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Children Have Rights, Too: How the Thirteenth Amendment Can Protect America's Abused Youth

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Children Have Rights, Too: How the Thirteenth Amendment Can Protect America's Abused
Youth

A Thesis

Presented to

The Faculty and the Honors Program

Of the University of San Diego

By

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Political Science

2021

Abstract: Three million children are abused every year in the United States. Although there are some safeguards, such as foster care and state child abuse laws, the number of abused children has not dwindled. How should the federal government respond? This article argues that the Thirteenth Amendment can be interpreted to protect abused children. It is widely accepted that the Thirteenth Amendment's sole purpose is to abolish Black slavery, therefore rendering it useless in the modern legal climate. Nothing in the wording or context of the Amendment, however, suggests that it is limited to Black slavery. Interpreting the Amendment to encompass modern forms of slavery and involuntary servitude could provide a solution to many of the most pervasive and perplexing human rights issues facing the world today. Abused children could find protection in the Amendment, as it prohibits all forms of slavery and involuntary servitude, regardless of familial relations, age, or race. The Courts have struggled to balance the conflicts between parental rights and children's rights, causing inconsistencies that have prevented sustained progress. This paper will argue that the Thirteenth Amendment can be applied to child abuse cases by creating a connection between slavery and involuntary servitude as it is traditionally understood and child abuse. Once this connection is made, this article argues that this legal protection will allow for a workable standard to be developed within the Courts for balancing parental rights and children's rights in cases involving serious child abuse.

“Like an antebellum slave, an abused child is subject to near total domination and degradation by another person, and is treated more as a possession than as a person. Unless the state acts to protect an abused child, the child's status bears an eerie resemblance to that of a pre-Civil War American slave.” – Akhil Reed Amar and Daniel Widawsky

I. Introduction

It is commonly accepted that children are deserving of life, liberty, and happiness. However, it is less commonly accepted that children are autonomous individuals who retain the same constitutional rights as their adult counterparts. Children are viewed as dependents, and this dependence has stripped them of some of their rights. This notion has been articulated through the government's response to child abuse. The current system for combating child maltreatment has been lackluster. In order to create an effective remedy to child abuse, there needs to be a federal level reform to set precedent for both state and local organizations to follow, as well as to create a legal basis for timely and effective intervention into cases of abuse. Because child abuse occurs most often in the private arena, it is important to create a preventative measure that extends beyond the public sphere and into the walls of a family home. Perhaps no legal vehicle is more equipped to address this than the Thirteenth Amendment.

Although it is commonly accepted that the Thirteenth Amendment's sole purpose is to combat pre-Civil War slavery and involuntary servitude, this is not the case. Nothing in the wording of the Amendment suggests that it is limited. In fact, scholarly discussion and modern case law have suggested that the Amendment should be extended to encompass modern forms of slavery and involuntary servitude, such as domestic violence, the over-incarceration of the black

community, amongst numerous other iterations.¹ The Amendment's clear wording and scope of influence make it an ideal tool to combat the most prominent human rights offenses facing the world today. Child abuse is no exception.

This paper will argue that by utilizing the Thirteenth Amendment to balance parental rights and children's rights, the federal government can create a legal basis for addressing child abuse. The first part of this paper will argue that the Thirteenth Amendment is the proper legal vehicle for abused children and that modern-day child abuse bears striking similarities to slavery as outlined by the Thirteenth Amendment. The second section will apply this logic through a demonstration of how the Thirteenth Amendment can help balance the rights of parents and the rights of children in the Court.

I. The System has Failed its Children

Joshua Deshaney was four years old when he was beaten nearly to death by his father.² Despite years of hospital visits, doctor reports, and child protective services visits, Joshua suffered traumatic brain injuries that permanently hindered his ability to live a life of liberty and eventually led to his premature death. Joshua's mother brought her son's case to the Supreme Court in hopes that the state's failure to intervene, regardless of their knowledge, would result in a Constitutional violation. However, the Court found that the state was not liable for the abuse

¹ Becky Little, *Does an Exception Clause in the 13th Still Permit Slavery?* Hist. (Oct. 2, 2018), <https://www.history.com/news/13th-Amendment-slavery-loophole-jim-crow-prisons>

² *Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249, 1989 U.S. LEXIS 1039, 57 U.S.L.W. 4218: In the modern legal climate, seeking legal reparations for the damages of abuse is difficult, as seen in the Supreme Court's decision in *Deshaney v Winnebago Department of Social Services*. Though there should be a demand for liability of the state for failing to protect its children, the Supreme Court has already set forth precedent that may be difficult to reverse. Joshua Deshaney's case was "undeniably tragic", but the Court's decision pushed past the gruesome details to create yet another legal obstacle for abused children. The Court's ruling made it so the state is better off not intervening in instances of abuse, which disincentivizes state agencies to perform their functions.

that occurred to Joshua. Unfortunately, Joshua is not alone in his story, as kids nationwide are currently lacking legal protection from abuse occurring within their own homes.

One in seven children in the United States is abused.³ This means that in a typical elementary school classroom hosting 35 students, 5 of those students are likely facing abuse at home. Three million cases of child abuse are reported annually in the United States alone, making the home to one of the highest numbers of reported cases amongst developed countries.⁴ Even more concerning is that 80% of these instances of abuse occur within the family unit.⁵ It is well documented that childhood physical abuse, emotional abuse, sexual abuse, and neglect have negative effects on children that last into adulthood.^{6 7} The severity and longevity of negative consequences that are associated with child maltreatment make it so the mitigation of abuse cases is in the nation's best interests, as well as the child's.⁸

It is incontestable that child abuse is a penetrating problem in the modern world. However, it is the federal government's response to child abuse that has perpetuated this problem. Child protective services is the sole government agency equipped to respond to child abuse, but evidence has shown that it has failed to do so. Studies have revealed that "there is

³Rebecca T. Leeb, Leonard J, Paulozzi, Cindy Melanson, *Violence Prevention: Fast Facts*, Ctr. for Disease Ctrl., <https://www.cdc.gov/violenceprevention/childabuseandneglect/fastfact.html> (January 2021).

