University of San Francisco School of Law

University of San Francisco Law Research Paper No. 2014-19

MIGRANT LABOUR IN THE UNITED STATES: WORKING BENEATH THE FLOOR FOR FREE LABOUR?

MARIA ONTIVEROS

10

Migrant Labour in the United States:

Working Beneath the Floor for Free Labour?

Maria Ontiveros*

I. Introduction

The United States has developed a regulatory system for workers designed to protect basic rights in the workplace. The system should set the floor for all workers. Unfortunately, migrant workers in the United States labour under very different conditions than those afforded other workers. They labour beneath the floor set for workers in America. The United States policy of exploiting labour from outside her borders, begun in slavery and continuing through current immigration policies, directly affects migrant labour. This chapter examines the intersection between migration law and labour law in the United States and argues that migrants in the US labour beneath a floor for free labour in a manner that violates prohibitions against slavery and involuntary servitude found in the Thirteenth Amendment to the US Constitution. Section II of this chapter describes the basics of US regulation of migrant labour, detailing protections given workers individually and collectively, as well as the categories of migrant labour in the United States. Section III identifies six problem areas for migrant labour under this system. It addresses the lack of protection for discrimination based on migrant status, undocumented workers, visa

* Maria Ontiveros is Professor of Law at the University of San Francisco School of Law.

workers, agricultural workers, domestic workers, and collective action issues. Section IV argues that the current treatment of migrant labour has created a class of workers who labour beneath a floor for free labour, in violation of the US Constitution.

II. US Regulation of Migrant Labour

This section provides the background information needed to understand the problems presented for migrant labour in the United States. It begins by describing, in general, the existing labour regulations. Then it describes the various categories of migrant labour present in the United States.

1. General US labour regulations

The United States has created a comprehensive system for providing protection for workers consistent with its free market principles. This system provides some protection to individual workers and some protection for workers to act collectively to negotiate their own terms and conditions of employment. This domestic system is sometimes in tension with international norms, arguably falling beneath the requirements of various treaties. Section II focuses on the domestic system only. Comparisons with international norms will be discussed in section IV.

i. Individual protection

In the United States, the dominant approach to employment security is characterized by modified 'at will' employment.[1] Under the most traditional definition of at will employment, an employer

[1] M Ontiveros, 'Female Immigrant Workers and the Law: Limits and Opportunities' in D Cobble (ed), *The Sex of Class* (ILR Press 2007).

had the right to terminate an employee for a good reason, a bad reason or for no reason. Currently, US law restricts an employer's ability to terminate employment for certain bad reasons, but still allows the termination of employment for a good reason or for no reason. The prohibited reasons for termination include discrimination based on membership in specified protected classes and for termination in violation of public policy. Under federal law, the protected classes are race, colour, sex, religion, national origin, age (over forty), and disability.[2] Several states have additional protected categories, such as sexual orientation, marital status, and political activity. These types of discrimination are also prohibited in hiring and in setting other terms and conditions of employment.

In addition, an employer may not terminate employment when the termination would violate certain public policies. For example, whistle-blower legislation prohibits an employer from firing an employee in retaliation against an employee who has reported violation of federal laws, such as those involving financial securities or occupational health. Through the use of common law, state courts have used tort principles to penalize employers when they have discharged a worker for refusing to engage in unlawful conduct or for exercising a constitutional or statutory right, such as refusing to commit perjury to protect an employer, refusing to drive a commercial vehicle without a commercial licence, or complying with a summons for jury duty. Legislation and common law work together to provide a patchwork of protection in this area.[3]

Federal law also provides for certain basic labour standards. The law requires a minimum hourly wage to be paid and provides for an overtime premium when an employee works in

---

[2] Civil Rights Act of 1964, title VII (covering race, sex, colour, national origin, and religion); Age Discrimination in Employment Act 1967 (covering age); Americans with Disabilities Act 1991 (covering disability).

