

# Is Modern Day Slavery a Private Act or a Public System of Oppression?

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## ABSTRACT

The government focuses on trafficking as the definitive form of modern day slavery. In doing so, it portrays modern day slavery as a private act with identifiable wrongdoers and views the Thirteenth Amendment through the lens of forced labor. Workers' advocates, on the other hand, portray modern day slavery as a systemic form of oppression, supported by governmental policies on immigration and occupational exclusions. These groups focus on the Thirteenth Amendment through the lens of class. A historical analysis suggests that the proper approach views the Thirteenth Amendment through the lens of both class and labor.

## CONTENTS

INTRODUCTION .....	666
I. TRAFFICKED WORKERS, IMMIGRANT WORKERS, AND THE RHETORIC OF SLAVERY .....	668
<i>A. A Survey of the Rhetoric of Slavery in the Twenty-First Century.</i>	668
<i>B. Trafficked Workers and the Rhetoric of the U.S. Government</i> .....	669
1. The U.S. Department of Justice .....	670
2. The U.S. Department of Health and Human Services .....	672
3. The U.S. Department of Homeland Security .....	673
<i>C. Workers' Advocacy Groups: Immigrants and Immigrant Workers</i> .....	674
1. Domestic Workers .....	675
2. Agricultural Workers .....	676

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3. Guest Workers .....	678
4. State Immigration Laws .....	679
II. MODERN DAY SLAVERY: PRIVATE ACT OR PUBLIC SYSTEM OF OPPRESSION? .....	680
<i>A. The Government's Approach to Modern Day Slavery: Trafficking     and The Thirteenth Amendment Through the Lens of Labor</i> .....	681
1. Focus on Private Acts by Individuals or Groups of Individuals	681
2. Focus on Forced Labor .....	682
<i>B. Immigrant Workers: The Thirteenth Amendment Through the Lens     of Class</i> .....	683
1. The Government's Immigration Policies and Modern Day Slavery .....	683
2. The Government's Labor Policies and Modern Day Slavery ...	685
III. LOOKING BACKWARD AND LOOKING FORWARD .....	687
<i>A. Historical Perspectives</i> .....	687
1. Slavery as a Private Act Supported by the State .....	687
2. The Thirteenth Amendment Through the Lens of Class and Labor .....	692
<i>B. Implications for Advocacy</i> .....	692

#### INTRODUCTION

About ten years ago, Professor James Gray Pope said: “Imagine the gun rights movement without the Second Amendment, and you get some idea how strange it is for the labor movement to be limping along without the Thirteenth.”<sup>1</sup> Since then, both the United States government and many labor groups have claimed the rhetoric of slavery, if not the Amendment itself, to describe oppressive conditions experienced by workers and to advocate for their protection. Examining how these groups have used the rhetoric of slavery provides an important window into how contemporary society views the Thirteenth Amendment as a tool for understanding and addressing workers’ rights. It also provides an opportunity to see how various groups view the Thirteenth Amendment through the lens of class and labor.

This Article examines how the U.S. government and workers’ advocates have used the rhetoric of slavery to advocate on behalf of traf-

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1. James Gray Pope, Peter Kellman & Ed Bruno, *Free Labor Today*, NEW LAB. F., Spring 2007, at 8, 9.

ficked and immigrant workers.<sup>2</sup> The government uses the rhetoric “modern day slavery” in its attempts to combat the problem of trafficked workers. The government focuses on trafficking as the definitive form of modern day slavery. The government also portrays modern day slavery as a private act with identifiable wrongdoers who can and should be punished. In doing so, the government focuses on the Thirteenth Amendment through the lens of labor.

Advocacy groups, on the other hand, use the rhetoric of slavery in addressing employment issues for immigrant workers, including guest workers. These advocates portray modern day slavery as a systemic form of oppression, supported by governmental labor and immigration policies. They focus on the Thirteenth Amendment through the lens of class.

Historically, slavery was a private system of oppression that was supported by public laws. The Thirteenth Amendment dismantled and prohibited both the private acts and the public support structure; yet, following emancipation, the courts turned the focus to dismantling egregious acts of private-labor oppression while upholding the state laws that supported class-based oppression. Looking forward, this means that while the Thirteenth Amendment can be used to challenge government policies as well as individual acts, advocates need to be mindful of this history and its implications in crafting strategy to best protect workers.

Part I of this Article presents a representative sample of how the U.S. government and workers’ advocates are using the rhetoric of slavery. The findings in this Section are based upon a systematic survey of the use of the rhetoric of slavery by nonlegal groups. Part II analyzes the use of the rhetoric of slavery by the government and the advocacy groups to emphasize how their views define modern day slavery in vastly different ways. Part III reveals how, historically, chattel slavery was a system of private oppression supported by a public system, and then looks forward to draw suggestions for advocates to use in the future.

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2. In *NCAA Athletes, Unpaid Interns and the S-Word: Exploring the Rhetorical Impact of the Language of Slavery*, 2015 MICH. ST. L. REV 1657 (2015), I analyzed the use of the language of slavery to advocate for unpaid interns and NCAA athletes. I concluded that, although the use of the language was contested, it effectively framed these individuals as workers and employees deserving of some protection under the labor and employment laws, even though they are not paid for their labor. The use of the slavery rhetoric was powerful because it showed that unpaid workers are still workers and that the lack of pay should not preclude their protection.

I. TRAFFICKED WORKERS, IMMIGRANT WORKERS, AND THE RHETORIC  
OF SLAVERY

*A. A Survey of the Rhetoric of Slavery in the Twenty-First Century*

In order to see how the rhetoric of slavery is used in the public sphere, the author undertook a survey of nonlegal, nonacademic online resources, such as press releases, newspaper articles, and blogs, to search for uses of the language of slavery.<sup>3</sup> This search focused on literal language (“Thirteenth Amendment,” “slave,” and “slavery”); connected language (“trafficking”); and symbolic language<sup>4</sup> (“plantation,” “Jim Crow”). Due to the author’s focus on popular uses of these terms, the survey did not include cases, law review articles, or academic journals. Its purpose was to find a representative sample of the use of the language of slavery, rather than to compile a comprehensive list of every use of the language. Thus, the author stopped collecting references for a topic once approximately 25 references were found.

The survey resulted in approximately 100 references. It found four recurring phrases related to slavery—“slave/slavery,” “modern day slavery,” “plantation,” and “Jim Crow” or “Juan Crow.” These phrases were associated with six different employment categories: trafficking; immigrant or guest workers; prison workers; NCAA college and professional athletes; unpaid interns; and other (coal miners, adjunct professors, etc.). About half of the references were to “slave or slavery,” a quarter to “modern day slavery,” ten percent to “Jim Crow” or “Juan Crow,” and eight percent to “plantation.” Few references were found directly to “Thirteenth Amendment.”

None of these phrases were used to describe workers in general. Instead, each instance was tied to a particular type of employment. Thirty-seven percent of the references were to trafficked workers. About one quarter of the references were to immigrants, immigrant workers, or guest workers. Sixteen percent of the citations referred to prison labor, thirteen percent referenced athletes, and about ten percent covered unpaid interns.

Certain connections between the phrases used and the types of employment categories became apparent. For instance, when mapping the language terms onto the employment categories, the terms “slave,”

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3. The search was conducted in June and July 2014, and sought resources published online between 2004 and 2014.

4. Symbolic language includes those words or phrases that carry a strong symbolic meaning such that a majority of Americans would associate them with slavery. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987).

“slavery,” and “modern day slavery” were used to describe all the employment categories, while the term “plantation” only occurred in the categories of athletes; prison labor; and immigrants, immigrant workers, and guest workers. The term “Jim Crow” was used exclusively to describe prison labor, and the term “Juan Crow” was used only for immigrant issues.

When mapping employment categories upon the phrases related to slavery, the categories prison labor, immigrants, immigrant workers, and guest workers were described by all the phrases (slave/slavery, modern day slavery, plantation, and Jim Crow or Juan Crow). Trafficking was described by the terms slave, slavery, and modern day slavery, and unpaid interns were only described by the terms slave and slavery. Athletes were described by the terms slave, slavery, modern day slavery, and plantation.