⁴ Leeb, supra note 3

⁵ William Suter, *Child Abuse and the Law*, Hoover Inst. (Dec. 9, 2015), <https://www.hoover.org/research/child-abuse-and-law>

⁶ Sutherland, Casanueva, Ringeisen, *Young adult outcomes and mental health problems among transition age youth investigated for maltreatment during adolescence.*, 31 Child. And Youth Svcs. Rev. 947, (September, 2009).

⁷ There is no set definition as to what constitutes each form of abuse, as it varies greatly from author to author. For the purpose of this article, these four forms of abuse will be understood generally, while remembering that what constitutes abuse is fluid and is not defined by a concrete set of characteristics. This same concept will interchangeably be referred to as child abuse and child maltreatment.

⁸ Sutherland, supra note 4.

little observable connection between CPS involvement and improved outcomes for the children and families.”⁹ In fact, there is no evidence that shows that CPS at all diminishes the recurrence of child maltreatment.

The government’s failure to properly intervene in child maltreatment cases does not end with local agencies. The judicial system has demonstrated its inability to properly balance the rights of parents and children, resulting in a system that disproportionately prioritizes the parents. This hierarchy of rights has made it such that children are not having their interests properly represented in cases dealing with their own wellbeing.

Parents have a right to the sanctity of the home, which makes it difficult for government agencies to intervene in cases of child abuse. However, children also need to be legally protected in situations where they are victims of child maltreatment. The position of children in society makes discussions around their rights complex and layered. Their dependence and lack of legal agency have made them reliant on other entities to protect and promote their rights, but this dependency certainly does not make them immune to human rights protections.¹⁰ Children deserve to be free from abuse and domination, but this is clearly not prioritized by the government.

Shifting focus away from legal reparations and corrections and instead towards legal preventative measures may provide workable solutions to this problem that works in both the best interest of the state and in the best interest of the children. In order for the government to intervene in situations of abuse and to create a legal framework for judicial utilization, a legal

⁹ Rio Russell, Colleen Kerwin, Julie L. Halverson, *Is child protective services effective?*, 84 Child. And Youth Svcs. Rev. 185, (January, 2018).

¹⁰ David F. Lancy, *Unmasking Children’s Agency*, 1 Soc. Work and Anthro. Fac. Pub., 277 (March, 2012).

basis needs to be formulated. Until there is a set understanding of abuse, of children's rights within the Constitution, and of the government's role in intervention, it will be difficult to limit child abuse. The Thirteenth Amendment, if understood without the barriers set by its conventional usage, could provide the government with its much-needed legal basis.

II. The Thirteenth Amendment is Alive and Well

The Thirteenth Amendment states that: "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party still have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."¹¹ The wording of the Amendment is clear; slavery and involuntary servitude shall not exist in the United States. Despite this, the application of the Amendment is ambiguous.¹² The Court has failed to set forth a framework for analyzing and applying the Thirteenth and has instead relied upon contradictory dicta that are lacking in elaboration.¹³ This has led to a general understanding that the Thirteenth Amendment is limited only to instances of pre-Civil War slavery, resulting in scarce usage within the Supreme Court.

The Thirteenth Amendment, however, is an underdeveloped piece of legislation. The Amendment's broad promise of freedom for all has been juxtaposed by a narrow judicial

¹¹ U.S. Const. amend. XII

¹² William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, (April, 2007).

¹³ Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 82 Wm. & Mary Fac. Pub., 2021 (2009).

interpretation.¹⁴ The Court's decisions in both the *Slaughterhouse Cases* and the *Civil Rights Cases* drastically diminished the Thirteenth's ocean of potential.¹⁵ The *Slaughterhouse Cases* were heard five years following the ratification of the Thirteenth Amendment, but they marked the first time that the Court addressed the meaning of the Amendment.¹⁶ Justice Miller directly declared that the primary purpose of the Reconstruction Era Amendments was to abolish Black Slavery in America.¹⁷ In the *Civil Rights Cases*, the Court determined that the Thirteenth Amendment could not be used to punish private individuals for racially discriminatory acts and determined that discrimination on the basis of race is not a badge of slavery.¹⁸ These two cases bound the definitions of slavery to the period of slavery that occurred before the Emancipation. They failed to take into account iterations of slavery that could occur in the future.

Involuntary servitude, though more frequently employed within the Court, has also been used in a way that "largely fit within the contours of the concept fleshed out by the states carved from the Northwest Territory before the Civil War."¹⁹ In the *Slaughterhouse Cases*, Justice

¹⁴Jack M. Balkin & Sanford Levinson, *The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications: Panel 1: The Thirteenth Amendment in Context: The Dangerous Thirteenth Amendment*, 112 Col. L. Rev. 1459, 1500 (2012).: "It is worth emphasizing how narrow this interpretation is. Compare it with the evolving jurisprudence of the Fourteenth Amendment, which, among other things, was originally designed to establish equal citizenship for blacks and whites and to make unconstitutional the Black Codes.... Suppose that in 1988 the Court had summarized 120 years of Fourteenth Amendment jurisprudence by asserting that the Equal Protection Clause extended only 'to cover forms of [denials of rights and liberties]....ain to [the Black Codes]...which in practical operation would tend to produce like undesirable results'. Most people today would find this interpretation implausibly narrow, almost a parody or originalist argument. If the Thirteenth Amendment were taken as seriously as the Fourteenth has been taken, one would expect considerable political and legal efforts to make sense of its underlying purposes and apply its terms (and purposes) to new situations."

¹⁵ Balkin, *supra* note 14

¹⁶ Oman, *supra* note 13

¹⁷ *Slaughter-House Cases*, 83 U.S. 36, 21 (1873).

¹⁸*Civil Rights Cases*, 109 U.S. 3, 20 (1883).

