

NCAA ATHLETES, UNPAID INTERNS, AND THE S-WORD: EXPLORING THE RHETORICAL IMPACT OF THE LANGUAGE OF SLAVERY

*Maria L. Ontiveros**

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INTRODUCTION

“Imagine the gun rights movement without the Second Amendment”¹ This is labor without the Thirteenth Amendment.² When Professor James Grey Pope wrote these words ten years ago, they struck me as an incredibly important observation in the struggle to find an effective strategy for protecting workers’ rights. Effective social change requires both an identifiable change agent and a coherent legal theory.³ While workers’ advocates have focused a lot of effort on creating or improving different social change agents, ranging from traditional labor unions to worker centers, the advocates have spent less time developing a coherent legal theory that could be effectively used to mobilize public support for workers’ rights.

I have argued that the Thirteenth Amendment should be the legal theory used to help certain groups of workers.⁴ The Thirteenth Amendment reads, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁵ In addition to abolishing chattel slavery as practiced in the United States before the Civil War, the amendment stands for certain core principles covering workers’ rights, human rights, civil rights, and citizenship rights. In particular, workers have the right to own and sell their labor and may not be forced to work beneath the floor for free labor established by our labor and employment laws. I have argued that advocates for low-wage workers, in general, and immigrant workers, in particular, should embrace the language and spirit of the amendment as an organizing tool.⁶

1. James Gray Pope, Peter Kellman & Ed Bruno, *Free Labor Today*, 16 NEW LAB. F. 9 (2007).

2. *Id.*

3. Maria L. Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers*, 2009 U. CHI. LEGAL F. 103.

4. *See id.*

5. U.S. CONST. amend. XIII, § 1.

6. Ontiveros, *supra* note 3 (arguing that the Thirteenth Amendment could be used to support low-wage workers); Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WISC. J.L.

During the last decade, I noticed more and more groups of workers using the rhetoric of slavery, if not the amendment itself, to advocate for their cause. To better understand this phenomenon, I undertook a literature survey to see which groups of workers were using this rhetoric and to explore its persuasive effect, if any. This Article presents, in general, the results of my survey of the use of the rhetoric of slavery by nonlegal groups. It then focuses on the use of this rhetoric by two specific groups: National Collegiate Athletic Association (NCAA) athletes and unpaid interns. These two groups provide an excellent way to explore the persuasive effect of the rhetoric of slavery in civil rights advocacy. The use of the S-word for both of these groups was controversial and contested, but also effective. On one hand, many commentators argued that comparing NCAA athletes and unpaid interns to slaves was inaccurate and somewhere between insensitive and offensive, primarily because both of these labor arrangements are voluntary. On the other hand, both groups have found some success in redressing their complaints, and the comparison to slavery may have played a role in this success. Beyond generating publicity, the comparison effectively framed these individuals as workers engaged in labor deserving of protection under the labor and employment laws, even though they were not being paid for their labor. Slavery rhetoric is effective because it recognizes that some unpaid workers must be considered workers, and their lack of pay must not preclude their protection under workers' rights laws. Thus, the rhetoric for these groups was effective even though it was the most controversial of the groups found in the survey.

Part I of this Article describes the methodology used in my study and summarizes its basic findings. Part II examines the cases of NCAA athletes and unpaid interns. For each of these groups, the Section briefly describes the problems faced by these workers; provides examples of how their advocates have used the rhetoric of slavery; and describes the resulting skepticism of their use of the S-word. Part III of the Article discusses the limited success that these groups have had in resolving their problems and the role that the

GENDER & SOC'Y 133 (2012) (arguing that the Amendment should be used as an organizing tool to support immigrant workers); Maria L. Ontiveros, *Immigrant Rights and the Thirteenth Amendment*, 16 NEW LAB. F. 26, 30-32 (2007); Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923 (2007); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2005).

rhetoric may have played in that success. Finally, Part IV draws conclusions about how the rhetoric of slavery may be used more generally.

I. A SURVEY OF THE LANGUAGE OF SLAVERY IN THE TWENTY-FIRST CENTURY

A. Methodology

In order to discern popular uses of slavery rhetoric, this survey focused on nonlegal, nonacademic online resources, such as press releases, newspaper articles, and blogs. The survey did not include cases, law review articles, or academic journals. Within these sources, searches were constructed for three different types of language: literal language (“thirteenth amendment,” “slave,” and “slavery”); connected language (“trafficking”) and symbolic language⁷ (“plantation” and “Jim Crow”). The survey covered a ten-year time period, from 2004-2014, with most examples being found in the last five years. The survey was constructed to focus on breadth, rather than depth. The goal of the search was to find a representative sample of the use of the language of slavery, rather than compile a comprehensive list of every use of the language. As a result, once approximately twenty-five references were found per topic, no more references were logged for that topic. A search for images was also conducted in Bing using the same terms that resulted in similar results, although those results have not been catalogued.

B. Results

The survey resulted in approximately 100 data points. These data points contained four recurring phrases that were used to describe six different employment categories. The four most commonly used phrases were “slave/slavery;” “modern day slavery;” “plantation;” and “Jim Crow or Juan Crow.” The six employment categories associated with these terms were trafficking; immigrant or guest workers; prison workers; sports (NCAA athletes and professional athletes); unpaid interns; and other (coal miners, adjunct

7. Symbolic language includes those words or phrases that carry a strong symbolic meaning such that a majority of Americans would associate them with slavery. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355-56 (1987).

professors, etc.). Few references were found to “Thirteenth Amendment.”

The recurring phrases broke down as follows:

Phrase	Number of Instances	Percentage of Instances
Slave/ Slavery	54	55%
Modern (Day) Slavery	25	26%
Plantation	7	8%
Jim Crow (3) Juan Crow (8)	11	11%

None of these phrases were used to describe workers, in general. Each instance was tied to a particular type of employment. The types of employment broke down as follows:

Type of Employment	Number of References	Percentage of References
Trafficking	34	37%
Immigrants, Immigrant Workers, and Guest Workers	21	24%
Prison Labor	14	16%
Sports	12	13%
Unpaid Interns	8	9%
Other (Adjunct Professors and Coal Miners)	2	1%

Some connections were noted between the phrases used and the types of employment categories. When mapping language upon employment categories, the following connections emerged:

- the terms “slave,” “slavery,” and “modern day slavery” were used to describe all the employment categories;
- the term “plantation” occurred in the categories of sports, prison labor, and immigrants, immigrant workers, and guest workers;
- the term “Jim Crow” matched prison labor; and
- the term “Juan Crow” matched immigrant issues.

When mapping employment categories upon language, the following matches were observed:

- trafficking was described with the terms slave, slavery, and modern day slavery;

- unpaid interns were described with the terms slave and slavery;
- immigrants, immigrant workers, and guest workers used all the phrases; and
- prison labor also utilized all the various phrases.

C. Analyzing the Survey Results

Initially, my purpose in conducting this study was to determine quantitatively the extent of the use of the Thirteenth Amendment or the rhetoric of slavery by workers' rights groups. Beyond that, my purpose is to examine *how* the rhetoric is being used in order to understand the popular meaning of the amendment currently held by the public and workers' advocates. This second purpose required a qualitative review of the rhetoric, which led me to divide my analysis into three separate parts: one analyzes the use of the rhetoric by NCAA athletes and unpaid interns; the second analyzes the use of the rhetoric by advocates for immigrant workers and anti-trafficking groups; and the third analyzes the field of prison labor. This Article focuses on NCAA athletes and unpaid interns.⁸

II. NCAA ATHLETES, UNPAID INTERNS, AND THE S-WORD

One of the most surprising results of the survey was the prevalence of the use of the slavery analogy in the fields of college athletics⁹ and unpaid interns. Although the problems facing both of these groups of workers have been well documented in the media, claims that they were being treated as slaves were not as obvious. Perhaps because the analogy is not an obvious one, the survey picked up several articles in both of these areas challenging the use of the S-word. This Part explores the problems faced by these workers, their use of the rhetoric of slavery, and the critical response.

