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Involuntary Servitude: An Eighteenth-Century Concept In Search of a Twentieth-Century Definition

In 1865, the United States abolished slavery and involuntary servitude through enactment of the thirteenth amendment to the United States Constitution.¹ Abolishing the concept of slavery did not end the modern practice of coerced labor.² Problems of statutory construction of the involuntary servitude statute continue to exist.³

1. U.S. CONST. amend. XIII, § 1. The thirteenth amendment provides in pertinent part that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.* Great Britain abolished slavery in 1833. Public General Acts, An Act for the Abolition of Slavery, 1833, 3 & 4 Will. 4, ch. 73. The British statute did not totally emancipate slaves in the Colonies, but instead placed them into three classes of apprenticed laborers. *Id.* at ch. 73, § 4. In contrast to the American emancipation, Parliament authorized the expenditure of twenty million pounds sterling as just compensation to slave owners. *Id.* at ch. 73, § 24. See U.S. CONST. amend. XIV, § 4. The fourteenth amendment provides in pertinent part that "[n]either the United States nor any State shall assume or pay . . . any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void." *Id.* See generally Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. REV. 1 (1974) (discussing the legislative history of the thirteenth amendment and reconstruction statutes).

2. U.S. CIVIL RIGHTS COMM'N, JUSTICE: 1961 COMMISSION ON CIVIL RIGHTS REPORT 5, at 203 n.91 (1961). As late as 1961 there were no reported decisions under the involuntary servitude statute in this century. *Id.* Such has not been the case in the past three decades. For example, after hearing testimony from victimized migrant farm workers on the East Coast, Congresswoman Burton commented that her husband (the late Representative Philip Burton) had sat on a California Labor Committee in 1957 and heard about the same type of atrocities committed against workers. *Oversight Hearing on Peonage Among Agricultural Workers: Hearing before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 29-30 (1983) (statement of Rep. Burton) [hereinafter *Peonage Hearings*]. See also Note, *Twentieth Century Slavery Prosecutions: The Sharpening Sword*, 8 CRM. JUST. J. 47, 83-86 (1985) (detailing, as evidenced in the *Peonage Hearings*, the contradictory position of the United States government in both initiating slavery prosecutions and encouraging the practice). The following is a compilation of actions brought under the involuntary servitude and peonage statutes:

TABLE 1

	1972	1973	1974	1975	1980	1981	1982	1984	1985
Indictments	13	1	2(b)	7		0			2
Convictions	2		1	4		1(d)		2	
Guilty Pleas		2(a)			5(c)		3	1	4

(a) indicted the previous year.

(b) hung jury in one prosecution.

(c) church officials holding nine teenagers in involuntary servitude (three pleas).

(d) church official holding eight teenagers in involuntary servitude.

A conflict presently exists in the federal courts regarding the statutory definition of involuntary servitude.⁴ However, some of the definitions

1972 ATT'Y GEN. ANN. REP. 86, 1973 ATT'Y GEN. ANN. REP. 73, 1974 ATT'Y GEN. ANN. REP. 77, 1977 ATT'Y GEN. ANN. REP. 154, 1980 ATT'Y GEN. ANN. REP. 127, 1981 ATT'Y GEN. ANN. REP. 123, 1982 ATT'Y GEN. ANN. REP. 157, 1984 ATT'Y GEN. ANN. REP. 147, 1985 ATT'Y GEN. ANN. REP. 165.

Letter from Albert S. Glenn, Attorney, Criminal Section, Civil Rights Division, United States Department of Justice (Oct. 2, 1987) (on file at the *Pacific Law Journal*) (complete listing of all complaints received by the United States Department of Justice during the last three fiscal years); Letter from Lorna Grenadier, Supervisory Paralegal Specialist, Criminal Division, United States Department of Justice (Dec. 23, 1987) (on file at the *Pacific Law Journal*) (complete listing of involuntary servitude complaints received by the United States Department of Justice from the beginning of fiscal year 1988 to date):

TABLE 2

Type	FY 85	FY 86	FY 87	FY 88
Migrant farm workers	22	17	4	1
Domestic	9	4	2	1
Cult	3	1	0	0
Sales	7	3	3	0
Prostitution/Sex	7	0	1	0
Other and unclassified	14	7	9	0
Total	62	32	19	2(e)

(e) From Oct. 1, 1987 to Dec. 23, 1987.

