Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry

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I. INTRODUCTION

Viewed as a relic of a bygone era, modern legal teaching largely ignores the Thirteenth Amendment. Few constitutional law textbooks give it any more than a passing glance.[1] After all, slavery was abolished in the United States in 1863.[2] While it is true that some scholars have suggested new applications for the Civil War Amendment,[3] legal practitioners have found few practical applications. This Article proposes a real world application of the Thirteenth Amendment to a current real world problem. Legal practitioners have under-utilized the Thirteenth Amendment. They should employ the Thirteenth Amendment as a valuable tool for fighting slavery and its modern-day cousins. This Article shows how legal practitioners can use the Thirteenth Amendment to protect immigrant garment workers from exploitation.

There is a growing problem in the United States of immigrant garment worker exploitation—or sweatshops. Sweatshops exist in every major city in the United States and produce a large portion of the clothes that are sold here today.[4] The women who "work" in these factories are

1. *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 2 (1995) (noting exactly how many pages various constitutional law textbooks devote to the Thirteenth Amendment).

2. President Lincoln issued the Emancipation Proclamation on January 1, 1863. *See* DONALD B. COLE, HANDBOOK OF AMERICAN HISTORY 137 (1968).

3. *See* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 488-89 (1990) (claiming that abortion should be legalized under the Thirteenth Amendment); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 220-21 (1992) (suggesting that batterers, in effect, hold battered women in involuntary servitude); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1360 (1992) (claiming that, under the Thirteenth Amendment, states would have a duty to protect abused children who they know are being abused); Michelle J. Anderson, Note, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1428-29 (1993) (suggesting that women who remain married to abusive husbands in order to avoid deportation are held in involuntary servitude); Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 792 (1993) (suggesting that government officials who fail to enforce laws against pimps are acting unconstitutionally under the Thirteenth Amendment).

4. It is estimated that U.S. sweatshops manufacture as much as 50% of women's clothing. Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the*

often denied basic legal rights, such as minimum wage, overtime, and health and safety protections.[5] They have seldom sought legal redress.[6] Because many garment workers are illegal immigrants,[7] their negotiating powers are limited by the constant threat of deportation. In short, a legal remedy needs to be found that will both prevent sweatshops from occurring and, in the event they do occur, bring swift and severe punishment to the parties involved.

In August 1995, California labor officials raided an apartment complex in El Monte, California. Inside they found eighty Thai garment workers held in virtual slavery. This Article employs the facts of the El Monte case as a framework for testing the viability of the three-part litigation strategy discussed below. Through the lens of the El Monte case, this Article shows that the Thai garment workers could have brought suit against the sweatshop owner, the companies that design and distribute the clothing, and the federal government under the Thirteenth Amendment. If they had done so, the impact on the industry would have been immediate and lasting—sweatshops would have gone out of fashion.

This Article proposes a three-part strategy to win restitution and vindication for enslaved garment workers. The strategy seeks to deter individuals from establishing sweatshops, to prevent garment manufacturers, including clothing design companies and retailers with their own clothing design lines, from contracting with sweatshops, and to encourage the federal government to increase enforcement. It is an attempt to hold accountable the three key parties who have contributed to the infliction of involuntary servitude on garment workers. The sweatshop owners themselves are the most obvious culprits. They are at the helm of the shop, threatening the worker, locking the doors, and paying minuscule wages. In many cases, the sweatshop owners recruit

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Need for Strengthening Worker Protective Legislation, 103 YALE L.J. 2179, 2185 (1994).

5. The United States General Accounting Office (GAO) defines a sweatshop as a business having just these sort of problems. *See* GAO, GARMENT INDUSTRY-EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS, H.R. REP. NO. GAO/HEHS-95-29 (1994) [hereinafter GAO REPORT].

6. Historically, only the government brought cases for wage and hour violations. The only known case where the workers themselves sued is *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996), which is discussed in detail *infra* Part II.

7. See Leo L. Lam, Comment, *Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops*, 141 U. PA. L. REV. 623, 632 (1992).

the women in their native countries, ship them to the United States, and then confiscate their passports, while threatening them with deportation for any insubordination.[8]

The sweatshop operators and their shops would not exist were it not for the financial support of garment manufacturing companies who are willing to place orders with them. If these companies were actually concerned about the working conditions of the women who make and assemble the clothing they design and sell, they would monitor the shops and do business only with reputable dealers, those which abide by state and federal laws. Unfortunately, because the apparel manufacturers focus on the bottom line, the sweatshops flourish. Many manufacturers are certainly aware that the money they pay for the finished product is not sufficient to sustain a shop that operates in compliance with federal and state labor laws.[9] It is for these reasons that a litigation strategy targeting the manufacturers is imperative. Arguably, if such companies had financial incentives to ensure that their producers comply with state and federal laws, the incidents of sweatshops would decrease substantially. Thus, this proposed litigation technique targets the source of the funding.

The litigation strategy also targets a third party, the federal government. While the federal government has very little direct impact on sweatshops and garment workers, its inaction encourages the sweatshops to flourish. The Thirteenth Amendment is unique in that it commands that slavery be abolished.[10] The federal government is mandated to enforce the Thirteenth Amendment. With greater and more vigilant government action, sweatshops would find their existence threatened.

II. THE WORKERS

A. El Monte

Although slavery no longer exists in its classic sense, there is a new, almost as invidious, form of slavery still being practiced. The form has changed—no longer are people bought and sold on an open market and taken away in chains to labor without compensation on their master's plantation. Modern-day slaves toil behind locked doors, at industrial

8. *See* Plaintiffs' First Amended Complaint at 18-20, Bureerong v. Uvawas, 922 F. Supp. 1450 (C.D. Cal. 1996) (No. CV 95-5958) [hereinafter First Amended Complaint].

9. *See Bureerong*, 922 F. Supp at 1460.

10. *See* Amar & Widawsky, *supra* note 3, at 1381-82.

machines, in secret urban sweatshops. The principal difference between modern slavery and that of the Civil War era is that today's masters know slavery is illegal. They use uneducated, non-English speaking laborers to ensure that their modern day plantations are not discovered.[11] Their slaves are unfamiliar with their rights under American law and often feel grateful simply to have a job.[12] They are at the mercy of their masters. Despite the passage of time, the eighty Thai garment workers in El Monte, California had lives that differed little from the pre-Civil War days. The women labored up to eighteen hours a day, seven days a week.[13] They were paid less than sixty cents an hour.[14] They were held captive in a renovated apartment building on a quiet residential street, where as many as sixteen women shared one bedroom.[15] No one seemed to notice that razor wire surrounded the building and guards patrolled the grounds.[16]

As with the African slaves of pre-Civil War days, escape was not a real option. The El Monte immigrant workers claimed the owners restrained them by threatening physical violence if they tried to escape.[17] As a warning to emphasize their point, the owners circulated a picture of one of the women who had been beaten.[18] One of the victims, Sawieng Singsathit, recalls being told that "[a] bullet is very cheap."[19] The workers also claimed that the owners told them that escape would result

11. *See* Lam, *supra* note 7, at 640. One law review article noted that the "closed, family-type atmosphere" of the sweatshop increases the chances that the owner will successfully conceal various labor law violations. *See* Barbara E. Koh, Note, *Alterations Needed: A Study of the Disjunction Between the Legal Scheme and Chinatown Garment Workers*, 36 STAN. L. REV. 825, 845 (1984).

12. *See* Lam, *supra* note 7, at 640.

13. *See* First Amended Complaint, *supra* note 8, at 4. The media estimates that the women actually worked up to 20 hours a day. *See All Things Considered* (NPR radio broadcast, Oct. 24, 1997).

14. The Washington Post reported that the women were paid approximately 60 cents an hour. *See* William Branigin, *Sweatshop Instead of Paradise*, WASH. POST, Sept. 10, 1995, at A1. National Public Radio reported that the women earned only 35 cents an hour. *See All Things Considered*, *supra* note 13.

15. *See* Charles R. Chaiyarachta, Comment, *El Monte is the Promised Land: Why Do Asian Immigrants Continue to Risk Their Lives to Work for Substandard Wages and Conditions?*, 19 LOY. L.A. INT'L & COMP. L.J. 173, 175-76 (1996).

16. *See* First Amended Complaint, *supra* note 8, at 8; *All Things Considered*, *supra* note 13.

17. *See* Bureerong v. Uvawas, 922 F. Supp. 1450, 1459 (C.D. Cal. 1996).

18. *See* First Amended Complaint, *supra* note 8, at 8; *All Things Considered*, *supra* note 13.

19. Branigin, *supra* note 14, at A12.

in harm to their families back in Thailand.[20] To make escape even more difficult, the owners censored the workers' mail and phone calls.[21] They had no unmonitored contact with the outside world.[22]

Unlike African slaves, the El Monte sweatshop owners did not buy or sell the immigrant workers, but conned and duped them into a life of involuntary servitude. The women claim that El Monte factory agents approached them in Thailand. The El Monte agents allegedly told them that if they agreed to come to the United States to work, they would earn a significant amount of money, and would live and work under acceptable conditions.[23] The women came to America, as most immigrants do, with a dream of making money and creating a better life for themselves. However, when the immigrants arrived in the United States, the El Monte owners confiscated their false passports, which the El Monte operators provided, and put them to work in the factory.[24] In addition, the sweatshop operators deducted the cost of the workers' transportation to the United States from their pay[25] and forced them to buy what little food they could afford at grossly inflated prices.[26] Their pay was so low, they could never be expected to pay off their "debt."[27] The women knew that they were being held illegally. As victim Sawieng Singsathit told the press, "We used to see police cars pass by and wonder, 'When are they going to come and help us?' . . . But nobody ever paid any attention to us."[28]

The El Monte sweatshop began operating in 1988. It continued to operate until a state raid on August 2, 1995.[29] The central question is, did the sweatshop simply go unnoticed, or was it ignored? The tragic truth is that it was ignored. The Immigration and Naturalization Service (INS) first learned about the sweatshop when an alleged escapee anonymously called the Los Angeles Police Department in March of 1992. The caller claimed that forty-five workers were being held against

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20. The victims believed the operators' threats because they knew that the operators traveled frequently to Thailand to recruit more women. *See* First Amended Complaint, *supra* note 8, at 22.

21. *See Bureerong*, 922 F. Supp. at 1459; First Amended Complaint, *supra* note 8, at 8; *All Things Considered*, *supra* note 13.

22. *See Bureerong*, 922 F. Supp. at 1459; First Amended Complaint, *supra* note 8, at 8.

23. *See* First Amended Complaint, *supra* note 8, at 31.

24. *See* Patrick J. McDonnell & Maki Becker, *7 Plead Guilty in Sweatshop Slavery Case*, L.A. TIMES, Feb. 10, 1996, at A1.

25. *See* First Amended Complaint, *supra* note 8, at 9; *Bureerong*, 922 F. Supp. at 1459.

26. *See Bureerong*, 922 F. Supp. at 1459-60.

27. *See* McDonnell & Becker, *supra* note 24, at A15.

28. Branigin, *supra* note 14, at A12.

29. *See id.*

their will at the complex.[30]

On April 2, 1992, the INS initiated external surveillance procedures on the El Monte complex. Agents monitored the complex, searched the garbage, and used telescopes to observe any incriminating activities within the complex.[31] For four months, they periodically monitored the premises.[32] Undoubtedly, what they saw was a sweatshop. They saw clothing being made in a residential complex; they saw no movement in and out of the complex, except for vans that brought in raw materials and took out finished clothing. One agent reported in his affidavit that he saw Asian women working around the clock at "industrial-type sewing machines."[33] As the agent believed the complex contained persons held in involuntary servitude, he requested a search warrant to further inspect the premises.[34] His request contained the following statement:

> Based on my experience, I expect to find the following at 2614 Santa Anita Ave.: approximately 45 aliens not lawfully present in the United States, one or more persons holding these natives of Thailand, records of time pay and production, passports[,] . . . and[35] receipts, invoices[,] or other evidence of purchase or sale of . . . garments.

Surprisingly, the government denied the request for a search warrant. The U.S. Attorney's Office has since claimed that there was "insufficient 'probable cause' for a criminal search warrant" and that the case under the INS was closed.[36]

In 1995, the INS reopened the investigation when another alleged escapee came forward. However, the INS and the U.S. Attorney's Office determined that her information was "dated" and again refused to seek a search warrant.[37] For at least three years, the INS had knowledge and evidence that women were being held in slave-like conditions and

30. *See id.*
31. *See* Robert Scheer, *The Slave Shop and the INS' Indifference*, L.A. TIMES, Aug. 8, 1995, at B9.
32. *See* Genevieve Buck, *Retailers Investigated for Links to California Sweatshop*, SAN ANTONIO EXPRESS-NEWS, Aug. 11, 1995, *available in* 1995 WL 9497887.
33. Robert Scheer, *Government Guilty of Slave-Factory Cover-Up*, NEWS TRIB. (Tacoma, Wash.), Aug. 10, 1995, at A14, *available in* 1995 WL 5370272.
34. *See* Robert Scheer, *Why Did INS Drop Its Investigation of Thai Slave Shop?*, SACRAMENTO BEE, Aug. 9, 1995, at B7.
35. Scheer, *Government Guilty of Slave-Factory Cover-Up*, *supra* note 33, at A14.
36. Branigin, *supra* note 14, at A12; *see also* McDonnell & Becker, *supra* note 24, at A15.
37. Branigin, *supra* note 14, at A12.

did nothing to stop it.[38]

On June 28, 1995, the California Labor Department claimed to learn for the first time about the possible existence of the El Monte sweatshop.[39] The Labor Department began its own investigation, secured a civil search warrant, and asked for a joint raid with the INS to be scheduled on August 2. Initially the INS agreed and participated in the planning of the raid. At the last minute, however, the INS withdrew from the raid, claiming that going in under the state's warrant would jeopardize their criminal case. They pulled out three dozen agents and the Thai interpreters.[40] The state proceeded with the raid as planned. In the raid, the state discovered the sweatshop and rescued the women. A few hours after the raid began, the INS appeared and arrested everyone, including the victims who were taken in shackles to an INS detention center. The government eventually released the workers on a $500 bond.[41]

After seven years of being held in indentured servitude, three years of which the government had full knowledge, the so-called Thai garment workers received some measure of justice. In return for testifying in a criminal investigation, the federal government allowed the victims to remain legally in the United States.[42] In 1996, the eight operators of the El Monte sweatshop all plead guilty to charges of conspiracy, indentured servitude, and harboring illegal immigrants. The courts sentenced the convicted owners to prison terms ranging from two to seven years.[43]

In addition to the criminal action, a coalition of civil rights groups sued both the sweatshop operators and the retailers and manufacturers, Mervyn's, Montgomery Ward, B.U.M., Internet, L.F. Sportswear, and Miller's Outpost in federal court.[44] The claims were brought under the Thirteenth Amendment, the Fair Labor Standards Act, the Racketeering Influenced and Corrupted Organizations Act (RICO), state statutes

38. In addition to the INS' surveillance procedures, the complex was inspected by El Monte building inspectors at least five times while in operation. *See id.*

39. *See Wilson Slams Delays in Raid on Sweatshop; Blasts INS, U.S. Attorney, for Not Acting More Quickly on Word of Slavery*, S.F. EXAMINER, Aug. 25, 1995, at A5.

40. *See* Branigin, *supra* note 14, at A12.