8. Maria L. Ontiveros, *Is Modern Day Slavery a Private Act or a Public System of Oppression?* (tentative title), SEATTLE U. L. REV. (forthcoming 2016) (analyzing the use of rhetoric by immigrant worker advocates and anti-trafficking groups. The field of prison labor may be covered in a third).

9. The survey revealed the use of the terms for NCAA athletes, as well as for professional football and professional basketball players. The main analysis for this Essay focuses on NCAA athletes because that case study best highlights the rhetorical use and effect of the language of slavery; however, some excerpts from the professional athletes results are included, especially in the section on skepticism, because they best illustrate the debate over the rhetorical use of the term.

A. NCAA Athletes

College athletics is big business; particularly football and basketball at large Division I schools. The NCAA brings in approximately \$875 million in revenue a year,¹⁰ making college sports a nearly \$11 billion industry.¹¹ Part of this revenue comes from the NCAA or universities selling merchandise bearing an athlete's name or likeness, and, until recently, their identities in video games.¹² Despite the money generated by the work of student-athletes, the athletes are not paid for their efforts because the athletes are considered students and not employees or workers.¹³ This situation led one commentator to observe, "Big-time intercollegiate athletics is a unique industry. No other industry in the United States manages not to pay its principal producers a wage or a salary."¹⁴ The athletes face various problematic conditions and, in order to address these problems, have sought to portray themselves as "employees" because employees could not legally be subject to these conditions and would be able to unionize to try to improve the terms and conditions of their employment.

1. *Problems Faced by NCAA Athletes*

Although playing football or basketball at a large university seems glamorous and the fulfillment of a dream for many, student-athletes soon find themselves facing a number of problems. First, athletes spend a lot of time at the sport. Though studies and commentaries vary, a general consensus is that student-athletes spend approximately fifty hours each week during the season on their sport.¹⁵ For football players, the season ranges from fourteen to

10. *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Nov. 23, 2015) [<https://perma.cc/FK7V-UDAN>].

11. Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 61 (2013).

12. *Id.* at 89.

13. See D. Stanley Eitzen, *Slaves of Big-Time College Sports*, USA TODAY, Sept. 1, 2000, at 26, 28.

14. *Id.* at 27 (quoting ANDREW ZAIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 6 (1999)).

15. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 100 (2006).

nineteen weeks, most of which is during the school year.¹⁶ For basketball players, “[a]t some schools, the road to the NCAA men’s basketball championship may require student-athletes to miss up to a quarter of all class days during their Spring semester.”¹⁷ During the off-season, players are often required to attend practices, team meetings, and conditioning.¹⁸ For many athletes, playing a sport requires as much time as a full-time job.

And it can be a very dangerous full-time job, with little protection for injuries.¹⁹ According to the NCAA, “there are 20,718 college football injuries a year, with 841 of those spinal injuries. The National Center for Catastrophic Sports Injury Research has recorded a steady rise in the number of football players who have permanent disability due to cervical cord and brain injuries.”²⁰ Of these, knee injuries are the most common injury and total about 4,000 per year.²¹ Despite these dangers, the NCAA does not require colleges or universities to pay for medical care for athletes.²² Even if the university does provide medical care, the doctors and treatment are under the direction and control of the institution, not the patient.²³ Such care can also be withdrawn because:

There is also no provision in the Division I Manual to prohibit a coach from revoking a scholarship the year after a recruit gets hurt. For those from poor families and without coverage through a parent, this means that a young man or young woman can be enlisted on the promise of an

16. *FBS (I-A) Schedule - 2015*, ESPN, <http://espn.go.com/college-football/schedule> (last visited Nov. 23, 2015) [<https://perma.cc/XY82-F8YG>]; *2015-2016 College Football Bowl Schedule*, ESPN (Oct. 6, 2015), http://espn.go.com/college-football/story/_/id/13004471/2015-2016-college-football-playoff-schedule-bowl-schedule [<https://perma.cc/4AGW-DQZB>].

17. Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014, 10:11 AM), <http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/>.

18. NCAA, 2012-13 NCAA DIVISION I MANUAL art. 17.9.6.1.1(d)-(e), at 272 (2012); *id.* at art. 17.9.2, at 267.

19. Meghan Walsh, *‘I Trusted ‘Em’: When NCAA Schools Abandon Their Injured Athletes*, THE ATLANTIC (May 1, 2013), <http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/> [<https://perma.cc/8Y5Q-SGYU>].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

education, get injured on the field, and lose his or her only source of medical insurance precisely when he or she needs it most.²⁴

Within the NCAA framework, athletes have very little control over their lives. In addition to the required time commitment associated with training and competition, the athletic department monitors the classes taken by players, attendance at classes, and attendance at study hall.²⁵ Players may be required to register their vehicle information and off-campus lease agreements with their coaches.²⁶ Unlike most other college students, their alcohol, tobacco, and drug use is monitored.²⁷ Finally, student-athletes are severely restricted in their ability to leave one athletic program and transfer to another university. An athlete must get written permission from his current school's athletic director before he can talk to a coach or member of the staff at another school's athletic department.²⁸ If a player is able to transfer, he generally must sit out a season and lose a year of playing eligibility.²⁹

Finally, athletes are not compensated for the time spent in playing sports, even though the universities and others make a lot of money from their efforts. Many Division I athletes do receive scholarships for their play, but these may not adequately compensate them for the number of hours spent at "work."³⁰ In addition, until recently, there were limitations on the amount of scholarship they could receive, relative to other students. For instance, athletes were not allowed to receive scholarships for more than one year at a time, even though other students could receive multiyear scholarships.³¹ Athletic scholarships are also not guaranteed and may be cancelled for reasons including a sports related injury.³² The fact that the scholarships are administered by the athletic department increases the amount of control held by the university.³³ Finally, there are

24. *Id.*

25. McCormick & McCormick, *supra* note 15, at 100.

26. Dennis Dodd, *Players About to Get Paid as Money Changes Game in College Athletics*, CBS SPORTS (Feb. 27, 2015, 12:08 PM), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/25083726/players-about-to-get-paid-as-money-changes-game-in-college-athletics> [<https://perma.cc/8C3Y-LMUS>].

27. *Id.* at 105.

28. NCAA, TRANSFER 101, at 9 (2012), <http://www.ncaapublications.com/productdownloads/TGONLINE2012.pdf> [<https://perma.cc/QXX5-MHKP>].

29. *Id.* at 20; NCAA, *supra* note 18, at art. 14.5.1, at 178.

30. See McCormick & McCormick, *supra* note 15.

31. *Id.* at 113.

32. *Id.* at 115.

33. *Id.* at 108-17.

limitations on the ability of student–athletes to take other jobs because of both time constraints and NCAA regulations.³⁴ As a result, some student–athletes find themselves without enough money to feed themselves properly.

2. *The Use of the Rhetoric of Slavery*

In 2009, *The American Spectator* declared, “The NCAA and its member institutions practice what can best be described as a modern form of slavery.”³⁵ In 2014, the *Atlanta Blackstar* listed “6 Reasons NCAA Football and Basketball Are Like Slavery.”³⁶ The reasons included the lack of pay; NCAA ownership of players’ identity; players living below the poverty line; injured players lack of health insurance; the lack of scholarship guarantee; and the fact that athletes are prohibited from working.³⁷ Walter Byers, who served as executive director of the NCAA from 1951 to 1988, compared the treatment of today’s collegiate athletes to “‘plantation’ life.”³⁸

The plantation analogy has been embraced by many commentators. For example:

The National Collegiate Athletic Association (NCAA) and universities are the perfect plantations. They have slaves who work for them tirelessly for no money. For free. Not a dime.