Top 11 states from which the above complaints were received:

TABLE 3

California	15	Georgia	5
Florida	14	Mississippi	5
Texas	13	New Jersey	5
North Carolina	13	Alabama	4
South Carolina	12	Pennsylvania	1
New York	7		

Number of prosecutions initiated in the past three and one-quarter years:

TABLE 4

Type	FY 85	FY 86
Slavery ("other")	1	0
Domestic	1	0
Cult	0	1

are not mutually exclusive. One definition of involuntary servitude is the use of physical force, threats of force or legal process to exact labor.⁵ Another definition permits a showing of psychological coercion used by a defendant against a victim to compel service.⁶ In contrast, a third definition of involuntary servitude is met in one of two ways. Either a showing of physical force or threat of legal process, or the use of fraud or deceit against certain classes of victims which forces them into a condition of involuntary servitude is enough to support a conviction.⁷ A final definition requires the government to prove that an act by a defendant resulted in the victim believing that he or she was not free to leave.⁸

First, this comment will examine the legislative history of the involuntary servitude and peonage statutes.⁹ This section will also discuss the intent of Congress in enacting the precursors of these statutes.¹⁰

See also Brodie, *The Federally Secured Right To Be Free From Bondage*, 40 GEO. L.J. 367, 374 (1952) (partial listing of unreported successful prosecutions under both statutes as well as a general history of involuntary servitude and peonage prosecutions).

3. *See infra* notes 71-191 and accompanying text (discussing conflicting judicial interpretations of the involuntary servitude statute).

4. *See* *United States v. Kozminski*, 821 F.2d 1186, 1189 (1987) (en banc). The *Kozminski* court noted that "[t]he Courts of Appeals are squarely in conflict in their interpretation of the words of [the involuntary servitude statute]." *Id.*

5. *United States v. Shackney*, 333 F.2d 475, 487 (2d Cir. 1964). *See infra* notes 75-94 and accompanying text (discussing the Second Circuit definition of involuntary servitude, which includes force, threat of force or legal process). *See* *Pollack v. Williams*, 322 U.S. 4 (1944). The use of legal process usually arose in the context of defendants paying the fines of inmates in return for the inmate working off the fine in the service of the defendant. State statutes made the inducing of borrowing money with intent to defraud by a promise to perform labor a misdemeanor. *Id.* at 5. Thus, if the inmate would refuse to work, he would be re-incarcerated. Almost invariably, the labor-incarceration cycle would repeat itself. Such statutes were declared unconstitutional. *Id.* *See also* *United States v. Reynolds*, 235 U.S. 133, 139-40 (1914) (holding invalid a state law system which allowed a "surety" to collect his debt for payment of a debtor's fine in the form of court-sanctioned labor); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (declaring these state statutes unconstitutional). Until recently, conventional wisdom was that the above example of indebtedness was the only use of legal process contemplated by defendants. *See infra* notes 104-18, 167-75 and accompanying text (suggesting that the use of abortion, adultery, and immigration laws constitutes coercion by means of state legal process, but only when those laws provide for incarceration of the victim).

6. *United States v. Mussry*, 726 F.2d 1448, 1455 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984). *See infra* notes 119-32 and accompanying text (discussing the Ninth Circuit definition of involuntary servitude, which includes psychological coercion).

7. *United States v. Kozminski*, 821 F.2d 1186, 1192-93 (6th Cir.) (en banc), *cert. granted*, 108 S. Ct. 225 (1987). *See infra* notes 146-65 and accompanying text (discussing the Sixth Circuit definition of involuntary servitude, which incorporates fraud or deceit, as well as the *Shackney* test).

8. *See infra* notes 166-83 and accompanying text (discussing *United States v. Bernal* and *United States v. Bibbs*, both of which define involuntary servitude in terms of the effect on the victim).

9. *See infra* notes 22-70 and accompanying text (discussing the legislative history of the involuntary servitude and peonage statutes).