[3] W Corbett, 'An Outrageous Response to "You're Fired!"' (2013) 92 North Carolina Law Review 17, 41.

excess of forty hours a week or eight hours a day (with some variation allowed).[4] Further, the law provides for protection of minimum health and safety standards in the workplace.[5] The Thirteenth Amendment to the United States Constitution, ratified in 1865, includes a prohibition against slavery and involuntary servitude. To give effect to the Amendment, the legislature passed the Anti Peonage Statue of 1867, which banned 'the voluntary or involuntary service or labor or any persons as peons, in liquidation of any debt obligation or otherwise' and reached beyond the prohibition of chattel slavery and involuntary servitude found in the Amendment.[6] The Anti Peonage Statue was amended by the Trafficking Victims Protection Act in 2000, 2003, and 2008 to penalize those who extract labour through force, fraud, coercion, threats, or abuse of the legal process.[7] These statutes reach labour extracted through threats of serious harm, including physical, non-physical, psychological, financial, or reputational harm; provide a civil cause of action for victims; and include threats of deportation as an abuse of the legal process.

ii. Collective protections

United States law also provides a statutory framework for certain employees to form labour unions. The National Labour Relations Act (NLRA) protects an employee's right to engage in 'protected concerted activity for mutual aid and protection'. So long as an employee is covered by the statute and follows its framework, the employee may not be terminated for his or her concerted activity. An employer may not terminate an employee for attempting to form a union, must not interfere with the formation of a union, and, once a union has been elected by the

[4] Fair Labor Standards Act 1938.

[5] Occupational Safety and Health Act 1970.

[6] A Sofer, 'Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage' (2012) 112 Columbia Law Review 1607, 1616–19.

[7] M Ontiveros, 'A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers' (2012) 27 Wisconsin Law Journal, Gender and Society 133, 147–8.

employees, must negotiate in good faith with it. The union negotiates over wages, hours, and terms and conditions of employment for members of the bargaining unit. Union-negotiated collective bargaining agreements typically provide higher wages, better benefits, and improved job security relative to unorganized workers. Most unionized workers may not be discharged unless the employer can prove that it had 'just cause' for the dismissal.

2. Categories of migrant or immigrant labour in the United States

There are three types of migrant or immigrant labour present in the United States: lawful permanent resident aliens; visa or guest workers; and undocumented workers. Documented resident workers (DRW) are non-citizens with the right to live and work in the United States. Although there are a few job categories which require US citizenship, most jobs are open to these workers. They have mobility between jobs, consistent with their skills and the demand for their labour.

Visa or guest workers are migrants who come to the United States to perform certain jobs for which they have received immigration authorization. The largest guest worker programmes cover agricultural workers (under H2A visas), technical or engineering workers (under H2B visas), nurses (under H1C visas), and nannies or au pairs (under J1 visas).[8] For most of these jobs, an employer must provide evidence that the immigrant labour is necessary because they cannot find domestic workers to perform the job. When a worker enters on a guest worker visa, he or she only has the right to remain in the United States while employed in that particular job for that particular employer. If an employee quits or is fired, he or she must return home. These workers are considered migrant, not immigrant, by the Immigration and Customs Enforcement

[8] Ontiveros, 'A Strategic Plan' (n 7) 138.

Agency within the Department of Homeland Security. There is not an expectation that these workers will remain in the United States or become citizens.

Undocumented or unauthorized workers are those workers who do not have the legal right to work in the United States. Employers are not allowed to hire these workers. To ensure compliance with this law, every employer must complete a form (I-9) when it hires a new employee. To complete the form, the employer must verify the employee's identity and his or her work authorization (through a social security card, work visa, etc). Although this system should theoretically mean that no unauthorized workers are employed, the reality is different. Employers can comply with the law and still employ undocumented workers by accepting false documents, so long as they look reasonably genuine. Workers may also obtain work in other ways. Sometimes, an employee begins a job with authorization but the authorization expires during the term of employment. Some employers do not fill out the required paperwork because they perceive the penalty for violating the law as low, relative to the benefit of employing undocumented workers, or because they know that the workers can easily be discharged before being discovered because a few days' notice is generally given before a compliance inspection can be completed.[9] In 2010, the number of undocumented immigrants in the United States stood at approximately 11 million or 3.7 per cent of the population, including 8 million undocumented workers (or 5 per cent of the workforce).[10] As of 2012, the number rose to 11.7 million; with some variation, the number has been between 11 and 12.2 million since 2005.[11] Unauthorized workers are concentrated in certain industries, such as agriculture, domestic work, maintenance

[9] M Ontiveros, 'Immigrant Workers and the Thirteenth Amendment' in A Tsesis (ed) *The Promises of Liberty* (Columbia University Press 2010).

[10] J Passel and D Cohn, *Unauthorized Immigrant Population: National and State Trends* (Pew Research Center 2010).