¹⁹ Oman, *supra* note 13

Bradley insinuated that “private discrimination was beyond Congress’s enforcement power.”²⁰ At a similar time, in *Arthur v Oakes*, the Court held that a situation can constitute involuntary servitude if the individual cannot quit the personal service of another. Justice Harlan decided that if a person was compelled to work for another and was unable to leave, he was in a situation of involuntary servitude.²¹ However, this decision was quickly retracted in *Robertson v. Baldwin*, when they decided that contractual work for a wage was not involuntary, as the worker entered into the relationship voluntarily.²² This reinterpretation limited the scope of what was defined as servitude to both situations that involve labor and involve an involuntary entry into said labor. These Court decisions limited the definition of slavery and involuntary servitude and therefore limited the scope of the Thirteenth Amendment.

Scholars Jack M. Balkin and Sanford Levinson also argue that the reason that the Thirteenth Amendment has been narrowly interpreted is that it is dangerous to utilize the Amendment to its full potential. They state that “The demand that “neither slavery nor involuntary servitude . . . shall exist within the United States,” taken seriously, potentially calls into question too many different aspects of public and private power, ranging from political governance to market practices to the family itself.”²³ Slavery and involuntary servitude, as it is understood in the contemporary context, is bound in its most visible iteration known as “chattel slavery”. Once this form of slavery and involuntary servitude was abolished through the

²⁰ Oman, *supra* note 13

²¹ *Arthur v. Oakes*, 63 F. 310, 1894 U.S. App. LEXIS 2389

²² *Robertson v. Baldwin*, 165 U.S. 275, 17 S. Ct. 326, 41 L. Ed. 715, 1897 U.S. LEXIS 1968

²³ Balkin, *supra* note 14

Emancipation Proclamation, however, American society was understood to be “liberated”. The Emancipation Proclamation did abolish chattel slavery in its basic form, but it failed to address systemic instances of slavery or involuntary servitude that remained in the United States.²⁴ The false sense of liberation removed the need for the Thirteenth Amendment, though its job was nowhere close to being finished. Furthermore, it is argued that the Thirteenth Amendment was unable to be utilized by corporations for their own benefit, while the Fourteenth Amendment was able to promote the interests of the powerful.²⁵ This led to the Fourteenth’s expansion, while the Thirteenth continued to decrease in potency.

The Thirteenth Amendment is not dead, however, and certainly must not be treated as such within the American legal framework. Just as the First Amendment has been interpreted to correspond with contemporary contexts, the Thirteenth should develop to serve in the twenty-first century.²⁶ In Supreme Court Case *United States v. Kozminski*,²⁷ the decision could be interpreted to open the door for the Thirteenth Amendment’s re-utilization. In the majority

²⁴ Balkin, supra note 14

²⁵ Balkin, supra note 14 “...The Fourteenth Amendment proved unexpectedly useful to a large number of powerful interests in post-Civil War America. Corporations and businesses were able to procure interpretations of the Fourteenth Amendment that served their purposes during the late nineteenth century and thereafter. They could make little use of the Thirteenth Amendment...”

²⁶ Supreme Court cases like *FCC v Pacifica Foundation* are an example of how the Court worked to interpret the First Amendment to encompass modern forms of technology and modern outlets. Because radio broadcasts are so readily available and reach broad audiences, the government is able to regulate indecent language in certain circumstances. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). The same can be done for the Thirteenth Amendment. “The Amendment must be interpreted in an evolutionary manner, but with specific regard to

the experience of the victims of human bondage in the United States and the destructive effects that the system of slavery had upon American society, laws, and customs.” (see supra 28)

²⁷ *United States v. Kozminski*, 487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788, 1988 U.S. LEXIS 3032, 56 U.S.L.W. 4910, 46 Empl. Prac. Dec.: This case dealt with a situation of involuntary servitude. The case was asking the question as to whether involuntary servitude could encompass situations of psychological coercion as well as physical coercion. The Court decided that the Thirteenth did not extend to these situations. However, in concurring opinions, there was a general consensus that the definition of involuntary servitude was being construed too narrowly. The Amendment should be interpreted in a case-to-case basis.

decision, the Court's dicta held that the Amendment not only was designed to eradicate all forms of slavery or involuntary servitude but also "conditions akin to African Slavery".²⁸ This definition may be underdeveloped, but it certainly "encapsulates the most essential attribute of slavery as it existed in the American South, i.e., master-on-slave coercive physical violence".²⁹ The definition outlined here created a glimmer of hope for those who advocate for Thirteenth Amendment expansion, as the Court recognized that the current interpretations of slavery and involuntary servitude may be too narrow.

There has been an increase of scholars and legal thinkers who feel that the Thirteenth Amendment should extend to modern civil rights abuses. Justice Blackmun's dissenting opinion in *Deshaney v Winnebago County Department of Social Services* worked to express how the state should be held accountable for the abuse that plaintiff, four-year-old Joshua Deshaney, suffered. The majority decision held that the failure of a state agency to prevent child abuse that occurs within the family unit is not a violation of the Fourteenth Amendment.³⁰ Justice Blackmun felt that the Court's majority opinion was devoid of "natural sympathy". He analogized the majority decision made by the Court to "the antebellum judges who denied relief to fugitive slaves". He saw that the Court's decision abandoned "fundamental justice", and argued that "compassion needed not to be exiled from the province of judging". His passionate argument opens the door for the discussion of a re-utilization of the 13th Amendment to be developed.

²⁸ *United States v Kozminski*, supra note 27

²⁹ Susan H. Bitensky, *An Analytical Ode to Personhood: The Unconstitutionality of Corporal Punishment of Children Under the Thirteenth Amendment*, 53 Santa Clara L. Rev. 1 (2013).