An examination of slavery-related references to two specific groups of workers—trafficked workers and immigrant workers—revealed several notable results. First, although in reality there is significant overlap between these two groups because most “trafficked workers” are from another country, it was fairly easy to separate these two groups for analytical purposes, because the speaker of each rhetorical statement chose to focus upon one aspect—the workers were either primarily described as victims of trafficking or as immigrant workers. Second, the most active purveyor of the language of slavery with respect to trafficked workers was the United States government. Finally, advocates for immigrant workers covered a wide variety of workers, including domestic workers, agricultural workers, and guest workers. The U.S. government and the workers’ advocates also used the rhetoric of slavery in very different ways. The following sections provide a representative sample of how the rhetoric of slavery was used to advocate for trafficked workers by the U.S. government and for immigrant workers by advocacy groups.

### *B. Trafficked Workers and the Rhetoric of the U.S. Government*

When examining the use of slavery rhetoric to discuss trafficked workers, the U.S. government proved to be the most common author. One of the earliest uses of the rhetoric occurred in a 2006 press release that discussed the million-dollar settlement of a trafficking case. The Equal Employment Opportunity Commission (EEOC) stated,

At least 17 of the workers were told if they tried to leave the location where they were being forcibly held, the police and immigration officials would be called to arrest them. EEOC also contends that all the workers were made to pay exorbitant “fees” to the re-

cruiting company which kept them in involuntary servitude. Ultimately, some of the workers escaped the slave-like conditions.<sup>5</sup>

Since then, the federal government has become a leader in the use of the rhetoric of slavery to fight trafficking. It uses rhetoric to address trafficked workers at both the international and domestic levels.

The United States Department of State (State Department) focuses on the global component of trafficking. When the State Department issued its 2012 Trafficking in Persons Report, Secretary of State Hillary Clinton said, “[The stories of human trafficking victims] remind us what kind of inhumane treatment we are capable of as human beings. They are living, breathing reminders that the war against slavery remains unfinished.”<sup>6</sup> President Obama used similar rhetoric when he said, “I’m talking about the injustice, the outrage, of human trafficking, which must be called by its true name - modern slavery.”<sup>7</sup>

At the domestic level, there are three Agencies that use the rhetoric of slavery to discuss their efforts to combat human trafficking: the Department of Justice; the Department of Health and Human Services; and the Department of Homeland Security.

### 1. The U.S. Department of Justice

U.S. Attorney General Eric Holder, the head of the U.S. Department of Justice, equated trafficking with modern day slavery when he stated, “This modern-day slavery is an affront to human dignity, and each and every case we prosecute should send a powerful signal that human trafficking will not be tolerated in the United States.”<sup>8</sup>

The Federal Bureau of Investigation (FBI) is the investigative and enforcement authority for the Department of Justice, and it too uses the rhetoric of slavery to discuss trafficking. On their website, the FBI states: “Here in this country, people are being bought, sold, and smuggled like modern-day slaves, often beaten, starved, and forced to work as prostitutes or to take jobs as migrant, domestic, restaurant, or factory workers

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5. Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC Resolves Slavery and Human Trafficking Suit Against Trans Bay Steel for an Estimated \$1 Million (Dec. 8, 2006), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-8-06.cfm>.

6. Maureen Q. McGough, *Ending Modern-Day Slavery: Using Research to Inform U.S. Anti-Human Trafficking Efforts*, NAT’L INST. JUST. J., Feb. 2013, at 26, 27, available at <https://www.ncjrs.gov/pdffiles1/nij/240701.pdf>.

7. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2013), available at <http://www.state.gov/documents/organization/210737.pdf>.

8. *Department of Justice Announces Launch of Human Trafficking Enhanced Enforcement Initiative*, U.S. DEP’T JUST. (Feb. 1, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-140.html>.

with little or no pay.”<sup>9</sup> The descriptions of trafficking offered by the FBI focus on the role of force in extracting labor. It reports:

Human trafficking—nothing less than modern-day slavery—often involves the most vulnerable populations and takes the form of forced prostitution, forced labor, and domestic servitude.

. . . .

There was less subtle coercion as well. “These girls and women were physically beaten and were held in apartments so they couldn’t escape,” said Special Agent Tricia Whitehill in [the] Los Angeles Field Office. “Members of the Vasquez-Valenzuela family would sleep by the doors with knives,” Whitehill added. “So not only were they physically held captive, but they were also under constant threat.”<sup>10</sup>

Similarly, an article in the Houston Chronicle reporting on trafficking in its city quoted the FBI who said, “‘It is absolutely modern day slavery,’ said Shauna Dunlap, spokeswoman for the FBI’s Houston Division. ‘These people are being forced into labor or prostitution against their will.’”<sup>11</sup>

Finally, the National Institute of Justice, the research arm of the Department of Justice, makes the connection between trafficking and slavery as follows:

Most countries banned “chattel slavery”—one person owning another person as property—in the 1800s. Despite this, slavery continues in the modern day. Although owning slaves used to be a major investment formalized through legal documents, today’s slaves are held through debt bondage, indentured servitude or other forms of control.

For more than a decade, the phrase “human trafficking” has been used to describe the act of holding a person in forced service—the very definition of slavery. The term can cause confusion, however, because it implies that traffickers always transport victims across borders; in actuality, victims can also be held in their own homes. Experts maintain that when considering the issue of human trafficking, it is important to do so in an accurate context—

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9. *Human Trafficking*, FED. BUREAU INVESTIGATION, [http://www.fbi.gov/about-us/investigate/civilrights/human\\_trafficking/human\\_trafficking](http://www.fbi.gov/about-us/investigate/civilrights/human_trafficking/human_trafficking) (last visited Mar. 2, 2016).

10. *Human Trafficking: Putting a Stop to Modern Day Slavery*, FED. BUREAU INVESTIGATION (Apr. 16, 2010), [http://www.fbi.gov/news/stories/2010/april/trafficking\\_041610](http://www.fbi.gov/news/stories/2010/april/trafficking_041610) [hereinafter *FBI, Human Trafficking*].

11. Dane Schiller, *Modern Day Slavery, Horror Lurk in Houston’s Shadows*, HOUS. CHRON. (June 19, 2014, 1:07 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Modern-day-slavery-horror-lurk-in-Houston-s-5523402.php>.

acknowledging that trafficking is modern slavery and that trafficked persons are slaves.<sup>12</sup>

## 2. The U.S. Department of Health and Human Services

The mandate for the U.S. Department of Health and Human Services (HHS) includes protecting public health and safety.<sup>13</sup> Within its Administration for Children and Families, HHS has an office on Trafficking in Persons, which is designed to combat human trafficking, educate the public, and protect and help victims.<sup>14</sup> Much like the Department of Justice, HHS also equates trafficking to modern day slavery. The HHS website contains this comprehensive definition of human trafficking:

Human trafficking is a form of modern-day slavery. Victims of human trafficking are subjected to force, fraud, or coercion for the purpose of commercial sex or forced labor. They are young children, teenagers, men and women. Trafficking in persons occurs throughout the world, including in the United States.

.....

Traffickers use various techniques to control their victims and keep them enslaved. Some traffickers hold their victims under lock and key. However, the more frequent practice is to use less obvious techniques including:

- Debt bondage – enormous financial obligations or undefined/increasing debt
- Isolation from the public – limiting contact with outsiders and making sure that any contact is monitored or superficial in nature
- Isolation from family members and members of their ethnic and religious community
- Confiscation of passports, visas and/or identification documents
- Use or threat of violence toward victims and/or family members
- The threat of shaming victims by exposing circumstances to family

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12. McGough, *supra* note 6.

13. *About HHS*, U.S. DEP'T HEALTH & HUM. SERVICES, <http://www.hhs.gov/about> (last visited Mar. 2, 2016).

