compellable work in mental institutions, required tasks could be acceptable as housekeeping chores only if they were reasonably related to the inmate's personal hygienic needs.[142] The court therefore opened two avenues for a valid forced labor program in mental institutions that did not violate the Thirteenth Amendment: (1) if the work served a therapeutic purpose benefitting the inmate, or (2) if the work was a housekeeping chore that met the inmates' personal needs. In both situations, the forced labor had to benefit the detainee.

The Second Circuit cautioned, however, that the amount and conditions of compulsory labor may be "so ruthless" as to constitute illegal involuntary servitude.[143] Therefore, even if the *type* of work could be considered therapeutic or housekeeping in nature, if the amount of work or the working conditions were too brutal, then the work violated the Thirteenth Amendment.[144] Additionally, if the work, unrelated to the inmate's therapeutic or hygienic benefit, was designed only to lessen the costs of the institution, then this constituted involuntary servitude regardless of whether the inmates were compensated for their labor.[145]

Given the Second Circuit's requirement that the work provide either a therapeutic or personal benefit to the inmate and not solely exist to ameliorate the institution's costs, it is surprising that the court remanded the case without deciding the work did not meet those constitutional requirements.[146] The court knew that Jobson was forced to work forty-eight hours at night per week in the boiler house.[147] It is difficult to imagine Jobson retaining a therapeutic or personal hygienic benefit from this labor, but easy to see the institution's cost-savings; compelling

141. *Jobson*, 355 F.2d at 132 n.3.

142. *See id.* at 131–33.

143. *Id.* at 132.

144. *See id.* at 132–33. (declining to provide guidance on when compulsory work crosses the ruthlessness threshold, reversing the district court's grant of summary judgment without determining whether working in the boiler house for eight hours per night, six nights per week in addition to working eight hours per day at jobs in town met that threshold).

145. *Id.* at 132 n.3.

146. *See id.* at 134 (reversing and remanding for trial). Unfortunately, if the case was subsequently tried on remand, it was not recorded.

147. *Id.* at 132.

Jobson to labor in the boiler house negated the need for the institution to pay an employee to complete that work. The Second Circuit's hesitancy to find that the compulsory labor was illegal involuntary servitude may be attributable to its sympathy for the financial burden these mental institutions placed on states.[148]

Though the Second Circuit did not cite *Butler* or the *Selective Draft Law Cases* directly, these cases provide a backdrop for the court's contortion of the concept of duty.[149] Where the civic duty of *Butler* and the *Selective Draft Law Cases* was based in the social contract between a state and its "rights-bearing" citizens, the duty in *Jobson* arose from a debt the citizen owed to the state for services provided in a state-funded detention facility as a result of the citizen's "individual failings."[150] However, duty predicated on debt also implicates *Bailey* and *Pollock*'s prohibition on compelling labor to pay off debts,[151] and the Second Circuit failed to incorporate those decisions in *Jobson*. If it had, the court may have distinguished those cases from *Jobson* by stating that the debt here was to a state-funded facility rather than to individuals or private companies as in *Bailey* and *Pollock*. Regardless, the distinction walks a fine line that merited legal analysis and should have played a part in the Second Circuit's holding.

Jobson provided the final step to the housekeeping exception to the Thirteenth Amendment in pretrial detention, enabling jails to force arrested but not convicted individuals into involuntary servitude. Together with *Robertson*, *Butler*, and the *Selective Draft Law Cases*, *Jobson* indicates that if the compulsory labor meets the following three criteria, courts are likely to create or expand an unwritten exception to allow it.[152] First,

148. *Id.* at 131 (assuming states may require inmates to perform chores "designed to reduce the financial burden placed on a state by its program of treatment").

149. *See* Armstrong, *supra* note 11, at 25 (contrasting the civic duty as it existed in *Butler* and *The Selective Draft Law Cases*, one that exists "by virtue of their belonging" as residents and citizens, to that in *Jobson*, one of "obligation or duty to pay down an existing debt").

150. *See id.*

151. *See supra* Part I.A.3. (summarizing *Bailey* and *Pollock*).

152. *See* Armstrong, *supra* note 11, at 25–26 (noting these three criteria creating willingness in courts to expand exceptions to the Thirteenth Amendment).

courts are more likely to allow compulsory labor if the individuals being forced to work are in physical settings that purport to require high levels of control and discipline for successful and safe operation.[153] Both the ship in *Robertson* and the mental institution with involuntarily committed residents in *Jobson* were such physical settings. Second, courts have had less sympathy for individuals being forced to work if the court has a negative impression of their character. In *Jobson*, the Second Circuit unnecessarily discussed Jobson's criminal history and consistently referred to Jobson as an "inmate" rather than a patient or resident, while in *Robertson* and the *Selective Draft Law Cases* the Supreme Court referred to the lesser moral character of sailors and draft dodgers.[154] Third, courts have been more likely to allow forced labor when they believe the coerced individual owes some kind of duty to the state. In *Butler* and the *Selective Draft Law Cases*, the Supreme Court created exceptions to the Thirteenth Amendment based on the duty citizens have to the State as part of the nation-citizen relationship.[155] In *Jobson*, the Second Cir-

153. *See Jobson*, 355 F.2d at 133 (ruling that work programs developed for "therapeutic and cost saving purposes" may not violate the Thirteenth Amendment); Robertson v. Baldwin, 165 U.S. 275, 282–83 (1897) (explaining that the Thirteenth Amendment was not meant to apply to "certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments" which involve "the surrender of . . . personal liberty"); Armstrong, *supra* note 11, at 25 ("[P]eople in certain settings or spaces, like ships or mental institutions, are deemed less worthy of protection from involuntary servitude.").

154. *See Jobson*, 355 F.2d at 130; *Robertson*, 165 U.S. at 287 (explaining that governments treat sailors as "deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults" such that they require protection of the law similar to how parents protect their children); The Selective Draft Law Cases, 245 U.S. 366, 390 (1918) (ascribing those who defend their country as fulfilling a "supreme and noble duty"); Armstrong, *supra* note 11, at 25 ("Where residing individuals are perceived as inferior, due to their moral character, acts, or ability, courts are more likely to expand the exception.").

155. *See* Butler v. Perry, 240 U.S. 328, 330 (1916) (explaining that statutorily requiring "reasonable" work on public roads is "a part of the duty which he owes to the public"); *The Selective Draft Law Cases*, 245 U.S at 390 (holding that "contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people" does not amount to "involuntary servitude in violation of the prohibitions of the Thirteenth Amendment"); Armstrong, *supra* note 11, at 26 (noting expansion of exceptions to the Thirteenth Amendment are "more likely when the compelled labor benefits the government, particularly when people compelled are perceived to owe a debt to the state").

cuit expressed sympathy for the financial burden the mental institution placed on the state and indicated inmates have a duty to ameliorate that burden.[156]

All three of these criteria—physical setting requiring order and control, negative impression of the compelled laborer's character, and sense of duty the compelled laborer owes the state—are present in pretrial detention settings.[157] Courts wield this caselaw and the notions behind them to bring the housekeeping exception to pretrial detention.

II. THE CIRCUIT SPLIT ON APPLYING THE HOUSEKEEPING EXCEPTION IN PRETRIAL DETENTION

Twelve years after *Jobson*, courts began applying the housekeeping exception in pretrial detention.[158] Section A describes the Seventh Circuit *Bijeol v. Nelson* decision first applying the housekeeping exception to a pretrial detainee's forced labor. Section B discusses Supreme Court decisions and federal regulations published after *Bijeol* impacting other circuits' approaches to the housekeeping exception. Section C breaks the circuit split into three categories: courts that hold housekeeping tasks automatically fit into the housekeeping exception, courts that hold housekeeping tasks fit into the housekeeping exception so long as they are not overly onerous, and the Second Circuit that holds housekeeping tasks only fit into the exception if they benefit the detainee and do not constitute hard labor.

A. THE SEVENTH CIRCUIT FIRST APPLIED THE HOUSEKEEPING EXCEPTION TO PRETRIAL DETENTION

In 1978, the Seventh Circuit became the first court to apply the housekeeping exception in the pretrial detention setting in *Bijeol v. Nelson*.[159] Paul Bijeol, a pretrial detainee, was unable to afford bond and was therefore held for ten months only to be acquitted by a jury.[160] During his time in the detention center,

156. *See* 355 F.2d at 131–32 (assuming that lessening the financial burden that rehabilitating patients like Jobson posed on the state was a positive outcome of compulsory labor, so long as the work either accompanied a therapeutic purpose or was a housekeeping chore benefiting the patient).

157. *See* discussion *infra* notes 176–178.

158. *See, e.g.*, Bijeol v. Nelson, 579 F.2d 423, 424 (7th Cir. 1978).

159. *Id.* at 424–25.

160. *Id.* at 424.

Bijeol was forced to complete housekeeping chores for 45 to 120 minutes every day without pay and under threat of being placed in segregation.[161] These tasks included keeping his own room clean, vacuuming, dusting, emptying ashtrays, cleaning windows, washing heal marks off walls, and organizing books.[162] After his release, Bijeol sued the leadership of the correctional facility under the Thirteenth Amendment for forcing him to work when he had not been convicted of any crime.[163]

The Seventh Circuit's *Bijeol* opinion was barely two pages in length, mentioned neither "involuntary servitude" nor "slavery," and cited no caselaw on exceptions to the Thirteenth Amendment.[164] Instead, the court cited cases generally acknowledging that pretrial detainees' meals, exercise, and other activities may be restricted and controlled as "incidental elements in the organized caretaking of the general company of prisoners."[165] The court went on to mock Bijeol, stating he "has no constitutional right to order from a menu or have a maid service."[166] This statement implied both that Bijeol asked for some kind of special treatment, which the facts do not support, and that such coddling would result if detention centers could not coerce their pretrial detainees to perform housekeeping tasks.