³⁰ *Deshaney v. Winnebago County Dep't of Social Services*, supra note 2

This string of thought was picked up by scholars Amar and Widawsky in their work, “Child Abuse as Slavery”.³¹ The dicta in Blackmun’s dissent allowed scholars to begin to develop “an analogy between antebellum slavery and child abuse”.³² Amar and Widawsky recognized that Deshaney’s lawyers did not raise a Thirteenth Amendment claim, but they argue that perhaps this claim could have been fruitful. They began to analogize a child abused with an antebellum slave and found that both are subject to “domination and degradation by another person” and that the state’s failure to protect children like Joshua “bears an eerie resemblance” to American slavery.³³ The commentary concluded that because Joshua’s situation was closely synonymous with that of the antebellum slave, and because the Thirteenth Amendment does not have a wide scope, but rather only applies to cases of slavery, that children like Joshua could utilize the Thirteenth Amendment in the Court. Amar and Widawsky focus primarily on analyzing abused children to slaves, as they believe that abused children “is in effect being treated as a possession.”³⁴ Though Amar and Widawsky curated a compelling argument for treating abused children as slaves, it is also important to consider them in the context of involuntary servitude as well. Using the two definitions in conjunction can create an even stronger argument for protecting children from maltreatment under the Thirteenth Amendment.

III. The Thirteenth Amendment: Designed to Protect

³¹Akhil Reed Amar and Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, Yale L. J., 1038 (1992)

³²Amar, supra note 31

³³Amar, supra note 31

³⁴Amar, supra note 31

Though the Thirteenth Amendment clearly has the potential to be revitalized, the legitimacy of a legal argument is not based on the rule of law or discussions in academia, but rather on custom and practice.³⁵ Therefore, it is important to continue to argue that the Thirteenth Amendment has the potential to correct some of the most pressing human rights issues facing the world today and it is crucial the body politic allows it to do so. Though the Amendment has been restricted, it holds all necessary qualities to regenerate and become influential once again. It was intentionally designed to eradicate all forms of slavery and involuntary servitude.

The Thirteenth Amendment is unique in its ability to limit child abuse. The wording of the Thirteenth Amendment is clear and “self-executing without ancillary legislation”.³⁶ Upon reading the Amendment, it is obvious that its intention is to eradicate slavery and involuntary servitude within the United States. This clarity is valuable when looking to apply this Amendment. If there is slavery occurring within the United States, it is unquestionably unconstitutional and the federal government has its much needed legal basis to ensure timely and effective intervention.³⁷

Other Amendments that can work to protect the liberty interest of citizens, such as the Fourteenth Amendment, have a state action clause. This means that the state must act in order for the Amendment’s protections to be applied.³⁸ For children who are being abused by their parents,

³⁵ Niles Peterson, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 Am. Uni. Intl. L. Rev. 275 (2007).

³⁶ *United States v Kozminski*, supra note 27

³⁷ The main issue here, then, is what is defined as slavey and involuntary servitude. This again ties in to the idea that what is accepted as a legitimate argument is reliant on custom. Current customary definitions of slavery do not include child abuse, but this certainly can change.

³⁸ U.S. Const. amend. XIV: State action is action that the state took directly, or actions that can be easily attributed to the state.

the Fourteenth Amendment's protections will not apply. In the eyes of the Court, there is no constitutional violation, as the state is not the abuser. The Thirteenth Amendment, however, does not have a state action clause. In the context of the Thirteenth, "One person owning another person as chattel applies more so to private conduct than state action".³⁹ It was designed to eradicate all forms of slavery, regardless of whether or not they occur in the private arena.

The Amendment also enables Congress to enact corrective legislation to ensure that the promise of freedom is upheld. Section Two of the Amendment states that Congress has the "power to enforce this article by appropriate legislation."⁴⁰ Again, the Amendment's clear working makes it apparent that Congress has the power to pass legislation that ensures that slavery and involuntary servitude shall not exist within the United States. In *Jones v Alfred H. Mayer Co.*, the Court "set out a two-step method for applying this authority".⁴¹ Congress was granted the ability to "rationally....determine what are badges and instances of slavery" and "translate that determination into effective legislation".⁴² Though this power is not often utilized by Congress, it has been successfully applied in the past and has the potential to be applied in the future.⁴³

In order to understand the future potential of the Amendment, we must look back at its past to see how and why it was ratified, what its intended purpose was, and how it has been used.

³⁹ Samuel M. Strongin* (April, 2016). Note: When Thirteenth is (still) Greater than the Fourteenth: The continued expansive scope of Congressional authority under the Thirteenth Amendment in a post-*City of Boerne v. Flores* world. *Virginia Law Review*, 102, 501.

⁴⁰ U.S. Const. amend. XIII

⁴¹ Strongin, supra note 39

⁴² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189, 1968 U.S. LEXIS 2980, 1 Empl. Prac. Dec. (CCH) P9832, 47 Ohio Op. 2d 43 (Supreme Court of the United States June 17, 1968.)

⁴³ Strongin, supra note 39

During the ratification of the Thirteenth Amendment, it is clear that the Founders intended the Amendment to abolish all forms of slavery. Those both for and against the amendment recognized “that it prohibited all future circumstances that would create conditions of substantive slavery.”⁴⁴ Senator Wilson stated that “Slavery committed innumerable, deeply corrupting crimes against ‘the life of a free nation’” in a Congressional debate that occurred at the time of the Amendment’s ratification.⁴⁵ At the time of these debates, the Emancipation Proclamation was already established two years prior, meaning that enslaved individuals had already been freed.⁴⁶ The intention of these debates, then, was not to free enslaved people but was to ensure that Emancipation would be carried out.⁴⁷ The Amendment was designed to “establish and decree universal civil and political freedom throughout the United States.”⁴⁸

Debates about the Thirteenth Amendment provide insight into the scope of usage that the Amendment’s supporters had intended. Congressmen knew that they needed to secure the rights of American citizens beyond the Emancipation Proclamation in order to ensure liberty for all. Charles Sumner stated that “everywhere within the limits of the United States, and of each State or Territory thereof, all persons are equal before the law so that no person can hold another as a slave.”⁴⁹ Senator Henry Wilson saw the Amendment as a guard on “sacred rights” of all

⁴⁴ Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 Cardozo Pub. L. Pol’y & Ethics J. 131 (2003)

⁴⁵ 169. Cong. Globe, 38th Cong., 1st Sess. 1320 (statement of Sen. Wilson)

⁴⁶ Bahar Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and Reconstructed Civil Rights Agenda*, 71 Fordham L. Rev. 981 (December, 2002).