Amazing.

Not only do the slaves work for the NCAA and the universities, but the slaves earn the NCAA and said universities millions of dollars in various forms of revenue.

They have money rolling in 24 hours a day, 7 days a week!

In business, we call that a multiplication of your efforts: making money while you sleep.

34. *Id.* at 118.

35. Andrew Cline, *The NCAA’s Slaves*, THE AM. SPECTATOR (Apr. 6, 2009), <http://spectator.org/articles/41823/ncaas-slaves> [<https://perma.cc/Z2UV-L7TV>].

36. Leo Davis, *6 Reasons NCAA Football and Basketball Are Like Slavery*, ATLANTA BLACKSTAR (Feb. 4, 2014), <http://atlantablackstar.com/2014/02/04/6-reasons-ncaa-football-and-basketball-are-like-slavery/> [<https://perma.cc/H3VH-AAZX>].

37. *Id.*

38. Keli Goff, *‘Schooled’: Are College Sports a Modern-Day Plantation?*, NEW HAVEN REGISTER (Oct. 16, 2013), <http://www.nhregister.com/sports/20131016/schooled-are-college-sports-a-modern-day-plantation> [<https://perma.cc/W5WY-APAA>] (quoting and citing Walter Byers).

It is the perfect situation for the plantation owners and handlers, but does nothing to help the slaves.

The plantation owners get to make money off the labor of the slaves in various forms, including selling shirts and other officially licensed gear with the names, faces, and identification numbers of the slaves while prohibiting the slaves to earn any money at all.

Amazing.

All plantation owners have to do is give the slaves a room to sleep, food to eat, and classes, while the owners earn millions. I guess the classes are a step up from the old plantations, but it is still a pretty good deal for the owners.

Let me break it down for you: The plantation owners are the universities and the NCAA. All of them have a collective agreement to share the slaves and the revenue from them. The slaves, of course, are the football players. The minders or the handlers are the coaches. The merchants who go to the market to trade the slaves are the agents.

....

If that is not modern-day slavery, tell me what is.³⁹

Jesse Jackson embraced the analogy as well, describing it this way:

This has, as Taylor Branch has written, more than “the whiff of the plantation.” On the cotton plantation, everyone got paid – the land owner, the overseer, the wholesaler, everyone except the slaves who actually picked the cotton. They were chattel, had no rights that a White owner was legally bound to respect. They benefitted, it was claimed, from the paternal care of the plantation owner, providing them with room and sustenance.

Similarly, everyone gets paid in big-time college athletics except the players who actually risk their bodies to provide the show. The NCAA dubs them “student-athletes,” using the claim of “amateurism” to deprive them of any remuneration. But bigtime college sports aren’t like the amateur sports of a Division III school. The demands on the players aren’t voluntary; they are mandatory and consuming. The injuries they risk aren’t minor; they can be career or even life threatening.

It wasn’t a good idea for the South to base its economy on slave labor. And it isn’t a good idea for universities to be the producers of professionalized, big money sports entertainment. It surely conflicts with the stated educational mission of the university.⁴⁰

39. Eric Guster, *NCAA Football and Universities Are Modern-Day Plantations*, NEWS ONE (Sept. 13, 2013), <http://newsone.com/2717899/ncaa-football-slavery/> [https://perma.cc/82NX-AA8Z].

40. Jesse L. Jackson, Sr., *End the NCAA’s Plantation Economics*, BLACK PRESS USA (Mar. 31, 2014), <http://www.blackpressusa.com/end-the-ncaas->

The plantation analysis focuses upon the lack of control that student-athletes have over their lives, as well as the money being made by universities off of the athletes' labor, none of which is given to the workers. One author summarized the argument this way:

A slave is, by definition: A person who is the property of, and wholly subject to another. Now, answer this, is an athlete during his or her years in college not living under, or "wholly subject to" the NCAA?

By definition alone, athletes involved in this Association can very well be considered 'slaves'. However not under the same inhumane force human convention suggests to us when talking about slavery. Forget every connotation of the word slavery you've learned in history class and focus on what the word itself denotes—being completely controlled.

....

... [W]hat made the thought of human slaves so desirable and accepted? They worked on plantations, and produced generous income for the plantation owners at no expense. Basically, they produced money but never acquired compensation for their work, resulting in greater revenue for the plantation—sound familiar?⁴¹

Although the plantation analogy has racial connotations, the rhetoric often focuses on the class aspects of the system, in addition to the racial aspects of the system. For example, in an interview about a documentary about NCAA sports, the filmmaker said:

"I want to be clear that I'm not saying the roots of this system are racial in origin, because many of these amateur rules were put into place when schools excluded minority athletes. But as the system has evolved, most of the athletes generating that revenue are predominantly minority." When asked if the original system was classist, he replied, "Classist, but not racist. Now it's both."⁴²

plantation-economics/#sthash.xTmdOZzs.dpbs [https://perma.cc/2J78-Y3EN]. Jackson refers to Taylor Branch whose 2011 Atlantic article, *The Shame of College Sports*, which, while refusing to categorize NCAA sports as slavery, did state that the system had the "whiff of the plantation." Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [https://perma.cc/AZM4-CYZ8]. The article has been a touchstone for many other commentators using the plantation analogy.

41. Danielle Lyn, *NCAA: Slavery or Free Play?*, @JOYTAYLORTALKS BLOG (Feb. 20, 2013), <http://joytaylortalks.com/2013/02/20/danielle-lyn-ncaa-slavery-or-free-play/#comments> [https://perma.cc/LQP6-G35T].

42. Goff, *supra* note 38 (quoting Taylor Branch).

For this reason, some have made the comparison to “indentured servitude”⁴³ or a “colonial system” of benevolent control.⁴⁴ These types of analogies emphasize the class and labor aspects of slavery and the Thirteenth Amendment, which works in concert with its racial aspects.

3. *Skepticism and Response*

Within the articles about NCAA athletes, there is some measured skepticism about the use of slavery rhetoric. The skepticism becomes much more overt and vehement when the slavery analogy is extended to professional sports. The strongest statement against the use of the analogy is found in response to claims that the NFL combine (a multiday tryout for football players in which prospects perform a variety of physical feats and are weighed, measured, and assessed) is like a slave auction. Jess K. Gonz stated:

Recently, more than a couple people have made the comparison between the NFL Scouting Combine and practices of the African slave trade. White men gauge the physical attributes of a stock of athletes and it reminds people of white plantation owners appraising slaves.

Stop. Right now. Stop making these comparisons.

....

Those kids *want* to be there. They trained for this and they want to prove themselves. By making these comparisons, you are belittling and degrading the athletes. And all the people who are comparing it to slavery, white or black, should be ashamed.⁴⁵

Gonz and others focus on the voluntary nature of playing high-level sports, whether it is at the NCAA or professional level.

Defenders of the use of the S-word have engaged in debate to try to explain the persistence and legitimacy of the rhetoric. According to Dave Zirin:

43. Andrew McGregor, *The NCAA, Northwestern, and a Crack 30+ Years in the Making*, ANDREW MCGREGOR BLOG (Mar. 27, 2014), <https://admcmgregor3.wordpress.com/2014/03/27/the-ncaa-northwestern-and-a-crack-30-years-in-the-making/> [https://perma.cc/2PSV-JYLM].

44. Goff, *supra* note 38 (quoting Taylor Branch).

45. Jess K. Gonz, *NFL Combine and Slavery*, JESSKGONZ BLOG (May 11, 2014), <https://jesskgonz.wordpress.com/2014/05/11/nfl-combine-and-slavery/> [https://web.archive.org/web/20151019232319/https://jesskgonz.wordpress.com/2014/05/11/nfl-combine-and-slavery/].

