The Slavery and Involuntary Servitude of Immigrant Workers:

Two Sides of the Same Coin

#### Maria L. Ontiveros, 2011

On its face, the Thirteenth Amendment bars two different institutions: slavery and involuntary servitude. Much of the legal doctrine surrounding the Thirteenth Amendment examines these as two separate prohibitions – considering, for example, whether the practice of debt bondage is involuntary servitude or whether racially restrictive covenants are unconstitutional badges and incidents of slavery. While these cases have been helpful in understanding the Thirteenth Amendment and ending egregious practices, I have argued that the Amendment is best understood holistically as prohibiting systemic deprivations of a bundle of rights at the intersection of human rights, civil rights, labor rights and citizenship rights. In my work, I apply this approach to modern day immigrant workers.

This essay argues that the current debate over the treatment of immigrant workers must be informed by the Thirteenth Amendment. Otherwise, immigration policy runs the risk of replicating a system where large groups of workers of color, those who work in the fields and in the homes of white citizens, are deprived of basic human rights, labor protections and the right to participate in the political process because of their race and their status as immigrants. While grounding my analysis in a holistic view of the Thirteenth Amendment, in keeping with predominant legal methodology, I structure my arguments along the lines of the Amendment's two

prohibitions. The first part of this essay looks at how the current treatment of undocumented workers can be understood to run afoul of the Amendment's prohibition against "slavery." The second part looks specifically at the treatment of so-called "guest workers" and the ways in which their treatment can be considered involuntary servitude. The final section of the essay returns to a holistic view of the Thirteenth Amendment and immigrant workers, in general, to consider how the Thirteenth Amendment can be used in organizing, litigation and legislative policy.

A brief introduction to the world of immigration law, as it relates to immigrant workers, is necessary to understand these arguments. Broadly speaking, individuals in the United States are classified into one of five different legal statuses. *Citizens* are those individuals who were either born in the U.S. or who went through a naturalization process to become a citizen. They have the legal right to be physically present and work in the United States. They also, generally, have an unrestricted ability to participate in the political and social systems of the United States, including such things as voting, going to public school, accessing social services (such as health care and welfare), the ability to marry, get a driver's license, etc. Documented Resident Workers (DRW) are those individuals who, while not U.S. citizens, have the legal right to both live in and work in the United States. This group includes those individuals are often referred to as permanent resident aliens or people who have a "green card." Guest Workers are noncitizen immigrant workers who have been brought to the United States on a restricted visa to work for a particular employer. They have the right to

reside and work in the United States, as long as they comply with the terms of their visas. The visas are generally issued for a short term (3 years) and require that the guest worker continue to work for the employer for whom the visa was originally issued. Examples of these types of workers include H1A agricultural workers, H2B technical or engineering workers, H2A laborers, nurses and nannies. *Documented Visitors* (DV) are the small group of individuals who have the legal right to be in the United States but who do not have the legal right to work in the U.S. These people include visitors on a tourist visa, students on restricted student visas and, often, the spouses or family members of guest workers. *Undocumented workers* are those individuals who possess neither the legal right to be present or work in the United States. Some of these individuals cross the border illegally into the U.S.; others overstay a visa, failing to return to their country of origin when legally required to do so.

For my purposes, I use the term *immigrant or immigrant worker* to refer to people in the last four groups, as well as to refer to descendents of individuals in those groups whom others view as likely to be part of one of these four groups, even if they are U.S. citizens. Under this definition, for example, I qualify as an immigrant worker, even thought I am a U.S. citizen and both my parents were U.S. citizens. My grandparents were all DRW's and others often view me as a non-citizen. This broad term is necessary because of the fluidity and interconnection of these categories. An individual may start in one category and move in to a different category (for example,

a guest worker who overstays his visa becomes an undocumented worker or an undocumented worker spouse might naturalize or go through the process to become a DRW). In addition, most immigrant families contain people from different statuses. For example, a DRW mother may give birth to children, making them U.S. citizens, while their father may be an undocumented worker. I include descendents in this definition because it is the perception and treatment of the group as a whole which lies at the center of my analysis.

#### I. Undocumented Workers and Slavery

### A. The meaning of "slavery"

In trying to define slavery, I view it as a system of oppression at the intersection of human rights, civil rights, labor rights and citizenship rights. It was particularly wrong and odious because of the way it impacted each of these rights individually and in combination. At the most basic level, the human rights of slaves were violated because they were not considered human beings, but property. In addition, they were denied freedom of movement, the right to education, the right to marry and maintain families, etc. In my taxonomy, the deprivation of civil rights focuses on the fact that these actions were directed against slaves because of their race. The institution of slavery was also a system which focused on the deprivation of labor rights, specifically the right to determine the terms and conditions of labor, the right to gain from your labor, and the right to quit. Finally, slavery deprived individuals of citizenship rights because they were never given the opportunity to

become citizens, engage in political activity or become part of the polity. They were outsiders, with no power to change the system.