14. *Human Trafficking*, ADMIN. FOR CHILD. & FAMS., <http://www.acf.hhs.gov/program-topics/human-trafficking-0> (last visited Mar. 2, 2016).



- Telling victims they will be imprisoned or deported for immigration violations if they contact authorities
- Control of the victims' money – e.g., holding their money for “safe-keeping”<sup>15</sup>

### 3. The U.S. Department of Homeland Security

The Department of Homeland Security (DHS) established its Blue Campaign to unite anti-human trafficking programs and provide resources for law enforcement and the public, to raise awareness, and to provide training.<sup>16</sup> The images provided by the Blue Campaign illustrate how DHS links slavery and trafficking.

Both images focus upon the types of coercion suffered by trafficked workers.<sup>17</sup> They portray the workers as being imprisoned and unable to escape. Both images portray people at work. The male worker has been robbed of his freedom and “forced to work in factories, farms, restaurants and small businesses.”<sup>18</sup> The woman works in domestic service. Although their immigrant status is not stated, it is implied by their ap-



15. *What Is Human Trafficking*, ADMIN. FOR CHILD. & FAMS. (Aug. 16, 2012), <http://www.acf.hhs.gov/programs/orr/resource/about-human-trafficking> [hereinafter *What Is Human Trafficking*].

16. See *Blue Campaign*, U.S. DEP'T HOMELAND SEC., <https://www.dhs.gov/blue-campaign> (last visited Mar. 2, 2016).

17. *Id.*

18. *Id.*

pearance and the wording used by DHS.

*C. Workers' Advocacy Groups: Immigrants and Immigrant Workers*

Groups representing immigrants and immigrant workers have also adopted the rhetoric of slavery to advocate on their behalf. In particular, advocates for four different groups of workers utilized this language most extensively: those supporting domestic workers; agricultural workers; guest workers; and those fighting against restrictive state immigration laws. In addition, a few other instances of rhetorical usage show how immigrant advocates perceive modern day slavery.

First, the only phrase found in the survey that refers to the Thirteenth Amendment deals with a variety of different immigrant workers. It reads:

The 250-year legacy of slavery continues to permeate throughout contemporary United States. However, these days, the images we see are likely to be those of immigrants from the global South.

Often described as “modern-day slavery,” human trafficking and exploitation are pervasive in domestic worker and farm worker industries. Trafficking in these industries is highly documented. According to a survey of domestic workers, the majority of live-in domestic workers work close to 60 hours per week, and almost 40 percent of domestic workers were not paid for their work or not paid on time. Meanwhile, almost 80 percent of farm workers are underpaid, and more than half of farm contractors violate the Migrant and Seasonal Agricultural Worker Protection Act, according to the National Employment Law Project.

. . . .

Employment laws that distinguish historically-slave industries from other forms of work should be eradicated once and for all. Almost 150 years after the end of the “peculiar institution,” the promise of the Thirteenth Amendment’s abolition of slavery and involuntary servitude requires more vigorous measures to protect all workers.<sup>19</sup>

A blog written by social scientists also used slavery rhetoric to describe immigrant labor in general:

Immigrant labor in the United States is not just any type of labor. Like slavery, the importation of foreign workers to fill the lowest sectors of the U.S. labor market allows many citizen workers to

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19. Ivy Suriyopas, *Slavery in the Home and Out in the Fields*, REWIRE (Jan. 13, 2011, 10:07 PM), <http://rhrealitycheck.org/article/2011/01/13/slavery-home-fields>.

move into the middle-class, where they enjoy cheap and abundant goods (especially food) made possible by the underpaid labor of others. This system of exploitation is legitimized by the systematic differentiation of immigrant and non-white workers that diminishes their claims to rights and resources in the United States.<sup>20</sup>

Finally, ABC News, in its reporting on workers at 7-Eleven franchises, described the system this way:

The owners of 7-Eleven franchises in New York and Virginia created a “modern day plantation system” in which undocumented workers were furnished with stolen identities and forced to work 100 hours a week for a fraction of their wages, according to a federal authorities [sic].

. . . .

“These defendants ruthlessly exploited their immigrant employees, stealing their wages and requiring them to live in unregulated boarding houses, in effect creating a modern day plantation system,” [Federal Prosecutor] Lynch said.<sup>21</sup>

### 1. Domestic Workers

In July 2011, arguing for the importance of a Domestic Worker’s Bill of Rights, the National Domestic Workers Alliance used the rhetoric of slavery to describe the situation of immigrant domestic workers:

In the fight over domestic worker rights, we can see issues of ethnicity, gender, and immigration intertwine.

Many domestic workers—nannies, housekeepers, and caregivers for the elderly—are women of color. Many of them are immigrants. However, these women are often not viewed as regular workers. Due to the nature of the work, these jobs are perceived more as the duty of the woman, a holdover from a time when women were bound to the privacy of their homes.

Domestic work has been historically linked to particular socio-economic groups, such as indentured servants, slaves, or immigrants. In our current era of globalization, the work has often be-

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20. Ruth Gomberg-Munoz, *Immigration Policy and Low-Wage Labor in a “Post-Racial” United States*, SOC. SCIENTISTS ON IMMIGRATION POL’Y (May 10, 2010), <http://stopdeportationsnow.blogspot.com/2010/05/immigration-policy-and-low-wage-labor.html>.

21. Aaron Katersky & Alyssa Newcomb, *7-Eleven Stores Operated ‘Modern Day Plantation System,’ Feds Claim*, ABC NEWS (June 17, 2013), <http://abcnews.go.com/US/eleven-stores-operated-modern-day-plantation-system-feds/story?id=19419739>.

come a form of modern-day slavery, using immigrants, particularly Caribbean and Latina women, to provide the labor.<sup>22</sup>

The Alliance also refers to these workers as trafficked:

Unfortunately, Shanti's case is not unique—this modern day slavery continues in our midst. Trafficked workers, particularly women domestic workers, are forced to toil for slave wages with extremely long hours, no days off, fraudulent and false promises, and coercion, including passport theft and threats of deportation. The lack of fair labor standards and regulations, society's low regard for women's work, and the isolation of these women workers in the privacy of employers' homes all contribute to the extreme exploitation of trafficked domestic workers.<sup>23</sup>

## 2. Agricultural Workers

The Coalition of Immokalee Workers (CIW) and the work they have done on behalf of agricultural workers provide a good example of how the rhetoric of slavery is being used to describe the conditions facing agricultural workers in Florida. The Florida Modern Day Slavery Museum booklet, created by the CIW, contains the following:

There is **real slavery** in the fields of Florida. This is not about lousy jobs, but violent control, vicious exploitation, and the potential for serious harm and even death. Even more heartbreaking is the fact that there has never been a day in the history of Florida agriculture without some amount of slavery tainting the food grown there. That food leaves the hands of slaves and ends up in the meals we eat with our families.

...

Modern-day slavery in Florida agriculture cannot be understood in a vacuum. It is not separate from the past, rather its roots extend deep in the state's history. While the phenomenon of forced labor has taken many forms over the past four centuries in Florida agriculture, the industry has never been entirely free of the scourge of slavery.

Though the extent of slavery in Florida agriculture has diminished over the centuries, one thing has remained constant: farmworkers have always been, and remain today, the state's poorest,

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22. Sarbelia Benedict, *Domestic Worker Protections Should Extend Beyond New York*, NAT'L DOMESTIC WORKERS ALLIANCE (July 12, 2011), <http://www.domesticworkers.org/news/2011/domestic-worker-protections-should-extend-beyond-new-york>.

23. Adhikaar, *Victory At Last: Judge Recommends Trafficked Domestic Worker Is Owed \$1.5 Million!*, NAT'L DOMESTIC WORKERS ALLIANCE (Feb. 24, 2012), <http://www.domesticworkers.org/news/2012/victory-last-judge-recommends-trafficked-domestic-worker-owed-15-million>.

least powerful workers. If we are to abolish slavery once and for all in Florida agriculture, we must pull it up from the roots by addressing farmworker poverty and powerlessness.

....