41. *See id.*

42. Telephone Interview with Dan Tokaji, ACLU of Southern Cal. (Nov. 4, 1997).

43. *See* George White & Patrick McDonnell, *Sweatshop Workers to Get $2 Million*, L.A. TIMES, Oct. 24, 1997, at D1. The court sentenced Suni Manasurangkun, the manager, to seven years in jail. The court imposed a six-year prison term on each of Manasurangkun's sons, Wirachi, Surachai, and Phanasak. The court convicted an accomplice, Suporn Verayutwilai, for conspiracy and imposed a five-year prison sentence. The court sentenced Sunthon Rawangchaison, a hired guard, to six years. The court also imposed a four-year prison sentence on Rampha Satthaprasit, another manager, and a two-year prison term on Seri Kanchakphairi, another guard. *See* McDonnell & Becker, *supra* note 24, at A15.

44. *See* First Amended Complaint, *supra* note 8, at 9.

prohibiting false imprisonment, extortion, unfair business practices, and state statutes establishing minimum wage and maximum hour laws.[45] The complaint alleged that the workers were held in indentured servitude. The complaint also alleged that the sweatshop operators restrained the workers "through the use of physical force, express and implied threats of physical force, and threats of harm to their families if they attempted to escape."[46]

A suit against the clothing design companies and retailers was a new tactic. Because the sweatshop operators were facing criminal sanctions and were arguably judgment proof, the plaintiffs knew that their one chance for restitution was to go after the companies that designed and distributed the garments. After all, the El Monte sweatshop-manufactured clothing was sold in stores such as Macy's, Robinsons-May, and Filene's.[47] The plaintiffs reasoned that the retail companies realized their profits, in part, by contracting for goods produced in a sweatshop. As plaintiffs' attorney Julie Sue noted, "[it] doesn't matter if you didn't know.... If you create the conditions for enslavement or for sweatshops, and then you walk away, you're still responsible."[48] In their complaint, the plaintiffs claim that the defendant retailers knew that they had contracted with the sweatshops to produce their brand of garments at such a low price that it would be impossible to pay employees minimum wages and overtime and that the entire system, under which the clothing manufacturers contract out their work, exists to avoid liability for failure to comply with labor laws.[49]

Under the Thirteenth Amendment they sued only the sweatshop operators. They claimed extreme mental suffering, humiliation, emotional distress, physical injuries, and economic losses. They asked in the complaint for damages of no less than $10,000 per plaintiff, per day of unlawful confinement.[50] In the end, the manufacturers settled the case out of court for more than four million dollars.[51] The manufacturers

45. *See id.* at 4.
46. *Id.* at 7-9.
47. *See* White & McDonnell, *supra* note 43, at D11. Boxes were found on the premises with shipping labels addressed to Mervyn's and Montgomery Ward, and clothing was found with Macy's, Hecht's and Filene's labels. *See* Genevieve Buck, *Prison Camp Sweatshop Probe Widens; Wards, Mervyn's, Macy's, Other Retailers to Face Questioning*, CHI. TRIB., Aug. 10, 1995, at N1.
48. *All Things Considered*, *supra* note 13.
49. *See* First Amended Complaint, *supra* note 8, at 11-12.
50. *See id.* at 14-15.
51. *See* K. Connie Kang, *Final $1.2 Million Added to Thai Workers' Settlement*,

admitted no liability.[52]

Because the facts of the El Monte case were so egregious, it received substantial media coverage. The coverage led to political grandstanding about the evils of sweatshop labor. Immediately after the El Monte sweatshop was "discovered," the government increased funding and staffing levels for the INS, but the number of raids after El Monte (approximately 1,000) was still significantly lower than the 5,000 raids conducted in the early 1990s and 1980s, when there were fewer contractors in the garment business.[53] The White House established a task force on apparel manufacturing, which was to design a code of conduct for clothing companies and retailers to root out sweatshops.[54] Yet, the sweatshop problem persists.

B. Sweatshops in General

Admittedly not all sweatshops are as reprehensible as the El Monte sweatshop, however, they still exploit a vulnerable element of our society.[55] Garment workers are typically female illegal aliens of Hispanic or Asian descent.[56] Naturally their illegal status makes them extremely susceptible to exploitation.[57] If the garment workers try to organize for better conditions, their employers can call the INS.[58] Constantly threatening workers with deportation allows sweatshop owners to take advantage of the workers' precarious situation. A reporter, who went under cover for three months in a garment sweatshop, found that while employee time cards reported forty-hour work weeks, employees actually worked twelve-hour days, six days a week.[59] The reporter also found that the company he investigated retained few records of payments to workers and usually paid the

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L.A. TIMES, July 29, 1999, at A1.

52. *See id.*

53. *See* Don Lee, *Task Force in Tatters; State-Federal Tensions Hinder Garment Industry Crackdown*, L.A. TIMES, Aug. 4, 1996, at D1.

54. *See* White & McDonnell, *supra* note 43, at D11.

55. As one article noted, "'[o]ther than unabashedly illegal enterprises, [the garment industry] is by all accounts the most lawless industry.'" Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 YALE J. INT'L L. 195, 197 (1992) (citing Mark Thompson, *Theadbare Justice*, CAL. LAW., May 1990, at 30).

56. *See* Lam, *supra* note 7, at 632; GAO REPORT, *supra* note 5.

57. "Immigrant women constitute one of the groups most vulnerable to exploitation in our society, yet their needs remain unaddressed [sic] by the legal system." Anderson, *supra* note 3, at 1428.

58. *See* Farhan Haq, *United States: Critics Link Immigration Laws to Sweatshops*, INTER PRESS SERV., Mar. 26, 1996, *available in* 1996 WL 9809605.

59. *See* Lam, *supra* note 7, at 634 n.108.

workers in cash without withholding taxes.[60] The sweatshop was usually "damp and hot, cramped with piles of highly flammable materials, poorly lit, with blocked exits, battered doors, and grime-coated windows; it was generally unsafe and unsanitary."[61] In a 1994 report, the United States General Accounting Office (GAO) found that many shops had exposed wiring, unsanitary bathrooms, lack of machine safety guards, blocked aisles, poor lighting, lack of temperature control, and lack of ventilation.[62] The report found that sweatshop conditions had changed little from those at the turn of the century.[63]

The country's three largest apparel production areas are Los Angeles,[64] New York City,[65] and San Francisco.[66] Overall, more than one million people work in the U.S. garment industry, which is dominated by small shop operations.[67] The GAO defines a sweatshop owner as "an employer that violates more than one federal or state labor law governing minimum wage and overtime, child labor, industrial homework, occupational safety and health, workers' compensation, or industrial registration."[68] Sweatshop owners most frequently violate labor laws that protect minimum wages, overtime pay, and place restrictions on child labor.[69] The GAO identified three primary factors that have led to the proliferation of sweatshops in the United States: the presence of a large immigrant community desperate for work, the labor intensity and low-profit margins of the work, and the rapid growth of subcontracting.[70]

In a 1995 spot test, agents from the U.S. Department of Labor

60. *See id.*
61. *Id.* at 633-34 (footnotes omitted).
62. *See* GAO REPORT, *supra* note 5.
63. *See id.*
64. Los Angeles is the largest garment producing area with more than 140,000 workers in 5,000 shops. *See* Patrick J. McDonnell, *Marchers Protest Garment Sweatshop Labor*, L.A. TIMES, Oct. 5, 1997, at B1. *But see* Bob Baker, *Union Targets Sweatshop Operators*, L.A. TIMES, Apr. 27, 1990, at B3 (reporting that the number of garment workers is 90,000). Arguably, a precise count is impossible due to the secretive nature of most shops.
65. Approximately 6,000 garment shops operate in New York City. *See* Lam, *supra* note 7, at 634.
66. A five-billion-dollar-a-year garment industry employs approximately 10,000 San Francisco-based workers. The majority of these San Francisco-based workers are Chinese immigrant women. *See id.* at 627 n.29.
67. *See id.* at 628.
68. *Id.*
69. *See* Lam, *supra* note 7, at 633.
70. *See* GAO REPORT, *supra* note 5; *see also* Foo, *supra* note 4, at 2185 (discussing the garment industry pyramid-like subcontracting structure).

investigated fifty registered Los Angeles garment manufacturing operations and discovered wage and overtime violations at forty-six of them. The investigators also determined that the garment shop operators improperly withheld more than $500,000 from approximately 600 employees' collective wages.[71] If such labor law violations occurred in legally registered garment production shops, one can only imagine what occurs in the unregistered shops. This concept is even more alarming when one considers that the GAO reports that sweatshop operations have been increasing throughout the 1990s.[72] Estimates indicate that approximately fifty percent of women's apparel made in America is produced in sweatshops.[73]

Historically, U.S.-based clothing companies manufactured the majority of garments bought and sold in the United States. In fact, during the 1950s, only four percent of the clothing purchased in the United States was made abroad.[74] In the 1960s and 1970s, however, domestic manufacturing companies began moving their operations abroad, seeking out cheaper labor forces located predominately in Asia and South America. By the late 1980s, over sixty percent of the "name-brand garments" sold in the United States were manufactured abroad and imported.[75] The U.S. garment industry, however, has recently reversed the trend. Companies are moving their operations back to the U.S. due to several factors, including unstable political climates in foreign countries, increases in U.S. import duties, significant decreases in product quality, and increased demand for higher wages abroad. In turn, these factors have significantly contributed to the substantial increase in U.S.-based garment workers.[76]

Unfortunately, many of these garment workers tolerate the harsh working conditions of illegal sweatshops because they are "accustomed to third-world working conditions."[77] The illegal sweatshops are typically located in the immigrant communities,[78] where the residents commonly speak little English. Despite the unhealthy conditions under which they labor, immigrant sweatshop workers often feel lucky to have

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71. *See* James Sterngold, *Agency Missteps Put Illegal Aliens at Mercy of Sweatshops*, N.Y. TIMES, Sept. 21, 1995, at A16.
72. *See* GAO REPORT, *supra* note 5.
73. *See* Foo, *supra* note 4, at 2185.
74. *See* Hayashi, *supra* note 55, at 196.
75. *See id.* at 196-97.
76. *See id.* at 197.
77. Lam, *supra* note 7, at 639. In fact, the average garment worker in Bangkok, Thailand earns between $3.35 and $6.07 a day for a workday that can last up to 16 hours. *See* Chaiyarachta, *supra* note 15, at 173-74.
78. *See* Lam, *supra* note 7, at 623.

any job at all.[79] They are at the mercy of the shop owners. They do not complain for fear that such complaints will result in their dismissal or will lead government officials to shutdown the shop and order the illegal immigrant workers deported.[80] As one worker in New York's garment district told a reporter, "We know we should be paid the minimum wage, we know we should be paid overtime, but what can we do? . . . If we complain about not getting overtime, if we ask for days off, they can always find someone else."[81] Similarly, garment workers interviewed in San Francisco's Chinatown claimed that the protection of labor laws and minimum wages were reserved for white Americans.[82]

The subjugation of these immigrant garment workers has been facilitated by recent legislative action. By passing tougher immigration laws, Congress has unintentionally allowed sweatshops to flourish. In an ever more precarious position, illegal immigrants in the United States have become increasingly desperate for work, and much more frightened to report violations.[83] The 1986 passage of the Immigration Reform and Control Act,[84] which increases penalties for hiring undocumented workers, was said to have "sparked a resurgence of sweatshops."[85] However, the threats of increased penalties for hiring illegal workers can increase their employers' power over them.[86] Employers hire undocumented immigrants knowing that these workers will not risk deportation to report labor law violations.[87] Wing Lam, Executive Director of the Chinese Staff and Workers Association, an immigrant rights group in New York City, stated that, "People are afraid they'll be deported. They have nowhere to go. It's like they're working on plantations."[88]

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79. *See id.* at 640.
80. *See id.*
81. Aurelio Rojas, *Border Guarded, Workplace Ignored*, S.F. CHRON., Mar. 18, 1996, at A1.
82. *See* Koh, *supra* note 11, at 844.
83. *See* Haq, *supra* note 58.
84. *See* 8 U.S.C. §§ 1101-1537 (1994 & Supp. III 1997).
85. Haq, *supra* note 58.
86. *See id.*
87. *See* Foo, *supra* note 4, at 2183.
88. Rojas, *supra* note 81, at A6. It is hard to identify with the immigrant workers' fear of being deported. It seems that deportation would be better than being subjected to slave-like conditions. However, immigrant women often subject themselves to physical abuse rather than risk deportation if they report their batterer. *See* Anderson, *supra* note 3, at 1421-22. Similarly, a study of undocumented immigrants found that for 64% of Latinas and 57% of Filipinas, the primary barrier to seeking help from any sort of social

The INS has facilitated the maintenance of the sweatshop system by focusing on border patrols rather than on employers. Despite the fact that half of the illegal immigrants who enter the United States come legally on visas and simply overstay; in 1995, the INS had fifteen times the amount of border patrol officers as workplace agents.[89]

III. THE THIRTEENTH AMENDMENT: AN OVERVIEW

The Thirteenth Amendment is viewed as ancient history in modern constitutional theory.[90] Most constitutional scholars disregard the Thirteenth Amendment as having outlived its usefulness. But the Thirteenth Amendment was intended to do more than simply free the slaves after the Civil War. The amendment was a "promise of 'universal civil and political freedom.'"[91] It was intended to bestow upon all second-class members of our society the right to be equal.

There are two sections in the Thirteenth Amendment. The first section[92] prohibits slavery or involuntary servitude. The second section[93] grants Congress the power to enforce the amendment through legislative action. The latter section gives Congress the right to redress the badges and incidences of slavery.

Irrespective of its creators' intent, the Thirteenth Amendment has largely been reduced to the narrowest of possible interpretations—the simple abolishment of slavery.[94] According to the legislative history of the amendment, Congress had three primary purposes behind its enactment. First, Congress intended the amendment to remove "the shackle . . . from the limbs" of the enslaved. Second, Congress intended the amendment to extend rights to African Americans both enslaved and free. Third, Congress sought to broaden constitutional rights for all Americans.[95]

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services agency is the fear of being deported. *See id.* at 1421 n.127 (citing CHRIS HOGELAND & KAREN ROSEN, DREAMS LOST, DREAMS FOUND: UNDOCUMENTED WOMEN IN THE LAND OF OPPORTUNITY 17 (1991)).

89. *See id.*

90. "Most constitutional law professors view the Amendment as having historical meaning only and thus overlook the link between the abolition of slavery and current human rights issues." Colbert, *supra* note 1, at 2 (footnote omitted).

91. *Id.* at 1.

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

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

94. *See* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 503 (1989).

95. Colbert, *supra* note 1, at 10 (footnote omitted). Massachusetts Senator Henry Wilson stated that the Amendment was to "obliterate the last lingering vestiges of the

After its passage, the Thirteenth Amendment did not meet many of its proponents' expectations.[96] As one Congressman declared in the debate that followed its passage, "What is freedom? Is it the bare privilege of not being chained? . . . If this is all, then freedom is a bitter mockery, a cruel delusion."[97] To counteract the narrow construction the states were giving the amendment, Congress, pursuant to its privilege under the second section of the amendment, passed the 1866 Civil Rights Act.[98] Through this Act, Congress guaranteed citizenship to all U.S.-born people, except Native Americans.[99] The Act identified the fundamental rights that were to be recognized in order for all men to be equal before the law. The 1866 Act specified the right to contract, the right to own property, the right to have access to the courts, and basic equality before the law.[100]

The congressional debate surrounding the 1866 Civil Rights Act was similar to a debate typically waged in the courts. In considering the necessity of the bill, congressional members argued in specific terms what they had meant when they passed the Thirteenth Amendment. They were, in effect, debating the meaning of their own legislative history. Proponents of the bill claimed that the Thirteenth Amendment was to make former slaves and all African Americans "freem[e]n . . . entitled to those rights which we concede to a man who is free."[101] As one proponent noted, "When I voted for the amendment to abolish slavery . . . I did not suppose I was offering [African Americans] a mere paper guarantee."[102] Despite passage of the Thirteenth Amendment, former slaves remained on the plantation laboring for their masters. The only change that occurred was that the slaves were paid ridiculously low

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slave system; [it will allow] the wronged victim of the slave system [and] the poor white man . . . impoverished, debased, dishonored by the system that makes toil a badge of disgrace . . . [to] begin to run the race of improvement, progress, and elevation." *Id.* at 10 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864)).