After setting this shaky legal foundation and mocking Bijeol's constitutional claims, the Seventh Circuit held that "daily general housekeeping responsibilities are not punitive in nature and for health and safety must be routinely observed in any multiple living unit" but gave no evidence or citation for that assertion.[167] Instead, the court found it sufficient to assume that such compulsory housekeeping work was "fair and equitable . . . when you have groups of people living together, some of whom may tend to be neater than others."[168] The court's tone is as if it is chiding the plaintiff for not doing his dishes promptly while living among roommates willingly choosing to live together rather

161. *See id*.

162. *See id*. at 424 n.1.

163. *See id*. at 424 (stating that Bijeol also sued under the First, Fifth, and Eighth Amendments).

164. *See id*. at 424–25.

165. *See id*. at 424 (quoting Butler v. Crumlish, 229 F. Supp. 565, 566 (E.D. Pa. 1964)).

166. *See id*.

167. *Id*.

168. *Id*.

than being forced to clean up after a group of individuals held pre- or post-trial. The court did not take Bijeol's Thirteenth Amendment claim seriously, despite his pretrial status and the Amendment's clear prohibition against involuntary servitude outside of punishment for a crime.

In establishing the test for whether the housekeeping exception to the Thirteenth Amendment was fulfilled, the Seventh Circuit directly quoted the trial court below.[169] The trial court had determined that the correctional facility did not violate the Thirteenth Amendment by forcing pretrial detainees to complete "simple housekeeping tasks in his or her own cell and community areas" so long as the work was not "overly burdensome in the time or labor required" and did not prevent the detainee from participating in their "defense to pending criminal charges."[170] The Seventh Circuit did not explicitly accept the trial court's limits that the housekeeping tasks must be simple, in the detainee's cell or community area, and not "overly burdensome," and did not provide any guidelines for how courts should determine the task's simplicity or burden in the future.[171] Instead, the court affirmed the trial court's decision and asserted, again without citations or evidence, that "pretrial detention centers must maintain some stability and discipline."[172] Compelling pretrial detainees to perform housekeeping chores, ostensibly towards this end goal of stability and discipline, was therefore reasonable and fair, despite a lack of explanation for how these housekeeping chores contributed to this goal.[173] Even if the Seventh Circuit intended to adopt the trial court's limits on the housekeeping exception's scope, other circuit courts which later cited to *Bijeol* cited only the Seventh Circuit's assertion that housekeeping chores are neither punitive nor unconstitutional without those limitations.[174] Effectively, the Seventh Circuit's test for whether

169. *Id.* at 425 (affirming the lower court's finding for the defendants).

170. *Id.*

171. *Id.*

172. *Id.*

173. *See id.* (concluding the detention center's actions were "fair and reasonable").

174. *See* Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) ("Requiring a pretrial detainee to perform general housekeeping chores, on the other hand, is not [punishment]." (citing *Bijeol*, 579 F.2d at 425)); Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993) ("The [Seventh Circuit] reasoned that '[d]aily general

forced labor falls into the housekeeping exception is simply whether the tasks are housekeeping in nature. Other circuit courts have largely followed the same simplistic analysis.[175]

While the *Bijeol* court did not cite any caselaw on exceptions to the Thirteenth Amendment, its dismissive opinion pulled from themes in *Robertson*, the *Selective Draft Law Cases*, and *Jobson*.[176] Pretrial detainees fulfill two of the three criteria for expansion of unwritten exceptions to the Thirteenth Amendment. As described by the cases the Seventh Circuit did cite, pretrial detention is a restricted environment, similar to the involuntary commitment to the mental institution in *Jobson* and the ship in *Robertson*.[177] Based on the Seventh Circuit's pejorative tone, it is also likely that the court viewed Bijeol and other pretrial detainees as morally inferior—similar to how the Supreme Court viewed sailors in *Robertson* and draft dodgers in the *Selective Draft Law Cases,* and how the Second Circuit viewed the involuntarily committed "inmate" patient in *Jobson*.[178]

The Seventh Circuit's oversimplified analysis failed to consider the constitutional text, legislative history, or the Supreme Court's construction of the Thirteenth Amendment. Instead, the Seventh Circuit completely sidestepped the textual ban on involuntary servitude within the Amendment by pointing to the necessity that pretrial detainees be restricted in their activities and that communal living areas be kept clean.[179] Although these factors may appear to be reasonable for analysis, the Seventh

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housekeeping responsibilities' are not inherently punitive and do not violate either the Due Process Clause or the Thirteenth Amendment[] . . ." (quoting *Bijeol*, 579 F.2d at 424)). One district court case interpreted *Bijeol* as expressly indicating that "even more arduous tasks would not affect the [Seventh Circuit's] decision." Ford v. Nassau Cnty. Exec., 41 F. Supp. 2d 392, 397 (E.D.N.Y. 1999) (citing *Bijeol*, 579 F.2d at 424 n.1).

175. *See infra* Part II.C (explaining how the Seventh, Eighth, and Fifth Circuit Courts' analysis ends after deciding whether the task fits into the housekeeping category).

176. *See* Robertson v. Baldwin, 165 U.S. 275 (1897); The Selective Draft Law Cases, 245 U.S. 366, 390 (1918); Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966).

177. *See Bijeol*, 579 F.2d at 424; *Jobson*, 355 F.2d at 130; *Robertson*, 165 U.S. at 283.

178. *See Bijeol*, 579 F.2d at 424; *Robertson*, 165 U.S. at 287; *The Selective Draft Law Cases*, 245 U.S. at 391; *Jobson*, 355 F.2d at 130; Armstrong, *supra* note 11, at 28 (discussing the court's "dim view of Mr. Bijeol's character" and implication that he was lazy).

179. *See Bijeol*, 579 F.2d at 424 ("By the very nature of confinement, restrictions do occur.").

Circuit does not acknowledge that the Thirteenth Amendment's prohibition of involuntary servitude leaves no space for these considerations.[180] The Thirteenth Amendment is a comprehensive ban on involuntary servitude, with the single textual punishment exception and a handful of specific exceptions created by the Supreme Court.[181] Housekeeping in pretrial detention falls into none of those exceptions.

Had the Seventh Circuit properly considered the Thirteenth Amendment's text, legislative history, and Supreme Court interpretation in *Hodges*, *Bailey*, and *Pollock*, the court would have had to show that the realities of confinement and cohabitation somehow trumped the Amendment's textual ban on involuntary servitude and its purpose to ensure individuals' ability to profit from their freely chosen labor.[182] Regardless of his later acquittal, Bijeol was not convicted of a crime when he was held pretrial, and the Constitution unequivocally states that he shall not be forced to work for another.[183] By not grappling directly with the text and legislative history of the Thirteenth Amendment or relevant and binding Supreme Court precedent, the Seventh Circuit failed in its duty to uphold the Constitution.

Despite the Seventh Circuit's apparent lack of care or effort regarding this decision, *Bijeol* would go on to play an outsized role in future pretrial detainee Thirteenth Amendment cases.[184] While three Supreme Court cases slightly altered other circuit

180. *See* U.S. CONST. amend. XIII (omitting the factors analyzed by the Seventh Circuit).

181. *See id.*; *see also* discussion *supra* Part I.B.1 (discussing the Thirteenth Amendment's text and follow up cases regarding sailors and draft dodgers).

182. *See* discussion *supra* Parts I.A.1, I.B.3.

183. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been, duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

184. *See* Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) (asserting that compelling pretrial detainees to complete general housekeeping tasks is not punishment in violation of the Constitution (citing *Bijeol*, 579 F.2d at 425)); Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993) (adopting *Bijeol*'s assertion that general housekeeping work was not inherently punitive and therefore did not violate the Thirteenth or Fourteenth Amendments (citing *Bijeol,* 579 F.2d at 424)).

courts' application of the Seventh Circuit's reasoning,[185] most of the Court's decisions came to the same conclusion: if the compulsory work was constituted of tasks that the court saw as housekeeping in nature, then it likely fit into the housekeeping exception.

B. THE SUPREME COURT AND DEPARTMENT OF JUSTICE PROVIDED GUIDELINES FOR SUBSEQUENT CIRCUIT COURT DECISIONS ON THE HOUSEKEEPING EXCEPTION

Before other circuit courts evaluated whether and how the housekeeping exception applied in pretrial detention, the Supreme Court issued three decisions which would alter those circuits' analysis to differing degrees. In two separate cases in the 1970s, the Court found that the presumption of innocence prevented pretrial detention programs from rehabilitating or punishing pretrial detainees.[186] After all, if the detainee is not convicted and therefore presumed innocent, there is nothing to rehabilitate and no reason to punish. Subsequent circuit court decisions used the same logic when evaluating Thirteenth Amendment claims in pretrial settings; if the labor was meant to rehabilitate or punish the detainee, it was unconstitutional.[187]

In 1988, the Supreme Court also shaped these claims by defining "involuntary servitude" in the Thirteenth Amendment in *United States v. Kozminski* as "servitude enforced by the use or

185. *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."); Bell v. Wolfish, 441 U.S. 520, 535 (1979) (observing that, under the Due Process Clause, detainees may not be punished until after an adjudication of guilt); United States v. Kozminski, 487 U.S. 931, 952 (1988) (establishing a clear definition of "involuntary servitude" for the purposes of criminal prosecution).