[11] J Passel, D Cohn, and A Gonzalez-Barrera, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed* (Pew Research Center 2013).

and grounds keeping, construction, and food services.[12] Most unauthorized workers are also unauthorized immigrants, meaning that they do not have the legal right to be present in the United States. If their immigration status is discovered, they are subject to deportation.

III. Problem Areas for Migrant Labour

The labour law system described earlier does not operate to fully protect migrant workers in the United States. Sometimes problems arise because statutes exclude migrant workers from protection. In other cases, US courts interpret statutes to limit protection for migrants. Other times, problems arise because the sectors where migrants are most likely to be employed are excluded from protection. Finally, problems can arise from the reluctance of migrant workers to assert their rights because their migrant status makes them vulnerable to deportation.

1. Migrant status discrimination not prohibited by federal law

United States anti-discrimination law only prohibits an employer from discriminating against or making employment decisions based upon certain criteria: race, colour, sex, religion, national origin, age (over 40), and disability. An employer is free to take into consideration any characteristic not on the list when making employment decisions. Significantly, migrant status is not included on the list of protected categories. Therefore, an employer is free to refuse to hire someone based on their migrant status as long as that decision does not have a disparate impact on members of a protected class or is not used as a pretext to cover discrimination against members of a protected class. Under US anti-discrimination law, criteria which have a disparate

[12] J Passel and D Cohn, *A Portrait of Unauthorized Immigrants in the United States* (Pew Hispanic Center 2009) 15.

impact may still be allowed if the employer can show that the requirement is job-related for the position in question and consistent with business necessity.

In 1972, civil rights advocates brought a case arguing that discrimination based on citizenship status violated the anti-discrimination statute's prohibition against discrimination based on national origin. In *Espinoza v Farah Mfg*,[13] Cecilia Espinoza, a legal permanent resident, married to a US citizen, and in the process of becoming a US citizen herself, applied for a job as a seamstress with Farah Manufacturing. Farah produced shirts, trousers, and other apparel, and was the largest employer in El Paso, Texas, which is near the Mexican border.[14] Ms Espinoza was not hired because Farah had a policy of only hiring US citizens. Even with this requirement, almost the entire Farah workforce was of Mexican descent. Most had ancestors who originally came from Mexico, while others had been born in Mexico but had become US citizens.

Ms Espinoza sued under Title VII, arguing that discrimination based on citizenship constituted discrimination based on national origin. She reasoned that a preference for US citizens inherently discriminated against people not from the United States, thus constituting intentional discrimination based on national origin.[15] Alternately, she argued that a citizenship requirement had a disparate impact on people based on their national origin because people not from the United States were less likely to be citizens than those from the United States, since the US has a policy of birth right citizenship. The United States Supreme Court had recently held

---

[13] *Espinoza v Farah Mfg* [1973] 414 US 86.

[14] M Ontiveros, 'Building a Movement with Immigrant Workers: The 1972–74 Strike and Boycott at Farah Manufacturing' (2011) 15 *Employee Rights and Employment Policy Journal* 479.

[15] In the United States, this type of discrimination is called 'disparate treatment.'

that neutral policies which have a disproportionate impact on members of a protected class and which are not justified by business necessity violate the employment discrimination statute.[16]

The United States Supreme Court rejected both of these arguments and created a bright line rule that discrimination based on citizenship status is analytically distinct from discrimination based on national origin. It found that intentional discrimination based on national origin occurs when an employer discriminates against individuals from a particular country (or whose ancestors came from a particular country) because of animus towards that nationality. It reasoned that the defendant had no such animus against those of Mexican descent because it hired a workforce almost exclusively of this nationality. With respect to the disparate impact argument, it found that the requirement did not have a disparate impact on people of Mexican descent (again because of the high proportion of employees of Mexican descent).

Since *Espinoza*, courts in the United States have uniformly held that discrimination based on citizenship status is not discrimination based on national origin. Discrimination based on migrant status more generally would also be seen as analytically distinct from discrimination based on national origin and not prohibited under Title VII.

One federal anti-discrimination law, the Immigration Reform and Control Act of 1986, does prohibit discrimination on the basis of citizenship; however its provisions are limited in several ways. First, it only covers discrimination in hiring and discharge decisions, not other types of discrimination such as harassment or wage disparities. More importantly, its provisions only protect citizens and intending citizens, defined as individuals who apply for naturalization within six months of the date on which they become eligible to apply for citizenship. In other words, permanent residents who do not apply for naturalization within six months of eligibility are not

[16] *Griggs v Duke Power* [1971] 401 US 424.

protected from citizenship status discrimination.[17] Otherwise, employers in the United States may take citizenship and migration status into account in making decisions about whether to hire a person, how much to pay them, and how to treat them on the job.