96. In fact, the passage of the Amendment was met with violence against African Americans in the South. *See* Colbert, *supra* note 1, at 11-12.

97. JAMES A. GARFIELD, THE WORKS OF JAMES ABRAM GARFIELD, 1:86 (Burke A. Hinsdale ed., 1970); *see also* Colbert, *supra* note 1, at 14 n.76.

98. The Civil Rights Act of 1866 was the precursor to 42 U.S.C. § 1982 (1988). *See* Akhil Reed Amar, Comment, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 157 (1992).

99. *See* Colbert, *supra* note 1, at 13.

100. *See id.*

101. CONG. GLOBE, 39th Cong., 1st Sess. 405 (1866).

102. Colbert, *supra* note 1, at 13 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer).

wages. As Senator Jacob Howard noted, "by compelling [the former slave] to labor at such price as the old master may see fit to pay him, while at the same time, he not being a slave, has no claim whatever upon that old master for support," puts the former slave in a worse position than prior to emancipation.[103] On the other hand, opponents of the bill said that the Thirteenth Amendment was meant simply to liberate slaves from their masters.[104] The Civil Rights Act was intended to restore the vision of the amendment's framers as a guarantee of liberty to freed slaves and was eventually passed over President Andrew Johnson's veto.[105]

A. Thirteenth Amendment Case Law

Just as there are two sections to the Thirteenth Amendment, there are two lines of Thirteenth Amendment case law. Under the second section, the courts were for a long while reticent to recognize anything as a "badge or incident" of slavery.[106] While the Court during the Warren

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103. VanderVelde, *supra* note 94, at 480.

104. *See id.*

105. *See* COLE, *supra* note 2, at 139.

106. Despite its potential, the Thirteenth Amendment was reduced soon after the enactment of the Civil Rights Act of 1866 to simply outlawing human bondage. In the landmark *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), white butchers in Louisiana sued to overturn a Louisiana law that granted a monopoly to a slaughter-house corporation and denied the plaintiffs the use of their own land and property to pursue their chosen profession. *See id.* The butchers claimed that this law violated the Thirteenth Amendment. The Supreme Court held that the Thirteenth Amendment simply abolished chattel slavery. *See id.* at 69. In the *Civil Rights Cases,* 109 U.S. 3 (1883), the Court overturned the 1875 Civil Rights Act which outlawed race discrimination in public accommodation and jury selection. *See id.* at 20-21, 25. Again, the Court held that slavery was one person owning another. *See* Colbert, *supra* note 1, at 23. The Court reasoned that because race discrimination did not affect the exercise of legal rights by free African Americans, such discriminatory acts were not "badges and incidents of slavery." The Civil Rights Cases, 109 U.S. at 20. The Amendment was to be limited to "[c]ompulsory service of the slave for the benefit of the master." *Id.* at 22. This holding negated Congress's ability to pass anti-discrimination laws under the Thirteenth Amendment.

In *Plessy v. Ferguson*, 163 U.S. 537 (1896), Justice Harlan tried to revive the Thirteenth Amendment, finding in his dissent that the Thirteenth Amendment was intended to eliminate the burdens and disadvantages of slavery, of which separate railway cars were one. *See id.* at 551 (Harlan, J., dissenting).

It was not until the last day of the Warren Court that the Supreme Court revived the Thirteenth Amendment. *See* Colbert, *supra* note 1, at 28. In the landmark case, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held for the first time that a private individual's refusal to sell a home to an African American family was prohibited under the Thirteenth Amendment, because the inability to own property was one of the primary badges of slavery. *See id.* at 441. Because it was tied to the badges of slavery, Congress had the power to prohibit such conduct under section 2 of the Amendment. It was under this authority that Congress was able to pass the Civil Rights Act of 1866, which prohibited discrimination in property transactions. *See id.;* Colbert, *supra* note 1, at 2.

years eventually did hold a discriminatory act to be a badge or incident of slavery, litigation under section 2 of the Thirteenth Amendment is not directly at issue in a case such as the garment workers in El Monte.

This Article focuses on section 1 litigation. The relevant question litigated under section 1 is the scope of the definition of involuntary servitude. Historically, litigation regarding the first section of the Thirteenth Amendment flourished as the Court struggled to define what involuntary servitude meant and to whom it applied.[107] The Court quickly dispelled the notion that the Thirteenth Amendment was applicable only to Africans and their decedents. In the *Slaughter-House Cases*,[108] despite finding against the white butchers, the Court held that the Thirteenth Amendment did not discriminate on the basis of race.[109] "Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the [T]hirteenth [A]rticle .... [i]f Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, [the Thirteenth A]mendment may safely be trusted to make it void."[110] The Court continued to reiterate this point in the *Civil Rights Cases*,[111] declaring that the Thirteenth Amendment made no distinctions on the basis of race, class, or color, but addressed slavery.[112] Again, in 1906, the Court held that "[s]lavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within [the Thirteenth Amendment's] compass as slavery or involuntary servitude of the African."[113]

In addition to the Court's conclusion that the Thirteenth Amendment

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With this single case, the Supreme Court breathed life into the dormant Thirteenth Amendment. While the Supreme Court has done little with this line of case law since *Jones*, it recently reaffirmed its decision. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 176 (1989).

107. The Court has recognized several exceptions to the Thirteenth Amendment's absolute decree. The Thirteenth Amendment, despite the frequent litigation attempts, does not prohibit the military draft, pretrial detention of a material witness to a trial, and civic duty laws that require work service or payment. *See* 45 AM. JUR. 2D *Involuntary Servitude & Peonage* § 12 (1999); *see also* Koppelman, *supra* note 3, at 489 (discussing whether "labor" applies to pregnancy, childbearing, and domestic duties).

108. 83 U.S. (16 Wall.) 36 (1873).

109. *See id.* at 72.

110. *Id.*

111. 109 U.S. 3 (1883).

112. *See id.* at 24 (pointing out that it is the Fourteenth Amendment that extends its protections on the basis of race and class, whereas the Thirteenth Amendment simply abolishes slavery).

113. Hodges v. United States, 203 U.S. 1, 17 (1906).

does not discriminate on the basis of race, the legislative history of the amendment reveals that the framers were concerned not only with the African slave but also with northern labor practices.[114] The members voiced concerns that the northern worker, unlike even the slaves, had no job security and was not provided for by his employer in the case of illness or injury. As southerners had noted during the anti-slavery debate, many congressmen believed that slavery was often more merciful than northern labor practices.[115]

The definition of involuntary servitude has raged in the courts since the passage of the Thirteenth Amendment. Generally, the debate has swung between those who wish to limit the definition of involuntary servitude to "the use or threatened use of physical or legal coercion,"[116] and those who wish to recognize that involuntary servitude can be psychologically enforced when the individual has or believes they have "no way to avoid continued service or confinement."[117] Both sides of the debate have traditionally agreed that the words "involuntary servitude" encompass more than the term slavery.[118]

The courts have struggled with many instances of plaintiffs asserting Thirteenth Amendment violations in cases that bear little resemblance to the days of slavery. Recently in *Mack v. United States*,[119] one of the plaintiff-sheriffs contended that the Brady Act's provision compelling local law enforcement officers to complete background checks on all gun applicants violated his Thirteenth Amendment rights in that the Act forced him to perform an additional duty without pay.[120] As the Ninth Circuit held, involuntary servitude cannot exist unless the individual has no other work options, including the option to quit.[121] Because the sheriff in that case could easily quit, with no adverse consequences to his personhood, he was not being held in involuntary servitude.[122] Hence, the crux of a civil slavery claim is to provide evidence that the coercion under which the plaintiff labors cannot be avoided by simply quitting his job.

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114. *See* VanderVelde, *supra* note 94, at 486-87.
115. *See id.* at 486 (stating that Southerners' paternalism benefited slaves by providing for the slaves' needs in old age or when there was little work, whereas northern employers simply fired employees when they were no longer useful).
116. United States v. Kozminski, 487 U.S. 931, 944 (1988).
117. United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964).
118. *See* Bailey v. Alabama, 219 U.S. 219, 241 (1911).
119. 66 F.3d 1025 (9th Cir. 1995).
120. *See id.* at 1034.
121. *See id.*
122. *See id.*

IV. LEGAL STRATEGIES UNDER THE THIRTEENTH AMENDMENT

The U.S. garment industry is a multi-billion-dollar industry. Except for the garment worker, every participant in the complicated web of employers, contractors, and subcontractors is trying to get a piece of the "action." With so many people fighting to make a profit, the workers have fallen by the wayside. This Article's objective is to identify a litigation strategy that will provide relief to enslaved garment workers and will also provide an incentive for the government to prevent such enslavement.

Employers in labor-intensive industries, such as the garment industry, commonly violate labor laws regulating minimum wage and overtime.[123] While the Fair Labor Standards Act (FLSA)[124] is a viable enforcement method, it falls short in several key areas. First, FLSA fails to exact a high enough penalty on the sweatshop operators. In 1997, federal investigators determined that almost two-thirds of the manufacturers in the New York City garment district violated minimum wage and overtime laws.[125] In 1990, California Department of Industrial Relations officials inspected approximately 1,700 Los Angeles garment shops and issued citations to eighty-six percent for violating labor laws.[126] Although the inspectors imposed $1.7 million in fines,[127] shop operators only paid a fraction of these fines in full. Even when labor laws are enforced,[128] the amount of money that each shop operator pays is often minimal. While the INS issues citations with significant fines to shops that employ illegal immigrants, the shop operators frequently argue, and win, at the agency level to have the fines reduced.[129] Apparently, the only effect that labor law citations have on shops is to cause some of them to close; most shops simply consider the fines a cost of doing business.[130] Simple citations do not address the systemic causes of

123. *See* Lam, *supra* note 7, at 623.
124. 29 U.S.C. §§ 201-219. (1994 & Supp. III 1997).
125. *See Garment Industry Sweatshops Persist, Government Finds*, ST. LOUIS POST, Oct. 19, 1997, at 3A.
126. *See* Hayashi, *supra* note 55, at 197.
127. *See id.*
128. Substantial budget cuts on both the federal and state level have significantly reduced the number of labor inspectors. By 1996, only 10% of the 703 inspections conducted by a joint task force of federal and state agents turned up cash paying violations. *See* Lee, *supra* note 53, at D14.
129. *See* Rojas, *supra* note 81, at A6.
130. *See* Lam, *supra* note 7, at 644.

sweatshops nor do they prevent new shops from opening. The fines are simply too insignificant and too sporadically enforced. Because of their small size and the secretive nature of their illegal alien workforce, it is too easy for sweatshops to go unnoticed and, hence, not receive citations.[131]

It is clear that the FLSA does not go far enough in stopping sweatshops. Therefore, legal practitioners need to identify other litigation strategies. The Thirteenth Amendment is a vastly under-utilized legal tool. Under this amendment, a garment worker and her advocate could seek restitution, for the harm that has been done to the worker, from the sweatshop owner, from the manufacturer who contracted with the sweatshop, and from the federal government for failing to protect her. This litigation technique would have the effect of hurting the defendant parties financially, which serves as a deterrent and also provides relief for the plaintiff.

A. The Sweatshop Owners

1. A Private Right of Action Under the Thirteenth Amendment

The Thirteenth Amendment is self-executing. It needs no ancillary legislation to give it effect.[132] Because it is an absolute prohibition on the existence of slavery, private actors are liable for breaching the Thirteenth Amendment.[133] Hence, an enslaved sweatshop worker can bring suit against the sweatshop owners under the Thirteenth Amendment. However, it is important for potential plaintiffs and legal practitioners to recognize that the chances of collecting anything more than nominal restitution from a sweatshop owner is unlikely. Certainly, if a sweatshop owner has little capital and few assets, a legal victory would be largely symbolic. Nevertheless, an enslaved worker should bring suit against the sweatshop owner. A potential plaintiff can argue that under the Thirteenth Amendment there is a private right of action to directly sue the person imposing the conditions of involuntary servitude. Similarly, this right can support a suit against clothing companies, retailers, and the government.

As of yet, only two cases have discussed whether involuntary

131. Many shops that should be registered with the state are not. In New York City alone, there are an estimated 2,000 unlicensed shops. They are often housed in lofts, back rooms, and garages. *See id.* at 634.

132. *See* United States v. Kozminski, 487 U.S. 931, 942 (1988) (citing The Civil Rights Cases, 109 U.S. 3, 20 (1883)).

133. *See* Terry Properties, Inc. v. Standard Oil Co., 799 F.2d 1523, 1534 (11th Cir. 1986).

servitude victims can sue their masters directly under the Thirteenth Amendment. In *Channer v. Hall*,[134] the Fifth Circuit allowed a victim of involuntary servitude to sue his masters directly for damages under the Thirteenth Amendment.[135] In contrast, in *Turner v. Unification Church*,[136] a Rhode Island District Court held that the plaintiffs could not sustain such an action.[137] The court recognized that it had the power to create a remedy for a violation of the Thirteenth Amendment, but it declined to do so.[138] Although the First Circuit affirmed the Rhode Island court's decision, the 1978 district court decision is questionable given the Fifth Circuit's 1997 ruling in *Channer v. Hall*. Moreover, a great deal of the case law recognizing a private right of action occurred after the Rhode Island District Court decision.[139]

The argument for declaring that there is a private cause of action under the Thirteenth Amendment[140] is based on the principles set forth in the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[141] *Bivens* held that there is a private right of action under the Fourth Amendment and that this right exists because it gives effect to the amendment itself.[142] Where federally protected rights are invaded, the court will adjust the remedies so as to grant the necessary relief.[143] The Court cites *Marbury v. Madison*[144] for

134. 112 F.3d 214 (5th Cir. 1997).
135. *See id.* at 219.
136. 473 F. Supp. 367 (D.R.I. 1978), *aff'd*, 602 F.2d 458 (1st Cir. 1979).
137. *See* 473 F. Supp. at 378.
138. *See id.*
139. *See* Bush v. Lucas, 462 U.S. 367 (1983) (holding that although the remedy was not complete because it did not include attorney's fees or emotional damages, the court will not second guess an elaborate remedial scheme set up by Congress); Carlson v. Green, 446 U.S. 14 (1980) (holding that withholding medical attention constitutes cruel and unusual punishment under the Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (inferring a private right of action directly under the Due Process Clause of the Fifth Amendment to provide relief to a congressional staffer who was fired because of her gender).
140. Amar and Widawsky imply that a private right of action under the Thirteenth Amendment is a constitutional "sure thing" under the logic of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See* Amar & Widawsky, *supra* note 3, at 1380; *see also* Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978) (expanding *Bivens* actions to the Fifth Amendment); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) (expanding *Bivens* actions to the First Amendment).
141. 403 U.S. 388 (1971).
142. *See id.* at 390-94.
143. *See id.* at 396 (inferring a private right of action against a federal agent who violated the plaintiffs' Fourth Amendment rights); *see also* Davis v. Passman, 442 U.S. 228 (1979) (inferring a private right of action directly under the Due Process Clause of

the proposition that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever [one] receives an injury."[145]

In *Bivens,* the Court recognized two situations where courts should hesitate to infer private rights of action. First, they should resist when there are "special factors counseling hesitation in the absence of affirmative action by Congress."[146] There are no such special factors here. Second, courts should be wary when Congress has articulated an alternative mechanism for relief.[147] Congress has provided only criminal prosecution for violations of the Thirteenth Amendment.[148]

The courts have expanded *Bivens* beyond its original coverage of the Fourth Amendment to include implied rights of action directly under the First,[149] Fifth,[150] and Sixth Amendments.[151] The district court in *Turner v. Unification Church,*[152] stated that "the right to be free from involuntary servitude is clearly a federally protected interest."[153] Because freedom from involuntary servitude is a federally protected interest, a federal court following *Bivens* would have the "'power' to imply a cause of action from the appropriate constitutional provision in order to redress the violation."[154] After recognizing that they had the power to create such a remedy, the court held that whether or not to do so was a discretionary issue. The court next noted that the Thirteenth Amendment in this specific case was not "necessary" or "appropriate" as a basis for relief.[155] The court cited three grounds for denying a remedy: first, there was no allegation of misconduct by a government agent; second, the plaintiffs had an adequate remedy under state law; and third, recognizing a cause of action would "constitutionalize" a large portion

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the Fifth Amendment to provide relief to a congressional staffer who was fired because of her gender). In *Bivens*, the court indicated that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens*, 403 U.S. at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

144. 5 U.S. (1 Cranch) 137 (1803).