186. *See McGinnis*, 410 U.S. at 273 (evaluating whether to award good time to pretrial detainees for rehabilitation progress). Note also that this decision came out before *Bijeol* but was not included in the Seventh Circuit's opinion. *See also Bell*, 441 U.S. at 535 (finding that holding an arrestee pretrial was not equivalent to being found guilty of any crime, but instead to ensure the arrestee appears at trial, and therefore they cannot be punished as if guilty of a crime). While the claims in both cases arose under the Fourteenth Amendment, this Note will discuss the cases in relationship to the Thirteenth Amendment because circuit courts subsequently applied them in a Thirteenth Amendment context. *See also infra* Part II.C.

187. *See infra* Part II.C (discussing the Fourth Circuit's decision in *Hause* and asking whether there was a non-punitive purpose present).

threatened use of physical or legal coercion."[188] The Court then listed previously decided exceptions to its new definition of involuntary servitude, including where the state or federal government compels citizens to perform "certain civic duties," such as military service and roadwork, and established exceptional situations, such as sailors.[189] Thus, the Court formalized the civic duty rationale from the *Selective Draft Law Cases* and *Butler*.

However, *Kozminski* did not include housekeeping tasks in pretrial detention or otherwise and did not include any directly analogous population under either the civic duty or exceptional case exceptions.[190] This is notable especially because the *Bijeol* decision was ten years old, and the Department of Justice's Bureau of Prisons had promulgated the housekeeping exception in its Rules and Regulations four years before the *Kozminski* decision.[191] The regulation did not name the housekeeping tasks in pretrial detention specifically as an exception to the Thirteenth Amendment and, since *Kozminski* did not involve pretrial detainees, the Supreme Court may have missed the prior existence of this regulatory exception.[192] However, even if the Court missed the significance of the DOJ regulation, it is unlikely to have missed a published circuit court decision establishing an exception to the Thirteenth Amendment.[193] While the Court's omission was not dispositive of its disapproval of the housekeeping exception, it indicated a lack of endorsement for the exception.

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188. 487 U.S. at 944, 952–53 (holding the defendant compelled two intellectually disabled men into involuntary servitude through physical and legal coercion).

189. *See id.* at 944 (first citing Hurtado v. United States, 410 U.S. 578, 589 n.11 (1973); then citing The Selective Draft Law Cases, 245 U.S. 366, 390 (1918); and then citing Butler v. Perry, 240 U.S. 328, 332–33 (1916)).

190. *See id.* ("Putting aside such exceptional circumstances, none which are present in this case, our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion.").

191. *See* 28 C.F.R. § 545.23(b) (2023) (originally promulgated as 49 Fed. Reg. 38,915 (Oct. 1, 1984)) ("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.").

192. *See id.*; *Kozminski*, 487 U.S. at 931 (stating the defendants were two mentally disabled men who were compelled to labor on a farm under actual and threatened physical violence).

193. *See* Bijeol v. Nelson, 579 F.2d 423, 424–25 (7th Cir. 1978).

Since the Court did not explicitly indicate approval or disapproval of the housekeeping exception, it left the question of the application's validity and scope open for circuit courts to interpret. When other circuits began facing the housekeeping exception in pretrial detention settings, they based their decisions on some combination of this recent Supreme Court precedent, the DOJ regulation, *Bijeol*, and *Jobson*.[194] However, none of these courts grappled with the Court's omission of the housekeeping exception in *Kozminski*.

C. THE CIRCUIT SPLIT ON THE HOUSEKEEPING EXCEPTION'S CONSTITUTIONALITY

All circuit courts that have grappled with the legitimacy of the housekeeping exception found that it applies within pretrial settings. However, they differ in how they determine whether tasks pretrial detainees were compelled to perform fell into the exception. Subsection 1 discusses how the Eighth and Fifth Circuits follow the Seventh Circuit's overly simplistic analysis when applying the housekeeping exception. Subsection 2 describes the Third and Fourth Circuits' similar approach, but with an added component of onerousness. Subsection 3 describes the Second Circuit's application of the housekeeping exception which declines the Seventh Circuit's analysis in favor of a comprehensive analysis of the Thirteenth Amendment, relevant Supreme Court precedent, and its own precedent in *Jobson*.

1. The Seventh, Eighth, and Fifth Circuits: Compulsory Housekeeping Tasks Are Inherently Constitutional

At the core of most circuits' housekeeping exception analyses is simply the question of whether the compulsory labor at issue is a housekeeping task. For the Seventh, Eighth, and Fifth Circuits, this appears to be the end of the inquiry; if the task is housekeeping in nature, then it is automatically neither punitive nor unconstitutional under the Thirteenth Amendment's ban on involuntary servitude. The Seventh Circuit established this simplistic and unsupported notion in *Bijeol*,[195] and the Eighth and

194. *See* discussion *infra* Part II.C (analyzing the holdings of the circuit court decisions that have addressed the housekeeping exception).

195. *See* discussion *supra* Part II.A (explaining the Seventh Circuit's holding that the Thirteenth Amendment does not proscribe prisons from requiring inmates to complete housekeeping tasks).

Fifth Circuits accepted the Seventh Circuit's holding at face value.[196]

None of these three circuit courts defined what qualifies work assignments as housekeeping tasks. Instead, they either accepted that the cleaning, meal service, or other operational tasks within the detention center were housekeeping in nature,[197] or found there was insufficient information on the required work and remanded the case to identify the compulsory tasks and decide whether they were housekeeping in nature.[198] When these circuits courts could identify the work the detainee performed, they concluded it was housekeeping; it is only when they lacked information on the actual work performed that they denied summary judgment for the detention centers.

At first blush, the Eighth and Fifth Circuits seem to depart from the Seventh Circuit and engage in a constitutional analysis of the housekeeping exception.[199] However, after stating Supreme Court precedent for other unwritten exceptions to the

196. *See* Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) ("Requiring a pretrial detainee to perform general housekeeping chores . . . is not [punishment]." (citing *Bijeol*, 579 F.2d at 425)); Channer v. Hall, 112 F.3d 214, 219 (5th Cir. 1997) ("We hold that the federal government is entitled to require a communal contribution by an INS detainee in the form of housekeeping tasks, and that Channer's kitchen service, for which he was paid, did not violate the Thirteenth Amendment's prohibition of involuntary servitude.").

197. *See Bijeol*, 579 F.2d at 424 n.1 (finding a pretrial detainee's compulsory cleaning of one's own cell and common areas, including vacuuming, dusting, emptying ashtrays, setting up and cleaning dining tables, and washing windows, were housekeeping chores); Mendez v. Haugen, Civil No. 14–4792, 2015 WL 5718967, at *2, *5 (D. Minn. Sept. 29, 2015) (listing compulsory tasks other courts found were housekeeping in nature and finding cleaning the communal bathroom in pretrial detainee's housing is a "normal housekeeping dut[y] that fall[s] outside the Thirteenth Amendment"). Immigration detainees, like pretrial detainees, have not been convicted of a crime but are nevertheless held in detention centers and forced to work. *See Channer*, 112 F.3d at 215, 219 (holding an INS detainee's forced eight hours of daily work in food services constituted "housekeeping chores" (first citing Bayh v. Sonnenburg, 573 N.E.2d 398, 412 (Ind. 1991); and then citing Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966))).

198. *See Martinez*, 977 F.2d at 423–24 (remanding for the lower court to determine the kind of work the prison forced the pretrial detainee to complete to decide whether the work was housekeeping in nature and therefore outside of the Thirteenth Amendment under *Bijeol* and the DOJ regulation).

199. *See id.* at 423 (discussing the presumption of innocence for pretrial detainees, whether restrictions on pretrial detainees are related to a governmental objective, and that segregation constitutes punishment); *Channer*, 112 F.3d at 217–19 (quoting the Thirteenth Amendment, discussing judicially-created

Thirteenth Amendment, the courts simply cited *Bijeol* or *Jobson*'s holdings establishing the housekeeping exception and accepted their application of the exception with no further analysis on whether the housekeeping exception was valid under those exceptions.[200] The Eighth Circuit recognized that "[p]retrial detainees are presumed innocent and may not be punished" but held that housekeeping tasks do not constitute punishment based solely on *Bijeol*.[201] The Fifth Circuit applied the Supreme Court's *Kozminski* test for involuntary servitude, holding the inmate was compelled to work under threat of legal coercion, but nevertheless upheld the housekeeping exception as an unwritten exception to the Thirteenth Amendment with no supporting analysis beyond citing *Jobson* and a similar Indiana Supreme Court decision.[202] The Fifth Circuit cited to *Jobson*'s holding that mental hospitals can require their inmates to perform housekeeping tasks but failed to incorporate the case's more nuanced holding that those chores must benefit the detainee.[203] In doing so, the Fifth Circuit joined the Eighth in accepting the Seventh Circuit's holding in *Bijeol* wholesale.

Once the Seventh, Eighth, and Fifth Circuits decided that the forced labor at issue was housekeeping in nature, they found

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exceptions to the Amendment's ban on involuntary servitude as listed in *Kozminski*, and quoting *Butler*'s limitation of the Thirteenth Amendment's application to "those forms of compulsory labor akin to African slavery" (first citing United States v. Kozminski, 487 U.S. 931, 943–44 (1988); and then quoting Butler v. Perry, 240 U.S. 328, 332–33 (1916))).