2. Undocumented workers

When an undocumented worker is performing work as an employee, the vast majority of courts and administrative agencies have held that she is protected under all federal labour and employment laws. So, for example, an undocumented worker may not be discriminated against because of her sex, race, religion, national origin, age, or disability status. She must be paid the applicable minimum wage and overtime premium for her work. She has the right to engage in protected concerted activity without being fired. A minority of courts have found to the contrary, arguing that since an undocumented worker does not have the legal right to contract for employment, these statutory protections do not apply.[18]

There are, however, two problems for undocumented workers in receiving full protection under these statutes: a court-ordered limitation on remedies for some statutes; and fear of deportation. In 2002, the United States Supreme Court ruled that undocumented workers may not receive the full remedies available to other workers under certain statutes. In the case of *Hoffman Plastic Compounds, Inc. v National Labour Relations Board*,[19] an undocumented employee was fired for union-organizing activity. In most cases, the National Labour Relations Board (NLRB) (the administrative agency that enforces the NLRA) orders an employee who is discharged for engaging in protected activity to be reinstated to his former position and be given back pay (full

[17] Immigration and Nationality Act 1952, s 1324b.

[18] M Ontiveros, 'Immigrant Workers' Rights in a Post-*Hoffman* World: Organizing Around the Thirteenth Amendment' (2005) 18 Georgetown Immigration Law Journal 651, 656–8.

[19] *Hoffman Plastic Compounds, Inc. v National Labour Relations Board* [2002] 535 US 137.

wages and benefits) covering the time between the discharge and reinstatement. In *Hoffman*, the NLRB did not order reinstatement because the employee did not have the legal right to work in the United States; however, it did award him back pay. The United States Supreme Court reversed the order and stated that the NLRB did not have authority to award back pay to undocumented workers. It reasoned that such an award would conflict with the intent of the immigration laws prohibiting employment of undocumented people and would serve as an incentive for undocumented people to come to the United States and seek work. The Court did confirm that the employer had violated the NLRA and ordered it to post an order promising not to discriminate in the future, arguing that this remedy best balanced the intent of the immigration laws with the policies of the labour statute.

Since *Hoffman*, courts and administrative agencies have extended similar reasoning to cases brought under the anti-discrimination laws. Undocumented workers are protected from discrimination, but they may not receive the remedies of reinstatement or back pay.[20] Cases for wage violations (failure to pay minimum wage or overtime premiums) are generally treated differently. Since the cases are being brought for work already actually performed, courts and administrative agencies require employers to pay employees the wages they should have earned under the applicable statutes.[21]

The outcome of *Hoffman* is problematic for several reasons. First, it severely decreases the deterrent function of the labour and employment laws when applied to undocumented workers. Employers essentially receive no monetary penalty for retaliatory or discriminatory behaviour. This has the possibility of leading to more discrimination against undocumented workers and of severely hampering their participation in union-organizing efforts. Second, the lack of potential

[20] Ontiveros, 'Immigrant Workers' Rights' (n 18).
[21] Ontiveros, 'Female Immigrant Workers' (n 1) 241.

monetary sanctions actually makes undocumented workers less expensive for employers to employ than documented workers. Contrary to the Court's reasoning in *Hoffman*, this increases the incentive for employers to hire undocumented workers and frustrates the purpose of the immigration laws. Finally, it means that undocumented workers are not fully compensated for their injuries, as compared to documented workers.[22] A two-tier system of workplace justice is established under *Hoffman*.

Undocumented workers also have difficulty receiving full protection of the labour and employment laws because they fear deportation. If an undocumented employee participates in union activity or complains about workplace conditions (discrimination, wage violations, safety, and health issues), the employer may report the worker's immigration status to the US Immigration and Customs Enforcement (ICE), resulting in deportation. This creates a huge disincentive for undocumented employees to participate in concerted activity or complain about labour violations.[23] The US Government has tried to address this problem by requiring its administrative agencies to not inquire about immigration status and to not report unauthorized status to ICE when receiving complaints and conducting investigations. Employers, however, can and do contact ICE on their own. In addition, the mere threat of 'calling immigration' is often enough to prevent undocumented workers from asserting their rights under the statutes.