145. *Bivens*, 403 U.S. at 397 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

146. *Id.* at 396.

147. *See id.* at 397.

148. *See* 18 U.S.C. §§ 241, 1584 (1994 & Supp. III 1997).

149. *See* Dellums v. Powell, 566 F.2d 167, 175 (D.C. Cir. 1977) (expanding *Bivens* actions to the First Amendment); Paton v. La Prade, 524 F.2d 862, 869-70 (3d Cir. 1975) (expanding *Bivens* actions to the First Amendment).

150. *See* Davis v. Passman, 442 U.S. 228, 234 (1979) (expanding *Bivens* actions to the Fifth Amendment).

151. *See* Wounded Knee Legal Defense/Offense Comm. v. FBI, 507 F.2d 1281, 1284 (8th Cir. 1974) (expanding *Bivens* actions to the Sixth Amendment).

152. 473 F. Supp. 367 (1978).

153. *Id.* at 374.

154. *Id.* (citing *Bivens*, 403 U.S. at 407 (Harlan, J., concurring)).

155. *Id.*

of state law.[156]

Despite the fact that this twenty-year-old decision is only one district court's view, the court's conclusion that a *Bivens* remedy should only be inferred when a government agent acts against a person's constitutional interests is simply wrong. The Thirteenth Amendment is unique because, unlike other amendments, it covers private conduct. To say that government conduct is required to obtain a remedy under the Thirteenth Amendment is to negate the entire purpose behind the amendment. The court's second reason for denying a remedy is also insufficient. The fact that individuals have an alternative state remedy does not deprive them of their federal rights.[157] The third rationale is also inadequate. The mere fact that state law remedies associated with false imprisonment might become constitutional questions does not render the federal remedy inappropriate.

The Constitution only refers to remedies in two instances: in habeas corpus cases and in the Just Compensation Clause of the Fifth Amendment. This does not mean that all other constitutional violations were intended to go without a remedy. Rather, it means that remedies would be applied under common law. In *Ward v. Board of County Commissioners*,[158] the Supreme Court held that there are implied remedies for constitutional violations, even if they are not specified in the text of the Constitution.[159] As Justice Brennan suggested in *Davis v. Passman*,[160] it is important that constitutional rights not be meaningless, hence those rights must be justiciable.[161] Likewise in *Carlson v. Green*,[162] the Court upheld the availability of a damages remedy in an action which alleged that the failure of federal prison officials to provide medical attention to plaintiff's now deceased son constituted cruel and unusual punishment under the Eighth Amendment.[163]

The cases in which the Supreme Court has resisted inferring private rights of action under constitutional provisions have typically been cases where the Court deemed the available remedy to be adequate.[164] If there

156. *See id.*
157. *See id.* at 372-73.
158. 253 U.S. 17 (1920).
159. *See id.* at 21-24.
160. 442 U.S. 228 (1979).
161. *See id* at 242.
162. 446 U.S. 14 (1980).
163. *See id.* at 24.
164. *See* Schweiker v. Chilicky, 487 U.S. 412, 428-29 (1988) (holding that congressionally provided remedies were adequate and stating that Congress is better

is no right of action directly under the Thirteenth Amendment, then a person held in a condition of slavery by a private person has no right to sue that person civilly. In order to effectuate the purpose of the amendment, "the enslaved person must have legal redress against the master."[165]

The value of the *Turner* case is limited in light of the Fifth Circuit's recent conclusion in *Channer v. Hall*, that they would "assume, *arguendo*, that the Thirteenth Amendment directly gives rise to a cause of action for damages under the analysis articulated in [the *Bivens* case] and its progeny."[166] Hence, without citing a case other than *Bivens*, the Fifth Circuit simply assumed that there were no reasons under the logic of *Bivens* that a private right of action should not be afforded under the Thirteenth Amendment.

The defendants in *Channer* argued unsuccessfully that section 2 of the Thirteenth Amendment, which grants "'Congress [the] power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,'" meant that Congress prohibited a private right of action directly under the Thirteenth Amendment.[167] Defendants argued that Congress, by endowing itself with this power, had foreclosed a private right of action directly under the amendment.[168] The Court felt that this reasoning was inapplicable to Channer's claim.[169]

If the Supreme Court is willing to infer a private right of action directly under constitutional amendments when there is no adequate remedy under federal law, the garment workers should have little difficulty suing their enslaving masters for civil damages under the Thirteenth Amendment. However, unless there is a private right of action under the Thirteenth Amendment, slaves cannot sue their masters for damages under federal law.[170] A court faced with a case such as the El Monte case, where women were held as virtual prisoners for up to seven years, would surely find a way to redress their harm. While penalties under existing criminal laws can bring some measure of compensation to the victims, at least emotionally, it is only through civil

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situated to create the remedy than the courts); Bush v. Lucas, 462 U.S. 367, 390 (1983) (holding that although the remedy was not complete because it did not include attorney's fees or emotional damages, the court will not second guess an elaborate remedial scheme established by Congress).

165. Amar & Widawsky, *supra* note 3, at 1380.

166. Channer v. Hall, 112 F.3d 214, 217 (5th Cir. 1997).

167. *Id.* at 217 n.5 (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883))).

168. *See Channer*, 112 F.3d at 217.

169. *See id.*

170. There are several different kinds of state torts under which they might seek relief, such as wrongful imprisonment, kidnapping, assault and battery, etc.

damages that such victims can exact their own measure of justice. In a criminal case, the crime that the defendants are answering for is a crime against the state. It is the state that prosecutes and the state that controls the case. In a civil case, the victim has control and power. When they win, they feel a sense of vindication, which is arguably not possible in the criminal justice system.

The sweatshop operators have inflicted pain and suffering upon their workers. They have held them against their will and forced them to toil for little pay, in squalid conditions, without choice. As the Fifth Circuit seems to note in its summary application of a private right of action to the Thirteenth Amendment, this is clearly what the Thirteenth Amendment was created to redress. Thus, it is extremely likely that a court in a case such as El Monte would infer a private right of action.

2. *Are Garment Workers Slaves?*

Because it appears likely that a Thirteenth Amendment case against the El Monte operators would be upheld in court, legal scholars and practitioners next need to question whether a case against a more garden-variety sweatshop owner would also succeed. As this Article has already noted, few sweatshops have conditions as egregious as El Monte. Working conditions in the garment industry rarely rise to the level of horror experienced by the Thai garment workers. However, sweatshops are often characterized by conditions and practices that might rise to the level of an actionable claim under the Thirteenth Amendment. The standard for bringing criminal charges under the Thirteenth Amendment is that the individual is subjected to threats of or actual physical or legal coercion to keep them in involuntary servitude.[171]

"[F]ree will and its negation have been the focus of the last half century of criminal cases enforcing the Thirteenth Amendment."[172] The dispute over the definition of involuntary servitude has centered on whether or not an individual, who has neither been physically harmed, threatened with harm, nor threatened with legal action, can ever be held in involuntary servitude. The Ninth Circuit ruled that psychological coercion alone could, under proper circumstances, result in an individual being held in involuntary servitude.[173]

171. *See* United States v. Kozminski, 487 U.S. 931, 952-53 (1988).
172. McConnell, *supra* note 3, at 221.
173. *See* United States v. Mussry, 726 F.2d 1448, 1453 (9th Cir. 1984), *cert. denied*,

The Ninth Circuit's opinion in *United States v. Mussry*[174] involved a defendant who recruited non-English speaking Indonesians and paid them more than they would make in Indonesia, but less than the U.S. minimum wage.[175] To ensure that they worked fifteen hours a day for seven days a week, the defendants held the workers' passports and return plane tickets.[176] The court found that "[a] holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor."[177] In reaching its decision, the court looked at the individual harmed and formulated a subjective standard that asked whether the experience would break their will.[178]

In *United States v. Shackney*,[179] a case that predates *Mussry* by twenty years, a Mexican man and his seven member family were recruited to work on a farm.[180] After making them sign a promissory note, the farmer paid for their transport, housed them in a corrugated metal shed without electricity or plumbing, gave them insufficient food, forced small children to work, and confined the family to the farm. He kept them captive by threatening them with deportation. The defendant refused to allow the children to go to school or the man or his wife to go into town.[181] Judge Friendly and the Second Circuit ruled that without evidence of physical or legal coercion, a simple threat of deportation to Mexico was not sufficient for a finding of criminal involuntary servitude.[182] The threat of deportation was only sufficient, according to Judge Friendly, if the "deportation [was] equivalent to imprisonment or worse."[183]

As noted previously, unlike most Thirteenth Amendment questions, the Supreme Court has actually ruled on the definition of involuntary servitude under the Thirteenth Amendment and the criminal prosecution statutes.[184] In *United States v. Kozminski*,[185] the Supreme Court reviewed a case where the defendants had held two mentally retarded men in hard

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469 U.S. 855 (1984).

174. 726 F.2d 1448 (9th Cir. 1984).

175. *See id.* at 1453.

176. *See id.*

177. *Id.*

178. *See* McConnell, *supra* note 3, at 223.

179. 333 F.2d 475 (2d Cir. 1964).

180. *See id.* at 477.

181. *See id.* at 478.

182. *See id.* at 487.

183. *Id.* at 486.

184. The criminal prosecution statutes are codified at 18 U.S.C. §§ 241, 1584 (1994 & Supp. III 1997).

185. 487 U.S. 931 (1988).

labor on their farm.[186] The men had basically been found, one walking along the road and the other in town, and brought to the farm.[187] The men worked seven days a week, often seventeen hours a day. While the defendants initially paid the workers fifteen dollars a week, eventually all compensation stopped. The defendants threatened the workers with physical violence, threatened to put them in an institution, and subjected them to various kinds of psychological coercion.[188] In 1988, the Supreme Court,[189] in an opinion by Justice O'Connor, adopted a requirement that in order for a court to find conditions of involuntary servitude, the defendant must threaten or use physical or legal coercion to intimidate the individual to remain in forced labor.[190] This case settled a dispute between the above referenced circuits regarding whether psychological coercion could be used to hold someone in involuntary servitude.[191]

At first glance, the standard set forth in *Kozminski* would appear to be a tough hurdle for most victims of sweatshops to overcome. The El Monte women were physically threatened and hence, under any definition, a court would find them to be held in involuntary servitude. But what of women who go home at the end of a fifteen-hour sweatshop work day or who are paid substandard wages? What of women who conceivably could quit? Would the courts consider these women to be held in involuntary servitude? The majority in *Kozminski* left the door open to possible use of threatened deportation to fit the definition of a threat of legal action.[192] However, even without such a finding, the women might be able to prevail under a civil application of the Thirteenth Amendment.

It is a well-established principle under the rule of lenity that criminal law applications are more narrowly defined than are civil applications.[193]

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186. *See id.* at 931.
187. *See id.* at 935.
188. *See id.*
189. The Supreme Court granted certiorari in *Kozminski* "to resolve [the] conflict among the Courts of Appeals on the meaning of involuntary servitude for the purpose of criminal prosecution under § 241 and § 1584." *Id.* at 939.
190. *See id.* at 952-53.
191. *Compare* United States v. Mussry, 726 F.2d 1448, 1453 (9th Cir. 1984) (holding that psychological coercion was sufficient), *with* United States v. Shackney, 333 F.2d 475, 487 (2d Cir. 1964) (holding that psychological coercion was not sufficient).
192. *See Kozminski*, 487 U.S. at 948.
193. The rule of lenity provides that "where there is ambiguity in the language of a statute concerning multiple punishment, ambiguity should be resolved in favor of lenity in sentencing." BLACK'S LAW DICTIONARY 902 (6th ed. 1990) (citing United States v.

This is because the ramifications of criminal law violations are far greater than the ramifications of civil law violations. The Due Process Clause requires that a potential defendant have clear notice of what behavior will be subject to criminal penalties.[194] As the *Kozminski* Court noted, the purpose of this standard is to "promote fair notice to those subject to the criminal laws [and] to minimize the risk of selective or arbitrary enforcement."[195] A case-by-case determination may not be consistent with this goal in criminal law and hence notice is required.[196] The Supreme Court noted that this rule of lenity commands that "genuine ambiguities affecting a criminal statute's scope" should be "resolved in the defendant's favor."[197] As the Court noted in *Kozminski,* it was not making an assumption as to the reach of the Thirteenth Amendment itself, but simply the criminal statutes passed under the amendment's protection.[198]

Unfortunately, despite the Supreme Court's limiting language, at least two lower courts have applied the *Kozminski* standard to civil Thirteenth Amendment cases.[199] In the case of *Channer v. Hall,* the Fifth Circuit extended the definition of involuntary servitude stated in *Kozminski* to a civil suit brought by a prisoner forced to work in the Food Service Office.[200] However, it is stated in a very brief decision in an extremely summary fashion. Moreover, while the finding was based on an exception to the Thirteenth Amendment, the court still held that the defendant had been subjected to legal coercion.[201] It is conceivable that because the defendant fit within the scope of the involuntary servitude definition as stated in *Kozminski,* it was easier for the court to adopt the articulation of the definition in the civil context than to attempt in such a perfunctory opinion to articulate a new standard.

Additionally, in the case of *Buchanan v. City of Bolivar,*[202] the Sixth Circuit, clearly misreading the *Kozminski* decision, held that the definition of involuntary servitude was the same under the criminal

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Barrington, 662 F.2d 1046, 1054 (4th Cir. 1981)).

194. *See* Lauren Kares, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine,* 80 CORNELL L. REV. 372, 388 (1994).

195. *Kozminski,* 487 U.S. at 952.

196. *See id.* at 951. The Court applied the "time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 952.

197. United States v. Lanier, 520 U.S. 259, 266 (1997).

198. *See Kozminski,* 487 U.S. at 944 (stating that the Court "dr[e]w no conclusions . . . about the potential scope of the Thirteenth Amendment").