⁴⁷ Azmy, supra note 46

⁴⁸ *Civil Rights Cases*, supra note 12

⁴⁹ Cong. Globe, 38th Cong., 1st Sess. 1451 (1864)

American citizens.⁵⁰ Certainly, it was clear that the Amendment was “guaranteeing civil liberty to all racial and economic strata of the population. Everyone, regardless of race, occupation, or resources, was to be an equal before the law.”⁵¹ They are entitled to basic "civil liberty," "that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally, and more especially by the [Thirteenth] Amendment which has recently been adopted." ⁵²

Modern case law has also begun to suggest that the Thirteenth Amendment can be expanded within the Courts. In *The United States v. Djoumessi*, the Court was faced with a case that dealt with a couple who arranged for a young girl to immigrate to the United States to work for them in exchange for room and board.⁵³ In the case, the Court stated, “[E]ven on its own terms, involuntary servitude is not too strong a phrase to describe what Djoumessi and his wife did to this fourteen-year-old girl. ‘In the jury’s view, [the defendant] was part of a conspiracy that substituted for a promised education and compensation, a regime of psychological cruelty and physical coercion that took some of the best years of a young girl’s life. For that, involuntary servitude is not too strong a term.’”⁵⁴ In *Doe v. Johnson*, a district court was faced with a case where a foster child was abused and neglected for three years.⁵⁵ The plaintiffs brought her case to

⁵⁰Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. Davis L. Rev. 1775, 1848 (2006)

⁵¹ Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. Davis L. Rev. 1775, 1848 (2006)

⁵² Azmy, *supra* note 46

⁵³ *United States v. Djoumessi*, 538 F.3d 547, 554 (6th Cir. 2008)

⁵⁴ *United States v. Djoumessi*, 538 F.3d 547, 554 (6th Cir. 2008): (quoting *United States v. Udeozor*, 515 F.3d 260, 272 (4th Cir. 2008))

⁵⁵ *Doe v. Johnson*, 817 F. Supp. 1382, 1993 U.S. Dist.

the court under the fourteenth amendment, but the claim was denied by the court. The judge stated that a thirteenth amendment could be a better claim for the young girl.⁵⁶ Though these iterations of slavery and involuntary servitude are variant from traditional definitions, they are still recognized by the Court as a violation of the right to agency and freedom granted by the Constitution. These are two examples of a plethora of cases in which the dicta suggests that the Thirteenth Amendment has the potential to help children in situations of abuse.

The Thirteenth Amendment also serves as a nationwide solution to nationwide problems. It helps to balance the rights of the federal government and state governments. If the state governments fail to protect the rights of those protected by the Thirteenth Amendment, the responsibility shifts to the federal government. The federal government is then able to address systemic problems plaguing the country, while also helping “the body politic conceptualize those problems as the awful, systematic problems that they are.”⁵⁷

If specific forms of child abuse can be properly understood as a form of modern-day slavery and involuntary servitude, then the definitive nature of the Thirteenth Amendment would make any form of systemic abuse illegal, regardless of whether the abuse was in a public arena. It would allow Congress to directly outlaw abusive parental behavior under the Thirteenth Amendment, regardless of where the abuse occurs and the relationship between the abuser and the abusee. The Thirteenth Amendment is authoritative because of its definitive language and lack of a state action requirement, allowing a lawsuit to be filed under a private right of action. Overall, it would allow the government to be more vigilant in their attempts to prevent child

⁵⁶*Doe v. Johnson*, supra note 55

⁵⁷Strongin, supra note 39

abuse, and their potential sweeping actions, both preventative and reparative, could work to threaten the entire existence of child abuse. The Amendment was designed to protect, and once the Court recognizes its full potential, abused children could find refuge in its promise.

IV. SOIS: Slavery and Involuntary Servitude Reimagined

To reiterate, the Thirteenth Amendment is unique because of the following characteristics. Primarily, it outlaws slavery outright. The wording of the Amendment is clear and concise, reducing ambiguity and aiding in interpretation. It also protects against slavery and involuntary servitude that occurs in the private sphere. There is no state action requirement, meaning that the state does not have to be the one enslaving in order for there to be a constitutional violation. Simultaneously, the Amendment enables Congress to create legislation that protects against slavery and involuntary servitude, creating a double-pronged approach. The judicial system is not the only federal agency that is working to ensure that violations of the Thirteenth do not occur. The Amendment does not just combat slavery, but involuntary servitude and peonage as well. “It does not require people to be US citizens” and it also “represents a shift from state to the federal level in the enforcement of individual rights accorded by the Amendment.”⁵⁸ The Amendment contains a variety of features that can work together to create a space for abused children to be protected.

In order for the Amendment to be expanded into this arena, child abuse must be understood as a form of slavery or involuntary servitude that encompasses the true essence of these forms of domination. According to the 1926 Slavery Convention, slavery is defined as “the status or condition of a person over whom any or all powers attaching to the right of ownership is

⁵⁸ Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions for an Age-Old Problem*. 55 *Catholic Uni. L. Rev.* 141, (Fall, 2015).

exercised.”⁵⁹ This definition, however, is vague and open to interpretation. It is also rooted in the idea of pre-Civil War slavery, which limits the definition to one particular historical period. SOIS has taken on a variety of iterations throughout history. However, it is important to question “who gets to decide when a custom is related to slavery” and “what limits discretion when defining a custom of slavery”.⁶⁰ Custom can “shape and content to the other undefined terms that the Thirteenth Amendment has generated: the ‘badges’, ‘incidents’ and ‘relics’ of slavery.”⁶¹ The definition of SOIS, then, is fluid and can be expected to shift and expand as customs change.