3. Guest or visa workers

Most guest or visa workers lose their right to work in the United States and their right to stay in the United States if they quit their job because their visas are tied to a job with a particular

[22] M Ontiveros, 'To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII' (1993–94) 20 New York University Law Review and Social Change 607.

[23] Ontiveros, 'Female Immigrant Workers' (n 1) 240–1.

employer. Unlike other workers in the US economy, they cannot leave a bad situation and take a better job. As a result, these immigrants are constrained in their ability to use ordinary free market forces to demand decent wages and fair working conditions. This situation also harms regular domestic workers who compete with visa workers because employers know that they can hire visa workers more cheaply and treat them worse. Regular domestic workers either must accept similar employment conditions themselves or go without employment. In this way, employers use guest workers to lower the floor which would otherwise be set by the free market.

Guest workers also have a fear of deportation that constrains their ability to receive full protection of labour and employment laws. If a visa worker complains about workplace conditions or becomes involved in union activity and is fired, the worker no longer has the right to stay and work in the United States because their visa-specific employment has been terminated. Therefore, very few visa workers file complaints challenging workplace conditions or discrimination.[24] In response, the United States has created two new visa categories which allow some immigrant workers to stay in the United States after filing a complaint. The U and T visas allow victims of trafficking or other serious crimes that cooperate with law enforcement to apply for permanent residency. Unfortunately these visas are limited in number and are only available to complaints alleging certain types of extreme criminal activity.[25]

Finally, guest workers may be subject to illegal employment practices that run foul of anti-trafficking laws.[26] Some workers who arrive in the US on guest worker visas find themselves at

---

[24] M Ontiveros, 'Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs' (2007) 38 University of Toledo Law Review 923, 938.

[25] Ontiveros, 'A Strategic Plan' (n 7) 154–5.

[26] Ontiveros, 'A Strategic Plan' (n 7) 151–3; Ontiveros, 'Female Immigrant Workers' (n 1) 246–8; K Kim, 'Pscyhological Coercion in the Contest of Modern-Day Involuntary Labor: Revisiting United States v Kozminski and Understanding Human Trafficking' (2007) 38 University of Toledo Law Review 941.

the mercy of their employers, held against their will, and unable to quit and leave the country, even if they want to. Cases exist where employers have confiscated a guest worker's passport and refused to return it to the employee until work has been completed. In other cases, allegations have been made that employers threaten a worker or a worker's family member in their home country with physical harm if the worker leaves. Many times these employers have financed the worker's travel to the United States or charge the worker living expenses and then refuse to let the worker leave until these expenses have been repaid. Finally, there are cases where employers have physically restrained such workers behind locked gates or doors. Although these types of abuses may happen to other immigrant workers, the guest worker system seems particularly susceptible.

4. The agricultural sector

The agricultural sector disproportionately employs migrants in all categories: authorized migrants, undocumented migrants and guest workers, and migrant agricultural workers face the problems described earlier. Migrant workers in the agricultural sector face some additional unique problems.[27] First, agricultural workers are specifically excluded from the National Labour Relations Act, so they do not have a protected right to engage in collective action. In most states, agricultural employers may fire workers if they try to form unions. Second, the minimum wage laws have been modified so that there is no required hourly minimum wage or overtime premium. Employers may use a piece rate system instead. Finally, much of the agricultural sector uses a model where hiring of workers and workplace supervision is done through a system of farm labour contractors. The contractor system makes it more difficult for agricultural workers

[27] Ontiveros, 'Female Immigrant Workers' (n 1) 238–40.

to protect their workplace rights because the contractor may not be financially stable or as accountable.

5. Domestic workers

Like the agricultural sector, domestic workers are disproportionately migrant workers (authorized, undocumented, and guest workers) and suffer all the problems that have been described. Domestic workers are also specifically excluded from protection under the National Labour Relations Act. There are additional unique problems for domestic workers.[28] First, the anti-discrimination laws only apply to employers who employ fifteen or more employees. Many domestic workers who work for individual families fall outside this protection and therefore can be discriminated against. Second, the employment laws only protect those workers categorized as 'employees' and do not cover workers who qualify as 'independent contractors'. Often, domestic workers are considered to be independent contractors and so are not guaranteed minimum wages, overtime, or other types of workplace protection.