It's not difficult to understand why some are crushing Adrian Peterson for likening his glamorized career to "modern-day slavery." But all the criticism in the world doesn't explain why the metaphor would cross his mind in the first place. It doesn't explain why other athletes—Curt Flood, Larry Johnson and Warren Sapp among them—have reached to this explosive analogy as a way to articulate their frustrations.

. . . Even if we are repelled by Peterson's choice of words, it's worth putting down the torches and trying to understand why this is the analogy that just won't die, especially in the world of pro football.⁴⁶

Quoting an interview with Anthony Prior, author of *The Slave Side of Sunday*:

"Black players have created a billion-dollar market but have no voice in the industry, no power. That sounds an awful lot like slavery to me. On plantations slaves were respected for their physical skills but were given no respect as thinking beings. On the football field, we are treated as what appears like gods, but in fact this is just the 'show and tell' of the management for their spectators. In reality, what is transpiring is that black athletes are being treated with disrespect and degradation. As soon as we take off that uniform, behind the dressing room doors, we are less than human. We are bought and sold. Traded and drafted, like our ancestors, and the public views this as a sport, ironically the same attitude as people had in the slavery era."⁴⁷

These defenders focus on how "lack of control" can easily translate into the feelings of being bought, sold, and owned by someone else. To these athletes, this feels very different than owning your own labor, selling that labor to an employer and being able to quit, even if there are large salaries attached to the labor.

Others, such as Dr. David J. Leonard, seek to both critique and explain the analogy in a more nuanced way.⁴⁸ He argues:

The references to slavery are not literal comparisons, but rhetorical devices that seek to emphasize power, race, and the control of black bodies within modern sporting context. The rhetorical comparison/analogy isn't simply about physical control but ideological and mental power differentials. Moreover, in a society that routinely devalues, ignores,

46. Dave Zirin, *Slaves to the Game? Adrian Peterson and the 'S' Word*, THE NATION (Mar. 16, 2011), <http://www.thenation.com/article/slaves-game-adrian-peterson-and-s-word/> [<https://perma.cc/9SXA-L53J>].

47. *Id.*

48. See David J. Leonard, *What's in a Name? The 'Plantation' Metaphor and the NBA*, NEWBLACKMAN (IN EXILE) (Dec. 25, 2011), <http://newblackman.blogspot.com/2011/12/whats-in-name-plantation-metaphor-and.html> [<https://web.archive.org/web/20130326155557/http://newblackman.blogspot.com/2011/12/whats-in-name-plantation-metaphor-and.html>].

sanitizes, and erases the horrors of American slavery, I think the selective resistance by many raises questions.⁴⁹

He argues that slavery, in many forms continues to exist and that “[w]hile NBA players are neither slaves on 19th century cotton fields nor those who pick tomatoes, harvest cocoa in the Ivory Coast, or work in the sex, soy and soccer ball industries, the ‘40 million dollar slave’ is part of that history.”⁵⁰ In this way, this rhetorical use of the language of slavery can be useful both in understanding the problems faced by NCAA athletes and in understanding how slavery operates around the world today.

B. Unpaid Interns

In 2011, Ross Perlin published *Intern Nation*,⁵¹ detailing the rising use of unpaid interns and their deplorable work conditions. Somewhere between 500,000 and 1,000,000 students⁵² will work as unpaid interns each year, and over half of all college graduates report holding some form of internship during college.⁵³ Internship experiences vary greatly: Individuals may work for nonprofit, government, or for-profit employers; students may or may not receive academic credit for the internship; and students may or may not receive training that can translate into marketable job skills later in life. For the most part, the critique of unpaid internships has focused on internships at for-profit companies that are not part of a college-administered program.

1. *Problems Faced by Unpaid Interns*

In the United States, employees must be paid a minimum wage for their work. This requirement helps protect against labor conditions “detrimental to [the] maintenance of the minimum

49. *Id.*

50. *Id.*

51. See ROSS PERLIN, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY* xvi-xviii (2011).

52. Derek Thompson, *Work Is Work: Why Free Internships Are Immoral*, THE ATLANTIC (May 14, 2012), <http://www.theatlantic.com/business/archive/2012/05/work-is-work-why-free-internships-are-immoral/257130/> [<https://perma.cc/45AM-89Y7>].

53. NAT’L ASS’N OF COLLS. & EMP’RS, *THE COLLEGE CLASS OF 2012: EXECUTIVE SUMMARY* 6 (2012) (stating the number is for internships and co-ops, not just unpaid internships).

standards of living ‘necessary for health, efficiency and general well-being of workers.’”⁵⁴ The obvious problem facing unpaid interns is that they are not paid for their work. If they are employees, the internship is in violation of the minimum wage law. On the other hand, an employer does not have to pay an intern if it is a nonprofit institution or if the internship is primarily educational and for the benefit of the intern.⁵⁵ The Department of Labor has created a six-part test to determine whether the internship is primarily educational or whether it should be considered an employment relationship. In order to qualify as an educational experience, the test requires:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁵⁶

Unfortunately for many interns in the for-profit sector, this requirement is ambiguous, unworkable, largely ignored by employers, and unenforced by the Department of Labor (DOL).⁵⁷ As a result, many interns work for no pay and without adequate compensation in terms of experience, improved knowledge,

54. E. Merrick Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945*, 59 HARV. L. REV. 321, 365-66 (1946) (quoting 29 U.S.C. § 202(a) (1940)).

55. WAGE & HOUR DIV., U.S. DEP’T. OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010).

56. *Id.* The factors are derived from a very old and the only major U.S. Supreme Court case to define employee for purposes of the Fair Labor Standards Act. *See* *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149-53 (1947).

57. Kara Brandeisky & Jeremy B. Merrill, *How the Labor Department Has Let Companies Off the Hook for Unpaid Internships*, PROPUBLICA (Apr. 9 2014, 1:59 PM), <http://www.propublica.org/article/how-the-labor-department-let-companies-off-hook-for-unpaid-internships> [<https://perma.cc/L6YU-VZRK>]; Andrew Mark Bennett, Comment, *Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 309-10 (2011).

enhanced marketability, specialized skills, and educational mentorship. In fact, most interns end up having to pay money for travel, housing, and other living expenses while they are an intern.⁵⁸ As a result, interns may have to take another job to subsidize their internship experience, go into debt, or have another source of financial support, such as family income, in order to afford the experience.⁵⁹

The second major problem faced by unpaid interns is that, since they are not considered employees, they are not protected by other labor and employment laws, such as the right to organize and strike, the right to claim workers' compensation, and protection under OSHA.⁶⁰

In 2011, the Equal Employment Opportunity Commission wrote in an unofficial opinion that unpaid interns are generally not protected by antidiscrimination laws.⁶¹ As a result, they can be and often are subject to discrimination, including sexual harassment without any legal recourse.⁶² There are certain rights and protections that society has decided are so important to individuals in a workplace that statutes and regulations are passed to secure these rights. Arguably, these define the floor for free labor in the United States. If unpaid interns work without these protections, these important social norms are violated.

2. *The Use of the Rhetoric of Slavery*

Advocates for better treatment of unpaid interns have used the rhetoric of slavery to focus the public on the unpaid nature of the work, as well as the unprotected and exploitative conditions faced by

58. See *id.* at 298.

59. See *id.* at 297-98.

60. David C. Yamada, *The Employment Rights of Student Interns*, 35 CONN. L. REV. 215, 251-56 (2002).

61. Letter from Raymond L. Peeler, Senior Attorney Advisor, EEOC Office of Legal Counsel, Federal EEO Laws: When Interns May Be Employees (Dec. 8, 2011), http://www.eeoc.gov/eeoc/foia/letters/2011/eeo_laws_when_interns_may_be_employees.html [https://perma.cc/GG2Z-LWHL].