200. *See Martinez*, 977 F.2d at 423 ("Requiring a pretrial detainee to perform general housekeeping chores . . . is not [punishment]." (citing *Bijeol*, 579 F.2d at 425)); *Channer*, 112 F.3d at 219 (analogizing the detainee's food services work in *Channer* to the housekeeping task in *Jobson* (citing *Jobson*, 355 F.2d at 131–32)).

201. *See Martinez*, 977 F.2d at 423 (first citing Bell v. Wolfish, 441 U.S. 520, 535 (1979); and then citing *Bijeol*, 579 F.2d at 424–25).

202. *See Channer*, 112 F.3d at 218–19 (first citing *Kozminski*, 487 U.S. at 943–44; then citing *Bayh*, 573 N.E.2d at 412; and then citing *Jobson*, 355 F.2d at 131–32).

203. *See id.* at 219 (citing *Jobson*, 355 F.2d at 131–32); *see also Jobson*, 355 F.2d at 132 (finding that mandatory programs in mental institutions must serve a therapeutic purpose).

that housekeeping tasks were inherently not punitive and therefore not unconstitutional.[204] These circuits take an automatic approach: if the pretrial detainee was forced to complete labor constituted of housekeeping tasks, they are not protected by the Constitution as to that forced labor.

2. The Third and Fourth Circuits: Housekeeping Tasks May Be Unconstitutional if Too Onerous

The Third and Fourth Circuits take a similar tack to the Seventh, Eighth, and Fifth, but they add another step before excepting housekeeping tasks from the Thirteenth Amendment.[205] In addition to determining that the compulsory labor was housekeeping in nature, the Third Circuit considered the time it took for the pretrial detainee to complete that labor in *Tourscher v. McCullough*.[206] The court implied that even if the forced work may be considered housekeeping, if the pretrial detainee was forced to work for overly long hours, then the work may fall outside the scope of the housekeeping exception and violate the Thirteenth Amendment.[207] However, the court did not define

204. *See Bijeol*, 579 F.2d at 424–25 (concluding that the cleaning tasks assigned to the detainee were housekeeping in nature and that they did not violate the Thirteenth Amendment because they were "fair and reasonable"); *Martinez*, 977 F.2d at 423 (explaining that while requiring a pretrial detainee to labor generally constitutes punishment, requiring the detainee to complete "general housekeeping chores" is not punishment)*; Channer*, 112 F.3d at 215, 217–19 (applying the housekeeping exception to immigration detention and holding the federal government can require immigration detainees to perform kitchen service without violating the Thirteenth Amendment).

205. *See* Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999) (remanding for the district court to determine the nature and duration of the pretrial detainee's compulsory labor); Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993) (finding the Thirteenth Amendment did not protect the pretrial detainee from being forced to clean the entire cell block several times a day under threat of segregation because the compulsory tasks were housekeeping duties "related to the legitimate, non-punitive governmental objective of prison cleanliness").

206. *See Tourscher*, 184 F.3d at 242 (indicating that evaluating both the nature and duration of the compulsory labor was "necessary before a court can determine whether the prison officials deprived [Tourscher] of this Thirteenth Amendment right").

207. *See id.* (asserting that "pretrial detainees may be required to perform 'general housekeeping responsibilities'" but maintaining that the court may nevertheless hold that the work violates the Thirteenth Amendment depending on the nature and duration of the work (first citing *Hause*, 993 F.2d 1079 ; and then citing *Bijeol*, 579 F.2d423)).

what length of time would indicate that the detainee's Thirteenth Amendment rights had been violated.[208]

The Fourth Circuit takes a slightly different approach, asking whether the work was assigned to the pretrial detainee with express punitive intent or without being reasonably related to some "legitimate, non-punitive governmental purpose."[209] So long as the detention center assigns compulsory tasks without expressly indicating that the tasks are meant to punish the pretrial detainee and can point to a legitimate reason for the required labor, then those tasks are not punitive and therefore constitutional.

Detention centers can point to "prison cleanliness" or other operational efficiency as a legitimate, non-punitive objective for the forced labor.[210] Thus, the Fourth Circuit's approach to the housekeeping exception may at first blush appear equivalent to the automatic approach. However, the Fourth Circuit later combined its precedent and the Third Circuit's rulings to hold pretrial labor that was housekeeping in nature fell *outside* of the housekeeping exception.[211] In *Harden v. Bodiford*, the pretrial detainee's compulsory labor was made up of serving meals, organizing uniforms, handing out blankets, and cleaning floors, walls, windows, tables and showers—all tasks that the Fourth Circuit or other courts have held to be housekeeping in nature and therefore not inherently punitive.[212] However, the volume of work was "particularly onerous" given that William Harden, at that time sixty-six years old, was forced to work for ten hours a day, seven days a week until his release.[213] Though the detention center did not expressly indicate that the work was meant to be punitive, the labor's onerous quality pushed the Fourth Circuit to remand the case to review whether the overly burdensome work evidenced punitive intent.[214]

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208. *See id.*

209. *See Hause*, 993 F.2d at 1085 (noting that if there is no "legitimate non-punitive governmental objective . . . an intent to punish may be inferred" (quoting Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988))).

210. *See id.* (holding that prison cleanliness is a legitimate, non-punitive governmental objective).

211. *See* Harden v. Bodiford, 442 F. App'x 893, 895–96 (4th Cir. 2011) (citing *Tourscher*, 184 F.3d at 242).

212. *See id.* at 894–95.

213. *Id.* at 894, 896.

214. *See id.* at 896.

Similar to the Seventh, Eighth, and Fifth Circuits, the Third and Fourth Circuits did not engage in a thorough legal analysis on the constitutionality of the housekeeping exception. The courts in *Hause*, *Tourscher*, and *Harden* cited neither the text of the Thirteenth Amendment nor the Supreme Court construction of the Amendment, instead relying on their own or other circuits' caselaw.[215] While the Third and Fourth Circuits do not apply the same proverbial rubber stamp to housekeeping tasks as the Seventh, Eighth, and Fifth Circuits, they too engage in an inquiry not supported by either the Thirteenth Amendment's complete ban on involuntary servitude outside of the punishment clause or the Supreme Court's civic duty or exceptional situation exceptions.

3. The Second Circuit: Housekeeping Tasks Are Unconstitutional if There Is No Personal Benefit to the Detainee or the Work Constitutes Hard Labor

While the Second Circuit first applied the housekeeping exception in mental institutions,[216] the court's later application of the exception in pretrial detention settings is the most grounded in the text and legislative history of the Thirteenth Amendment and Supreme Court precedent compared to the other circuits.[217] The Second Circuit's *Jobson* decision both set the stage for the housekeeping exception in pretrial settings and limited its application by including the requirement that the compulsory housekeeping tasks be for the detainee's benefit.[218] Forty-six years

215. *Compare Hause*, 993 F.2d at 1085 (first citing Bijeol v. Nelson, 579 F.2d 423, 424 (7th Cir. 1978); and then citing Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992)), *with Tourscher*, 184 F.3d at 242 (first citing *Hause*, 993 F.2d 1079; and then citing Bijeol, 579 F.2d 423), *and Harden*, 442 F. A'pp' x at 895 (first citing *Hause*, 993 F.2d at 1095; then citing Channer v. Hall, 112 F.3d 214, 218–19 (5th Cir. 1997); and then citing *Tourscher*, 184 F.3d at 242).

216. *See supra* Part I.B.2 (analyzing *Jobson v. Henne*, in which the Second Circuit held that compulsory labor does not violate the Thirteenth Amendment under certain circumstances in mental institutions).

217. *See* McGarry v. Pallito, 687 F.3d 505, 514 (2d Cir. 2012) (holding the state prison violated the pretrial detainee's Thirteenth Amendment rights by compelling him to work in the prison laundry "for up to 14 hours a day for three days a week doing other inmates' laundry" (quoting U.S. CONST. amend. XIII, § 1)).

218. *See* Jobson v. Henne, 355 F.2d 129, 131–32 (2d Cir. 1966) (reasoning that compulsory labor does not violate the Thirteenth Amendment if it serves a therapeutic or housekeeping purpose).

later, the court incorporated *Jobson* into its test for applying the housekeeping exception in *McGarry v. Pallito*.[219] In that case, the Second Circuit clarified the inquiry as asking whether the work (1) is housekeeping in nature, (2) is not hard labor, and (3) personally benefits the detainee.[220] Only if all of these qualifications are met does the task fall into the scope of the housekeeping exception to the Thirteenth Amendment.[221]

Finbar McGarry was a pretrial detainee forced to work in the "hot, unsanitary" prison laundry room for "fourteen hours per day, three days per week" and forced to "handle other inmates' soiled clothing" under threat of segregation and an extended release date.[222] Under these facts, the circuits that take the automatic approach to the housekeeping exception would likely hold that doing laundry was a housekeeping task, and so the forced labor was covered by the housekeeping exception and did not violate the Thirteenth Amendment.[223] The Third and Fourth Circuits may have held that although the task of laundry was housekeeping in nature, the volume of labor was too onerous and there may have been intent to punish McGarry.[224] However, unlike in *Harden*, McGarry was forced to work only three long shifts per week rather than daily;[225] the Third and Fourth Circuits may just as easily have considered the labor light enough to uphold the forced labor as constitutional under the housekeeping exception.[226]

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219. *See McGarry*, 687 F.3d at 513–14 (discussing the requirement that compulsory labor benefit the detainee (citing *Jobson*, 355 F.2d at 131–32)).

220. *See id.*

221. *See id.* at 514 (holding that failure to satisfy the third prong of the inquiry could violate the Thirteenth Amendment).

222. *Id.* at 508–09.