B. Current meanings: the lives of Undocumented Workers

Currently, in the United States, in the United States, there are approximately 21

million undocumented immigrants. The subset of undocumented workers is large —

comprising approximately four percent of the workforce or about one out of every 21

workers in the United States. Although these individuals provide essential services

and, in many ways, are integrated into the United States economy and society, they are

also legally prohibited from being here and thus face the constant threat of

deportation. As a result, these workers live in a situation created by a political,

economic and legal system which severely restricts the same bundle of rights impacted

by slavery and discussed above.

From a labor rights standpoint, undocumented workers are technically protected by the same labor regulations which govern other workers in their industry. They have the right to be paid minimum wage, to organize into a union, and to be free from discrimination based on race, sex, national origin, religion, etc. These protections prove illusory, however, in two key ways. First, the workers are unlikely to protest an interference with their rights because they fear that their status will be discovered, and they will be deported. An individual who is deported faces time spent in a detention facility, separation from their family, relocation to a country where they may not know anybody and the prospect of a perilous border crossing to return to the

United States. In addition, even if an employer is found to have violated the labor rights of an undocumented worker, the remedies available to these workers are severely limited. In particular, they are not eligible for the typical remedies or reinstatement (for a discriminatory or retaliatory discharge) or backpay (to make up for the wages they would have earned had they not been treated illegally). These two forces decrease the incentives for employers to provide undocumented workers with basic labor rights. As a result, this exploitable group of workers often labor beneath the floor for free labor established by our labor and employment laws.

This system was not created accidentally or entirely voluntarily. United States economic and trade policy, which has destabilized rural communities in Mexico while driving up the cost of living and limiting job opportunities south of the border, creates strong economic motivation for immigration from Mexico. The structure of workplace immigration laws protects those who hire and profit from undocumented workers. Employers are able to avoid serious penalties, so long as they check the immigration status of new employees (even if they know the documents they are reviewing are falsified) or if they discharge those identified by the government as likely to be undocumented. The United States has created a legal, political and economic situation where those employers which require an exploitable group of workers (such as those in agriculture, construction, restaurant and domestic work) can find it in today's undocumented workers.

From a human rights standpoint, undocumented immigrants are the subjects of dehumanizing rhetoric reminiscent of that used to describe slaves. They are compared to animals, viewed as promiscuous breeders and are told that their lives are just not worth that much. They have limits on the rights to free movement, to maintain their families and to access social services. Although undocumented children still currently have the right to public education, that too is under attack. Although these are all defined as basic human rights in international treaty documents, undocumented immigrants in the United States are denied these rights.

From a citizenship rights standpoint, undocumented immigrants lack access to the political process and political power. A "path to citizenship" is a particularly contested part of immigration reform because it would provide such power. In addition, this group is clearly defined as being "outsiders" or "aliens." This distancing helps justify and re-enforces inequality. Thus, it is key that the treatment is due partly to discrimination based on national origin or immigrant status. Finally, from a civil rights perspective, the treatment is also motivated by race.

One may ask why these people don't just go home. The answer begins with this number: 21 million. Just as it was impossible to send the slaves back to Africa when slavery was abolished, so too is it impossible to deport 21 million people. The logistics are simply impossible. In addition, to many of these people, the United States is "home," and they simply do not have any place to go in Mexico. These people are integrated into society in many ways. They are mothers, fathers, brothers, sisters, sons

and daughters of U.S. citizens. They are also the workers who pick the nation's produce, slaughter our country's meat and poultry, care for our children and build our houses. They are not allowed to be here, they do not have a legal place here, yet they are an integral part of our society. It is a peculiar institution indeed.

### C. History: Undocumented Workers' Predecessors

The idea of comparing the condition of current undocumented immigrant workers to slavery is considered audacious to many, but two historical points help provide some insight to this claim. Distinct parallels exist between current undocumented workers and those workers for whom the Thirteenth Amendment was clearly designed to free.

### 1. Chattel slavery as immigration

Although traditional immigration scholarship marks the beginning of immigration policy in the early 1900's, a growing number of scholars have begun to consider whether chattel slavery should be considered our country's first immigration law. Slaves can be considered immigrant workers brought to this country and then regulated by the legal system to deny them the bundle or rights described above.

### 2. California mission system

While chattel slavery was developing in the American south, a parallel system of labor was developing in the west. Catholic missionaries brought Mexican workers with them to build the missions and develop an agriculture-based economy to support them. When those immigrant workers perished, the missionaries conscripted

members of the native Californian Indian tribes to live and work insider their walls. The native workers were not allowed to leave, except under armed supervision to work in outlying fields. Family groups were separated, so that women were housed with women, men bunked together, and children lived in a separate barracks. The workers were converted to Catholicism, and escapees were captured and severely punished. When the natives were eventually freed from this situation, a set of new laws was developed which required that they carry papers to show that they were indeed "free" and which allowed for a system of debt bondage (based on convictions for loitering and alcohol use) which paralleled the system developing in the South. These workers do much the same work as today's undocumented workers. They are subordinated because of their race and national origin and the subordination has become entrenched through systemic deprivations of labor, political and human rights.