62. See Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN'S L.J. 95 (2000); see, e.g., *Wang v. Phx. Satellite Television US Inc.*, 976 F. Supp. 2d 527, 535-37 (S.D.N.Y. 2013) (holding plaintiff had no claim for sexual harassment because she did not receive significant remuneration in the form of compensation or benefits from her work).

interns. For example, one CEO, writing as a guest blogger, titled his post “Are Internships a Form of Slavery?” and argued “[s]lavery is morally wrong, and what else is a job with all the obligations of formal employment but without any pay. . . . So where does that all leave unpaid internships? Sounds a lot like slavery to me.”⁶³

Analyzing the lack of protection under labor and employment laws, one online liberal news magazine argued:

Internships, while starting with the best of intentions, are turning out to be little more than legalized slavery. A ruling from the U.S. District Court for the Southern District of New York claims, in a catch-22, that interns can't claim sexual harassment because they work for free. . . . Unpaid interns are also not covered by Title VII of the Civil Rights Act, which means that companies are allowed to discriminate based on race, national origin, sex or religion (sexual orientation is not part of the Civil Rights Act).⁶⁴

Finally, looking at the overall exploitive conditions of the intern relationship, one college newspaper ran an opinion piece that read:

Internships can be the gateway to a career in a competitive profession or the 21st century form of slavery. College students who hope to work their way into their dream careers have literally been worked to death.

. . . .

On the other end of the scale are the cruel and exploitive practices of some law firms and investment banks where unpaid interns can labor anywhere from 60 to 80 hours a week. Moritz Erhardt, 21-year-old intern at Bank of America, died shortly before his internship ended from exhaustion and malnutrition. Following the death, Bank of America announced it was looking into the affects the long hours and hazardous work conditions have on young employees. Hmm, seems the answer to that question is—they kill people.

Bank of America and other abusive companies are engaging in modern day slavery. Working someone to death is an astonishing act of barbarism, particularly from a wealthy corporation with an enormous profit margin.⁶⁵

63. Tom Curtin, *Are Internships a Form of Slavery?*, PUB. REL. CONSULTANTS ASS'N BLOG, http://www.prca.org.uk/Are_internships_a_form_of_slavery (last visited Nov. 23, 2015) [<https://perma.cc/LG5T-6WUZ>].

64. Wendy Gittleston, *Interns: As Long As You Aren't Paid, Your Boss Can Do What?*, LIBERALS UNITE (Oct. 9, 2013), <http://samuel-warde.com/2013/10/interns-long-arent-paid-boss-can/> [<https://perma.cc/C2Q7-55DY>].

65. Anna Pryor, *Unpaid Internships Can Be Wonderful Opportunities or Modern Day Slavery*, THE SW. COLL. SUN (Oct. 9, 2013), <http://www.theswcsun.com/unpaid-internships-can-be-wonderful-opportunities-or-modern-day-slavery/> [<https://perma.cc/6ZSZ-DXXC>].

These commentators look to the rhetoric of slavery to emphasize that when individuals labor in employment relationships without pay, without legal protection for basic workplace rights, and which are abusive, something is very wrong. They categorize these relationships as legalized slavery or modern day slavery to attract attention and to criticize these specific problems.

3. *Basis for Skepticism*

The use of the S-word by intern advocates has been strongly criticized. Most critics focus on the fact that internships are voluntary and that interns can quit. For example, one career consultant who specializes in advising interns and intern employers wrote on her blog:

Internships—paid or unpaid—are not slavery.

Slavery is simply defined as forcing a person to work against their own will. Do you think this is this [sic] an accurate definition of the 21st century intern? I don't. Any intern who accepted their internship most likely read and signed a contract accepting the responsibilities of the internship.

If you want to compare internships to the 13th Amendment, there is are [sic] some key points to keep in mind. The 13th Amendment declared, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Does this sound like an internship to you? I don't think so. Internships are not involuntary positions.

If a college student willingly applies for an internship and then willingly performs the work, then it cannot be considered an involuntary position. Think about it: If it was an opportunity the student was serious about, they would have read all the objectives and expectations for the position. Now, if the employer lied about the objectives for their internship program, that's another story. But even then, there's a way out actual slaves didn't have: they can quit.⁶⁶

Another typical critique looks to the benefits of internships and the fact that they are desired by so many students as the answer to claims of slavery. For example, in a Huffington Post article titled

66. Heather R. Huhman, *Unpaid Employment: 21st Century Slavery?*, HEATHER R. HUHMAN BLOG (July 15, 2013), <http://heatherhuhman.com/unpaid-employment-21st-century-slavery/> [<https://perma.cc/7ZG4-J2F7>].

“Unpaid Interns and Medieval Peasants. Comrades in Arms?,”⁶⁷ the author wrote:

Are unpaid internships a form of modern day slavery? Should they be abolished? Any positive answer to these questions has to face up to the fact that many of us are prepared to do a ‘job’ which involves working eight (or more) hours a day for no money. From the assertion that unpaid internships are a modern take on slavery comes a simple but awkward question. Why are there so many willing slaves? . . . [P]eople are prepared to give away their labour for free in exchange for the prospect of future rewards. Unlike a slave, whose future prospects are, to say the least, limited, an unpaid intern will willingly work for free because the work brings with it the hope of better things to come.⁶⁸

Those who critique the use of slavery rhetoric with regard to unpaid interns assume that any voluntary labor relationship cannot qualify as slavery. To them, voluntariness can be seen as either the ability to quit or by the fact that individuals seek out a particular work relationship. They also emphasize the benefits of an internship and argue that slavery did not entail any similar benefits.

III. THE IMPACT OF THE RHETORIC OF SLAVERY

In the survey I conducted on the use of the rhetoric of slavery, the use by NCAA athletes and unpaid interns were the only two arrangements that faced skepticism and criticism. The use of the S-word by immigrant advocates, prison labor advocates, and trafficking opponents drew no such opposition. Interestingly, these were also the two arrangements where the most significant steps have been taken to deal with the problems faced by these workers. This Part briefly examines the steps that have been taken to resolve the problems faced by NCAA athletes and unpaid interns and then turns to the issue of how the rhetoric of slavery may have supported or influenced those solutions.

67. Will Manners, *Unpaid Interns and Medieval Peasants. Comrades in Arms?*, HUFFINGTON POST UK (Oct. 24, 2013, 4:24 PM), http://www.huffingtonpost.co.uk/will-manners/unpaid-internship_b_4148067.html [<https://perma.cc/TW6L-VDW8>].

68. *Id.*

A. NCAA Athletes

1. *Resolution of the Problem*

There have been two ways in which the landscape for NCAA athletes have begun to shift for the better: the possibility of being paid and increased control over their lives. In *O'Bannon v. NCAA*, a group of athletes challenged the NCAA's restrictions on paying student-athletes more than the full value of grant-in-aid (tuition and fees, room and board, and required course-related books) for athletic services as a violation of the antitrust laws.⁶⁹ In addition, they argued that the NCAA rules that "bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses in video games, live game telecasts, and other footage . . . violate the Sherman Antitrust Act."⁷⁰ The district court ruled in favor of the athletes and found "that the challenged NCAA rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools."⁷¹ After considering three different alternatives suggested by plaintiffs,⁷² the court crafted the following remedy:

The Court will enjoin the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid. The injunction will not preclude the NCAA from implementing the rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws.

The injunction will also prohibit the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires. Although the injunction will permit the NCAA to set a cap on the amount of money that may be held in trust, it will prohibit the

69. 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014).

70. *Id.* at 963.