6. Collective action

When migrant workers seek to organize into labour unions in the United States, they encounter a variety of problems. First, two of the major sectors in which they work (agriculture and domestic work) are excluded from protection. Second, some employers who are facing an organizing effort that includes many undocumented migrants will either threaten to call or will actually call ICE to arrange for a workplace raid. This can have the effect of stopping the organizing campaign. In one study of over 1,000 union representation election campaigns, these threats

[28] Ontiveros, 'Female Immigrant Workers' (n 1) 238–40.

appeared in 7 per cent of all campaigns, in 41 per cent of campaigns in immigrant-dominated workforces, and in half of the campaigns involving workplaces with a majority of undocumented workers.[29]

IV. Migrant Labour—Working Beneath the Floor for Free Labour

Section one of the Thirteenth Amendment to the United States Constitution proclaims that 'neither slavery nor involuntary servitude . . . shall exist within the United States'. Section two gives Congress the power to enforce the amendment with appropriate legislation. Although passed in 1864 to end the system of chattel slavery at the heart of the United States Civil War, the Amendment is more than a historical footnote. The legislative history of the amendment, the interpretation and use of its enabling legislation, and the social understanding of the amendment show that it creates a constitutional policy requiring a minimum floor for free labour within the United States. As the United States Supreme Court said in *Pollock v Williams*:

> the undoubted aim of the Thirteenth Amendment as implemented by the Anti Peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States . . . [I]n general, the defense against oppressive hours, pay, working conditions or treatment is the right to change employers. When the master can compel and the labourer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the labourer under the system, but every other with whom his labor comes in competition.[30]

---

[29] K Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* (Economic Policy Institute Briefing Paper No 235, 2009) 12.

[30] *Pollock v Williams* [1944] 322 US 4, 17–18. For a discussion of the legislative history and its intent to create a floor for free labour, see L VanderVelde, 'The Labor Vision of the Thirteenth Amendment' (1989) 138 University of Pennsylvania Law Review 437; L VanderVelde, 'The Thirteenth Amendment of our Aspirations' (2007) 38 University of Toledo Law Review 855.

Unfortunately, because of the problems noted earlier, migrant workers in the United States too often work beneath that floor for free labour. When they do, the employer's actions or the state policy arguably violate the Thirteenth Amendment and should be struck down.

Each of the problems identified for undocumented workers has implications under the Thirteenth Amendment analysis described earlier. The exclusion of migration or immigration status as a protected category means that immigrants as a group may be singled out for inferior treatment and discriminated against in the workplace. This violates the Thirteenth Amendment by creating a group of legally exploitable workers who, in practice, tend to be racial minorities, without the political power of citizens, and who are treated as inferior or 'other' by society as a whole. Although their treatment is not as bad as the treatment of human beings held in chattel slavery prior to the Civil War, this exclusion replicates the system by creating a caste of workers who may legally be treated differently because of a characteristic unrelated to their ability to do their job and runs foul of the broad purpose of the Thirteenth Amendment.[31]

Internationally, many treaties prohibit discrimination on the basis of migrant status.[32] The International Labour Organization (ILO) has identified discrimination on the basis of migrant status as a violation of human rights.[33] The ILO conclusion is based on the worldwide history of discrimination against migrants and the way it has been used to violate the human rights of workers, including the treatment of Roma and Chinese rural migrants. The United Nations has appointed a Special Representative on International Migration to address the issue, recognizing

---

[31] Ontiveros, 'Immigrant Workers and the Thirteenth Amendment' (n 9) 282. See also R Zietlow 'Free at Last! Anti-Subordination and the Thirteenth Amendment' (2010) 90 Boston University Law Review 255 (demonstrating how the Amendment was meant to create a broad grant of anti-subordination, civil, and economic equality, and inclusion for African Americans).

[32] R Smith, 'Prosecute, Prevent, Protect: Migrant Labor, Forced Labor, and Human Rights' in J Gross and L Compa (eds), *Human Rights in Labor and Employment Relations: International and Domestic Perspectives* (LERA 2009) 164.

[33] M Ontiveros, 'Employment Discrimination' in Gross and Compa (n 32) 210.

the importance of addressing it as an 'economic' issue.[34] Discrimination against migrant workers, based on their migrant status, clearly affects their economic rights, their human rights, and their civil rights in ways similar to systems of slavery or involuntary servitude.