In order to continue this discussion, the definitions of slavery and involuntary servitude, or SOIS, must be operationalized in a way that transcends custom, time, and period. Scholars Akhil Reed Amar and Daniel Widawsky defined slavery as “a power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons.”⁶² This definition seems to analogize ownership to the more specific idea of a “power relation of domination”, which allows for there to be a distinction between those who dominate and those who do not. This distinction is crucial for discussing the role of parental custody. This definition, however, fails to specify the state of the slave himself. The current legal definition of a slave is “a man who is deprived of his liberty for life” and a person who “has no political rights”.⁶³

Combining these definitions, then, slaves are those who are deprived of their liberty interest and

⁵⁹ League of Nations, *Slavery Convention*, Geneva, (September, 1926).

⁶⁰ Darrel A. H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 Duke L. Rev. 1811 (2012).

⁶¹ Miller, *supra* note 60

⁶² Amar, *supra* note 31

⁶³ John Bouvier, “Slave”, *A Law Dictionary, Adapted to the Constitution and Laws of the United States*, (1856).

their political and social rights because of the power relation of domination in which they reside. For the remainder of this paper, slavery should be understood as such.

Involuntary servitude has been utilized within case law more often than its counterpart. It was defined by the Supreme Court in *The United States v. Kozminski* as “a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury or by the use or threat of coercion through law or the legal process. This definition encompasses cases in which the defendant holds the victim in servitude by placing him or her in fear of such physical restraint or injury or legal coercion,”⁶⁴

For the remainder of this argument, SOIS should be understood as a person whose status falls under either the definition of slavery or of involuntary servitude or whose status falls under both. Children who are facing extreme physical violence, sexual exploitation, or neglect can be analogized to being in a condition of SOIS. Because the Thirteenth Amendment protects against both slavery and involuntary servitude, there is no need to choose which definition best describes the situation of an abused child. Using the two definitions in tandem can provide a space for abused children to be understood as being in a situation of enslavement.

So what situation, then, would qualify a child as a slave? Clearly, parental custody cannot be the sole distinguishing factor, because this would make it so there is no distinction between a free child and a slave child. There needs to be a clear line as to what children are subject to Thirteenth Amendment protection. The first factor that must be taken into consideration when determining this is the relationship between the parent and the child. It is commonly understood and respected that parents have the right to be with their children free from government

⁶⁴ *United States v. Kozminski*, supra note 27

intrusion.⁶⁵ However, when parents prevent their authority as guardians and custodians, they are violating their role as parents, and therefore are violating the Thirteenth Amendment.⁶⁶ Parents who are failing to provide proper guardianship for their children are those who are physically abusive, sexually abusive, emotionally abusive, neglectful, or exploitative. Physical and sexual abuse are two of the most easily identifiable forms of abuse, but protections for children must not be limited to just these two forms.

It is essential to make it clear that a person does not have to be an adult to be a slave, nor do they need to be of a certain race or status. The Thirteenth Amendment does not lose potency if the slave in question is the offspring of the master.⁶⁷ It has also been made clear, both in the wording of the Amendment and in current precedent, that the Amendment is not limited to pre-Civil war slavery. These conditions do not exclude children from the protections of the Thirteenth Amendment. Perhaps the most important aspect to clarify, however, is the idea that slaves are doing free labor. “Slavery is a status, not merely an activity.”⁶⁸ The labor argument -- or the idea that slavery is dependent on the existence of free labor -- causes many to feel that children no longer can classify as a slave. However, no part of the Amendment’s wording, nor in

⁶⁵ Soo Jee Lee, *A Child’s Voice vs. A Parent’s Control: Resolving a Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 Col. L. Rev. (2017).

⁶⁶ Amar, *supra* note 31

⁶⁷ Amar, *supra* note 31: Many times, in fact, the “master” was the parent to the “slave child”. Enslaved women were often sexually exploited and would become impregnated by their “masters”, but this did not exempt the child from being considered a slave.

⁶⁸ Mundorff, *supra* note 44

historical understandings of slavery⁶⁹, require there to be an exploitation of labor in order for a person to be considered a slave.

In reference to the definition of slavery and involuntary servitude above, the defining characteristic of the enslaved is a person who is in a “power relation of domination”. The relationship of power, and most importantly the abuse of said power, over another person is what creates an instance of slavery. It is power over the person, and most importantly, the removal of their liberty, that makes them enslaved by another. If free labor were the defining characteristic, then unpaid interns or college athletes would be characterized as enslaved. Free labor, in these instances, is not accompanied by a power relation of domination, nor are the individuals stripped of their liberty interests.⁷⁰ Based on this understanding, perhaps no individual qualifies as a slave or involuntary servant more than an abused child. Slaves and involuntary servants are characterized by their legal status, one from which they cannot escape. A child cannot leave their parent’s care; they are essentially trapped in a cycle of abuse.

Parents, then, become less like parents and more like slave owners when they use their power to systemically abuse and dominate over a child. It is key to clarify that the domination of a parent over a child must be systemic. A one-time instance of domination is not the same severity and intensity of the continual and perpetual abuse that strips the child of their liberty rights. It is important to make it clear that the goal of this proposal is not to strip parents of their right to care and custody of their child. If a parent fails to be exemplary for a short period of

⁶⁹ Mundorff, *supra* note 44: “...there can be no work requirement in the definition of slavery. If a slave was not made to work, she was not unshackled of her status and allowed to be free. The injured, infants, and the elderly were slaves, whether or not they contributed to any labor.”

⁷⁰ This notion is debatable, but certainly is worth noting in the context of this argument.

time, it is not the state's responsibility to reprimand. To an extent, "parents retain a vital interest in preventing the irretrievable destruction of their family."⁷¹ The argument here, though, is that it is crucial to prioritize children's rights at the same level, if not higher than, parental rights. When prioritizing the rights of children, however, the state must provide a fair procedural process for all involved parties.