223. *See supra* Part II.C.1 (analyzing the Seventh, Eighth, and Fifth Circuit Courts' approaches to the housekeeping exception, whereby compulsory labor found to be housekeeping in nature does not violate the Thirteenth Amendment).

224. *See supra* Part II.C.2 (discussing the Third and Fourth Circuit Courts' approach to the housekeeping exception, which considers how onerous the compulsory labor was).

225. *Compare McGarry*, 687 F.3d at 509 (finding that the prison compelled the detainee to work fourteen hours of work per day, three days per week), *with* Harden v. Bodiford, 442 F. App'x. 893, 894 (4th Cir. 2011) (finding that the detainee worked ten hours per day, seven days per week).

226. *See supra* Part II.C.2 (explaining that the Third Circuit has not provided a standard for determining whether compulsory labor is onerous enough to violate the Thirteenth Amendment).

The Second Circuit, on the other hand, held McGarry's compulsory labor did *not* fall into the housekeeping exception and thus violated the Thirteenth Amendment.[227] Combining the Amendment's text and its subsequent interpretation by the Supreme Court, the Second Circuit held that involuntary servitude encompasses forms of coerced servitude beyond that of chattel slavery and, although pretrial detainees may be subject to restrictions inherent to a detention facility, they maintain their Thirteenth Amendment rights.[228] In considering whether the housekeeping exception to the Thirteenth Amendment may nevertheless apply, the Second Circuit held that under *Jobson* and *Hodges*, the forced labor may only be constitutional if the work provides therapeutic value to the detainee or is "reasonably related to the inmate's housekeeping or personal hygienic needs."[229] Unlike the Third and Fourth Circuits, where the servitude was validated by the detention facility's legitimate, nonpunitive objectives, the Second Circuit pulled from Supreme Court precedent in *Hodges* to show that the servitude may only be validated by the *detainee's* needs.[230] Requiring that the work

227. *See McGarry*, 687 F.3d at 514 ("[W]e conclude that a pretrial detainee's compelled work in a laundry for up to 14 hours a day for three days a week doing other inmates' laundry cannot reasonably be construed as personally related housekeeping chores . . . .").

228. *See id.* at 510–11 (first citing U.S. CONST. amend. XIII, § 1; then citing The Civil Rights Cases, 109 U.S. 3, 20 (1883); then citing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873); then citing Pollock v. Williams, 322 U.S. 4, 17–18 (1944); and then citing Bell v. Wolfish, 441 U.S. 520, 533, 536–37 (1979)).

229. *See McGarry*, 687 F.3d at 513–14 (first citing Jobson v. Henne, 355 F.2d 129, 132 n.3 (2d Cir. 1966); and then citing Hodges v. United States, 203 U.S. 1, 16 (1906), *overruled in part on other grounds by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)). While the court does not address this directly, the therapeutic purpose likely does not validate compulsory labor in pretrial detention settings. Under *McGinnis*, pretrial detention programs cannot constitutionally rehabilitate detainees, and therapy would likely be considered rehabilitation. *See* McGinnis v. Royster, 410 U.S. 263, 273 (1973); *see also* discussion *supra* Part II.B (summarizing two Supreme Court cases finding that the presumption of innocence prevents pretrial detention programs from rehabilitating or punishing pretrial detainees).

230. *Compare McGarry*, 687 F.3d at 513–14 (requiring that the housekeeping chores personally benefit the detainee to fall into the housekeeping exception to the Thirteenth Amendment), *with* Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999) (remanding for the lower court to develop the record on the nature and duration of the compulsory labor (citing Hause v. Vaught, 993 F.2d 1079 (4th Cir. 1993))), *and Hause*, 993 F.2d at 1085 (stating that forced

benefit the detainee aligns with Congress's intent in passing the Thirteenth Amendment: to ensure that everyone stands to benefit from their labor.[231]

The court went on to hold that forcing pretrial detainees to perform "hard labor" violates the Thirteenth Amendment.[232] Though the court did not define hard labor, its hard labor analysis may be similar to the Third and Fourth Circuits' inquiry regarding the onerousness of the labor.[233] The Second Circuit then held that being forced to do other inmates' laundry for long hours "cannot reasonably be construed as personally related housekeeping chores" and therefore failed to fit into the housekeeping exception.[234] While the court did not indicate which aspect of its housekeeping exception test the compulsory labor failed, the analysis implied that while the laundry work itself may have been housekeeping in nature, it was not of personal benefit to McGarry and likely constituted hard labor such that it fell outside the scope of the housekeeping exception and violated the Thirteenth Amendment.[235]

Of all the circuits that have weighed in on the housekeeping exception, the Second Circuit performed the most comprehensive legal analysis and came the closest to upholding the Thirteenth Amendment's text and legislative history. Despite the housekeeping exception fitting neither the Amendment's express punishment exception nor the Supreme Court's list of judicially-created exceptions in *Kozminski*, the housekeeping exception is likely to exist for the immediate future under circuit court precedent and DOJ regulation.[236] Given this reality, the Second Circuit's three-part approach to the housekeeping exception best

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labor for pretrial detainees does not violate the Thirteenth Amendment when it is reasonably related to a "legitimate non-punitive governmental objective" (quoting Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988))).

231. *See* discussion *supra* Part I.A.1 (describing the Thirteenth Amendment's ideological underpinnings).

232. *See McGarry*, 687 F.3d at 514 ("It is clearly established that requiring hard labor of pretrial detainees . . . violates the Thirteenth Amendment." (citing U.S. CONST. amend. XIII, § 1)).

233. *See supra* Part II.C.2 (discussing the Third Circuit's onerousness analysis in *Tourscher*).

234. *See McGarry*, 687 F.3d at 514.

235. *See id.* at 513–14 (distinguishing between compelling a pretrial detainee to clean their own cell and "doing other inmates' laundry").

236. *See* discussion *supra* Part II (analyzing the Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits' rulings on the housekeeping exception).

meets the Amendment's purpose that no one be forced to work for the benefit of another and, instead, everyone be empowered to benefit from their own labor.[237]

III. SOLUTIONS TO ALIGN THE HOUSEKEEPING EXCEPTION AND THE THIRTEENTH AMENDMENT

The judicially-created housekeeping exception violates the text and purpose of the Thirteenth Amendment and falls outside the judicially-created exceptions accepted by the Supreme Court in *Kozminski*.[238] The housekeeping exception is therefore unconstitutional. There are several solutions to diminish and abolish the exception at the state and federal levels. Section A proposes a judicial solution where the Supreme Court and circuit courts that have not yet considered the housekeeping exception should strike down the DOJ regulation and establish that the exception is unconstitutional or, in the alternative, should accept the Second Circuit's application of the exception as the lesser of evils in the circuit split. Section B proposes a legislative solution where state and federal legislatures narrow and eliminate the housekeeping exception.

A. THE JUDICIAL SOLUTION: COURTS SHOULD STRIKE DOWN THE HOUSEKEEPING EXCEPTION AS UNCONSTITUTIONAL OR FOLLOW *MCGARRY*

The housekeeping exception violates the Thirteenth Amendment's plain text and legislative history and is not covered in any of the Supreme Court's judicially-created exceptions.[239] Accordingly, Section 1 argues that the Supreme Court and circuit courts that have not yet ruled on the housekeeping exception should hold that it is unconstitutional and strike down the lower courts' application of the exception, the corresponding DOJ regulation, and any state Department of Corrections (DOC) policy enabling any kind of compulsory pretrial labor. Section 2 posits

237. *See* discussion *supra* Part I.A.1 (explaining the political and philosophical ideologies that informed the Thirteenth Amendment).

238. *See supra* Parts I.A.1, II.B–II.C (summarizing the Supreme Court case formalizing exceptions to the Thirteenth Amendment's prohibition on compulsory labor, which notably excludes the housekeeping exception).

239. *See supra* Parts I.A.1, I.B, II.B (recounting the legislative intent behind the Thirteenth Amendment and the Supreme Court's subsequent narrowing of the amendment's effect).

that, if these courts are hesitant to hold the housekeeping exception unconstitutional, they should follow the Second Circuit's analysis in *McGarry*.

1. Courts Should Strike Down the Housekeeping Exception as Unconstitutional

The Supreme Court and circuit courts have consistently found that pretrial detainees have not been "duly convicted" of a crime and therefore do not fit the Thirteenth Amendment's express punishment exception.[240] On a plain reading of the Amendment, then, pretrial detainees are protected from being forced to work in service of another, regardless of the substance of that work.[241] Additionally, Congress passed the Thirteenth Amendment to reconstruct the Southern states in the image of the Northern states' free labor ideology.[242] Freeing four million enslaved people was a crucial precursor to that reinvention, but not the Amendment's only impact.[243] Doing so would then foster a culture of self-reliance and discipline as the nation rebuilt after the Civil War.[244] The legislative history of the Thirteenth Amendment indicates it is meant to effect sweeping change to American society.[245] Any exception to the Amendment undermines this purpose.

While the Supreme Court nevertheless created exceptions, they are limited and do not include pretrial detainees.[246] These

240. U.S. CONST. amend. XIII, § 1; *see also* Bell v. Wolfish, 441 U.S. 520, 536 (1979) ("A person lawfully committed to pretrial detention has not been adjudged guilty of any crime."); *McGarry*, 687 F.3d at 511 (holding as a pretrial detainee, McGarry was not "duly convicted" and therefore "[did] not fall within the category of persons to whom the Amendment . . . does not apply"); *cf.* Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988) (describing plaintiff as a "pretrial detainee and not a convicted prisoner"); Tourscher v. McCullough, 184 F.3d 236, 241–42 (3d Cir. 1999) (distinguishing between the plaintiff's status as a "duly convicted prisoner" and a "pretrial detainee" at different times in his prison stay in relation to the plaintiff's Thirteenth Amendment claim).