Today the Florida agricultural industry remains mired in a human rights crisis made possible by the continuing poverty and powerlessness of farmworkers. In 2008, during a fact-finding visit to Immokalee—a small town at the epicenter of Florida tomato production—Senator Bernie Sanders described the conditions he encountered with these words: “[For Florida farmworkers], the norm is a disaster, and the extreme is slavery.”

....

... Four hundred years of slavery in Florida, and 145 of those coming after the Civil War, are the result of the continued violation and debasement of workers’ human rights.<sup>24</sup>

A CIW press release from 2008 described the conditions that gave rise to federal prosecutions:

Vargas, along with her co-defendants, are connected to an Immokalee business operation allegedly designed to hold workers in involuntary servitude and peonage.

“Slavery, plain and simple,” said Chief Assistant U.S. Attorney Doug Molloy.

....

“Sadly, this is the worst of what happens when you have across-the-board degradation of labor and conditions that allow slavery to take root and flourish,” said Laura Germino of the Coalition of Immokalee Workers, which has helped prosecute six slavery cases that freed more than 1,000 workers in the past decade.<sup>25</sup>

In 2012, a Washington Post Op-Ed summarized the work that was done: “Since 1997, the Justice Department has prosecuted seven cases of slavery in the Florida agricultural industry—four involving tomato harvesters—freeing more than 1,000 men and women. The stories are a cata-

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24. COALITION OF IMMOKALEE WORKERS, FLORIDA MODERN-DAY SLAVERY MUSEUM: AN EXAMINATION OF THE HISTORY AND EVOLUTION OF SLAVERY IN FLORIDA’S FIELDS 2, 7, 18 (2011) [hereinafter CIW, FLORIDA MODERN-DAY SLAVERY MUSEUM], available at <http://ciw-online.org/museum/booklet0811.pdf>.

25. Pat Gillespie, *Sixth Immokalee Slavery Case Suspect Arrested[:] Group Accused of Keeping, Beating, Stealing from Immokalee Laborers*, COALITION OF IMMOKALEE WORKERS (Jan. 18, 2008), [http://ciw-online.org/blog/2008/01/slavery\\_plain\\_and\\_simple](http://ciw-online.org/blog/2008/01/slavery_plain_and_simple).

logue of horrors: abductions, pistol whippings, confinement at gunpoint, debt bondage and starvation wages.”<sup>26</sup>

### 3. Guest Workers

A “guest worker” is a person from a foreign country that has received a special visa to work in the United States for a specific employer for a limited period of time.<sup>27</sup> The Thai Community Development Center’s Slavery Eradication and Rights Initiative focuses on workers brought into the United States from Thailand under the guest worker program and through other forms of human trafficking.<sup>28</sup> The Center describes the guest worker problem as follows: “On the surface, it looks like the workers were legally contracted. But upon closer inspection, it’s slavery. Their passports were confiscated and threats were made if any of them dared to escape. The (US) guest worker program can be legalized slavery if it is not constantly monitored.”<sup>29</sup>

The Southern Poverty Law Center also works extensively with guest workers. This organization’s position with regard to slavery is as follows:

The Southern Poverty Law Center announced that five more lawsuits have been filed this week against Signal International LLC, accusing the shipbuilder and its network of recruiters and labor brokers of trafficking 500 Indian guest workers to the United States and forcing them to work under barbaric conditions.

. . . .

“The Indian workers who came to this country through Signal’s recruitment effort were skilled laborers seeking opportunity, but they were forced into modern-day indentured servitude,” said Daniel Werner, SPLC senior supervising attorney. “These cases highlight the urgent need for stronger foreign labor recruiter regulations

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26. Holly Burkhalter, *Fair Food Program Helps End the Use of Slavery in the Tomato Fields*, WASH. POST (Sept. 2, 2012), [http://www.washingtonpost.com/opinions/fair-food-program-helps-end-the-use-of-slavery-in-the-tomato-fields/2012/09/02/788f1a1a-f39c-11e1-892d-bc92fee603a7\\_story.html](http://www.washingtonpost.com/opinions/fair-food-program-helps-end-the-use-of-slavery-in-the-tomato-fields/2012/09/02/788f1a1a-f39c-11e1-892d-bc92fee603a7_story.html).

27. See *H-2B Temporary Non-Agricultural Workers*, DEP’T OF HOMELAND SEC., <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> (last visited Mar. 2, 2016).

28. *Slavery Eradication & Rights Initiative*, THAI COMMUNITY DEV. CENTER, <http://thaicdc.org/humanservices/slavery-eradication-rights-initiative/> (last visited Feb. 28, 2016) [hereinafter *Slavery Eradication & Rights Initiative*].

29. *Id.*

and better protections for workers[—]some of which are included in the U.S. Senate's comprehensive immigration reform bill."<sup>30</sup>

Both advocacy groups argue that the slavery or servitude resulted from the structure of the government's guest worker program.

#### 4. State Immigration Laws

As individual states have started to pass oppressive immigration laws, commentators have started to use the rhetoric of slavery, especially the Jim Crow era of Bull Connor and segregation, to describe the system. The Nation magazine summarized the situation like this:

They are growing up in a racial and political climate in which Latinos' subordinate status in Georgia and in the Deep South bears more than a passing resemblance to that of African-Americans who were living under Jim Crow. Call it Juan Crow: the matrix of laws, social customs, economic institutions and symbolic systems enabling the physical and psychic isolation needed to control and exploit undocumented immigrants.

In fact, the surge in Latino migration . . . is moving many of the institutions and actors responsible for enforcing Jim Crow to resurrect and reconfigure themselves in line with new demographics. Along with the almost daily arrests, raids and home invasions by federal, state and other authorities, newly resurgent civilian groups like the Ku Klux Klan, in addition to more than 144 new "nativist extremist" groups and 300 anti-immigrant organizations born in the past three years . . . are harassing immigrants as a way to grow their ranks.<sup>31</sup>

The Washington Examiner in an Op-Ed described the Alabama experience:

This law seeks to frighten undocumented immigrants into leaving the state or going deeper underground, where they will be vulnerable to exploitative employers, unscrupulous landlords and violent criminals. While today's bigots have found more sophisticated ways to intimidate minority groups, there's a short distance between

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30. *More Human Trafficking Lawsuits Filed Against Signal International*, S. POVERTY L. CENTER (Aug. 8, 2013), <http://www.splcenter.org/get-informed/news/more-human-trafficking-lawsuits-filed-against-signal-international> [hereinafter S. POVERTY L. CENTER].

31. Roberto Lovato, *Juan Crow in Georgia*, THE NATION, May 26, 2008, at 20, 21, available at <http://www.thenation.com/article/juan-crow-georgia>.

Bull Connor and today's slumlords, sweatshop owners and anti-immigrant demagogues.<sup>32</sup>

And Politic365 reported, "As Georgia continues down immigration enforcement road, it will continue to attract criticism for being harsh and specifically targeting immigrants, even those who are in the state legally. While Jim Crow may be a thing of the past, Juan Crow is alive and well in the peach state."<sup>33</sup>

The connection between Jim Crow and Juan Crow has also been made by those in the African American community, as reported by Immigration Impact:

In fact, many in the African American community have called Alabama's harsh anti-immigrant law a "Juan Crow Law," comparing it to our nation's Jim Crow laws [that] encouraged legalized racial segregation against African Americans. And it's not hard to see the connection with the racially suggestive phrasing in the law like "reasonable suspicion" and provisions that aim at limiting basic needs, like water, to undocumented immigrants.

Wade Henderson, President of the Leadership Conference on Civil and Human Rights, denounced Alabama's law even before the Governor Bentley signed it. Henderson said the law "is designed to do nothing more than terrorize the state's Latino community" and characterized it as "so oppressive that even Bull Connor would be impressed."<sup>34</sup>

## II. MODERN DAY SLAVERY: PRIVATE ACT OR PUBLIC SYSTEM OF OPPRESSION?

Part I of this Article presented a representative sample of how the U.S. government uses the rhetoric of slavery to address trafficking and how workers' advocates use the rhetoric to protect immigrant workers. This Part offers analytical observations about the differences between the two approaches.