199. *See* Channer v. Hall, 112 F.3d 214, 217-18 (5th Cir. 1997); Buchanan v. City of Bolivar, 99 F.3d 1352, 1357 (6th Cir. 1996).

200. *See Channer,* 112 F.3d at 218-19.

201. *See id.* at 218.

202. 99 F.3d 1352 (6th Cir. 1996).

enabling statutes of the Thirteenth Amendment as it was under the Thirteenth Amendment itself.[203] Under this misconception, the court held that despite the fact that a child may have been psychologically coerced into service against his will, he was not physically or legally coerced and, therefore, did not have a civil claim under the Thirteenth Amendment.[204] Unlike the Fifth Circuit in *Channer*, the Sixth Circuit clearly felt compelled to adopt the criminal definition of involuntary servitude for use in civil cases. While its logic for incorporation, that it was compelled by *Kozminski,* was wrong, its decision to use the same standard is legally sound, although short-sighted. This is, however, the opinion of only one circuit.

Therefore, it is still unclear which definition would apply in other circuits to civil Thirteenth Amendment cases. The Supreme Court specifically noted that it is easier to comprehend the "general spirit of the phrase 'involuntary servitude'" than to define "the exact range of conditions it prohibits."[205]

B. The Clothing Manufacturers and the Retailers

The second part of this three-part litigation strategy for achieving the most advantageous outcome for all garment workers, and in particular for the El Monte women, is to sue the clothing design and manufacturing companies and retailers that contract with the sweatshops.[206] Once the plaintiffs have established that there is clearly a private right of action under the Thirteenth Amendment, under which they can sue the sweatshop owners, they can extrapolate that they can bring a suit under the Thirteenth Amendment against the manufacturers as well.

Suits against the manufacturers have been tried under the FLSA.[207]

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203. *See id.* at 1357.
204. *See id.* at 1358.
205. *Kozminski*, 487 U.S. at 942.
206. This Article collectively refers to clothing companies that design and manufacturer clothing, clothing companies that contract to have clothing manufactured under their label, and retailers that contract to have their store-brand labels manufactured as "manufacturers."
207. In a few instances, government agencies, typically the Department of Labor, have gone after the manufacturers based on the "hot goods" provision in the FLSA. The "hot goods" provision states that it is unlawful for anyone to transport any goods made in violation of the FLSA. Typically, these sanctions are only pursued when repeated fines against the shop itself have led the government to the same manufacturer over and over again. *See* Lam, *supra* note 7, at 653. This provision only permits an injunction against a non-employer, such as the manufacturer, with potential criminal penalties for non-

There has, however, never been successful litigation against clothing manufacturers directly under the Thirteenth Amendment. Obviously, there are several problems with litigation directed at the top of the garment-making pyramid, but it is a strategy that potential plaintiffs should try, albeit in conjunction with a suit against both the sweatshop owners and the government.

There are two primary benefits to suing the contractor. First, manufacturers have sufficient resources to pay damages, whereas sweatshops are often judgment proof.[208] Second, retailers provide the impetus for the entire sweatshop system. It is quite possible that the manufacturers recognize that the prices they pay to shop owners are far too low to provide shop workers with minimum wage.[209] Raising the consciousness of the manufacturers would obliterate most sweatshops. It is their claim of ignorance that allows the shops to flourish so unabashedly. Clothing manufacturers are also in the best position to comply with the FLSA.[210] Unlike a shop owner, clothing manufacturers are able to pass the increased cost of paying a living wage and overtime on to the consumer.[211] In the present situation, they unjustly reap a benefit of low wage labor without having to bear any of the liability.

In the El Monte case, the plaintiffs alleged that the manufacturing companies could be held liable for the sweatshop operator's actions under three theories. First, they argued that, under the agency theory, the companies were vicariously liable for the intentional torts of their agents, the shop owners. Second, the plaintiffs contended that the

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enforcement. The FLSA only provides a private right of action against employers. *See id.*

Plaintiffs in the El Monte case asserted a negligence claim based on the "hot goods" provision of the FLSA. *See* Bureerong v. Uvawas, 959 F. Supp. 1231, 1236 (C.D. Cal. 1997). The court dismissed the claim, holding that the plaintiffs failed to state a claim for negligence. *See id.* The court did, however, allow the plaintiffs the opportunity to plead their claim again, stating that it is possible to read into the FLSA a desire to protect individual employees despite the fact that the act itself does not contain a private right of action. *See id.* at 1237.

208. *See* Lam, *supra* note 7, at 644 (stating that penalties are inconsequential when compared to a sweatshop's total profits).

209. Charles Wang, the Executive Director of the Greater Blouse, Skirt and Undergarment Association, claims that manufacturers often pay a piece rate that translates to paying people three to four dollars an hour. *See* Steven Greenhouse, *Garment Shops Found to Break Wage Laws*, N.Y. TIMES, Oct. 17, 1997, at B1.

210. Despite the fact that a manufacturer is best able to bear the costs of complying with regulations aimed at breaking up the sweatshops, the laws are typically targeted at the shop owner rather than the manufacturer. State regulations (i.e., registration and licensing requirements for apparel shops with more than a certain number of employees, sanctions against homework systems, sign posting requirements to assist officials in locating shops, and record keeping requirements) are all directed at the shop owners. *See* Lam, *supra* note 7, at 643.

211. *See Bureerong*, 959 F. Supp. at 1235.

companies were jointly liable for aiding and abetting the intentional torts of the shop owners. Finally, under a joint employer theory, the workers argued that the contracting clothing companies were jointly liable with the shop owners for any intentional torts committed under the FLSA.[212]

In considering a Rule 12(b)(6) motion, the district court found that there was sufficient evidence against the defendants as agents under a vicarious liability theory for the claim to go forward. The court held that under the doctrine of respondeat superior, employers were responsible for the "malicious acts and other intentional torts" of their employees if committed within the scope of their employment.[213] Potentially, this would cover even non-sanctioned criminal acts committed by the employee.[214] The court based this conclusion on both California law and the Restatement (Second) of Agency.[215] The decision never reached any question that involved federal law, holding that because there was merit to the agency claim, the case should not be dismissed.[216]

In addition to the above claims, the plaintiffs in the El Monte case should also have brought an action against the clothing companies under the Thirteenth Amendment. In the following sections, this Article shows that potential plaintiffs can bring suits both directly under the Thirteenth Amendment and through 42 U.S.C. § 1986, an enabling statute passed under the Thirteenth Amendment. A direct suit against the contracting clothing company, under the Thirteenth Amendment, can prevail by either showing that the garment workers were in fact employees of the manufacturers or by showing that the contracting clothing company was a joint employer. Under § 1986, plaintiffs must show that the defendant clothing design or distribution company had knowledge of the conspiracy that existed at the sweatshop that deprived the workers of their civil rights, and that the company was in a position to aid the workers but failed to do so.

212. *See Bureerong*, 959 F. Supp. at 1235.
213. *Id.*
214. *See id.*
215. *See id.*
216. *See id.* at 1236.

1. *Is the Sweatshop a De-Facto Employee of the Garment Manufacturer?*

a. Employee or Independent Contractor?

The garment manufacturer is the entity that controls the sweatshop system. There are less than 1,000 manufacturers that parcel out contracts to approximately 20,000 sweatshops, which enter and exit the industry constantly.[217] Without the manufacturers placing orders with the sweatshops, there would simply be no sweatshops.[218] However, the attenuated relationship between the garment worker and the manufacturer exists for a reason.[219] Commentators believe that the relationship exists to insulate the manufacturer from liability to the garment worker. It is far cheaper for the apparel manufacturers to contract the work out to sweatshops, which cut corners on wage laws, health benefits, and sanitary working conditions, than it is for the manufacturers to hire their own workers and assume the liability for treating them improperly.[220] Therefore, not only do manufacturers receive the benefits of competition between the sweatshop contractors to win and keep contracts,[221] but they also receive moral and legal insulation from violations of labor laws.[222] The garment worker is technically an employee of the sweatshop, which is an independent contractor of the manufacturer. Hence, no employer-employee relationship exists between the garment worker and the manufacturer.[223]

Herein lies the heart of the problem facing any suit against the

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217. *See* GAO REPORT, *supra* note 5.

218. Susan Cowell, Vice-President of the Union of Needletrades, Industrial and Textile Employees (UNITE), claims that conditions in sweatshops will not improve until the largest retailers are targeted. *See* Haq, *supra* note 58, at 6-7.

219. The relationship may be even more attenuated than assumed by this Article. There is evidence that shops often subcontract their orders out to other shops without the knowledge of the manufacturer, making the manufacturer's ability to monitor even harder. *See* White & McDonnell, *supra* note 43, at D11.

220. *See* Lam, *supra* note 7, at 629-30.

221. There are so many shops bidding for the manufacturers' business that the profits the contractors make are as minimal as the wages they pay. *See id.* at 630.

222. It is cheaper for the manufacturers to contract work out to a sweatshop than to hire their own garment workers. *See id.*

223. The retailer, who is supplied by the manufacturer, who is supplied by the contractor, who pays the garment worker, heads the garment industry business structure. The manufacturer designs the clothes and often provides the fabrics. The contractors employ cutters, seamstresses, trimmers, and pressers. *See id.* at 629. The retailer usually receives more than a 100% mark-up and the manufacturer gets twice the price the contractor gets. *See id.* For example, workers who sewed dresses for Jessica McClintock, which retailed for $175.00 each, were paid only $5.00 per dress. *See* Sarah Henry, *Can an Upstart Women's Group Press a New Wrinkle into the Rag Trade Wars?*, L.A. TIMES MAG., Aug. 1, 1993, at 20, 22.

manufacturer—the entire system has been established to shield the manufacturer from liability. Yet, despite the valiant efforts of the manufacturers' attorneys, it may be possible to prove that the garment worker is a de facto employee of the manufacturer.[224] Most courts employ the "economic reality" test[225] to determine whether a worker is an employee or an independent contractor under the FLSA.[226] The Seventh Circuit utilized this test in *Secretary of Labor v. Lauritzen*,[227] to determine that migrant farm workers were employees under the FLSA.[228] The court focused on the economic reality of the migrant farm workers' situation. The court examined how dependent the migrant workers were upon the business for which they labored.

> Under the economic realities test, the courts examine the facts of the case in light of the following criteria: (1) the extent to which the services in question are an integral part of the "employer's" business; (2) the amount of the "employee's" investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer"; (4) the "employee's" opportunities for profit or loss . . . ; (5) the amount of initiative, skill, judgment, or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship.[229]

In applying the above six criteria to a case in which sweatshops contracted with manufacturers, a reviewing court would have a great deal of discretion. The test, when applied to such a case, is far from conclusive. As to the first element, the extent to which the questioned services are central to the business, the shop is an integral part of the manufacturer's everyday business. The manufacturer could not function without the shop assembling its garments. This element of the test favors a finding that the sweatshop is not simply an independent employer, but rather, represents an employee of the manufacturer.

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224. One article has suggested that the only way to accomplish this is if Congress amends the FLSA to create a cause of action specifically against the manufacturer. *See* Hayashi, *supra* note 55, at 196.

225. See Debra T. Landis, *Annotation, Determination of "Independent Contractor" and "Employee" Status for Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 USCS § 203(e)(1))*, 51 A.L.R. FED. 702, 706 (1997).

226. This Article uses the FLSA as a starting point because the nature of the claim, that the victims are being held in involuntary servitude, is more akin to a wage and hour violation under the FLSA than a workers compensation or unemployment claim.

227. 835 F.2d 1529 (7th Cir. 1987).

228. *See id.* at 1534.

229. Landis, *supra* note 225, at 706. *See* Henderson v. Inter-Chem Coal Co., 41 F.3d 567, 570 (10th Cir. 1994); Real v. Driscoll Strawberry Assoc., 603 F.2d 748, 754 (9th Cir. 1979); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311 (5th Cir. 1976), *cert. denied*, 429 U.S. 826 (1976); Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. 1974).

Element number two, the amount of the employee's investment in facilities and equipment, most likely favors the manufacturer. The sweatshop buys its own equipment and hires its own workers. The owner invests in rent and decides where to locate the business. One court, however, approached this element by weighing the relative investment of the "employee" versus the investment of the "employer."[230] In that case, which involved farm workers, the court found that the purchase of shovels, hoses, and picking carts was minimal in comparison with the grower's purchase of land, heavy machinery, and other supplies necessary for cultivating the strawberries.[231] While in the case of garment workers the facts may not be nearly as strong, plaintiffs' counsel could allege that the sweatshop owners' investment is also minimal. Simply purchasing sewing machines and renting space is an insignificant investment when compared to the entire set-up of the manufacturer, which includes designing the clothes and patterns, marketing the clothes, and providing the fabric, zippers, buttons, and other supplies needed to assemble the clothes.

The third element, the degree of control the employer exercises or retains over the employees' work, as with the first criterion, appears to favor the finding of an employer/employee relationship. The manufacturer clearly controls the work of the sweatshop. While the sweatshop owners control whom they hire or fire and the places of production, there is little else under their control. The manufacturer determines when the pieces will be completed, how they will be completed, the pattern in which the pieces will be cut, the price for which the pieces will sell, and often supplies the fabric out of which the clothing will be made.[232] A factor that may be relevant to this analysis is that the sweatshop owners have an extremely low level of bargaining power in their negotiations with the manufacturer.[233] This suggests that the sweatshop owners are merely the manufacturers' agents.[234]

The fourth element examines the sweatshop's ability to control its own opportunity for profit and loss. The courts wield great discretion in determining whether this element has been satisfied. A court could conclude that the sweatshop bargained with the manufacturer for a price and that they controlled their own profit and loss. Alternatively, a court could conclude that the sweatshop has an unfair disadvantage in the

230. *See Driscoll Strawberry Assoc.*, 603 F.2d at 755.
231. *See id.*
232. *See* Lam, *supra* note 7, at 658-59.
233. Often, another recent immigrant, potentially a former garment worker who saved enough money to buy a few sewing machines and rent space, owns the contracting shop. In general, sweatshop owners are very inexperienced. *See id.* at 630.
234. *See id.* at 661.

bargaining process—that they are at the mercy of the manufacturer and, therefore, have little control over the outcome.

The fifth element asks the court to examine the amount of initiative, skill, judgment, and foresight required for the success of the claimed independent enterprise. While there is little special skill that the sweatshop operator provides the manufacturer (i.e., the manufacturer is capable of hiring its own crew of garment workers), the sweatshop operator does establish his own shop, on his own initiative. The questions of judgment and foresight are extremely subjective and, therefore, are probably dependent on the individual facts of the case.