71. *Id.*

72. *Id.* at 982 (stating the alternatives included raising the grant-in-aid limit to allow schools to pay stipends based on licensing revenue to student-athletes; allowing schools to deposit licensing revenue into a trust fund for student-athletes to use when they graduate; and permitting student-athletes to receive compensation for third-party endorsements approved by the schools).

NCAA from setting a cap of less than five thousand dollars (in 2014 dollars) for every year that the student-athlete remains academically eligible to compete.⁷³

The ruling in the lawsuit was set to go into effect in 2016, but it was revised by the Ninth Circuit Court of Appeals in September 2015.

In *O'Bannon v. NCAA*, the Ninth Circuit agreed that the NCAA rules were subject to antitrust regulation and did have some anticompetitive effect, and that the plaintiffs had suffered an injury.⁷⁴ The court found, though, that under the antitrust analysis known as the rule of reason, the rules were allowable to serve the procompetitive purposes of integrating academics with athletics and promoting the idea of amateurism.⁷⁵ The court struck down the requirement that the NCAA allow member schools to pay compensation up to \$5,000, but it did uphold the requirement that the NCAA allow its member schools to give scholarships up to the full cost of attendance.⁷⁶ Although the decision no longer allows compensation for the work of student-athletes, it does still allow for better treatment of the athletes by allowing them to receive more generous and equitable scholarships.

Perhaps believing the adage that “the best defense is a good offense,” while the district court was considering *O'Bannon*, the NCAA passed new regulations giving five big conferences autonomy to offer scholarships covering the full cost of attending the university (rather than the smaller amount accounted for in grants-in-aid); prohibit coaches from revoking scholarships for athletic reasons; to allow student-athletes to borrow against future earnings in purchasing loss-of-value insurance; and pledging to limit the time athletes spend on their sports.⁷⁷ These changes should help improve the conditions for student-athletes and will remain in effect, regardless of the ultimate outcome in the *O'Bannon* case.

Meanwhile, another lawsuit, *Jenkins v. NCAA*, has been filed which seeks to go much further than *O'Bannon* and overturn any restrictions on NCAA ‘no pay’ rules.⁷⁸ The *Jenkins* lawsuit, as well

73. *Id.* at 1007-08.

74. Nos. 14-16601, 14-17068, 2015 WL 5712106, at *1 (9th Cir. Sept. 30, 2015).

75. *Id.* at *7-8.

76. *Id.* at *1.

77. Jake New, *Autonomy Faces First Test*, INSIDE HIGHER ED (Jan. 14, 2015), <https://www.insidehighered.com/news/2015/01/14/power-five-members-flex-new-legislative-muscles-ncaa-convention> [<https://perma.cc/Z4LT-N83S>].

78. Andy Staples, *O'Bannon Just the Beginning: Jenkins Case Could Unhinge NCAA*, SPORTS ILLUSTRATED (Jun. 18, 2014),

as another lawsuit seeking damages for past compensation when athletes were not allowed “full cost of attendance” scholarships, is still before the courts.⁷⁹

In March 2014, the regional director of the National Labor Relations Board (NLRB) issued a ruling that could have gone far to give NCAA athletes more control over their lives. In *Northwestern University Employer & College Athletes Players Association (CAPA) Petitioner*, the director ruled that grant-in-aid scholarship football players are employees who have the right to form a union.⁸⁰ The NLRB Regional Director focused on the control which the university exerts over its athletes, the amount of time which athletes devote to their sport, the amount of money paid in scholarship to athletes, and the revenue generated for the school from athletics to conclude that “players receiving scholarships to perform football-related services for the Employer under a contract for hire in return for compensation are subject to the Employer’s control and are therefore employees within the meaning of the Act.”⁸¹ As a result, the Regional Director ordered an election to be held for the players to determine if they want to have CAPA as its representative.⁸²

If student-athletes could form a union, they would be able to negotiate over the terms and conditions of their employment with the University. Kain Colter, the former quarterback at Northwestern and leader of CAPA, testified before the NLRB that the players want better medical coverage, concussion testing, four-year scholarships, and the possibility of being paid. In addition to these substantive gains, the ability to form a union means that players would be able to share control over their lives. This would be a major shift in how NCAA athletes are treated because they would go from being under the total control of the NCAA to being in a more equal partnership.

Unfortunately for the athletes, in August 2015, the full NLRB overturned the decision of the regional director. In *Northwestern*

football/2014/06/18/obannon-vs-ncaa-jenkins-mark-emmert-claudia-wilken [https://perma.cc/4BJH-NZPL].

79. Marc Tracy & Ben Strauss, *Court Strikes Down Payments to College Athletes*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html>.

80. No. 13-RC-121359, 2014 WL 1246914, at *1 (N.L.R.B. Mar. 26, 2014).

81. *Id.* at *12.

82. See *id.* at *21-22; Marc Edelman, *One Year Later, NLRB Still Hasn’t Ruled on Appeal of Whether College Football Players May Unionize*, FORBES (Apr. 14, 2015, 10:34 AM), <http://www.forbes.com/sites/marcedelman/2015/04/14/one-year-later-nlrbs-still-hasnt-ruled-on-appeal-of-whether-college-football-players-may-unionize/>.

University & College Athletes Player Association (CAPA), Petitioner, the Board declined to decide whether the scholarship players were employees.⁸³ Instead, they said that, even if the athletes are employees, “it would not effectuate the policies of the Act to assert jurisdiction [because] . . . [it] would not serve to promote stability in labor relations.”⁸⁴ The Board reasoned that it would be impractical to order collective bargaining for only one team at one school.⁸⁵ In addition, the Board would not be able to assert jurisdiction over public colleges and universities, which make up a large part of the NCAA.⁸⁶ As a result of declining to exercise jurisdiction in the case, the Board decided not to order an election for the players at Northwestern University.⁸⁷

The NLRB was careful to emphasize that it was not deciding whether the athletes were employees and concluded:

Our decision today is limited to the grant-in-aid scholarship football players covered by the petition in this particular case; whether we might assert jurisdiction in another case involving grant-in-aid scholarship football players (or other types of scholarship athletes) is a question we need not and do not address at this time.⁸⁸

Thus, the question of whether NCAA athletes are workers who deserve to have some control over their work through collective bargaining has been raised, given serious consideration and, at least for now, deferred.

2. *Impact of the Rhetoric of Slavery*

One of the major problems identified for NCAA athletes forming the basis for the slavery analogy is the lack of control over their lives. Even if athletes are playing sports by choice and even if they are being paid well (in the case of professional athletes), the metaphor persists because there is something wrong with giving power and control to someone else over your labor.⁸⁹ The success of NCAA athletes in having their claims taken seriously by the NLRB and the future possibility of being able to form a union directly

83. 362 N.L.R.B. No. 167, 2015 WL 4882656, at *1 (N.L.R.B. Aug. 17, 2015).

84. *Id.* at *1.

85. *See id.* at *4.

86. *See id.*

87. *Id.* at *7.

88. *Id.* at *1.

89. *See Zirin, supra* note 46.

addresses the issue of lack of power and control. With a union, they would be able to negotiate the ability to quit one university and move to another, as well as being able to negotiate better protection for work/athletic related injuries and the ability to be paid through better scholarship rules.

The other major concern found in the rhetoric of slavery used by NCAA athletes was lack of pay, especially when their labor was being used to enrich others. The *O'Bannon* case (if it is appealed) and the pending *Jenkins* case both open the door for the possibility of NCAA athletes being able to be paid to play for their labor and to share in the profits made from licensing their names and likenesses. In this way, NCAA athletes will be able to own and profit from their labor.