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32. *Alabama's Anti-Immigrant Law Recalls Bull Connor, and MLK*, WASH. EXAMINER (Aug. 21, 2011), <http://washingtonexaminer.com/alabamas-anti-immigrant-law-recalls-bull-connor-and-mlk/article/40755>.

33. Adriana Maestas, *Immigration and Georgia's New Juan Crow*, POLITIC365 (Mar. 29, 2012, 4:30 PM), <http://politic365.com/2012/03/29/immigration-and-georgias-new-juan-crow>.

34. Geena Jackson, *Congressional Members to Join Civil Rights Groups in Fight Against Alabama's "Juan Crow" Law*, AM. IMMIGR. COUNCIL (Nov. 3, 2011), <http://immigrationimpact.com/2011/11/03/congressional-members-to-join-civil-rights-groups-in-fight-against-alabama-s-juan-crow-law>.



*A. The Government's Approach to Modern Day Slavery: Trafficking and The Thirteenth Amendment Through the Lens of Labor*

In early 2014, the U.S. government released a report that described its overall anti-trafficking program, which shed light on how the government views modern day slavery. The Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States, 2013–2017<sup>35</sup> described their program as a collaboration between the Departments of Justice, Health and Human Services, and Homeland Security. The report identified these three Departments as the main spokespersons for the federal government. Their use of the rhetoric of slavery highlights two key aspects of the government's perception of modern day slavery. First, the government perceives slavery as a private act—a crime that is being committed by an individual or a group of individuals. Second, it describes slavery as an act that involves force or control exerted by these private individuals over the victims of human trafficking in order to extract labor.

1. Focus on Private Acts by Individuals or Groups of Individuals

In the examples of the rhetoric of slavery found in the report, each of the governmental departments portrays slavery as something that is being carried out by an individual or group of individuals. They use the term “traffickers” to represent the individual criminals that they see at fault in modern day slavery. The Department of Health and Human Services, for instance, says, “*Traffickers* use various techniques to control their victims and keep them enslaved. Some *traffickers* hold their victims under lock and key.”<sup>36</sup> Similarly, the Department of Homeland Security in their Picket Fences Blue Campaign poster states that “*Traffickers* prey on the vulnerable, using trickery and coercion to imprison their victims into lives of domestic servitude.”<sup>37</sup> The Department of Justice, through the FBI, personalizes the traffickers a bit more in their discussion. They describe how “members of the Vasquez-Valenzuela family would sleep by the doors with knives.”<sup>38</sup>

The Strategic Action Plan best describes how the government perceives human trafficking as a crime perpetrated by individuals or groups when it states, “The cases tell stories of a single trafficker who works

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35. See U.S. DEP'TS OF JUSTICE, HEALTH & HUMAN SERVS. & HOMELAND SEC., FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES (2014) [hereinafter FEDERAL STRATEGIC ACTION PLAN], available at <http://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>.

36. *What Is Human Trafficking*, *supra* note 15 (emphasis added).

37. *Blue Campaign*, *supra* note 16 (emphasis added).

38. FBI, *Human Trafficking*, *supra* note 10.

alone to deceive and prey on victims; of families that have been in the business of human trafficking for generations; and of front businesses that appear legitimate at first glance but disguise human trafficking.”<sup>39</sup> In conjunction with this approach, the government also emphasizes that human trafficking affects individual victims. In discussing one of its “overarching themes,” “[t]he Plan uses the terms ‘victim’ and ‘survivor’ to refer to individuals who were trafficked. The term ‘victim’ has legal implications within the criminal justice process and generally means an individual who suffered harm as a result of criminal conduct.”<sup>40</sup> The federal government clearly perceives and portrays modern day slavery as a private criminal act carried out by an individual or group of individuals.

## 2. Focus on Forced Labor

The federal government’s second major descriptor for modern day slavery is the use of force to procure labor. Many of the government’s references include the use of physical force. The FBI, for instance, describes trafficked workers as “often beaten, starved, and forced to work as prostitutes or . . . [jobs] with little or no pay.”<sup>41</sup> The FBI describes specific victims who were “physically beaten” and threatened with knives.<sup>42</sup> It also defines modern day slavery as “*forced* prostitution, *forced* labor, and domestic servitude”<sup>43</sup> and describes people who are “*forced* into labor or prostitution against their will.”<sup>44</sup>

The government recognizes that there are other types of force besides physical force, such as debt bondage or indentured servitude; isolation from others; confiscation of passports, visas, and identification documents; threats of shaming; and control of money.<sup>45</sup> Yet, when discussing other types of force, the government still uses the metaphor of victims being locked up and held as captive against their will. The heading for one of the DHS’s Blue Campaign posters, for example, reads, “Some prison cells have metal bars, and some have picket fences.”<sup>46</sup> The text reads, “Traffickers prey on the vulnerable, using trickery and coercion to *imprison* their victims into lives of domestic servitude.”<sup>47</sup> The Department of Justice describes how trafficking victims are not always trans-

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39. FEDERAL STRATEGIC ACTION PLAN, *supra* note 35, at 6.

40. *Id.* at 8.

41. FED. BUREAU INVESTIGATION, *supra* note 9.

42. FBI, *Human Trafficking*, *supra* note 10.

43. *Id.* (emphasis added).

44. Schiller, *supra* note 11 (emphasis added).

45. *What Is Human Trafficking*, *supra* note 15.

46. *Blue Campaign*, *supra* note 16.

47. *Id.* (emphasis added).

ported across borders but “can also be *held* in their own homes.”<sup>48</sup> The government’s numerous references to force exhibit a perception that force is a defining factor in modern day slavery.

*B. Immigrant Workers: The Thirteenth Amendment Through the Lens of Class*

In contrast to the government’s perception and description of modern day slavery as a private criminal act in which a victim is forced into labor or prostitution, immigrant advocates use the rhetoric of slavery to describe a system of class oppression that is defined and controlled by various state laws and regulations. This focus reflects a robust definition of class oppression that includes the context of history, labor, race, and gender. Although, broadly speaking, their rhetoric of slavery can be divided as looking at the immigration systems or the labor systems that create modern day slavery, the analysis they offer underscores the interplay of these and other systems of oppression.

1. The Government’s Immigration Policies and Modern Day Slavery

The argument that the government’s immigration policies support modern day slavery takes many forms. Some advocacy groups focus on how undocumented workers’ fear of deportation, due to immigration laws, allows for mistreatment of the workers. These advocacy groups describe private employers as being able to exploit undocumented status to create a “modern day plantation” by furnishing workers with stolen identities, forcing them to work 100 hours a week for little or no pay, and requiring them to live in unregulated boarding houses.<sup>49</sup> At the state-law level, the treatment of undocumented workers is explicitly linked to Jim Crow and renamed.

Call it Juan Crow: the matrix of laws, social customs, economic institutions and symbolic systems enabling the physical and psychic isolation needed to control and exploit undocumented immigrants.

. . . [M]any of the institutions and actors responsible for enforcing Jim Crow [have begun] to resurpect and reconfigure themselves in line with new demographics.”<sup>50</sup>

The ability to exploit undocumented workers exists because the workers are less protected under current immigration laws and because their fear

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48. McGough, *supra* note 6 (emphasis added).