The sixth element, the duration of the relationship, is also largely dependent upon the individual working relationship in the specific case before the court. While some sweatshops are fly-by-night operations, most sweatshops have long-standing relationships with manufacturers.[235] What is clear is that manufacturers are permanently in need of a shop to assemble their goods. In this sense, the relationship is intended to be a permanent one. Courts have found that contracts for as little as a year that are routinely renewed may qualify as a permanent relationship.[236]

The courts do not consider any one of the six elements controlling. All courts applying the test have agreed that the elements are merely tools by which to gauge the degree of the worker's dependence.[237] While it is unclear whether a court would find that a sweatshop was in an employer/employee relationship with the manufacturer, it is clear that the agreements between the parties as to employment status do not control. In *Rutherford Food Corp. v. McComb*,[238] the Supreme Court argued that what mattered most in determining independent contractor status was not the particular formalities constructed by the employer. For example, the mere fact that the farm owner in *Lauritzen* wrote contracts declaring the migrant workers to be independent contractors was held not to be determinative.[239] Rather, the circumstances surrounding the entire activity should be considered.[240]

In addition to holding that the contracts themselves are not controlling, courts have concluded that the subjective intent of the parties is not

235. *See* Chaiyarachta, *supra* note 15, at 194.
236. *See* Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1312 (5th Cir. 1976).
237. *See id.* at 1311.
238. 331 U.S. 722 (1947).
239. *See* Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987).
240. *See* Lam, *supra* note 7, at 651.

controlling.[241] Therefore, courts have found an employer/employee relationship to exist even where both parties intended to and agreed to form an independent contractor relationship.[242]

The manufacturers sued in the El Monte case filed a Rule 12(b)(6) motion declaring that, under the FLSA, the garment workers could not be considered their employees. After performing an analysis very similar to the one discussed above, the district court held that the definition of "employee" under the FLSA was unclear but that, for purposes of the case, it would hold that an employer/employee relationship did exist.[243] The statute itself defines "employee" in a circular manner as "any individual employed by an employer."[244] The verb "employ" is defined as to "suffer or permit to work."[245] The court in the El Monte case followed the Ninth Circuit ruling that courts "must be mindful of the directive that [the FLSA] is to be liberally construed."[246] The court reasoned that it was to rule in accordance with Congress' goals in passing the FLSA.[247] The court indicated that, according to the Supreme Court, the FLSA's definition of an employee, as any person acting directly or indirectly in the interest of an employer, was to be construed "expansively."[248] Thus, the Supreme Court's interpretation of the definition instructed lower courts to "stretch[] the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."[249]

In finding that the courts have broad discretion to define the term "employer," the court noted that the Supreme Court had instructed lower courts to inquire "whether there is an employment relationship under the FLSA [by examining the] 'economic reality' rather than 'technical concepts.'"[250] Specifically, the reviewing court is to examine the "totality of the circumstances,"[251] rather than the contractual labels in

241. *See, e.g.*, Real v. Driscoll Strawberry Assoc., 603 F.2d 748, 755 (9th Cir. 1979); *Pilgrim Equip. Co.*, 527 F.2d at 1315; Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. 1974).

242. *See id.*

243. *See* Bureerong v. Uvawas, 922 F. Supp. 1450, 1467 (C.D. Cal. 1996).

244. 29 U.S.C. § 203(e)(1) (1988).

245. *Id.* § 203(g).

246. *Bureerong*, 922 F. Supp. at 1466 (quoting Biggs v. Wilson, 1 F.3d 1537, 1539 (9th Cir. 1993), *cert. denied*, 510 U.S. 1081 (1994)).

247. *See Bureerong*, 922 F. Supp. at 1466.

248. *See id.* at 1467 (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326-27 (1992)); *see also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947) (holding that the definition of "employ" is broad).

249. *Id.* at 1467 (quoting *Darden*, 503 U.S. at 326).

250. Hale v. Arizona, 993 F.2d 1387, 1393 (9th Cir. 1993) (quoting Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961)). *See Bureerong*, 922 F. Supp. at 1467.

251. *Hale*, 993 F.2d at 1394.

order to determine employee status under the FLSA.[252]

The Ninth Circuit has elaborated on the language of the Supreme Court and has provided lower courts with indicators of whether there is an employer/employee relationship. The five-part analysis, which is similar to the six criteria that are commonly used in the economic reality test, assesses: (1) whether the employer has the power to hire or fire employees; (2) whether the employer supervises or controls the work schedules and conditions of employment; (3) whether the employer determines the rate of payment; (4) whether the employer maintains employee records;[253] and (5) whether the employee's services are an integral part of the employer's business.[254] The district court cautioned that these criteria are not "etched in stone and will not be blindly applied."[255]

The crux of the analysis under the economic reality test, according to the district court in the El Monte case, is how dependent the employee is upon the employer.[256] As the Supreme Court noted in *Bartels v. Birmingham*,[257] the issue is whether the individuals as a "matter of economic reality are dependent upon the business to which they render service."[258] In the El Monte case, the district court found that the garment workers and the manufacturers were clearly not in a typical employer-employee relationship.[259] The manufacturer had no power to hire or fire and did not exercise direct supervision over the workers.[260] The claim does, however, argue that the plaintiffs were an integral part of the manufacturers work,[261] and that the manufacturers' practice of contracting at absurdly low prices for garments prohibited the payment of minimum wage and overtime, making it impossible for the contractor to comply with the FLSA.[262] Further, the court recognized that the defendants might have engaged in such practices specifically to avoid

252. *See Bureerong*, 922 F. Supp. at 1467.
253. *See* Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).
254. *See* Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981).
255. *Bureerong*, 922 F. Supp. at 1468 (quoting *Donovan*, 656 F.2d at 1370).
256. *See id.*
257. 332 U.S. 126 (1947).
258. *Id.* at 130.
259. *See Bureerong*, 922 F. Supp. at 1468.
260. *See id.*
261. *See id.*
262. *See id.*

liability under wage and hour laws.[263] Finally, the court found that, under the liberal rules of pleading, the plaintiffs had sufficiently alleged that there was an employer-employee relationship.[264]

While the district court in the El Monte case was willing to construe the FLSA statute quite liberally to find that the manufacturers were the employers of the sweatshop, it is clear that another court could decide differently, even under the same analysis. The test is extremely malleable.

b. The Joint Employer Relationship

Yet another alternative is to show that there is a joint employer relationship. The joint employer relationship exists:

> where one employer is acting directly or indirectly in [another employer's] interest in relation to the employee and... where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.[265]

The issue is whether a group of employees clearly employed by one employer, here—the sweatshop, can be deemed to be employees of another separate employer, here—the manufacturer. Once courts have found that the two entities were actually joint employers, they have held both employers liable for FLSA violations.[266] Hence, in a potential garment worker case, the court could hold the manufacturer liable for holding the garment workers in involuntary servitude.

The Supreme Court has noted that the primary element in determining whether a joint employer relationship exists is the "indicia of control" exercised by an employer over the work of the others' employees.[267] Like the independent contractor test, the joint employer test accords little weight to the contractual agreement between the parties.[268]

The National Labor Relations Board (NLRB) has found that a garment manufacturer and a contractor, who sewed and pressed the garments produced for the manufacturer, were joint employers. The NLRB viewed the fact that the contractor was dependent on the manufacturer in

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263. *See id.*
264. *See id.* at 1469.
265. Maldonado v. Lucca, 629 F. Supp. 483, 487 (D.N.J. 1986).
266. *See* Annotation, *When Are Separate Business Entities "Joint Employers" of Same Employees for Purposes of Application of Federal Labor Laws*, 73 A.L.R. FED. 609 (1985) [hereinafter *Joint Employers*].
267. *See* Boire v. Greyhound Corp., 376 U.S. 473 (1964).
268. *See Joint Employers, supra* note 266, at § 2[a].

order to meet its payroll as decisive.[269] The specific case involved a contractor, who rented space from the manufacturer, but maintained separate bookkeeping and payroll systems.[270] While the sweatshops discussed in this Article are not on the manufacturer's premises, they too are dependent on the manufacturer for financial survival.

The plaintiffs in the El Monte case alleged a joint employer claim as well. The District Court, in ruling on a Rule 12(b)(6) motion, found that this was a possible claim against the manufacturers.[271] Without ruling on the specifics of the claim, the court refused to foreclose the possibility that the manufacturers were indeed joint employers.

c. Conclusion

As the above discussion suggests, the manufacturer can be found directly liable for the actions of the sweatshop owner as the garment workers' de facto employer. A claim is highly possible and is clearly worth bringing. As is clear from the El Monte case, under egregious circumstances, like those surrounding sweatshop exploitation and involuntary servitude, courts are willing to stretch the definition of employer beyond its traditional boundaries.

2. Under the Civil Rights Statutes

While it may be possible to sue manufacturers directly under the Thirteenth Amendment,[272] legal practitioners often find it more practical to sue under an enabling statute.[273] Although attorneys commonly rely on 42 U.S.C. § 1983, this statute requires state action before redress can be obtained. Therefore, in order to obtain redress, plaintiff garment workers need a statute that condemns private as well as public action. In contrast to § 1983, 42 U.S.C. § 1985(3), also known as the Ku Klux

269. *See* Freda Redmond and Sir James, Inc., 147 N.L.R.B. 1025 (1964).
270. *See id.*
271. *See* Bureerong v. Uvawas, 922 F. Supp. 1450, 1468 (C.D. Cal. 1996).
272. *See supra* Part IV.A.1.
273. For example, in *Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I. 1978), the plaintiff failed to persuade the court to infer a right of action under the Thirteenth Amendment. *See id.* at 374. *But see* Baker v. McDonald's Corp., 686 F. Supp. 1474, 1480 (S.D. Fla. 1987), *aff'd*, 865 F.2d 1272 (11th Cir. 1988), *cert. denied*, 493 U.S. 812 (1989) (permitting a suit to proceed under the Thirteenth Amendment pursuant to § 1985(3)).

Klan Act, does not require state action.[274] Conspiracy to violate the Thirteenth Amendment has formed the basis of a suit brought pursuant to § 1985(3).[275]

Section 1985(3) provides that "[i]f two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action."[276] The statute requires not that there be racial animus, but that the discriminatory animus behind the conspirators' action is at least class-based.[277] This class-based requirement has been met in cases where immigrants are the class being discriminated against.[278]

In order to establish a § 1985(3) claim, the plaintiff must prove four elements: (1) a conspiracy;[279] (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges or immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) actual injury to a person or his property or deprivation of any right granted to a citizen of the United States.[280]

Section 1985(3) itself creates no rights; it is simply a vehicle to secure damages for deprivation of federally protected rights derived from other sources, such as the Thirteenth Amendment. To bring a suit under § 1985(3) against the manufacturers directly would be almost impossible. It would be extremely difficult to prove that the manufacturer had actually conspired with the sweatshop owner. In *Byrd v. Local Union No. 24, International Brotherhood of Electrical Workers*,[281] the Maryland District Court held that a general contractor's mere knowledge of a subcontractor's discriminatory acts toward the plaintiff did not make the general contractor a party to a conspiracy by continuing to employ the subcontractor.[282] In *Byrd*, the plaintiff alleged that the general contractor's knowledge of the subcontractor's practice of racial discrimination was sufficient to bring a claim under § 1985(3). There was no evidence that the general contractor was in any way involved in

274. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 409 (1968).
275. *See Baker*, 686 F. Supp. at 1480.
276. 42 U.S.C. § 1985(3) (1988).
277. *See* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).
278. *See* Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1006 (S.D. Tex. 1981).
279. The conspiracy need not be an explicit agreement; it may be implied from the circumstances. *See* Hunt v. Weatherbee, 626 F. Supp. 1097, 1107 (D. Mass. 1986).
280. *See* Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993).
281. 375 F. Supp. 545 (D. Md. 1974).
282. *See id.* at 558.

the discrimination.[283]

Because a § 1985(3) action seems improbable, the plaintiffs should consider mounting a § 1986 claim. Section 1986 is an action for negligence based on a failure to prevent a § 1985(3) violation.[284]

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, . . . which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case.[285]

In order for a plaintiff to state a § 1986 claim, she must claim that she can state a claim under § 1985(3) against another party.[286] The plaintiff must also show that "the defendant had actual knowledge of a [§] 1985 conspiracy [and] had the power to prevent or aid in preventing [a conspiracy, but] . . . neglected or refused to prevent [the wrongful act committed], and . . . a wrongful act was committed."[287] In the case of the garment workers, plaintiffs could allege that the conspiracy existed amongst the owners and operators of the sweatshop. In the El Monte case, there were eight defendants arrested for participating in the holding of the women. Clearly, they had engaged in a conspiracy to deprive the Thai women of their civil rights. The conspiracy requirement itself would be satisfied as long as the sweatshop had more than one manager or supervisor.[288] The only real difficulty in bringing a § 1986 claim against a manufacturer would be proving that they had actual knowledge of the conspiracy.

However, there is evidence that the manufacturer is fully aware of the low wages paid to the garment workers, because manufacturers typically factor these wages into their calculation of how much to charge for the retail product. One author notes that a typical skirt, which retails for $120.00, provides the manufacturer with a twenty-five dollar profit and the contractor with a ten dollar profit, of which the garment worker typically receives two dollars and forty cents.[289] The fact that the

283. *See id.* at 558-59.
284. *See* 42 U.S.C. § 1986 (1988).
285. *Id.*
286. *See* McCalden v. California Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1992), *cert. denied,* 504 U.S. 957 (1992).
287. Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir. 1994).
288. The statute requires that two or more persons act in concert. *See* 42 U.S.C § 1985(3) (1988).
289. *See* Chaiyarachta, *supra* note 15, at 190 (claiming that the labor costs, material

manufacturer knows the costs involved suggests that they are probably aware of and control the entire production process.[290] Indeed, plaintiffs in the El Monte case alleged that "the 'manufacturers' contracted with the [sweatshop owners] to produce garments at prices too low to permit payment of employees' minimum wages and overtime."[291]

While the manufacturers are aware that they are paying sub-standard prices and that the shop owners cannot possibly afford to pay minimum wages, the knowledge that they are facilitating violations of the FLSA is not sufficient to make a claim under § 1986. The manufacturers must have concrete knowledge of the conspiracy. Nevertheless, manufacturers also have a basic understanding of how their industry works. They know that garments are often manufactured in sweatshop conditions and yet they never investigate the shops with which they contract. It seems plausible to conclude that manufacturers prefer ignorance; for them, the danger lies in really knowing that their garments are not made in compliance with federal laws.

Hopefully, these arguments would be sufficient to carry a potential case beyond the pleading stage and into discovery. Once in the discovery phase, the plaintiffs can locate more concrete evidence that the manufacturers knew that they contracted to have workers produce their garments under sweatshop-like conditions. It is important to remember that the manufacturers created this system in order to remove themselves from liability for the manufacturing process. By contracting out labor, they attempt to distance themselves from the more unseemly side of the garment business. The manufacturers created this method in order to insure ignorance; such self-imposed ignorance should not insulate them from liability. Their actions are simply too deliberate. Justice cannot allow the manufacturers to avoid liability simply by putting on blinders and pretending not to see the havoc they create. But this is exactly what the manufacturers would have the courts allow them to do. Based on these intuitive arguments, the courts can deduce that manufacturers had knowledge of the conspiracy and that they were in a position to stop the deprivation of rights, or at least to aid in the workers' salvation. Once they learn that the garments are being produced using illegal methods, the manufacturers could cancel their contracts, refuse to work with sweatshops, or raise the price they pay per garment, thereby allowing the sweatshops to pay the workers more.

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costs, and expected profit margins are taken into account by manufacturers in calculating the retail price).

290. *See id.*

291. Bureerong v. Urawas, 922 F. Supp. 1450, 1460 (C.D. Cal. 1996).

3. *Summary*

If the courts hold the manufacturers liable for their actions, contractors would lose their freedom to run their shops as sweatshops. It would eliminate much of the under bidding that drives down the wages of garment workers. It would also encourage contractors to establish more stable and efficient operations.[292] This stability could endow them with greater bargaining power, allowing them to demand higher prices, and hence, pay the workers more.[293]

The manufacturer is the most powerful player in this triangle composed of sweatshop owners, the manufacturers, and the federal government. The sweatshop owner is the most dire villain and the government is supposed to be the outside legal force, but it is the manufacturers who have the greatest ability to effect change. If the manufacturers were able to self-regulate, to reach a consensus that they did not want to be involved in the marketing of human bondage, then actions against the sweatshop owners and the government would not be necessary. The sweatshop owners would not exist and the government would not need to take such an active regulatory role.