Custody is a state-created concept, and the roles of parents in raising their children have changed dramatically throughout history. In ancient Rome, "children were viewed as the property of their father", who was granted the authority to do with his children what he wished.⁷² In the mid-nineteenth century, mothers were finally awarded custody over their young children, after generations of this right being the sole responsibility of the father.⁷³ Currently, there is a relatively gender-neutral prioritization within the court, resulting in "joint custody" following a divorce, for example.⁷⁴ As society shifts, the concept of custody shifts along with it. Parents are not guaranteed the custody that they are currently granted under the government. The custody laws that are employed today would have been viewed as radical 100 years prior. In the near future, abusive parents retaining sole custody of their children could be seen as equally radical. Custody is not a natural law, and should not be preserved over the fundamental right to be free from abuse. Therefore, if the parents fail in their role as custodians, the state must take over.

⁷¹ Santosky v. Kramer, 455 U.S. 745 (1982)

⁷² Joan B Kelly, *The Determination of Child Custody*, 4 *Future of Child*. 121, (Spring, 1994)

⁷³ Kelly, *supra* note 72

⁷⁴ Kelly, *supra* note 72

Children lack the agency and legal legitimacy of their adult counterparts. Their individual autonomy is seemingly second to the wishes of the adults around them. When children run away from home, they are immediately placed back in the custody of their parents.⁷⁵ However, there is little emphasis placed on whether the biological parents were the cause of the running away.⁷⁶ Modern society places a great emphasis on the biological parent's right to custody, but it is important to remember that custody is a socially constructed legal concept. The "role of the parent, including the accompanying rights and responsibilities, is largely shaped by society-at-large,". The general emphasis on the fitness and ability of biological parents to care for their children may be generally true, but the children who find themselves in the care of their biological parents, but are also in abusive homes, must be able to be protected.

Children's personal autonomy must be preserved under the law. Scholar Pamela D. Bridgewater argues that the Thirteenth Amendment may be a constitutional vehicle for securing self-determination and individual autonomy in the modern political climate. She writes, "...the Thirteenth Amendment may be read to prohibit "modern reproductive abuses" that deny reproductive self-determination,".⁷⁷ Her work focuses on the right of women to reproduce free from government intrusion, but the general sentiment can apply well to child abuse cases as well. Children who are abused are stripped of their autonomy and liberty by an overarching, dominating force. They are unable to choose what is best for their bodies and are subject to the will of a force that is stronger than themselves. When the Court makes decisions about women's

⁷⁵ Amar, *supra* note 31

⁷⁶ Amar, *supra* note 31

⁷⁷ Pamela D. Bridgewater, *Breeding a Nation: Reproductive Slavery, The Thirteenth Amendment, and the Pursuit of Freedom*, Compass Academic, (2006).

reproductive rights, rarely are the women's best interests placed at the forefront of the decision-making process.⁷⁸ In that same light, children's best interests are rarely prioritized under the current legal structure in cases of systemic abuse.

Children will always be under the custody of others, and most often their parents. This is a result of their developmental stage. As a general rule, this has worked. However, custody does not have to result in a sacrifice of rights, self-determination, and autonomy. Children must still possess those rights, in appropriate amounts, in order to be able to grow comfortably, safely, and freely. Amar writes that "...parental custody is justified only if such custody is plausibly in the best interests of the child,". Following this argument, when parental custody is not in the best interests of the child, is laden with domination and degradation, and when it sacrifices a child's autonomy and wellbeing, it is no longer parental custody but is a form of slavery. When a child is being abused, he is not in a home, but in a space of constant fear and discomfort. Because of his physical and legal vulnerability, he is unable to escape this home. When children are in this situation, the Thirteenth Amendment's outright abolition of slavery should enact to protect them.

V. Striking a Balance

The United States is unique in its lack of prioritization of children's rights. Germany, for example, has adopted the United Nations Convention on the Rights of the Child.⁷⁹ Since its acceptance, Germany has seen a shift where "the child and their welfare have increasingly become the focal point in parental authority".⁸⁰ Parental rights are recognized, but they are linked

⁷⁸ Bridgewater, *supra* note 77

⁷⁹The United Nations Convention on the Rights of the Child is a legally binding document that discusses the rights granted to every child. The United States has not signed this agreement, along with Somalia and South Sudan.

⁸⁰ Lee, *supra* note 65

to parental duties. A parent only has said rights when they are fulfilling their role as a parent. Ideally, this line of thought can be picked up in the United States through the Thirteenth Amendment.

Historically, children have been seen as vulnerable and dependent in the eyes of the law. Parental rights have been prioritized over those of children because of the notion that children are unable to care for themselves. In 1641, Massachusetts passed a law, entitled the Stubborn Child Law, which mandated that children could receive capital punishment for simply disobeying their parents. What was classified as disobedience was at the discretion of the parents. Flash-forward to the nineteenth century and the juvenile justice system was in the beginning stages of its development. The first juvenile court was a result of the “child-savers” movement. The child-savers were a group of middle-aged women who were working to “protect children from harm”. The movement was founded on the idea that children were unable to care for and protect themselves. However, the movement resulted in an increase in the criminalization of youth, as well as detrimental psychological effects on children. These laws and movements are examples of how the dependency of children on parents and other authorities is a prevailing narrative in the justice system. Children have been defined as dependent beings that are lacking complete autonomy. Because of this, they have not been granted proper rights within the court.

Currently, children are still lacking proper legal and social agency to advocate for themselves and their needs. Parental rights, on the other hand, are prioritized and protected within the Court. The Supreme Court has protected the parents’ ability to “establish a home and bring up children” since the early 1900s.⁸¹ This protection confirms that parents have an

⁸¹ Lee, *supra* note 65

overarching right to parent over their children how they see fit. More importantly, there is a narrow legal avenue for the government to utilize when it finds it necessary to intervene in the parent-child relationship.⁸² Children's rights or their own opinion are often ignored in cases dealing with their own well being, and "parental rights supersede them when conflict arises".⁸³

This is seen repeatedly within the Court, specifically in *Wallis v. Spencer*, *Rogers v. County of San Joaquin* and *Good v. Dauphin County Social Services*. *Wallis v. Spencer* was a case in the Ninth Circuit Court discussing "a conflict between the legitimate role of the state in protecting children from abusive parents, and the rights of children and parents to be free from arbitrary and undue government interference."⁸⁴ The case was determining whether a child was unlawfully removed from the home after hearing of alleged sexual abuse. The Court determined that without a warrant, the state has no right to remove a child from the home without "reasonable cause and imminent danger".⁸⁵ Unless there is specific, tangible evidence, the state cannot remove a child from their home, as this is a violation of parental rights.