The treatment of undocumented workers also violates the Thirteenth Amendment by creating a group of workers without recourse for violations of their workplace rights.[35] They labour beneath the floor set for free labour because they fear deportation if they complain and are not allowed to receive those remedies available to other workers. As a group, they are excluded from access to the courts to enforce basic workers' rights, as well as citizenship rights, civil rights, and human rights. These are the types of rights which were denied to chattel slaves. In the United States, the Supreme Court has said that the Thirteenth Amendment bans not only slavery but also the 'badges and incidents of slavery', which could include these rights.[36] Internationally, when the Inter-American Court of Human Rights reviewed the *Hoffman* case, it found that the exclusion of undocumented workers from full protection, including equal access to courts, violated fundamental human rights and workers' rights.[37]

The Thirteenth Amendment is implicated in a slightly different way for visa or guest workers.[38] Their situation can be more clearly analogized to involuntary servitude because their ability to leave an undesirable work situation is so strongly circumscribed. When a guest worker cannot complain about poor working conditions or leave an unfair work situation because their visa will be revoked and they will be deported, they lose the ability to quit required by the

---

[34] Smith (n 32).

[35] Ontiveros, 'A Strategic Plan' (n 7) 139–43.

[36] Ontiveros, 'Immigrant Workers and the Thirteenth Amendment' (n 9) 286–7; Ontiveros, 'Immigrant Workers' Rights' (n 18) 673.

[37] Juridical Condition and Rights of the Undocumented Migrants Advisory Opinion OC-198/03 Inter-American Court of Human Rights Series A No 18 (17 September 2003). See also Ontiveros, 'Immigrant Workers and the Thirteenth Amendment' (n 9) 678–9; Smith (n 32) 165–6.

[38] Ontiveros, 'A Strategic Plan' (n 7) 143–6.

Thirteenth Amendment. This situation also pulls down the working conditions of free, non-visa workers, which was one of the problems of slavery and involuntary servitude identified by the drafters of the Thirteenth Amendment and discussed by the US Supreme Court in *Pollock*. Finally, those guest workers who cannot quit because their employers have confiscated their passports, threatened their families, or used physical force to prevent them from leaving are clearly working in a system of involuntary servitude as defined by the US anti-trafficking statutes.

The exclusion of domestic and agricultural workers from labour and employment law protection further illustrates the link of migrant worker treatment and the Thirteenth Amendment. The legislative history of the statutes shows that these workers were specifically excluded from protection under the labour standards laws because they were primarily African-Americans who were performing the same tasks which chattel slaves performed prior to the American Civil War.[39] The racial nature of the exclusion found in the Congressional debates and connection to the history of these occupations in the American south support the argument that the creation of a caste of workers labouring beneath the floor for free labour violates the Thirteenth Amendment.

Finally, the difficulty which migrants encounter when trying to organize into labour unions is a small example of the difficulties which American workers face when trying to form unions. Commentators have argued that the ability to form unions is one of the rights guaranteed to free labour under the Thirteenth Amendment.[40] Under this analysis, restrictions on the ability to strike

---

[39] M Linder, 'Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal' (1987) 65 Texas Law Review 1335.

[40] J Pope, 'Labor's Constitution of Freedom' (1997) 106 Yale Law Journal 941, 6; J Pope, 'The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957' (2002) 102 Columbia Law Review 1.

and engage in other concerted activity, which apply to all workers, violate the Thirteenth Amendment. Specifically excluding migrant-dominated industries such as agriculture and domestic work and using threats of immigration raids to dissuade organizing further interfere with migrant workers' Thirteenth Amendment rights. The legislative history of the exclusion of these two industries from the National Labor Relations Act reveals the exclusion's origin in racial discrimination and the institution of slavery.[41] International law also equates the right to engage in collective workplace action as a human rights violation.[42]

V. Conclusion

The United States regulatory system to protect workers cannot be read in isolation from the Thirteenth Amendment to the US Constitution which prohibits slavery and involuntary servitude. The Amendment provides the backdrop for understanding the importance of workplace protection in the United States and its interpretation. Analysing the treatment of migrant workers in the context of the Thirteenth Amendment provides additional insights about the need to give them equal protection under the statutory labour laws. Although this analysis is relatively new in the United States (and varies from the analysis of forced labour under international law), it is beginning to provide a useful mechanism to protect migrant workers in the United States.

---

[41] J Perea, 'The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act' (2011) 72 Ohio State Law Journal 95.

[42] T Novitz, 'Workers' Freedom of Association' in Gross and Compa (n 32) 123.