Unfortunately, it is extremely unlikely that the manufacturers will suddenly decide to band together and eliminate slavery and sweatshops from their industry.[294] Therefore, legal practitioners need to encourage morality through litigation. A litigation strategy focused on the manufacturers does not promise certain victory. It is for this reason that practitioners and scholars must explore focusing litigation on another power, one capable of forcing sweatshop owners and manufacturers to comply with the law, the federal government.

C. *The Federal Government*

A suit against the manufacturers is, as noted above, a definite possibility. But it would be breaking new legal ground. No court has ever held a relationship as attenuated as the relationship between the manufacturers and the contractors, with as little direct control over the

292. Today, sweatshops last an average of 13 months. *See id.* at 1471.
293. *See* Chaiyarachta, *supra* note 15, at 194.
294. Randall Harris, Executive Director of the San Francisco Fashion Industries trade group, claims that the manufacturers are not responsible for the contractors' employees, because they are employees of a separate business. *See* Catherine Yang & Christina Del Valle, *In a Sweat Over Sweatshops*, BUS. WK., Apr. 4, 1994, at 40.

particular workers, to constitute an employer-employee relationship. While the plaintiffs in *Bureerong v. Uvawas* did direct their litigation against the manufacturers, due to the fact that the operators themselves were judgment proof, the district court was unable to render a decision on that case's merits.[295] The court did issue a 12(b)(6) ruling which took a strong stance in favor of the plaintiffs; however, the case settled before the court ruled on the merits of the arguments.[296] Hence, while any case seeking damages on behalf of garment workers should offer a claim against the manufacturers, it is imperative that potential plaintiffs file another claim based more firmly in precedent, albeit precedent that has long been forgotten. It is in this spirit that this Article proposes a suit against government officials for failure to protect individuals, who are subjected to slavery or involuntary servitude, under the Thirteenth Amendment.[297]

The Thirteenth Amendment is the only amendment that confers an affirmative right to government aid.[298] The language of the amendment, that slavery shall not exist, goes beyond the mere outlawing of slavery. It does more than simply prohibit states from passing laws sanctioning slavery. It imposes an affirmative duty upon the state and the federal government "to provide an adequate apparatus to enforce the emancipation of all persons within its jurisdiction."[299] It goes beyond simply not requiring state action to state a claim. It goes further than simply covering private and public enslavement. "[P]recisely because the Amendment imposes a legal duty on private masters, it simultaneously requires the state to enforce that legal duty."[300]

The courts have failed to recognize that the Thirteenth Amendment is a potentially powerful tool by which courts can free people that the law may deem not held captive. However, a few scholars have suggested possible unique uses for the amendment. They have suggested using the amendment to support a woman's right to an abortion,[301] to sue perpetrators of forced prostitution,[302] to prosecute husbands who batter

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295. *See* Kang, *supra* note 51, at A1.

296. *See id.*

297. Some commentators have suggested that it is not fair to turn manufacturers into INS agents or labor inspectors. While heavy fines against manufacturers will certainly decrease the instances of sweatshops, the government should not be allowed to "pass the buck" completely. *See* Rojas, *supra* note 81, at A1.

298. *See* Amar & Widawsky, *supra* note 3, at 1380-81.

299. *Id.* at 1380.

300. *Id.* at 1381.

301. *See* Koppelman, *supra* note 3, at 484 (claiming that forcing a woman to carry a baby to term is akin to modern day slavery).

302. *See* Katyal, *supra* note 3, at 792 (suggesting that government officials who fail to enforce laws against pimps are acting unconstitutionally under the Thirteenth Amendment).

their wives,[303] and to rectify the legal quandary that immigrant women married to citizen husbands who batter them face during their conditional residency period.[304]

But it is Professor Akil Reed Amar and Daniel Widawsky who first asserted the theory that is an essential ingredient to this Article's litigation strategy. Amar and Widawsky note that the Thirteenth Amendment is unique in that it places an affirmative duty upon the government to prevent involuntary servitude.[305] Amar and Widawsky point out that their proposition, that a constitutional provision requires affirmative action on the part of the government, is neither new nor out of the ordinary.[306] They look to the requirements of Article I, Section 2, a decennial census and a biennial congressional election, as illustrative of this point.[307] Additionally, Article I, Section 8 requires Congress to raise and support armies and to establish post offices and roads.[308]

Amar and Widawsky's article is framed as presenting a counter litigation strategy to the one adopted by the plaintiff's attorney in *DeShaney v. Winnebago County Department of Social Services.*[309] In *DeShaney*, the court permitted little Joshua DeShaney to remain in his father's custody[310] despite evidence of repeated abuse, including several episodes of hospitalization.[311] The county social services office was aware of the abuse and had sufficient evidence to remove Joshua from his father's home. Yet, the county allowed him to remain in his father's custody, until the boy was beaten so severely that he became

303. *See* McConnell, *supra* note 3, at 210 (stating that battered women are held in involuntary servitude and that civil and criminal constitutional claims should be brought against the batterer under the Thirteenth Amendment).

304. *See* Anderson, *supra* note 3, at 1430 (stating that immigrant women who are dependent on their abusive spouses for their legal status are being held in involuntary servitude).

305. *See* Amar & Widawsky, *supra* note 3, at 1381-82.

306. *See id.* at 1381.

307. *See id.*

308. *See* U.S. CONST. art. I, § 8.

309. 489 U.S. 189 (1989).

310. After Joshua DeShaney's parents divorced, the court awarded his father, Randy DeShaney, custody. *See DeShaney*, 489 U.S. at 191.

311. There was evidence that Joshua was repeatedly beaten beginning at age two or three. *See id.* at 191-92. In January of 1982, Joshua's stepmother first reported the abuse. *See id.* at 192. The Winnebago County Department of Social Services interviewed Randy regarding the reported abuse, but did not take any further action. *See id.* In January of 1983, Joshua was hospitalized for suspected abuse and the Department of Social Services briefly placed him in the hospital's custody. *See id.* He was later hospitalized again and social services did nothing. *See id.*

permanently disabled.[312] Even Justice Rehnquist found the facts of the *DeShaney* case "undeniably tragic."[313] The plaintiffs in *DeShaney* argued that the Fourteenth Amendment imposed a duty on the state to protect Joshua. But, the Court held that the purpose of the Fourteenth Amendment was not to require that the state protect people from each other, but rather to protect people against state action.[314]

According to Amar and Widawsky, this is the beauty of the Thirteenth Amendment. It places an affirmative burden upon the state. Under the Thirteenth Amendment, the state has a duty to protect people from being held in a condition of involuntary servitude, even if ordinary citizens subject them to that condition.[315] Because the Thirteenth Amendment applies to private, as well as state, action and imposes an affirmative duty upon the state to act in the face of evidence of involuntary servitude,[316] Amar and Widawsky concluded that Joshua DeShaney would have a cause of action under the Thirteenth Amendment against the county for failing to come to his aid.[317]

The Thirteenth Amendment is written in broad sweeping terms: "slavery . . . shall [not] exist."[318] It is this mandatory language that "commands the state to affirmatively protect" the individual held in involuntary servitude.[319] Once the state has been made aware of private violations of the amendment it has a duty to intervene.[320]

Amar and Widawsky note that the *DeShaney* Court was hesitant to make such a sweeping statement with respect to the state's duty under the Fourteenth Amendment.[321] They note that the "Rehnquist Court Justices have perfectly sensible and principled reasons to be skeptical of claims wrapped in the language of substantive due process."[322] If the courts required the states to right private wrongs, "an unending parade of

312. In March of 1984, Randy beat Joshua so severely that Joshua fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by numerous blows to the head inflicted over a long period of time. Joshua lived, but he suffered brain damage so severe that he is expected to spend the rest of his life in an institution for the profoundly retarded. *See id.* at 193.

313. *Id.* at 191.

314. *See id.* at 196.

315. *See* Amar & Widawsky, *supra* note 3, at 1381-82.

316. *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (holding that "the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States").

317. *See* Amar & Widawsky, *supra* note 3, at 1381-82.

318. U.S. CONST. amend. XIII, § 1.

319. *See* Amar & Widawsky, *supra* note 3, at 1364.

320. *See id.*

321. *See id.* at 1384.

322. *Id.*

horribles of government liability might be unleashed."[323] The Fourteenth Amendment, according to the *DeShaney* Court, imposes a duty on the states to assume responsibility for their citizens' safety and well-being only when the states take citizens into custody and hold them against their will.[324] After the *DeShaney* decision, only people in state custody have the right to raise a substantive due process claim under the Fourteenth Amendment.[325] In this manner, the Court prevented citizens from bringing suit against the government for every private wrong.[326]

The Thirteenth Amendment would not result in a similar flood of litigation. Unlike the sweeping nature of the Due Process Clause, which applies to all denials of life, liberty, or property, the Thirteenth Amendment only applies to involuntary servitude, which applies in far fewer cases.[327] In recent years, the Supreme Court Justices have often

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323. *Id.* at 1363.

324. *See* DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 201 n.9 (1989).

325. *See* James T. R. Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After DeShaney*, 93 W. VA. L. REV. 251, 295 (1990). A possible argument that the garment workers, especially the ones held captive in El Monte, could adopt is that the government put them in a dangerous predicament and, therefore, they were de facto in state custody. The Supreme Court has not indicated how it would rule in such a case. In *Martinez v. California*, 444 U.S. 277 (1980), the Court avoided the question of whether a non-custodial relationship could ever result in a substantive due process claim. Instead, the Court affirmed the lower court's dismissal on the narrower grounds that the casual connection between the release of a parolee and a murderer was too weak to establish a claim for deprivation of constitutional rights under § 1983. *See id.* at 285. However, several courts have interpreted the Court's decision as authorizing a substantive due process action when a special relationship exists. *See, e.g.*, Jones, *supra* at 263-64.

The Ninth Circuit revealed its liberal reading of the *DeShaney* opinion in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). In that case, the court construed the *DeShaney* custody requirement in a "special danger" situation and found that a duty can arise in a non-custodial setting. In *Wood*, a Washington state trooper stopped a car in which the plaintiff was a passenger. He arrested the driver and impounded the car, leaving the plaintiff on the side of the road, in a dangerous area, at 2:30 a.m. The plaintiff was later raped. The court held that the actions of the police officer created a "special danger," which was enough to satisfy the *DeShaney* custody requirement. Jones, *supra* at 303. Therefore, an additional argument could be made that by failing to seek a search warrant in the El Monte case, the federal government put the women in a dangerous situation and, thus, assumed liability for their subsequent injuries.

326. The dissent in *DeShaney*, of course, does not agree that a flood of litigation would be unleashed by finding the county liable under the Fourteenth Amendment. Rather, Justice Brennan articulated that the Wisconsin child protection statutes created an obligation upon the state to protect Joshua, which was constitutionally enforceable. *See DeShaney*, 489 U.S. at 208-12 (Brennan, J., dissenting).

327. *See* Amar & Widawsky, *supra* note 3, at 1365.

seemed wary of creating additional substantive due process rights.[328] The Thirteenth Amendment comes with no such baggage. The Thirteenth Amendment has "a stronger textual basis and a less tainted doctrinal pedigree."[329] Its application would be strictly limited to cases where the fact pattern reveals slave-like conditions. Thus, relief for an individual under the Thirteenth Amendment would not "give[] a cause of action against the state" to "victims of random street crime."[330]

Amar and Widawsky have offered a compelling alternative to litigation under the Fourteenth Amendment. Using the Thirteenth Amendment's unique stature, as the sole amendment that outlaws private as well as public conduct, plaintiffs can argue that the court should place an additional burden on state and federal governments to protect citizens from prohibited conduct by private parties. Unlike the Fourteenth Amendment, which requires that litigants manipulate the language of the amendment to find state action, the Thirteenth Amendment prohibits the state from "turn[ing] a blind eye to de facto slavery within its jurisdiction."[331]

The argument that Amar and Widawsky make in relation to the *DeShaney* case is more compelling when applied to the garment worker case, and even more so when applied to the Thai garment workers in El Monte. In making their argument, Amar and Widawsky had to surmount the lack of economic profit involved in the so-called enslavement of an abused child. Their argument that many instances of slavery do not rely on financial incentives is, at best, unpersuasive.[332] The reality of slavery is that it typically involves an individual laboring for another's financial gain. The very terms, slavery and involuntary servitude, imply service for another's benefit. Joshua provided no service to his father. As Amar and Widawsky note, Joshua DeShaney was treated only as a "punching bag";[333] he served no other purpose in his father's life.

Garment workers labor under far different circumstances. They slave away, hour after hour, in order to make money for others, both the sweatshop operator and the manufacturer. The garment workers are clearly providing a service. Thus, arguing that the Thirteenth

328. In fact, the Court has recently narrowed the application of several previously recognized substantive due process rights. *See, e.g.*, Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833, 851 (1992) (reducing the status of abortion rights from a fundamental right to a protected liberty interest).

329. Akhil Reed Amar, *Remember the Thirteenth*, *in* 10 CONST. COMMENTARY 403, 406 (1993).

330. Amar & Widawsky, *supra* note 3, at 1385.

331. *Id.* at 1381.

332. *See id.* at 1370.

333. *Id.* at 1378.

Amendment applies to their situation is much less of a stretch than arguing that it applies to Joshua DeShaney. The legislative history of the amendment clearly shows that it was intended to protect laborers.[334]

In order to bring suit under the Thirteenth Amendment, by arguing that it compels the government to intervene on behalf of the garment workers, the plaintiffs need to show that the government knew about the conditions in El Monte, but failed to intervene. The facts show that the INS clearly had sufficient evidence to obtain a search warrant three years before the state government intervened to free the women.[335] In the case of the El Monte garment workers, there is significant evidence that the INS ignored clear signs that the apartment complex was a slave camp. As California State Senator Richard Mountjoy said to an INS representative at a state hearing on the raid, "It's astounding to me that you had this information and you ignored it."[336]

William Slatterly, Executive Assistant Commissioner for INS Field Operations, told the committee that the INS saw trucks delivering and picking up garments and scraps and pieces of clothing, but no evidence of people being held against their will.[337] He insisted that the case had been handled properly, stating that, "In 1992, I'm not sure I would have done anything differently."[338] Despite Slatterly's protests to the contrary, it is clear that the INS did have enough evidence in 1992. As Senator Mountjoy noted at the hearings, they had a signed affidavit from an INS agent, Richard Kee, which stated that he suspected a sweatshop was housed in the complex; they saw the barbed wire surrounding the

334. According to Professor VanderVelde, the legislative history of the Thirteenth Amendment reveals that "[b]y abolishing slavery and involuntary servitude, the framers of the thirteenth amendment [sic] sought to advance both a floor of minimum rights for all working men and an unobstructed sky of opportunities for their advancement." VanderVelde, *supra* note 94, at 495. Much of the legislative history reveals that the framers considered labor to be an intrinsic element of slavery. *See supra* Part III. Amar and Widawsky define slavery in relation to its power dynamic only. They write that slavery is "[a] power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons." Amar & Widawsky, *supra* note 3, at 1365. The legislative history does not confirm Amar and Widawsky's hypothesis, rather, it consistently talks about slavery in terms such as "degrad[ing] labor" and indicates that the laborer has the "right to the fruits of his labor." VanderVelde, *supra* note 94, at 472-73.

335. *See* Scheer, *supra* note 33, at B7.