49. Katersky & Newcomb, *supra* note 21.

50. Lovato, *supra* note 31.

of deportation allows employers to demand more work for less money, in worse conditions, than other employers.<sup>51</sup>

Guest workers, those here on a certain type of visa, have also been categorized as laboring under modern day slavery because of the government's immigration policies. The Thai Community Development Center argued, "The (US) guest worker program can be legalized slavery if it is not constantly monitored."<sup>52</sup> Similarly, the Southern Poverty Law Center stated that guest workers were "forced into modern-day indentured servitude."<sup>53</sup> An employer can exercise undue control over a guest worker by threatening to discharge a worker who complains about abusive conditions, which would result in deportation. Alternatively, some employers refuse to let workers quit a job until they pay a fee or until a job is completed, or compel labor by confiscating an employee's passport or threatening an employee's family in their home country. In these ways, the guest workers can be viewed as laboring in slavery, involuntary servitude, or debt bondage.<sup>54</sup>

Finally, some advocates look at the dynamics of immigration policy in general as contributing to modern day slavery. For example, one advocate wrote:

Immigrant labor in the United States is not just any type of labor. Like slavery, the importation of foreign workers to fill the lowest sectors of the U.S. labor market allows many citizen workers to move into the middle-class, where they enjoy cheap and abundant goods (especially food) made possible by the underpaid labor of others.<sup>55</sup>

This has been noted as particularly true for the women of color who perform domestic work, which has been described as "a form of modern-day slavery, using immigrants, particularly Caribbean and Latina women, to provide the labor."<sup>56</sup> At the state-law level, harsh anti-immigrant

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51. Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J.L. GENDER & SOC'Y 133, 139–43 (2012) [hereinafter Ontiveros, *A Strategic Plan*]; see also Maria L. Ontiveros, *Immigrant Workers and the Thirteenth Amendment*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 279 (Alexander Tsesis ed., 2010); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2004) [hereinafter Ontiveros, *Organizing*].

52. *Slavery Eradication & Rights Initiative*, *supra* note 28.

53. S. POVERTY L. CENTER, *supra* note 30.

54. For a more extensive discussion of guest worker programs and how they violate the Thirteenth Amendment, see Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 927 (2007) [hereinafter Ontiveros, *Noncitizen*]. See also Ontiveros, *A Strategic Plan*, *supra* note 51, at 144–53.

55. Gomberg-Munoz, *supra* note 20.

56. Benedict, *supra* note 22.

laws have been called “Juan Crow,” described as “designed to do nothing more than terrorize the state’s Latino community” in a way that “even Bull Connor would be impressed.”<sup>57</sup> Abusive labor conditions facing immigrants are related to the overall system of immigration, the type of work done by immigrants, and the nonwhite race of most immigrants.<sup>58</sup>

While the ways in which advocate groups explain the government’s contribution to modern day slavery may differ, the groups, as a whole, plainly agree that U.S. immigration policies are contributing to the issue.

## 2. The Government’s Labor Policies and Modern Day Slavery

According to immigrant advocates, governmental labor policies, which are influenced by the history of slavery, create and support modern day slavery in many ways. The Coalition of Immokalee Workers linked the current poverty and powerlessness of agricultural workers to the history of slavery when it stated,

Modern-day slavery in Florida agriculture cannot be understood in a vacuum. It is not separate from the past, rather its roots extend deep in the state’s history. While the phenomenon of forced labor has taken many forms over the past four centuries in Florida agriculture, the industry has never been entirely free of the scourge of slavery.

. . . [F]armworkers have always been, and remain today, the state’s poorest, least powerful workers. If we are to abolish slavery once and for all in Florida agriculture, we must pull it up from the roots by addressing farmworker poverty and powerlessness.

. . . .

. . . Four hundred years of slavery in Florida, and 145 of those coming after the Civil War, are the result of the continued violation and debasement of workers’ human rights.<sup>59</sup>

The National Domestic Workers Alliance linked modern day slavery to a history of slavery, the nature of domestic work, and the identity characteristics of those who provide it when stating,

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57. Jackson, *supra* note 34. Eugene “Bull” Connor was a staunch segregationist who advocated the use of violence in response to nonviolent civil rights demonstrators traveling to Alabama where he was Birmingham’s Commissioner of Public Safety in 1961. See *Eugene “Bull” Connor*, PBS, <http://www.pbs.org/wgbh/americanexperience/freedomriders/people/eugene-bull-connor> (last visited Mar. 2, 2016).

58. See Maria L. Ontiveros, *Immigrant Rights and the Thirteenth Amendment*, NEW LAB. F., Spring 2007, at 26. See generally Maria L. Ontiveros, *Migrant Labour in the United States: Working Beneath the Floor for Free Labour?*, in *MIGRANTS AT WORK: IMMIGRATION AND VULNERABILITY IN LABOUR LAW* (Cathryn Costello & Mark Freedland eds., 2004).

59. CIW, FLORIDA MODERN-DAY SLAVERY MUSEUM, *supra* note 24.

Many domestic workers—nannies, housekeepers, and caregivers for the elderly—are women of color. Many of them are immigrants. Due to the nature of the work, these jobs are perceived more as the duty of the woman . . . .

Domestic work has been historically linked to particular socio-economic groups, such as indentured servants, slaves, or immigrants.<sup>60</sup>

Both these groups view modern day slavery as connected with a social, political, and labor system.

One commentator noted that the agricultural and domestic work industries have been excluded from coverage of many labor and employment protection laws and concluded, “Employment laws that distinguish historically-slave industries from other forms of work should be eradicated once and for all.”<sup>61</sup> The same commentator noted the under-enforcement of the few labor laws that do exist for these groups: “Almost 150 years after the end of the ‘peculiar institution,’ the promise of the Thirteenth Amendment’s abolition of slavery and involuntary servitude requires more vigorous measures to protect all workers.”<sup>62</sup> The National Domestic Workers Alliance also noted the “lack of fair labor standards and regulations” as a reason that domestic workers are “forced to toil for slave wages with extremely long hours, [and] no days off.”<sup>63</sup> In these ways, the advocates see the labor system as contributing to modern day slavery as experienced by immigrant workers.

Agricultural and domestic workers are treated differently from other workers under a variety of protective labor and employment laws.<sup>64</sup> The National Labor Relations Act, which protects the rights of workers to organize into unions, specifically excludes agricultural and domestic workers.<sup>65</sup> This exclusion can be directly traced to the fact that slaves historically performed this type of work.<sup>66</sup> Workers’ advocates recognize and refer to these exclusions in their advocacy.

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60. Benedict, *supra* note 22.

61. Suriyopas, *supra* note 19.

62. *Id.*

63. Adhikaar, *supra* note 23.

64. Maria L. Ontiveros, *Female Immigrant Workers and the Law: Limits and Opportunities*, in *SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR* 235, 238 (Dorothy Sue Cobble ed., 2007).

65. Section 152(3) of the Act states that protected employees “shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home.” 29 U.S.C. § 152(3) (2012).

66. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 109 (2011).

### III. LOOKING BACKWARD AND LOOKING FORWARD

When looking at modern day slavery, the United States government and workers' advocates have very different perspectives. The government portrays modern day slavery as a private criminal act carried out by an individual or group of individuals. The criminal act, known as trafficking, involves the forced labor of identifiable victims harmed by the particular act. Workers' advocates, on the other hand, focus on modern day slavery as a systemic problem created or aided by governmental immigration and labor policies. They focus on how these policies create a subordinated class of workers laboring in modern day slavery. This Part of the Article examines this dichotomy from a historical perspective and a forward-looking perspective. Specifically, it argues that the institution of chattel slavery targeted by the Thirteenth Amendment was both a public and private system; however, following emancipation, the courts focused mainly on dismantling the most egregious private systems of oppression, rather than regulating actions taken by the states. These observations suggest several avenues for using the Thirteenth Amendment to protect workers.

#### *A. Historical Perspectives*

##### 1. Slavery as a Private Act Supported by the State

Slavery was certainly a private system of property ownership and of contracts of sale for slaves. Mark V. Tushnet described slavery as “an economic system [that] involved slave masters’ using the human beings they owned to produce goods that the masters owned.”<sup>67</sup> As described by Kenneth M. Stampp,

The use of slaves in southern agriculture was a deliberate choice (among several alternatives) made by men who sought greater returns than they could obtain from their own labor alone, and who found other types of labor more expensive. “For what purpose does the master hold the servant?” asked one ante-bellum Southerner. “Is it not that by his labor he, the master, may accumulate wealth?”<sup>68</sup>

Thus, slavery was a private act of ownership carried out by individuals.