## II. "Guest Workers" and Involuntary Servitude

A. The meaning of "involuntary servitude"

The legal definition of involuntary servitude focuses on the inability to quit a contract for labor. Workers who cannot quit because of threats of force or imprisonment clearly fall within this category. Those who feel they cannot quit their jobs because they do not want to lose their health insurance are clearly not protected by the Amendment. In between these two poles, courts have struggled to determine the types of coercion which does violate the proscription. Looking at the

"involuntary servitude" prong in isolation makes this analysis difficult. A better analysis focuses on the inability to quit coupled with other systemic factors of oppression at the intersection of human rights, civil rights, labor rights and citizenship rights. The treatment of so-called "guest workers" fits into this pattern.

## B. Current meanings: Guest Workers

A "guest worker" is a worker from outside the United States who is brought here on a restricted visa to work. In most cases, the employer must demonstrate that there is a need for the worker by alleging that no domestic worker is available to fill the position. A guest worker is recruited to fill the position with that particular employer. The visa typically lasts for three years and is renewable for one or two terms. Some visas allow workers to bring their family with them; others do not. If they are allowed to bring their families, the family is generally not allowed to work here. The focus is on keeping the worker as a "guest" or "temporary" worker. The expectation is that the worker will come to the United States, work for a few years, and then return to his or her country of origin. In this way, their citizenship rights are limited.

The labor rights of guest workers are constrained because most of the visas require that the worker continue to work for the same employer. If the worker quits or gets fired, the visa expires and the worker must return to his or her country of origin. As a result, guest workers are limited in their ability to protest working conditions for fear of being terminated. Employers recognize this limitation and

often exploit guest workers, forcing them to work in sub-market working conditions. Employers have also used the availability of exploitable guest workers as a reason to pay citizen workers less and treat them worse. Employers threaten citizen workers with replacement by visa workers if they complain. Examples from legal cases and interviews show that employers often berate these workers using racist language and referring to their immigrant status, revealing the civil rights implications of this exploitation.

Guest workers are unable to quit their employment if they do not want to return to their country of origin. While it is unclear whether this penalty for quitting is sufficient by itself to qualify guest worker employment as involuntary servitude, the system becomes problematic when placed in the larger context of a systemic deprivation of the bundle of rights discussed here.

# C. History of guest workers

Although the impact on these rights can be limned in the current situation of "guest workers," they come into sharper relief when the history of guest workers in California agriculture is examined. The history reveals a series of programs designed to bring immigrant workers into the United States in situations which infringed on their human rights, labor rights, citizenship rights and civil rights, creating an exploitable class of workers. Each program brought in a different racial group and ended when that particular group began to gain rights, power, and citizenship. The system would then move on to a new group of workers.

The Native Californians used in the missions and discussed above were the first group of agricultural workers in California. When those workers were no longer available (primarily because they died), an immigration system designed to bring in Chinese workers was developed. Only men were allowed to come to the United States, and they were not allowed to become citizens. Their ability to move freely was severely constricted by a system requiring documents for travel. When these workers started to agitate for better working conditions, they were replaced by Japanese workers. When the Japanese workers started to gain power and make movements toward assimilation and citizenship, legal structures emerged to bar this development. As agricultural workers, they were replaced by Mexican Braceros. The Braceros were a group of Mexican men brought into the United States under labor contracts. Their plight, which included sub-standard housing, lack of payment of wages and physical and emotional abuse have been well documented. The Bracero program is noted for being called "legalized slavery."

III. Where do we go from here? Immigrant workers and a holistic view of the Thirteenth Amendment

A holistic view of the Thirteenth Amendment provides important insights to bring to today's immigration debate. It provides a different lens with which to understand the debate, it provides an avenue for coalition building, and it provides the basis for litigation and policy reform.

A. A new way to approach immigration issues

The debate over the undocumented worker problem often gets bogged down in a discussion of legality and whether undocumented immigrants deserve the right to work or become citizens. By focusing on the Thirteenth Amendment, the treatment of undocumented immigrants can be understood as a human rights issue, in addition to a civil rights issue, labor issue and a citizenship rights issue. It provides a constitutional and moral basis to approach the problem.

### B. Linking communities to create coalitions

Viewing the actions prohibited by the Thirteenth Amendment under a lens of the intersection of human rights, civil rights, labor rights and citizenship rights also provides an opportunity to build coalitions among those groups which focus on these rights individually. There have been a variety of initiatives taken recently by coalitions of labor activists and immigrant rights groups to challenge government action directed against immigrant workers. These can provide a template for additional coalition work.

# C. Legal recourse: carefully crafted litigation and immigration reform

The Thirteenth Amendment can also be used to shape legal reform. In the proper circumstances, it can be used as the basis for litigation. It can also be used to help shape immigration reform by showing the importance of visa portability and a path to citizenship.