336. *INS Is Criticized for Ignoring California Garment Sweatshop*, CHI. TRIB., Aug. 27, 1995, at 18 [hereinafter CHI. TRIB.].

337. *See id.*

338. Sterngold, *supra* note 71, at A16.

complex and the agents never saw anyone coming or going.[339] The conclusion of most journalists and the State Senate committee was that the INS was negligent in either failing to act in the face of evidence or failing to put two and two together to ascertain that the complex was something invidious.[340]

The INS claims that the U.S. Attorney's Office turned down a request for a search warrant. The attorney, who admits turning down the request, has stated that there was no probable cause.[341] One article questions why probable cause was not established given that not one worker was ever seen leaving or entering the building during the three months the complex was under surveillance.[342] The U.S. Attorney at the time of the raid, Nora Manella, states in a letter to the *Los Angeles Times* that there truly was insufficient evidence for a warrant, and "[n]o amount of hindsight can alter the fact that an uncorroborated tip from an anonymous informant, without independent evidence of criminal activity, cannot justify a federal search warrant."[343] Ms. Manella states that the U.S. Attorney's Office was simply respecting the Fourth Amendment.[344] Even with the denial of the warrant, the INS could have continued its investigation and again asked for a warrant. Instead, the inquiry was dropped.

It was not until 1995 that the INS reopened the El Monte case when yet another escapee came forward with her story.[345] Even after the INS placed the complex under surveillance a second time, it failed to inform the new agent, Phillip Bonner, that it had previously investigated the complex. It was not until state officials were brought into the case that the previous affidavit from Agent Kee was produced.[346]

Even after Bonner, an eight-year criminal investigator with the INS,[347] documented his surveillance of the sweatshop in May and June of 1995, the U.S. Attorney's Office did not receive copies of his memoranda.[348] In fact, the U.S. Attorney's Office was not informed about the results of the surveillance until July 30, 1995, more than two months after Bonner

339. *See* CHI. TRIB., *supra* note 336, at 18.
340. *See supra* notes 336-39 and accompanying text.
341. *See* Robert Scheer, *So Many Questions, So Few Answers*, L.A. TIMES, Aug. 20, 1995, at M5.
342. *See id.*
343. Letter from Nora M. Manella, *Thai Sweatshop*, L.A. TIMES, Aug. 15, 1995, at B8.
344. *See id.*
345. *See* Shawn Hubler & George White, *INS Accused of Blocking Probe of Sweatshop Labor*, L.A. TIMES, Aug. 10, 1995, at B1.
346. *See* Scheer, *supra* note 341, at M5.
347. *See* Hubler & White, *supra* note 345, at B1.
348. *See* Scheer, *supra* note 341, at M5.

first began observing the complex.[349] Even when it received Bonner's memoranda, instead of requesting a search warrant, the U.S. Attorney's Office asked the state to delay its search of the premises.[350]

Bonner claimed that one of the reasons for the lack of action in the El Monte case, despite sufficient evidence, was a personality conflict in the INS office.[351] Agent Bonner wrote a letter in August 1993 to Attorney General Janet Reno, claiming that the management at the INS had obstructed investigations into a criminal case in Los Angeles involving "the smuggling of Asians and their peonage in Los Angeles."[352] He sent similar letters to U.S. Senators Diane Feinstein and Barbara Boxer, but no action was taken.[353] Mr. Bonner claimed that the INS discriminated against him because he spoke Thai and was married to a Thai woman. He brought suit against the INS based on this alleged discrimination.[354] Although Bonner's lawsuit may cast a shadow on his claims, there is no doubt that the several 1995 affidavits he wrote urged federal officials to raid the shop.[355] As Bonner's attorney, David L. Ross, commented, "[T]he INS killed this investigation.... They stopped him from exposing slavery."[356] Even with the myriad of delays, Bonner became

349. *See id.*
350. *See id.*
351. *See* Sterngold, *supra* note 71, at A16.
352. Scheer, *supra* note 341, at M5; *see also* Hubler & White, *supra* note 345, at B1.
353. *See* Scheer, *supra* note 341, at M5.
354. *See* Hubler & White, *supra* note 345, at B1.
355. *See* Sterngold, *supra* note 71, at A16.
356. Hubler & White, *supra* note 345, at B1. Governor Pete Wilson, then a candidate for President, called for a Justice Department investigation of the federal government's actions in failing to liberate the women of El Monte. He asked that Attorney General Reno investigate the "inaction and apparent indifference" of the INS and the Los Angeles U.S. Attorney's Office. *Wilson Slams Delays in Raid on Sweatshop*, S.F. EXAMINER, Aug. 25, 1998, at A5. Wilson noted that the INS had "detailed knowledge of the slavery operation" and that an agent had notified Reno directly. *Id.* (seeming to be a reference to Agent Bonner's letter to Attorney General Reno). Wilson added in his letter that the lack of action by the federal government was "unspeakable, and raises serious questions as to the federal government's ability to carry out its responsibilities in a manner that is fair and equitable to all citizens." *Id.*

Despite his condemnation of the Justice Department, Governor Wilson twice vetoed bills that would have held big manufacturers responsible for monitoring their subcontractors' compliance with labor and immigration laws. *See* Sterngold, *supra* note 71, at A16. He felt that such legislation would drive the lucrative garment industry out of the state. *See id.*

In addition to Governor Wilson's complaints about the lack of federal action, the El Monte City Council sent a letter to President Clinton and Attorney General Reno saying that residents were "extremely angry, bewildered, disappointed and discouraged with the

one of the government's chief witnesses in the criminal prosecution against the sweatshop owners.[357]

El Monte is not the only instance of the INS ignoring the indentured servitude of illegal immigrants. In New York's Chinatown, located near the INS regional headquarters, thousands of illegal immigrants labor in garment factories.[358] Although Department of Labor inspectors often come to the factories and issue citations, the INS never visits the shops.[359] The INS spends millions upon millions of dollars guarding the border between Mexico and the United States, yet it spends almost no time investigating employers.[360] Despite the fact that it is well known that half of the illegal immigrants who enter the United States do so legally and simply overstay their visas,[361] there are fifteen times as many border guards as there are workplace agents.[362]

According to a study conducted by the *San Francisco Chronicle*, the INS often fails to use one of its most powerful tools—sanctions against employers.[363] After examining 300 pages of INS documents, the *Chronicle* discovered that fewer than half of the 12,700 employer cases reported to the INS from 1989 to 1994 resulted in fines. When fines were assessed against the employers, the average was $1,612 per offense. Many companies were able to negotiate their penalties from thousands of dollars down to nothing.[364]

The decentralized organization of the INS has resulted in some bizarre statistics. For example, despite the relatively modest amount of immigrants in Cleveland, the local INS collected more than double the fines collected in the immigration mecca of San Francisco.[365] Additionally, INS officials in Nebraska issued more citations than INS officials in Fresno, California, a hub of the migrant farm worker population.[366] The *Chronicle* notes that the Los Angeles INS, which was in charge of the El Monte investigation, has been "historically lax in enforcing the employer sanctions law."[367] They note that there is little doubt that there are more illegal immigrants working in Los Angeles

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federal response to reports of the sweatshop's existence." Hubler & White, *supra* note 345, at B1.

357. *See* Kenneth B. Noble, *Growing Vulnerability of Immigrants in the US*, NEW STRAITS TIMES PRESS, Aug. 5, 1995, at 12.

358. *See* Rojas, *supra* note 81, at A1.

359. *See id.*

360. *See id.*

361. *See id.*

362. *See id.*

363. *See id.*

364. *See id.*

365. *See id.*

366. *See id.*

367. *Id.*

than anywhere in the country. Despite the vast number of violations which occur there, the INS has collected more fines in small towns, such as Laredo, Texas, than in the entire city of Los Angeles.[368]

In the last few years, the INS has cut back its enforcement efforts against employers. Between 1989 and 1994, the INS eliminated more than half the agents assigned to workplace surveillance, even in the face of GAO reports that there were 36,000 outstanding leads that needed follow-up.[369] Accordingly, the number of workplace investigations declined from 14,706 in 1989 to 5,963 in 1995.[370] All of this occurred in the face of escalating condemnation against illegal immigrants themselves.

It is clear that the INS's lack of action in the El Monte case had tragic results. The INS had significant evidence that for over three years the El Monte sweatshop owners held women in captivity, and yet authorities did not come to their rescue. Obviously, society needs to make the government feel more obligated to its constituents. This Article proposes that one strategy to effect this change is to encourage arguably enslaved garment workers to bring suit under the Thirteenth Amendment. As noted above, a suit directly under the Thirteenth Amendment is grounded in precedent. There is no reason to believe, as there was in the *DeShaney* case, that the Court would want to shy away from this sort of affirmative duty. However, in order to bring suit against the federal government, one must overcome significant hurdles. These are discussed below.

1. Immunity

The federal government is protected against lawsuits by its citizenry under the doctrine of sovereign immunity. Unless the federal government expressly grants an exception to that doctrine, citizens cannot bring suit. As Chief Justice Marshall noted in the early days of the Court, "The universally received opinion is that no suit can be commenced or prosecuted against the United States."[371] Therefore, potential plaintiffs often bring suit against individual agency officials to indirectly reach the government or the agency. The federal government

368. *See id.*
369. *See id.*
370. *See id.*
371. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-412 (1821).

then indemnifies the officers so that they suffer no financial penalties themselves.

In *Bivens,* the Supreme Court authorized a civil suit directly under the Fourth Amendment against agents of the Federal Bureau of Narcotics for money damages.[372] Therefore, the correct course of action for garment workers is to sue the director of the INS and the local management in Los Angeles.

Even if the court finds that there is a cause of action under the Thirteenth Amendment to sue government officials, the officials can still raise the defense of immunity. Government officials are entitled to qualified immunity[373] for performing, or in this case, failing to perform a discretionary function, unless their actions "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[374]

In order to maintain an action against an INS official, the garment workers would need to prove that the agent's conduct clearly violated the workers' Thirteenth Amendment right to be free from involuntary servitude. In light of the extensive evidence that the INS compiled on the El Monte factory, it seems that an enslaved garment worker can make a plausible claim. The agents had a clear directive under the unforgiving language of the Thirteenth Amendment, that slavery "shall" not exist, knew that there was, at the very least, strong evidence that slavery was ongoing, and failed to prevent it. Under the above reasoning, the INS agents are not entitled to immunity for failing to prevent a clear constitutional violation.

A similar suit against the U.S. Attorney's Office would be almost impossible to maintain. Prosecutors are generally entitled to absolute immunity.[375] In the case of *Burns v. Reed,*[376] the plaintiff-suspect sued a prosecutor for his participation in investigating the plaintiff-suspect, securing an arrest warrant, and aiding in the plaintiff's four-month confinement in a mental hospital. The *Burns* court found that the prosecutor did not have absolute immunity for his investigative acts, but did have absolute immunity for securing the arrest warrant.[377] The Assistant U.S. Attorney failed in the El Monte case to issue a search warrant in the face of substantial evidence. It is unclear whether asking

372. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

373. This is an affirmative defense. If the defendant fails to invoke it, the defendant waives the defense.

374. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

375. *See* Imbler v. Pachtman, 424 U.S. 409 (1976).

376. 500 U.S. 478 (1991).

377. *See id.*

for a search warrant is an act within the prosecutor's discretion or whether it represents an investigative act. If the court determines the act to be an investigative act, there is a chance that garment workers similarly situated to those in the El Monte case could bring suit against the U.S. Attorney as well.

2. *Civil Rights Statutes*

In addition to suing the federal government directly under the Thirteenth Amendment, a claim should also be brought using the civil rights enabling statutes. Unfortunately, a § 1985(3) suit would be as difficult to win against the government as it would be against the manufacturer. In *Peck v. United States*,[378] for example, the court precluded a suit against a federal agent that was brought under § 1985(3).[379] Although the federal agent had knowledge of an alleged agreement between vigilante groups and local law enforcement to permit an assault of the freedom riders, the court found that the facts were insufficient to support a claim of conspiracy.[380] The court held that "[m]ere knowledge . . . is insufficient to sustain a claim of conspiracy under [§] 1985(3)."[381] The plaintiff in the freedom rider case did find a way in which to hold the federal agent liable. Whereas the court found that the strict definition of conspiracy contained in § 1985(3) did not apply to the facts of the case,[382] the court held that the plaintiffs were entitled to relief under § 1986.[383] The court declared that they were entitled to relief because the federal agents failed to prevent a conspiracy of which they had knowledge.[384] The conspiracy between the vigilante groups and the sheriffs to attack the freedom riders was held to constitute a conspiracy under § 1985(3); the FBI's knowledge of this conspiracy and lack of action to stop it was held sufficient to maintain a § 1986 claim.[385]

The plaintiffs in the El Monte suit could convincingly argue that the INS had knowledge of the conspiracy that existed amongst the

378. 470 F. Supp. 1003 (S.D.N.Y. 1979).
379. *See id.* at 1012.
380. *See id.*
381. *Id.* at 1012 (quoting Byrd v. Local Union No. 24, Int'l Bhd. of Elec. Workers, 375 F. Supp. 545, 558 (D. Md. 1974)).
382. *See id.*
383. *See id.*
384. *See id.*
385. *See id.* at 1016.

sweatshop employees. They had documented the conditions in various affidavits and monitored the complex for months. It is clear that the evidence they had collected was sufficient to warrant taking action to prevent further civil rights violations. Despite this conclusive evidence, the INS did not even participate in the raid that eventually freed the enslaved workers. Rather, it was the state, acting on even less evidence, that finally ended the conspiracy. Therefore, the court could hold the INS liable under § 1986.

V. CONCLUSION

This Article develops a three-part litigation strategy that would allow enslaved garment workers to seek restitution and vindication for their pain, while at the same time providing incentives for manufacturers and the government to monitor sweatshops to avoid creating more victims. The three-part strategy targets the sweatshops, manufacturers, and government in an attempt to bring all parties into compliance with the law.

Garment workers are a highly vulnerable group. Largely immigrant, their fear of deportation makes them especially susceptible to the more sophisticated sweatshop owners. Their lack of resources and limited knowledge of the English language and American legal system makes the possibility of their seeking legal counsel very slim. It is for this reason that legal practitioners and scholars need to devise a legal penalty so severe that it will deter sweatshops altogether. If the courts impose significant penalties on the manufacturer for contracting with the sweatshops and on the government for failing to prevent slavery, garment industry slavery will be practically eliminated. The risks will simply be too high.

Therefore, legal practitioners need to put the three-part litigation strategy to the test. Cases in which the manufacturer is forced to pay for contracting with an illegal sweatshop, and the government is penalized for failing to act when presented with evidence of slavery, would serve as ideal test cases. Once a legal right to sue has been established, the manufacturer would have every incentive to investigate their contractors thoroughly and the government would have every incentive to initiate investigations. While holding the sweatshops liable is a necessary component of a suit against the manufacturers and the government, it cannot reasonably be expected that any deterrence will occur from this action alone. After all, the majority of sweatshops are judgment proof.

This strategy is largely attractive because of its deterrence benefits. The reality of garment workers is that by coming forward they not only risk losing their job, they also risk being deported. For many garment

workers this is reason enough to stay quiet.[386] By deterring the manufacturer from contracting with sweatshops and encouraging the government to beef-up investigations, the garment worker would be able to enjoy a better work environment without having to fear indentured servitude.

386. A potential down side to this litigation strategy is that it may result in more international contracts, as contractors seek to avoid greater liability for wrongful employment practices in the United States. The discussion of this outcome is beyond the scope of this Article.


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