241. U.S. CONST. amend. XIII, § 1 (banning slavery and involuntary servitude without regard to the substance of the compulsory labor).

242. *See* discussion *supra* Part I.A.1 (describing the role Republican free labor ideals played in drafting the Thirteenth Amendment).

243. *See* discussion *supra* Part I.A.1.

244. *See* discussion *supra* Part I.A.1.

245. *See* discussion *supra* Part I.A.1.

246. *See supra* Part I.B.1 (outlining the Supreme Court cases creating exceptions to the Thirteenth Amendment).

judicially-created exceptions, as listed in *Kozminski*, include the following: jury service, military service, roadwork, rights of parents and guardians in relation to their children and wards, and contracted sailors.[247] The Court categorized the first three exceptions as civic duties and the latter two as exceptional cases.[248] The housekeeping exception falls into neither category. In *Robertson*, the Court describes the exceptional cases as those that "have always been treated as exceptional" before describing ancient maritime law to illustrate sailing contracts' historical exceptionalism in terms of compulsory performance of labor.[249] If there is such a record of pretrial detainees being compelled to work since time immemorial, no court has endeavored to uncover it.

Courts may attempt to fit the housekeeping exception into the civic duty exception, but this too fails. The civic duty exceptions cited by the Court are all duties that individuals have to the state or federal government by their nature as citizens in that jurisdiction.[250] Pretrial detainees, like the involuntary patient in *Jobson*, do not owe a civic duty to the detention facility based upon their status as citizens.[251] In *Jobson*, the Second Circuit attributed the patient's duty to the financial burden that the mental institution placed on the state by virtue of its continuing

247. United States v. Kozminski, 487 U.S. 931, 944 (1988) (first citing Hurtado v. United States, 410 U.S. 578, 589 & n.11 (1973); then citing The Selective Draft Law Cases, 245 U.S. 366, 390 (1918); then citing Butler v. Perry, 240 U.S. 328 (1916); and then citing Robertson v. Baldwin, 165 U.S. 275 (1897)).

248. *See Kozminski*, 487 U.S. at 943–44 ("[T]he Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens . . . to perform certain civic duties . . . . [And] the Thirteenth Amendment was not intended to apply to 'exceptional' cases.").

249. *See* 165 U.S. at 282–83 (explaining why some of the risks inherent to military service justify the use of compulsory labor as a punishment).

250. *Hurtado*, 410 U.S. at 589 (describing jury service as "public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned" (citing Blair v. United States, 250 U.S. 273, 281 (1919))); *The Selective Draft Law Cases*, 245 U.S. at 390 (describing military service as citizens' "supreme and noble duty of contributing to the defense of . . . the nation"); *Butler*, 240 U.S. at 330 (describing public roadwork labor as "part of the duty" that able-bodied men in the state jurisdiction "owes to the public").

251. *See supra* Part I.B.2 (discussing the genesis of the housekeeping exception).

to treat and house Jobson.[252] The patient's status as a citizen had no impact on his duty in this case; it was his status as a detainee in a mental institution that generated the financial burden on the state which then created the duty.[253] Similarly, it is not the pretrial detainees' citizenship status that creates a duty in the pretrial detention settings; it is the burden placed on the state for feeding and housing them. The nature of the duty generated by citizenship compared to debt is qualitatively different such that the housekeeping exception does not fall into the civic duty exception described in Supreme Court caselaw. Additionally, the nature of the duty predicated on a debt owed by the pretrial detainee to the detention facility or the state implicates the Court's holdings in *Bailey* and *Pollock* that states cannot force debtors to perform labor.[254] Based on the Court's analyses and holdings in the antipeonage cases, the pretrial detainee's duty to work created by debt they owe is unconstitutional.

The Supreme Court and First, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits have yet to weigh in on the constitutionality of the housekeeping exception. These courts are not bound by other circuit courts' decision to uphold the housekeeping exception.[255] While these courts are bound by the DOJ regulation, they also have the power to strike down the regulation as unconstitutional.[256] Based on the housekeeping exception's failure to fit into any established exception to the Thirteenth Amendment, express or judicially-created, and its incoherence with the Amendment's purpose to end compulsory labor and establish positive rights to free labor and autonomy, the Supreme Court and circuit courts should hold the housekeeping exception unconstitutional.

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252. Jobson v. Henne, 355 F.2d 129, 131 (2d Cir. 1966) (recognizing that housekeeping chores can be "designed to reduce the financial burden placed on a state by its program of treatment").

253. *Id.*

254. *See supra* Parts I.A.3, I.B.2 (discussing the Supreme Court's broadened reading of the Thirteenth Amendment and the genesis of the housekeeping exception).

255. *See Legal Research: An Overview: Mandatory v. Persuasive Authority*, UCLA (Feb. 2, 2024), https://libguides.law.ucla.edu/c.php?g=686105&p=5160745 [https://perma.cc/UPX9-3MRG] (describing one circuit court's decision as persuasive authority for a similar case in another circuit court).

256. *See, e.g.*, Regency Air, LLC v. Dickson, 3 F.4th 1157, 1162 (9th Cir. 2021) (determining whether to strike down an agency's regulations).

A world without the housekeeping exception is one where pretrial detainees can choose whether to work and receive at least minimum wage for their labor. Pretrial detainees will likely voluntarily work as they await trial to make money and fill their time.[257] Rather than be forced to work or face harsh physical and legal consequences, pretrial detainees can choose to work and be compensated according to their jurisdiction's minimum wage laws, just like every other unconvicted individual in the United States. Alternatively, they can simply elect not to work. This approach to pretrial detainee labor is consistent with the intention of the Thirteenth Amendment and its underlying free labor principles.[258]

Despite the housekeeping exception's lack of constitutional basis, these courts may hesitate to abolish the exception because the other circuit courts agree that it is acceptable in some form.[259] If these courts decline to hold that the exception is unconstitutional, they should follow the Second Circuit's personal-benefit analysis.

2. Courts Reluctant to Hold the Housekeeping Exception Unconstitutional Should Follow the Second Circuit's Analysis in *McGarry*

The Second Circuit stands apart from the others in its application of the housekeeping exception primarily because it focuses on whether the detainee benefits from the work required of them.[260] This approach, while still upholding the exception in violation of the Constitution, follows from the legislative history of the Thirteenth Amendment and subsequent Supreme Court

257. *See* Meg Anderson, *Colorado Banned Forced Prison Labor 5 Years Ago. Prisoners Say It's Still Happening*, NPR (Nov. 13, 2023), https://www.npr.org/2023/11/13/1210564359/slavery-prison-forced-labor-movement [https://perma.cc/2RLC-TZS6] (discussing prisoners' desire to do voluntary, meaningful work); Moe Clark, *Forced Labor Continues in Colorado, Years After Vote to End Prison Slavery*, BOLTS (Sept. 19, 2023), https://boltsmag.org/colorado-prison-slavery [https://perma.cc/KZ3K-2M6G] (noting the intent of Colorado anti-forced-prison-labor activists is not to dissolve prison work programs because inmates want to work).

258. *See supra* Part I.A.1 (discussing the legislative history of the Thirteenth Amendment).

259. *See supra* Part II.C (discussing the current circuit split on the housekeeping exception).

260. *See* discussion *supra* Part II.C.3 (discussing the Second Circuit's housekeeping exception caselaw).

interpretation of the Amendment most aligned with its text and purpose, while remaining compliant with the DOJ regulation.[261]

The Second Circuit was the only circuit court to incorporate the Thirteenth Amendment's purpose to create a free labor society in its application of the housekeeping exception. While the court did not directly reference congressional debates leading to the Amendment's passage in *McGarry*, it cited aspects of Supreme Court precedent that upheld Congress's intent to go beyond abolishing chattel slavery and proactively "maintain a system of completely free and voluntary labor throughout the United States."[262] All of the other circuits engaged in no or minimal analysis of the Thirteenth Amendment's purpose.[263] Legislative history and congressional intent are critical to interpreting the Thirteenth Amendment,[264] and courts that do not hold the housekeeping exception unconstitutional should follow the Second Circuit's more accurate reflection of the Amendment's purpose based upon its comprehensive constitutional analysis using binding Supreme Court precedent.

For example, the Second Circuit is the only circuit court to cite *Pollock* or *Hodges*.[265] In *Pollock*, the Court expanded the understood intention behind the Thirteenth Amendment beyond "cover[ing] those forms of compulsory labor akin to African slav-

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261. *See* discussion *supra* Part II.C.3.

262. *See* McGarry v. Pallito, 687 F.3d 505, 510–11 (2d Cir. 2012) (first citing The Civil Rights Cases, 109 U.S. 3, 20 (1883); then citing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873); and then quoting Pollock v. Williams, 322 U.S. 4, 17 (1944)).

263. *See* Bijeol v. Nelson, 579 F.2d 423, 424–25 (7th Cir. 1978) (citing no Thirteenth Amendment legislative history or caselaw); Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) (citing no Thirteenth Amendment legislative history or caselaw outside *Bijeol*); Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993) (citing no Thirteenth Amendment legislative history or caselaw outside its own circuit and *Bijeol*); Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999) (citing no Thirteenth Amendment legislative history or caselaw outside *Hause* and *Bijeol*); Channer v. Hall, 112 F.3d 214, 218–19 (5th Cir. 1997) (citing United States v. Kozminski, 487 U.S. 931, 943 (1988)).