I am not arguing that NCAA athletes made these inroads directly because of their use of the rhetoric of slavery; however, the rhetoric of slavery was powerful in bringing attention to these issues. More importantly, it helped frame the most egregious problems faced by the athletes as labor abuses. The slavery analogy makes clear why allowing athletes to unionize and allowing them to get paid serves important values in American society. Although the Thirteenth Amendment did not form the basis for the legal opinions giving rights to these workers, it does provide a moral basis to justify claiming these legal rights, even if such a claim was controversial, contested, or unsuccessful.

B. Unpaid Interns

1. *Resolution of the Problem*

In the last several years, things have been getting better for unpaid interns. Since the publication of *Intern Nation* and increased publicity (including the use of the rhetoric of slavery), a movement has begun to protect unpaid interns. Websites such as unpaidinternslawsuit.com⁹⁰ have sprung up, and ProPublica began a yearlong project to study the problems of unpaid interns.⁹¹ The 2011

90. *Should You Have Been Paid for Your Unpaid Internship?*, UNPAID INTERNS LAWSUITS, <http://unpaidinternslawsuit.com/> (last visited Nov. 23, 2015) [<https://perma.cc/28B9-U3EQ>].

91. Blair Hickman & Jeremy B. Merrill, *Have You Held an Unpaid Internship? Help Us Investigate*, PROPUBLICA (May 6, 2013, 10:14 AM), <http://www.propublica.org/getinvolved/item/worked-an-internship-in-2013-tell-us-about-it> [<https://perma.cc/YL8M-5F7E>]; Blair Hickman, *What We Learned*

Department of Labor regulations were a direct reaction to the increased scrutiny brought to bear on unpaid internships.⁹² Some schools have begun to better monitor their internship programs,⁹³ and interns have begun to organize.⁹⁴ This movement has begun to create changes in two ways: lawsuits to recover unpaid wages and changes in state laws to protect unpaid interns against discrimination. Although these two have not completely solved the problems faced by unpaid interns, they show significant progress in the fight to protect unpaid interns as workers and employees.

In *Glatt v. Fox Searchlight Pictures Inc.*, a federal judge ruled that the movie studio had violated the Fair Labor Standards Act when it did not pay its interns who worked on the film *Black Swan*.⁹⁵ The court concluded that the workers were employees because they did not receive training similar to that in an educational environment and because they performed routine tasks that otherwise would have been performed by paid employees.⁹⁶ Fox Searchlight was found to be the “primary beneficiar[y]” of the internships.⁹⁷ Even though the interns understood that they were not to be paid for their work, the court pointed out that “the FLSA does not allow employees to waive their entitlement to wages.”⁹⁸ It continued, “Considering the totality of the circumstances, Glatt and Footman were classified improperly as unpaid interns and are ‘employees’ covered by the FLSA and NYLL. They worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training.”⁹⁹

The reaction to the ruling was significant. Forbes ran an article titled “Is the Unpaid Internship Dead?” describing the current docket

Investigating Unpaid Internships, PROPUBLICA (July 23, 2014, 9:00 AM), <http://www.propublica.org/article/what-we-learned-investigating-unpaid-internships> [<https://perma.cc/HQ46-V7WX>].

92. Brandeisky & Merrill, *supra* note 57.

93. Jena McGregor, *Schools Crack Down on Unpaid Internships*, WASH. POST (May 16, 2015), <http://www.washingtonpost.com/blogs/on-leadership/wp/2014/05/16/schools-crack-down-on-unpaid-internships/> [<https://perma.cc/4Q9P-9H7A>].

94. Lydia DePillis, *Now Interns Are Unionizing, Too*, WASH. POST (June 5, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/06/05/now-interns-are-unionizing-too/> [<https://perma.cc/WM2N-8WAE>] (stating that this is a movement among paid interns who are already considered employees under the federal labor laws).

95. 293 F.R.D. 516, 534 (S.D.N.Y. 2013).

96. *See id.*

97. *See id.* at 533.

98. *Id.* at 534.

99. *Id.*

of unpaid intern lawsuits and predicting more to come.¹⁰⁰ In the ensuing years, many companies settled lawsuits for multiple millions of dollars. Condé Nast paid their interns \$5.8 million in backpay.¹⁰¹ NBCUniversal settled its intern claims for \$6.4 million.¹⁰² PBS paid \$250,000 to former interns,¹⁰³ and the talent agency ICM settled its claims for an undisclosed amount.¹⁰⁴ Companies seemed to settle these suits out of recognition that their internship programs would not pass the strict reading of the DOL Fact Sheet enunciated in *Glatt*. In addition, some companies ended their unpaid internship programs because they realized they were not providing sufficient educational benefits to the workers in exchange for their labor.¹⁰⁵

100. Susan Adams, *Is the Unpaid Internship Dead?*, FORBES (June 14, 2013, 11:47 AM), <http://www.forbes.com/sites/susanadams/2013/06/14/is-the-unpaid-internship-dead/>. *But see* Susan Adams, *The Unpaid Internship is Not Dead Yet*, FORBES (June 20, 2013, 1:15 PM), <http://www.forbes.com/sites/susanadams/2013/06/20/the-unpaid-internship-is-not-dead-yet/> (describing the magnitude and composition of the internship workforce).

101. Tom McKay, *Unpaid Interns Just Won a \$5.8 Million Victory*, NEWS.MIC (Nov. 14, 2014), <http://mic.com/articles/104318/unpaid-interns-just-won-a-5-8-million-victory> [<https://perma.cc/RU4Y-BZAN>].

102. *NBCUniversal Settles Lawsuit with Unpaid Interns for \$6.4 Million*, HUFFINGTON POST (Oct. 24, 2014, 11:55 AM), http://www.huffingtonpost.com/2014/10/24/nbcuniversal-intern-lawsuit-settles-64-million_n_6042426.html [<https://perma.cc/68CN-6VPX>].

103. Steven Greenhouse, *'Charlie Rose' Show Agrees to Pay Up to \$250,000 to Settle Interns' Lawsuit*, MEDIA DECODER (Dec. 20, 2012, 9:09 PM), http://mediadecoder.blogs.nytimes.com/2012/12/20/charlie-rose-show-agrees-to-pay-up-to-250000-to-settle-interns-lawsuit/?_r=2 [<https://perma.cc/4DW6-V6N8>].

104. Eriq Gardner, *ICM Partners Settles Lawsuit over Unpaid Intern (Exclusive)*, THE HOLLYWOOD REPORTER (Dec. 23, 2014, 8:08 AM), <http://www.hollywoodreporter.com/thr-esq/icm-partners-settles-lawsuit-unpaid-760035> [<https://perma.cc/U972-TLSC>]. It was eventually revealed to be a \$725,000 settlement. Eriq Gardner, *Warner Music Group Settles Lawsuit over Unpaid Interns*, THE HOLLYWOOD REPORTER (Jan. 30, 2015, 12:08 PM) [hereinafter Gardner, *Warner Music*], <http://www.hollywoodreporter.com/thr-esq/warner-music-group-settles-lawsuit-768614> [<https://perma.cc/8F7L-N3V5>]. Other significant settlements include Viacom at \$7.2 million and Warner Music. Meg James, *Viacom Agrees to Pay Up to \$7.2 Million to Settle Intern Lawsuit*, L.A. TIMES (Mar. 12, 2015, 12:14 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-viacom-settles-intern-lawsuit-20150312-story.html> [<https://perma.cc/EVP5-S2KR>]; Gardner, *Warner Music*, *supra*.

105. Erin Cunningham, *Condé Nast Ends Internship Program*, THE DAILY BEAST (Oct. 23, 2013, 1:16 PM), <http://www.thedailybeast.com/articles/2013/10/23/cond-nast-ends-internship-program.html> [<https://perma.cc/6CVB-4PLE>].