The defining aspect of slavery in the United States was its racialized nature. Tushnet describes the fact that “[s]lavery was a racial phe-

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67. MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* 6 (2003). Not all Americans, or even all Southerners, owned slaves or were involved in the slave trade. Some chose to sell, buy, and own slaves; others did not.

68. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 5 (Vintage Books 1989) (1956) (quoting 2 *FARMER’S JOURNAL* 52 (1853)).

nomenon” as the most important characteristic of slavery in the American South and found that “Southern law settled on the position that slavery was a legal status confined to people of African ancestry.”<sup>69</sup> Slaves were Negroes<sup>70</sup> (or those with sufficient Negro ancestry to be considered Negro) who were brought to the United States for their labor.<sup>71</sup> Although slaves performed a variety of tasks, their labor was most prevalent in the agricultural and domestic spheres.

Although slavery was a private ownership system, it was supported by an elaborate system of laws passed and enforced by the government. According to Tushnet,

The law of slavery supported the social and economic systems of slavery. Owning a slave was, after all, a form of ownership, itself a legal category. Implementing a comprehensive system of slavery required other laws as well: laws dealing with what could be done when a slave ran away from his or her owner, laws dealing with whether a slave’s seller should pay damages to a new owner if the slave ran away, laws dealing with whether a slave’s owner should pay damages if a slave burnt down someone’s barn.<sup>72</sup>

This public system of support for the private institution of slavery began in the Constitution, evidenced itself in state laws (so-called Slave Codes or Black Codes), and was enforced by the state and federal courts.

The United States Constitution provided a framework that recognized the existence of slavery and allowed it to continue to exist in the United States. Article I, Section 2 of the Constitution included the “three-fifths compromise,” which stated that slaves would be counted as three-fifths of a person when determining the population of a state for representation in the House of Representatives and for taxes to be paid to the federal government.<sup>73</sup> Article I, Section 9 provided that the “migration or importation” of slaves could not be prohibited by Congress for a period of twenty years.<sup>74</sup> Finally, the Fugitive Slave Clause stated that runaway slaves who made it to a free Northern state shall not become

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69. TUSHNET, *supra* note 67, at 8.

70. This section uses the term “Negro” or “Negroes” to refer to the race of slaves and groups of slaves, as that is the term found in the laws being discussed.

71. STAMPP, *supra* note 68, at 6–7.

72. TUSHNET, *supra* note 67, at 6.

73. U.S. CONST. art. I, § 2, cl. 3.

74. U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”).



free, but instead must be returned to the slave owner.<sup>75</sup> From the nation's inception, the federal government countenanced slavery.

On the state level, all Southern slave states passed Slave Codes or laws to regulate slavery.<sup>76</sup> Alabama's Legal Code of 1852, for example, confirmed that slaves were the property of the owner and that the slave owner also had rights to the slave's time, labor, and service, as well as "his obedient compliance with all lawful commands."<sup>77</sup> It also defined the proportion of "Negro blood" necessary to legally be a Negro and therefore excluded from the privileges reserved for white men.<sup>78</sup> The Code addressed who could own slaves and how their ownership could be transferred.<sup>79</sup> Further, these state laws proscribed the ability of slaves to make contracts, marry, bring suit, to move freely, to become educated, and to enjoy other rights available to white persons.<sup>80</sup> Other significant provisions typical to the Slave Codes included regulations limiting private emancipation by owners<sup>81</sup> and the fact that slaves could be held criminally liable for offenses they committed.<sup>82</sup>

The Slave Codes were not static; they changed over time in order to reflect the private nature of the slavery relationship. The laws of each state adapted to reflect changes in the perception of the ways that slaves should be treated. Louisiana, for example, established its first comprehensive Black Code in 1806; compiled its existing, largely unwritten private laws into the Digest of the Civil Laws Now in Force in the Territory of Orleans in 1808; and passed a variety of state constitutional provisions between 1812 and 1865.<sup>83</sup> These changes reflect the fact that "[s]tatutes were not necessarily the only or the most dynamic vehicle of change and they contained only a fraction of the 'law'. Custom was at least a co-equal form of law-making throughout the period of slavery."<sup>84</sup> These customs reflect the private aspects of the state Slave Codes.

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75. U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service of Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

76. See STAMPP, *supra* note 68, at 192–236.

77. *Id.* at 192. Slaves were given some limited protection against the harshest mistreatment. *Id.* at 217–24.

78. *Id.* at 195–96. The definitions ranged from one-fourth to one great grandparent to a mulatto with a "visible mixture" of Negro blood. *Id.*

79. *Id.* at 197–205.

80. *Id.* at 197–98, 206–12.

81. *Id.* at 232–36.

82. *Id.* at 224–27.

83. Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803-1865*, 24 S.U. L. REV. 145, 147–57 (1997).

84. Vernon Valentine Palmer, *The Customs of Slavery: The War Without Arms*, 48 AM. J. LEGAL HIST. 177, 177 (2006) (discussing customary slave norms regarding how a slave spent free

The Slave Codes defined three important aspects of the labor relationship between master and slave. At the most basic level, the codes restricted free labor for Negroes. Since slaves were the property of their masters, they “could not freely dispose of their labor and were required to work without pay for their entire lives.”<sup>85</sup> An extensive body of law developed covering the hiring out of slaves by their masters to perform work for others.<sup>86</sup> The codes and customs<sup>87</sup> also allowed masters to control, or sometimes completely prohibited, any entrepreneurial work done by Negroes in their spare time.<sup>88</sup> The codes gave owners almost unfettered authority over the rules governing slaves’ working conditions, allowing, for example, sixteen-hour workdays.<sup>89</sup> Finally, the codes allowed masters to inflict physical punishment on slaves in order to compel labor and obedience.<sup>90</sup> In these ways, the codes defined the labor status of slaves and supported the private institution of slavery.

State and federal courts showed their support for slavery through rulings on the Slave Codes and constitutional provisions in a variety of cases. Significantly, although courts in Britain utilized common law to restrict slavery,<sup>91</sup> the United States federal judiciary and southern state courts were comfortable enforcing state law restrictions on slavery but would not judicially construct restrictions through common law.<sup>92</sup> Using the example of Judge Ruffin’s opinion in the seminal case of *State v. Mann*,<sup>93</sup> Mark Tushnet explained,

[The jurist] could not have had in mind the thought that slavery was a purely private relation between the master and the slave, not subject to public control through law. Legislative regulation intruded on that relation, yet Ruffin was completely open to the possibility of statutes imposing obligations on masters. Rather, Ruffin must have been concerned about something that distinguished courts, which

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time; a slave’s right to work on the Sabbath; the right to cultivate a garden for his own sustenance; and the ability to sell property resulting from side work or his own industry in Louisiana).

85. Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 HOW. L.J. 45, 51 (2010).

86. JENNY BOURNE WAHL, *THE BONDSMAN’S BURDEN* 49–77 (1998) (discussing how the slave rental market required laws regulating injuries done to the rented slaves, and the Southern courts tended to protect the property rights of the slave owners).

87. Palmer, *supra* note 84.

88. Plass, *supra* note 85.

89. *Id.* at 51–52.

90. *Id.* at 52; see also Lea VanderVelde, *The Last Legally Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, 39 SEATTLE U. L. REV. 727 (2016).

91. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.).

92. The Massachusetts Supreme Court did adopt the reasoning of the British *Somerset* case in *Commonwealth v. Aves*. 35 Mass. (18 Pick.) 193 (1836), discussed in PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 101–25 (1981).

93. 13 N.C. (2 Dev.) 263 (1829).

could not regulate the relation of master and slave, from legislatures, which could.<sup>94</sup>

Instead, in a series of cases, the state and federal courts enforced the private system of slavery as protected and defined by the state laws. In *State v. Mann*,<sup>95</sup> the North Carolina Supreme Court concluded that slave owners could not be prosecuted for physical assaults on their slaves. In *Groves v. Slaughter*,<sup>96</sup> the Supreme Court upheld the rights of states to regulate the slave trade at the state level. This allowed Southern states to pass their own laws regulating slavery. In *Prigg v. Pennsylvania*,<sup>97</sup> the Supreme Court held that states do not have the right to pass legislation concerning fugitive slaves, so Pennsylvania could not regulate “kidnapping” of runaway slaves. This area of legislation was found to be the exclusive domain of the federal government. In *Strader v. Graham*,<sup>98</sup> the Supreme Court held that slaves from Kentucky did not lose their status simply by having spent time in the free state of Ohio and found that the Kentucky state court had jurisdiction to determine that issue. Finally, in *Dred Scott v. Sandford*,<sup>99</sup> the U.S. Supreme Court held that Negroes were not citizens of the United States and therefore had no federal constitutional rights, such as the right to sue in federal court for their freedom.