Though the children in the case were simply being removed to go to necessary doctors check-ups, the Court found this unconstitutional without parental consent. The primary concern here is that the physical well-being of the child was not able to be determined by the child themselves or by their physical state. The parents -- in this case, the ones who were causing the health problems -- were also the ones who were given complete authority to maintain their

⁸² Lee, supra note 65

⁸³ Lee, supra note 65

⁸⁴ *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 1999)

⁸⁵ *Wallis v. Spencer*, supra note 82

children's health. This is seemingly oxymoronic, as the parents had not cared for the children's wellbeing previously, but were being expected to do so in the future. In this case, the social workers were only advocates for the children, but they were punished for prioritizing the health of the child over the right of a parent to their privacy.

Rogers v. County of San Joaquin is a similar case, where the Court is working to determine if a warrantless removal of children is constitutional.⁸⁶ In this case, the social worker found the children in question in a state of severe neglect, both physical and emotional. They were locked in filthy rooms, were suffering from bottle rot, and there were unsecured guns in the home. The children were removed from the home, and the parents of the two children died under 28 U.S.C. § 1983, claiming that the children were wrongfully removed.⁸⁷ The Court decided that the abuse of the children was not imminent and that the social worker wrongfully removed the children.⁸⁸

Good v. Dauphin County Social Services was a case heard in the 3rd circuit court. In this case, the court determined that neither a social worker nor a police officer may conduct a search of a home that is suspected of child abuse without pressing circumstances. Pressing circumstances, in this case, meant that there was "reason to believe that life or limb is in immediate jeopardy."⁸⁹ Searches in cases of child abuse were seen as illegal under the Fourth Amendment, which prevents general searches of the home. With this decision, the abuse of a

⁸⁶ *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007)

⁸⁷ *Rogers v. County of San Joaquin*, supra note 84

⁸⁸ *Rogers v. County of San Joaquin*, supra note 84

⁸⁹ *Good v. Dauphin County Social Services for Children & Youth*, 891 F.2d 1087, 1989

child was comparable to a non-violent crime that would prompt a search of the home. The court's opinion implemented a further barrier for social workers.

In these instances, the Court prioritized the parental right to guardianship and sanctity of the home over the child's right to be free from abuse. "The current rhetoric of U.S. law fails to emphasize the rights of children and the duty of parents to serve in the best interests of a child."⁹⁰ This protection of parental rights is based on the idea that parents are always in a position to successfully determine what is in the best interest of their children. As stated earlier, this is not always the case. There needs to be a balance struck between these rights if there is to be hope for future children facing abuse.⁹¹

If parental authority is seen as valid only when the child's welfare is being protected, cases involving child maltreatment could have different consequences. Currently, in cases dealing with Child Protective Service agencies, social workers are often held liable for removing children from their homes. Holding government officials liable for doing their jobs will lead to increased disincentivization. When government officials can be legally liable for intervening, but will face no repercussions when failing to intervene, it is likely they will choose the latter. When the sole agency for protecting children in the United States is not being properly supported, it cannot be expected that they are successful in conducting their duties. The current Child Protective Service agencies are not without flaw, but they should not be completely discredited by the courts. Instead of disincentivizing these individuals, the focus needs to be placed on

⁹⁰ Lee, *supra* note 65

⁹¹ It is important to note that the current child protective services system is flawed. There are situations where children have been wrongfully removed. In order for there to be any positive change, the systems in place must shift in all respects. However, when social workers are correctly functioning, as is the case in the previously mentioned cases, they should not be penalized for doing so.

proper training and resources for these agencies that will further equip them to perform their roles effectively. Reducing liability and increasing training for CPS will likely make social workers more effective at necessary interventions.

The Thirteenth Amendment, and the recognition of abused children within its context, could provide a legal basis for intervention by the government in situations of abuse by prioritizing the rights of children equally to parents. If a child is facing extreme abuse, then he will be recognized by the government as being under a situation of SOIS, which is unacceptable in all forms. The government, then, can effectively intervene without being sued by parents. Further, if the government is sued by parents for their intervention, it is likely that the rights of the child to be free from abuse would supersede the rights of the parent to dominate over their child.

When a case reaches the Court and deals with conflicting interests, “the judge is not in all cases simply applying law to fact or applying mechanically the general guides for resolving conflicting interests to the particular conflict.”⁹² Sometimes, the judge must “on occasion balance interests...when the laws as guides compel to particular resolution.”⁹³ In these situations, the judge is given discretion to balance interests as he sees fit. In the case of child abuse, judges most often are aligning with the interests of the parents. Protecting children under the Thirteenth Amendment would create an indisputable basis for their protections within the Court. Individual states and Congress can alter these rights, strengthening them in certain situations or clarifying when they apply, but the Amendment itself still remains the basis that cannot be ignored.

⁹² Vincent Luizzi, *Balancing of Interests in Courts*, 20 *Jurimetrics* 373 (1980)

⁹³ Luizzi, *supra* note 92

VI. Conclusion

The balancing of the rights between parents and children is complex and should be part of an ongoing debate about the role of parents and the position of children in society. However, children deserve to be protected regardless. The Thirteenth Amendment, if understood to encompass modern day forms of SOIS, can provide a legal basis for government agencies to protect children who are being abused. The Amendments' intended purpose and the general flexible nature of the Constitution allows it to redefine itself to protect against modern violations if the body politic is willing to accept this shift.

Children are the future of this nation, and certainly should be treated as equal under the law. A person's relationship with their abuser should not be a reason to prevent proper intervention to protect them. Similarly, age and dependency does not constitute a stripping of autonomy. The history of children's position in society is complex and layered, but it is certainly time that the law develops to ensure that they are protected.