264. *See The Civil Rights Cases*, 109 U.S. at 26 (Harlan J., dissenting) (noting that giving "full effect . . . to the intent with which [constitutional provisions] were adopted" was a traditional judicial approach to constitutional interpretation).

265. *See McGarry*, 687 F.3d at 510–11, 513 (first citing *Pollock*, 322 U.S. at 17–18; and then citing Hodges v. United States, 203 U.S. 1, 16 (1906), *overruled in part on other grounds by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)).

ery" to "maintain a system of completely free and voluntary labor."[266] *Hodges* is significant in that it defines "slavery and involuntary servitude" in the Amendment as, in part, "a condition of enforced compulsory service of one to another."[267] The Second Circuit used this broadened view of the Thirteenth Amendment's application and definition of involuntary servitude to contour the housekeeping exception in both *Jobson* and *McGarry*, finding that the compulsory labor must serve some benefit to the detainee.[268] If there is no benefit to the detainee and the work instead serves a benefit to the detention center, the labor does not serve the laborer but instead serves another; under binding precedent in *Hodges*, such coerced service to another violates the Thirteenth Amendment.[269]

The other circuits did not cite *Pollock* or *Hodges*, and so did not grapple with the Supreme Court's broadened application of the Thirteenth Amendment or the question of whether the detainee benefited from the forced labor. Instead, they largely cited *Bijeol* as their primary, and often only, support for their assertions that housekeeping tasks are not inherently punitive or unconstitutional without a critical eye on the Seventh Circuit's legal analysis, or lack thereof.[270] It is possible that these circuits did recognize the Supreme Court's requirement that the laborer benefit from their own work, but considered this requirement part of the Amendment that housekeeping tasks were exempted

266. Butler v. Perry, 240 U.S. 328, 332 (1916); *Pollock*, 322 U.S. at 17.

267. *Hodges*, 203 U.S. at 16.

268. *See* Jobson v. Henne, 355 F.2d 129, 131–32 (2d Cir. 1966) (stating that labor performed without compensation is allowed "if the chores are reasonably related to a therapeutic program, or . . . chores of a normal housekeeping type and kind"); *McGarry*, 687 F.3d at 513 (discussing *Jobson* and the assumption that the work was therapeutic or related to housekeeping (citing *Jobson*, 355 F.2d at 129)); *see also* discussion *supra* Parts I.B, II.C.3 (discussing the historical development of the housekeeping exception and the Second Circuit's housekeeping exception caselaw).

269. *Hodges*, 203 U.S. at 16 (defining slavery and involuntary servitude as "enforced compulsory service of one to another").

270. *See* Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999) (citing Bijeol v. Nelson, 579 F.2d 423 (7th Cir. 1978)); Hause v. Vaught, 993 F.2d 1079, 1085 (4th Cir. 1993) (quoting *Bijeol*, 579 F.2d at 424); Martinez v. Turner, 977 F.2d 421, 423 (8th Cir. 1992) (citing *Bijeol*, 579 F.2d at 425). While the Fifth Circuit did not cite *Bijeol*, it adopted the ruling from *Jobson* without applying the Second Circuit's analysis, effectively adopting the equivalent of the Seventh Circuit's housekeeping exception test. *See* Channer v. Hall, 112 F.3d 214, 218–19 (5th Cir. 1997) (citing *Jobson*, 355 F.2d at 131–32); *see also supra* Part II.C.1.

from. It is also possible the other courts assumed that as part of being housekeeping in nature, the compulsory work benefited everyone who lived in the proverbial "house" of the detention center including the detainee being forced to work. Regardless, the circuit courts failed to explain why they sidestepped binding Supreme Court precedent. This is an analytical failing, especially where the ignored precedent is so aligned with congressional intent that the laborer benefit directly from their own work.[271]

The Second Circuit's application of the housekeeping exception differs from that of other circuits but nonetheless complies with the DOJ regulation that pretrial detainees not be forced to work unless the work assignments are housekeeping tasks in their own cell or communal living space.[272] The court did not comment directly on whether the laundry room in which McGarry was compelled to work was a commonly shared space, but it is a reasonable assumption that a separate room for prison laundry work was likely only occupied by individuals doing the laundry.[273] It is therefore reasonable that the court may not have considered the laundry room a "community living area."[274] Even if the court assumed that the laundry room was a communal space and a compulsory housekeeping task therein would satisfy the text of the regulation, the labor may still violate the Thirteenth Amendment.[275] Since the court found the work both unbeneficial to McGarry and hard labor, the laundry service failed the court's housekeeping exception test and violated the Thirteenth Amendment regardless of whether the laundry room was a communal area.[276]

The Second Circuit laid a workable foundation for other circuit courts and the Supreme Court to apply the housekeeping

271. *See* discussion *supra* Part I.A.1 (detailing statements from supporters and proponents of the Amendment before passage).

272. *See* 28 C.F.R. § 545.23(b) (2023); *McGarry*, 687 F.3d at 511 n.5 (citing § 545.23(b) as a legal basis for its assertion that pretrial detainees are protected by the Thirteenth Amendment).

273. *See McGarry*, 687 F.3d at 509 (describing McGarry's work conditions in the laundry room of the correctional facility).

274. 28 C.F.R. § 545.23(b) (2023).

275. *See* U.S. CONST. art. VI, cl. 2. (establishing the supremacy of the Constitution above all federal and state statutes or regulations).

276. *See McGarry*, 687 F.3d at 514 (holding that requiring hard labor of pretrial detainees violates the Thirteenth Amendment).

exception to the Thirteenth Amendment in the current legislative and regulatory landscape. While the housekeeping exception violates the text of the Thirteenth Amendment, widespread circuit precedent and the DOJ regulation have solidified the exception such that courts may shy away from fully abolishing the exception. Given this current reality, the Second Circuit provides the best example for other courts to apply the housekeeping exception while staying most true to the Thirteenth Amendment's text and legislative history. While courts may hesitate to hold the exception unconstitutional, another solution lies with state and federal legislatures.

B. STATE AND FEDERAL LEGISLATURES SHOULD PROHIBIT THE HOUSEKEEPING EXCEPTION IN PRETRIAL DETENTION WITHIN THEIR JURISDICTIONS

While the Second Circuit approach currently presents the best way for courts to apply the housekeeping exception in pretrial detention settings in the immediate future, state and federal legislatures can and should alter the legal landscape to limit the exception as much as possible. On the federal level, Congress can pass a bill vetoing the agency regulation and eliminating the housekeeping exception.[277] While states cannot alter the federal regulation's supremacy in federal facilities within their borders,[278] state legislatures can pass legislation preventing compulsory pretrial housekeeping labor in state facilities.

Some state legislatures have already begun taking similar steps to uphold the promise of the Thirteenth Amendment. Many state constitutions have a clause modeled after the Thirteenth Amendment, including the punishment exception.[279] In 2018,

277. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 945–46, 952–55, 955 n.19 (1983) (finding that one house legislatively vetoing a federal agency regulation was unconstitutional, but bicameral federal statutes passed in Congress and presented to the president could constitutionally override the regulation).

278. *See* 28 C.F.R. § 545.23(b) (2023); *see* discussion *supra* Part II.B (outlining the Supreme Court's caselaw on the housekeeping exemption).

279. *See* McCullough, *supra* note 15 (stating that twenty-one states, Washington, D.C., and Puerto Rico still have language regarding slavery and involuntary servitude in their constitutions or laws).

voters in Colorado passed a ballot initiative removing the punishment exception from the state constitution.[280] Since then, Utah, Vermont, Nebraska, Oregon, Tennessee, and Alabama have passed similar amendments to their constitutions, outlawing forced prison labor.[281] Organizers in other states are currently pushing for similar measures on ballots for the 2024 election.[282] While these states face enforcement issues fueled by over 150 years of entrenched compulsory prison work programs and attitudes towards prison labor,[283] this movement shows a promising wave of popular support for the idea that no one should be excepted from the Thirteenth Amendment's prohibition of slavery and involuntary servitude.[284]

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280. *See* Clark, *supra* note 257 (reporting on the 2018 ballot measure and resulting effects, including prisoners still being punished for refusing work assignments); *Colorado Amendment A, Removal of Exception to Slavery Prohibition for Criminals Amendment (2018)*, BALLOTPEDIA [hereinafter *Colorado Amendment A*], https://ballotpedia.org/Colorado_Amendment_A,_Removal_of_Exception_to_Slavery_Prohibition_for_Criminals_Amendment_(2018) [https://perma.cc/B3R8-L66H] (reporting 66.21% of Colorado voters voted to pass the amendment).

281. *About*, ABOLISH SLAVERY NAT'L NETWORK, https://abolishslavery.us/about [https://perma.cc/5W4N-CFU5] (detailing the successful efforts in six states to abolish slavery in their state constitutions since 2020).

282. *See id.* (stating that California and Nevada have introduced slavery abolition as a ballot measure in 2024).