The effect of *Dred Scott* and other cases

created the impression in the minds of many northerners that the entire federal court system was a tool of the “slaveocracy.” As early as 1845 Salmon P. Chase decried that “[i]n the Judiciary, the very balance wheel of our government, and which has continually before it the most important questions . . . that are to decide the LIBERTY OR SLAVERY OF MAN; here, we say, the preponderance of the Slave power is still more alarming.”<sup>100</sup>

The cases, however, were in many ways a reflection and a “junior partner” to the political struggle going on to regulate slavery<sup>101</sup> and which ultimately led to the passage of the Thirteenth Amendment.

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94. TUSHNET, *supra* note 67, at 31.

95. *Mann*, 13 N.C. at 263.

96. *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841).

97. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

98. *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851).

99. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). The Court also ruled that the federal government could not regulate slavery in its territories and that slaves could not become free simply by entering a free state.

100. See FINKELMAN, *supra* note 92, at 239.

101. EARL M. MALTZ, *SLAVERY AND THE SUPREME COURT, 1825–1861*, at 299–302 (2009).

## 2. The Thirteenth Amendment Through the Lens of Class and Labor

The Thirteenth Amendment, on its face, eliminated slavery in the United States. It overturned the private system of slavery by which individuals could contract for the purchase or sale of slaves and then own slaves as property. It also overturned the public system of oppression that supported the private ownership of human beings. It faced a system of slavery that was both a system of labor oppression and class subordination and boldly claimed that neither shall exist in the United States. It was truly a sea change in American law.

Following emancipation, however, the courts began to focus on enforcing the Thirteenth Amendment against private acts of slavery but not against the state laws passed to continue the subordination of the freed slaves.<sup>102</sup> In his essay in this Symposium, Dean Aviam Soifer explains how concerns about federalism and states' rights led courts to uphold state laws regulating freed blacks.<sup>103</sup> The state-sponsored, court-approved system of Jim Crow, segregation and "separate but equal"<sup>104</sup> followed. Socially, the legacy of slavery entrenched ideas that black workers should only provide menial labor, should not be paid above subsistence wages, and should still be subject to corporal punishment.<sup>105</sup> During the 1900s, the courts only regulated and overturned state laws that led to the most egregious private acts of involuntary servitude.<sup>106</sup> Thus, the full promise of the Amendment, to overturn class subordination as well as labor exploitation, was never realized.

### *B. Implications for Advocacy*

This brief history has illustrated that the system of slavery challenged by the Thirteenth Amendment was both a system of private acts and a system of public oppression. Following emancipation, the courts focused more on the prohibition against private acts and less on overturning state laws. Currently, the U.S. government and immigrant workers' advocates are using the rhetoric of the Thirteenth Amendment in ways that mirror this dichotomy. The government portrays modern day slavery

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102. In addition, for a short period of time following Emancipation, courts continued to uphold existing slave contracts, requiring sellers to pay the full price for the slaves that were now free. See John C. Williams, *Slave Contracts and the Thirteenth Amendment*, 39 SEATTLE U. L. REV. 1009 (2016).

103. Aviam Soifer, *Of Swords, Shields, and a Gun to the Head: Coercing Individuals, But Not States*, 39 SEATTLE U. L. REV. 787 (2016).

104. *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896).

105. Plass, *supra* note 85, at 53–55.

106. See Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 OHIO ST. L.J. 1165, 1189 (2014); Ontiveros, *Organizing*, *supra* note 51.

as a private act involving forced labor and calls it “trafficking.”<sup>107</sup> Immigrant advocates portray modern day slavery as a system of class oppression supported by government labor and immigration policies.<sup>108</sup> Given this progression, several conclusions can be drawn about how to craft an effective agenda for current advocates that want to reach both aspects of modern day slavery.

First, since federal courts are likely to uphold acts of state legislatures, advocates should focus on the state level. Advocates have been attacking those state laws that burden immigrant workers.<sup>109</sup> Some of these attacks have found success in the courts, but many have not.<sup>110</sup> Advocates need to continue to focus on repealing state level anti-immigrant legislation and preventing the passage of new laws. Just as importantly, state laws should be explored as an avenue of protection. States can provide enhanced labor protections to workers, including undocumented workers, agricultural workers, and domestic workers. For example, California protects undocumented workers<sup>111</sup> and has passed a law to protect agricultural workers.<sup>112</sup> Both California and New York have passed Domestic Workers’ Bills of Rights.<sup>113</sup> On the immigration front, “sanctuary jurisdictions” provide support and protection for immigrants, including a prohibition against transferring undocumented immigrants to federal law enforcement for potential deportation. In 2013, California Governor Jerry Brown signed a law making California a sanctuary jurisdiction.<sup>114</sup>

Second, advocates should also develop strategies to attack the most oppressive federal labor and immigration laws. On the labor side, agricultural and domestic workers need to be covered by all protective legislation. Challenges can be made either through legislative amendment of the statutes or through legal action. Strong arguments can be made that the exclusions are unconstitutional.<sup>115</sup> Given the number of statutes with exclusions for domestic and agricultural workers, legislative amendment

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107. *See supra* Part I.B.

108. *See supra* Part II.B.

109. *State and Local Immigration Laws*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/immigrants-rights/state-and-local-immigration-laws> (last visited Mar. 2, 2016).

110. Matthew Kolodziej, *Local Anti-Immigrant Laws Die as More States and Municipalities Pursue Pro-Immigrant Policies*, AM. IMMIGR. COUNCIL (Mar. 5, 2014), <http://immigrationimpact.com/2014/03/05/local-anti-immigrant-laws-die-as-more-states-and-municipalities-pursue-pro-immigrant-policies/>.

111. CAL. LAB. CODE § 1171.5 (West 2002).

112. Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 175–78 (2003).

113. *See* 2010 N.Y. Sess. Laws ch. 481 (A. 1470-B) (McKinney); CAL. LAB. CODE §§ 1450–1454 (West 2014).

114. *See* A.B. 4, 2013–2014 Leg. (Cal. 2013); CAL. GOV’T CODE §§ 7282, 7282.5 (West 2014).

115. Ontiveros, *A Strategic Plan*, *supra* note 51, at 156–57.

may be difficult to accomplish. Legal action could also continue to educate the public and the judiciary of the continuing legacy of slavery. On the immigration side, Title VII should be amended to cover discrimination based on national origin.<sup>116</sup> In addition, guest worker programs must be carefully designed to protect those workers by providing a path to citizenship, portability of visas, and full protection under the labor and employment laws.<sup>117</sup>

Although the anti-human trafficking work of the United States government does not target the public, systemic aspects of slavery, it does help immigrant workers. The work should be appreciated and strengthened. One avenue for strengthening the work is to increase the use of visas for those workers who have been trafficked into the United States.<sup>118</sup>

Finally, the survey of the use of slavery rhetoric shows that the workers' advocates are utilizing the language of the Thirteenth Amendment to advocate for their cause.<sup>119</sup> It provides a moral and constitutional basis for protecting workers. Advocates need to continue to use the rhetoric of slavery to educate the public and influence legislatures.<sup>120</sup>

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116. *Id.* at 157.

117. Ontiveros, *Noncitizen*, *supra* note 54.

118. Ontiveros, *A Strategic Plan*, *supra* note 51, at 154–55.

119. *See supra* Part I.C.

120. Ontiveros, *A Strategic Plan*, *supra* note 51, at 158–60.