The landscape again shifted recently when the Second Circuit reversed the lower court's *Glatt* decision.¹⁰⁶ Instead of using a strict interpretation of the DOL Fact Sheet, the Second Circuit decided to focus on whether there was more of a benefit to the intern than to the company, adopting the so-called "primary beneficiary test."¹⁰⁷ In doing so, the court said it would look at the extent to which the internship provided an educational purpose by evaluating the following factors:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. . . .
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.¹⁰⁸

It is unclear what the effect of the decision will be on pending lawsuits in other jurisdictions because it provides less definition. Both the original *Glatt* decision and the recent Second Circuit decision, however, focus on the need for the internship to provide a benefit to the intern. The benefit can be nonmonetary compensation, but the experience must provide a substantial benefit to the intern.

Interns are also gaining some protection under state-level labor and employment laws against employment discrimination and/or sexual harassment. As of May 2015, approximately seven states, including New York, California, and Illinois, have started to provide

106. *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 388 (2d Cir. 2015).

107. *See id.* at 383-84.

108. *Id.* at 384.

such protection.¹⁰⁹ Although the number of states is few, it does show that legislatures are recognizing that workers, even if they are not paid, are still entitled to some protection as workers.

2. Impact of the Rhetoric of Slavery

The problems identified by unpaid interns that formed the basis for the slavery analogy were lack of pay and lack of protection under labor and employment laws. Recent changes made by agencies, courts, and legislatures address these two issues. The court decisions looking at the DOL Fact Sheet focus on whether interns are receiving some nonmonetary compensation, some benefit for their labor. If they are, then they do not need to be paid money. If they are not, however, then they do need to be paid. The decisions recognize and validate the need to compensate workers for their labor, even if that compensation is not in the form of money. Similarly, the changes made in state regulations extending workplace coverage to interns recognizes that these individuals need to be covered by workplace protection, even if they are not being paid because they are workers, and workers derive certain protections by benefit of their status as workers, even if they are not technically employees.

The use of the rhetoric of slavery does not necessarily form the basis for these legal gains. It does, however, draw attention in a dramatic way to the problems faced by interns. It also frames or highlights the types of problems which most offend the moral notions of labor rights found in the Thirteenth Amendment. When people are not paid for their labor and when they are not protected by the basic human rights protections of antidiscrimination law, their situation becomes one that justifies the use of slavery rhetoric. These are the two most egregious problems faced by interns, and they are the two that are being addressed.

CONCLUSION

What does this study of these two industries and their use of the rhetoric of slavery tell us about the potential to use the Thirteenth Amendment as a rallying cry for workers' rights? There are at least five takeaways from this discussion. First and foremost, NCAA

109. Samantha Lachman, *A Shocking Number of States Don't Protect Unpaid Interns from Discrimination and Sexual Harassment*, HUFFINGTON POST (May 27, 2015, 4:17 PM), http://www.huffingtonpost.com/2015/05/27/unpaid-interns-harassment_n_7453826.html [<https://perma.cc/X65W-FT4U>].

athletes and unpaid interns used the rhetoric to portray themselves as providers of labor or workers. The Thirteenth Amendment recognized that slavery was a labor system. Slaves were workers, even though they did not get paid and were not covered by protective labor and employment laws. By drawing the analogy to slavery, athletes and interns have been able to emphasize the nature of the activities as work and their status as workers. They are providing labor that profits the university or their employer. This rhetorical move enabled them to argue that the definition of “employee” for purposes of labor and employment law needed to be expanded to include workers in non-traditional labor arrangements. This categorization was essential to the possibility of getting compensation and protection. Significantly, neither the Ninth Circuit nor the NLRB said that the NCAA athletes were not employees or workers. Instead, they reached their decisions based on policy grounds. This potentially provides the opportunity to categorize other types of nontraditional work as employment and extend workplace protection to more workers.

Second, both groups emphasized that they were providing labor that economically benefitted someone else while not being paid. The lack of payment is seen as a marker of slavery because people are not able to own their labor and benefit from it. This is particularly true when others are seen to be reaping the economic reward of the labor. This provides the opportunity to explore other types of labor arrangements where workers are being unpaid and where workers are not able to fully participate in the labor market and benefit from their labor.

Third, lack of protection under existing labor and employment laws can be seen as a marker of slavery. Both groups were concerned with the lack of protection of labor and employment rights. Interns were concerned about discrimination and sexual harassment, while NCAA athletes were concerned about the right to unionize and to receive compensation for work-related injuries.¹¹⁰ Protective labor and employment laws can be seen as defining for the floor for free

110. Some early cases covered injuries to college athletes under workers' compensation laws, but this was quickly changed. See Donald Paul Duffala, Annotation, *Workers' Compensation: Student Athlete as "Employee" of College or University Providing Scholarship or Similar Financial Assistance*, 58 A.L.R. 4th 1259 (1987); David W. Woodburn, *College Athletes Should Be Entitled to Workers' Compensation for Sports-Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01*, 28 AKRON L. REV. 611 (1995).

labor in the United States. When workers labor beneath the floor created by these statutes and regulations, their work relationships become suspect under the Thirteenth Amendment. This provides a strong rhetorical way to challenge other employment relationships where workers are excluded from protection, such as workers in the agricultural and domestic industries.

Fourth, lack of control over a worker's life can also be seen as a marker of slavery. For NCAA athletes, one of the biggest problems was being under the exclusive control of the NCAA and the universities. Professional athletes and, to a lesser extent, elite college athletes linked this issue to race because most of these athletes are black and those in control of their labor are white. However, total control was also linked to class, through the use of terms such as indentured servitude, even when race was not an issue in the relationship. This emphasizes two different aspects of the Thirteenth Amendment. The rhetoric of slavery emerges when individuals feel that they no longer own their labor so they feel that they are bought, sold, and owned by others. Also, slavery needs to be viewed through the lens of class, as well as race.

Finally, the successful use of the slavery rhetoric in these two situations shows that a simple claim of voluntariness is not a complete defense to a portrayal that a labor arrangement is akin to slavery. The skepticism about these claims shows that many people feel that the voluntariness of these arrangements negates the ability to make a rhetorical claim under the Thirteenth Amendment; however in both cases, the analogy has been useful to frame problems as being akin to slavery and have resulted in some resolution. This issue resonates in debates over how to define "involuntary servitude" under the Thirteenth Amendment. Most courts in interpreting the enabling statutes passed pursuant to the Thirteenth Amendment struggle to determine the amount of "coercion" present in various work situations in determining the legality of the situation.¹¹¹ In looking at immigrant workers and trafficked workers, for example, the courts have struggled to determine the parameters of "involuntary" servitude when immigrants come to the United States to work, desire to work and, in some ways, are free to quit work and leave the country.¹¹² The use of the rhetoric of slavery by NCAA athletes and unpaid interns provides

111. Kathleen Kim, *Beyond Coercion*, 62 *UCLA L. REV.* 1558 (2015); Kathleen Kim, *The Coercion of Trafficked Workers*, 96 *IOWA L. REV.* 409 (2011).

112. See *supra* footnote 111.

insight in this debate because it shows that the definition of slavery includes many aspects besides whether a labor arrangement is voluntary or involuntary.

One commentator observed, “[Q]uestions and criticisms about a slavery analogy (and it is an analogy) are important because it demonstrates the power of language.”¹¹³ A large number of workers fighting to improve their lives have claimed this power by using the S-word and other words associated with it in popular media. Two of the most controversial claimants have been NCAA athletes and unpaid interns. Even though their use of the analogy has been contested, it has also been effective because it has forced decision makers to see these individuals as workers and employees. The rhetoric has also been effective in highlighting the types of oppressive labor conditions that need to be remedied to prevent the relationships from offending the spirit, if not the words, of the Thirteenth Amendment.

113. Leonard, *supra* note 48.