283. *See* Anderson, *supra* note 257 (discussing the Colorado Department of Corrections writing up over 14,000 prisoners for failing to work since the amendment to the Colorado Constitution was enacted and Colorado prisoners' ongoing lawsuit to enforce the amendment); The Indicator from Planet Money, *The Uncounted Workforce*, NPR (June 29, 2020), https://www.npr.org/transcripts/884989263 [https://perma.cc/7TC6-EVC5] (discussing prison labor's role in the U.S. economy since the late 1800s, describing prison labor today as a "multi-billion-dollar industry with incarcerated people doing everything from building office furniture and making miliary equipment to staffing call centers and doing 3D modeling"); Sarah Shemkus, *Beyond Cheap Labor: Can Prison Work Programs Benefit Inmates?*, GUARDIAN (Dec. 9, 2015), https://www.theguardian.com/sustainable-business/2015/dec/09/prison-work-program-ohsa-whole-foods-inmate-labor-incarceration [https://perma.cc/837Z-G486] (noting advocates for prison labor programs argue work programs teach inmates both technical skills and soft skills helpful for jobs post-release, stating opponents believe "American society . . . is too ideologically committed to using prisoners as a source of low-cost or free labor").

284. *See* Anderson, *supra* note 257 (noting anti-punishment clause organizers in New York are learning from Colorado organizers in their pursuit for a state statute outlawing involuntary servitude).

This popular support logically extends to narrowing the housekeeping exception to the Thirteenth Amendment. Removing the punishment exception may incidentally decrease detention facilities' reliance on compulsory labor to operate; if jails and prisons can no longer legally compel convicted prisoners to work, their work programs may shift to accommodate in ways that are likely to impact pretrial detainees as well.[285] Rather than forcing convicted inmates to perform jobs, the facility may either pay the inmates to voluntarily work or hire from the regular population. Since this will not occur in some detention facilities, particularly those that house more pretrial detainees than convicted individuals, state legislatures will need to take further action to narrow the housekeeping exception. Given the popular support for eliminating the punishment exception,[286] state and federal legislatures are likely to find strong support for narrowing and eliminating the housekeeping exception as well.

State legislatures can abolish the housekeeping exception in state facilities by enacting legislation explicitly stating that pretrial detainees cannot be required to perform labor, including housekeeping chores. While no state has legislatively forbidden the housekeeping exception, state departments of corrections have defined the allowable compulsory housekeeping chores more narrowly than those in the DOJ regulation.[287] The Minne-

285. *See id.* (noting inmates perform a significant amount of prison maintenance and the resulting fear that if that cheap or free labor were to end, "the entire institution would possibly need to shut down").

286. *See Colorado Amendment A*, *supra* note 280 (reporting two-thirds of voters in Colorado voted to remove the punishment clause from the Colorado Constitution); *Utah Constitutional Amendment C, Remove Slavery as Punishment for a Crime from Constitution Amendment (2020)*, BALLOTPEDIA, https://ballotpedia.org/Utah_Constitutional_Amendment_C,_Remove_Slavery_as_Punishment_for_a_Crime_from_Constitution_Amendment_(2020) [https://perma.cc/N2KA-W8BB] (reporting 80.48% of voters in Utah voted to remove the punishment clause from the Utah Constitution); *Nebraska Amendment 1, Remove Slavery as Punishment for Crime from Constitution Amendment (2020)*, BALLOTPEDIA, https://ballotpedia.org/Nebraska_Amendment_1,_Remove_Slavery_as_Punishment_for_Crime_from_Constitution_Amendment_(2020) [https://perma.cc/G2LK-5UB3] (reporting 68.23% of voters in Nebraska voted to remove the punishment clause from the Nebraska Constitution).

287. *See, e.g.*, Minn. Dep't of Corr., Pol'y, No. 303.025 (Nov. 19, 2019) (detailing the list of required cleaning tasks for offenders/residents); 28 C.F.R.

sota DOC, for example, has a policy requiring inmates and detainees to clean their rooms daily, including making their beds, folding their clothes and placing them in any available drawer or container, and throwing away garbage.[288] State legislatures hesitant to abolish the housekeeping exception should use similar language to define housekeeping chores such that they are limited to a specified list of tasks that are strongly related to the detainee's own personal hygienic needs.

Furthermore, these exception-narrowing statutes should stipulate that the housekeeping chores must be limited to a certain duration. Doing so would fall in line with the Second, Third, and Fourth Circuits' housekeeping exception analyses, which consider the onerousness of the labor required, including the length of time it takes to complete the assigned tasks.[289] These statutes should also define communal spaces such that the area pretrial detainees may be compelled to clean are limited; for example, in *Bijeol*, the Seventh Circuit mentioned Bijeol was required to clean up cigarette butts directly outside his room.[290] Legislatures should narrowly limit "community living area" to generally accessible rooms immediately outside the detainee's room or cell.[291] This would prevent courts from expanding the housekeeping exception to laundry, food service, and other general facility operations.

In addition to narrowing the housekeeping exception, Congress has the power to pass a bill overruling the DOJ regulation and eliminating the exception entirely.[292] This is a longer-term strategy; with competing national priorities, it will likely be difficult to amass enough voter and congressional support for a rel-

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§ 545.23(b) (2023) (allowing federal correctional facilities to force pretrial detainees to generally complete "housekeeping tasks in the inmate's own cell and in the community living area").

288. *See* Minn. Dep't of Corr., Pol'y, No. 303.025 (Nov. 19, 2019) (detailing the list of required cleaning tasks for offenders/residents).

289. *See supra* Parts II.C.2–C.3 (discussing case law from the Second, Third, and Fourth Circuit's that placed limits on the tasks that fall under the housekeeping exemption, including tasks that were too onerous).

290. Bijeol v. Nelson, 579 F.2d 423, 424 (7th Cir. 1978).

291. 28 C.F.R. § 545.23(b) (2023) (leaving the term "community living area" undefined).

292. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 954–55, 955 n.19 (1983) (finding bicameral federal statutes passed in Congress and presented to the president could constitutionally override the regulation).

atively unknown and little-researched topic like the housekeeping exception. This is likely especially true for a bill that directly conflicts with an established federal regulation. While federal legislation ending the housekeeping exception may seem unrealistic today, organizers and their political allies can set the foundation for future national change by connecting rights of pretrial detainees to rights of convicted prisoners. As more states follow Colorado's example and end forced prison labor within their borders, those state organizers can work with federal organizers to transition the momentum to the federal level.[293]

There are two other pathways to abolishing the housekeeping exception that, while effective, are less realistic: DOJ could remove the housekeeping exception from its regulation, and Congress and states could amend the Constitution to remove the punishment exception to the Thirteenth Amendment. While a change to the DOJ regulation would require significantly less effort,[294] there is no evidence that DOJ has the political will or motivation to remove the housekeeping exception. Furthermore, doing so is not as permanent a change as passing state and federal statutes; the subsequent DOJ leadership could just as easily reinstate the housekeeping exception. Additionally, enacting a constitutional amendment is extremely difficult. It requires either support from two-thirds of both Houses of Congress or a constitutional convention requested by two-thirds of the states, and ratification by three-fourths of state legislatures or three-fourths of state conventions.[295]

Congress can end forced labor in pretrial detention by passing a bill explicitly stating that pretrial detainees are entitled to the full protection of the Thirteenth Amendment and shall not be compelled to work in any capacity, including performing housekeeping chores.[296] This legislation could, for example,

293. *See* ABOLISH SLAVERY NAT'L NETWORK, *supra* note 281 (stating their goals of altering both state and federal constitutions to abolish the punishment exception to the Thirteenth Amendment).

294. *See Learn About the Regulatory Process*, REGULATIONS.GOV, https://www.regulations.gov/learn [https://perma.cc/HRX9-6V6C] (explaining the note-and-comment process for agency rule-making).

295. *See The Constitution*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution [https://perma.cc/SAS5-Y3LA] (describing the process by which the Constitution can be amended).

296. Congress has authority under the Thirteenth Amendment to pass laws to enforce the Amendment's prohibition of slavery and involuntary servitude.

amend an existing federal statute that prohibits forced labor to explicitly include housekeeping work in pretrial detention.[297] Removing the unwritten housekeeping exception completely, either by a federal court holding it unconstitutional or by passing targeted legislation, is the only step that can fully and finally bring the exception into full alignment with the Thirteenth Amendment's text and purpose.

CONCLUSION

The housekeeping exception to the Thirteenth Amendment plays a large role in mass incarceration of people of color; pretrial detainees are disproportionately Black and constitute a large part of the growth in detained populations.[298] These detainees, who have not been convicted of any crime and are supposedly presumed innocent, have their liberty stripped away from them as they are forced to labor for a detention facility that holds them captive. The racial makeup of pretrial detainees underscores the systemic racism in pretrial detention and undermines the Thirteenth Amendment's purpose to end involuntary servitude and subjugation of any racial group.

Courts should limit the racist housekeeping exception today by rejecting the Seventh Circuit's unsubstantiated assertions in *Bijeol* and holding the exception unconstitutional or, alternatively, following the Second Circuit's three-part test in *McGarry*. State legislatures should narrow the exception in the near future, and Congress can follow by eliminating the exception completely. Removing the housekeeping exception in pretrial detention will bring the United States closer to fulfilling the Thirteenth Amendment's promise of freedom to choose and benefit from one's own labor.

See U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

297. *See* 18 U.S.C. § 1589 (criminalizing knowingly providing, obtaining, or benefiting from another's labor where the labor was coerced by physical force, serious harm, threat of serious harm, and real or threatened legal abuse).

298. *See* Sawyer, *supra* note 37 (noting in 2002, when the Bureau of Justice Statistics last reported pretrial population demographics, Black people made up 43% of the pretrial detainee population while making up less than 13% of the total U.S. population); Aiken, *supra* note 33 (noting the significant increase in jail populations in the last fifteen years is almost entirely due to a growth in the number of people held pretrial); Digard & Swavola, *supra* note 30, at 3–4 (stating pretrial detention of three or more days increased the defendant's likelihood of conviction by twenty-four percent).

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