10. *Id.*

Second, each judicial definition of involuntary servitude will be discussed.¹¹ Finally, this comment will propose that the Supreme Court adopt a bifurcated test in determining whether a state of involuntary servitude exists.¹²

LEGISLATIVE HISTORY OF THE ANTISLAVERY STATUTES

The enactment of the thirteenth amendment was surrounded by debate.¹³ However, the debate focused on the wisdom of enacting the amendment, and not on defining the words of the amendment. Opponents of the thirteenth amendment argued that the amendment was flawed in two respects. First, the provisions of the thirteenth amendment encompassed not just the emancipation of slaves, but also mandated the equality of blacks to whites.¹⁴ Second, the thirteenth amendment also gave Congress power to regulate purely private conduct by combatting the incidents of servitude.¹⁵ According to opponents, by cen-

11. See *infra* notes 71-191 and accompanying text (discussing the four judicial definitions).

12. See *infra* notes 201-04 and accompanying text (discussing the test for involuntary servitude that this comment proposes).

13. Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT'L. B.J. 26, 31 (1951).

14. CONG. GLOBE, 38th Cong., 2d Sess. 177 (1865) (statement of Sen. Howard).

15. 42 U.S.C. § 1981 (1982) (originally enacted as Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144); 42 U.S.C. § 1982 (1982) (originally enacted as Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27); 42 U.S.C. § 1983 (1982) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13). After enacting the thirteenth amendment, Congress passed further legislation to combat various incidents of servitude. Incidents of servitude are generally defined as the denial of the right to enter into contracts, the right to own property, the right to vote, the right to invoke the judicial process. *Id.* An analysis which equates "slavery" with legal "badges of servitude" in all contexts is unworkable in the context of sections 1581 and 1584 of title 18, the Crimes and Criminal Procedure Code. If Congress intended to prohibit incidents of servitude a similar list would have been inserted in the precursors of sections 1581 and 1584, as Congress expressly did in various other civil rights statutes. *Id.* The absence of senatorial comment by Senators Sumner and Trumbull as to requiring a list of incidents of servitude in the precursors of the peonage and involuntary servitude statutes when colleagues uttered the words "involuntary servitude," suggests that the peonage and involuntary servitude statutes were not intended to cover such incidents. See, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867) (statement of Sen. Davis); CONG. GLOBE, 39th Cong., 2d Sess. 240 (1867) (statement of Sen. Sumner, quoting from the Commissioner on Indian Affairs report concerning peonage in New Mexico); CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull). Furthermore, the mere private denial of the right to own property or the right to bear arms cannot place a victim into a condition of involuntary servitude analogous to the state of involuntary servitude obtained by recourse to more egregious types of coercion such as physical force or the threat of legal process. See CONG. GLOBE, 39th Cong. 1st Sess., 478 (1866) (statement of Sen. Saulsbury, asserting that the Civil Rights Act of 1866 would set a dangerous precedent by requiring a state to deny all citizens access to firearms and ammunition in order to prohibit possession by "dangerous persons" such as blacks). See also *United States v. Cruikshank*, 92 U.S. 542, 544-45, 553 (1876) (unsuccessful prosecution of Ku Klux Klan members for conspiring to prevent blacks from exercising their "right to keep and bear arms for a lawful purpose"); S. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 99-153 (1984) (arguing that by enacting the Civil Rights Act of 1866 and the fourteenth amendment Congress intended to ensure the right of blacks to own firearms); J. Haag, *Between the Extremes:*

tralizing national power,¹⁶ the amendment "revolutionized" the relationship between the United States and the state governments¹⁷ by requiring the supremacy of federal law over areas which had traditionally been the exclusive concern of state governments.¹⁸ On the other hand, some proponents wanted the amendment to be enacted to ensure the equality of blacks and whites, as well as to transfer primary control of certain areas of state concern over to the federal government.¹⁹ Other proponents of the thirteenth amendment, however, argued that the amendment was enacted solely to abolish slavery as practiced in the Southern States.²⁰ Neither the opponents nor the proponents of the thirteenth amendment, however, even attempted to define the term "involuntary servitude."²¹

A. Legislative History of Section 1581 of the Crimes and Criminal Procedure Code

Because slavery still existed in certain parts of the United States,²² Congress enacted the original peonage statute in 1867,²³ which later

An Exercise in Second Amendment Jurisprudence 138-41 (May 22, 1986) (unpublished senior honors thesis, Permanent Collection, Haines Political Science Library, University of California, Los Angeles) (on file at the *Pacific Law Journal*) (discussing the present implications of the *Cruikshank* case for interpretation of the second amendment).

16. Buchanan, *supra* note 1, at 9. See also ten Broek, *Thirteenth Amendment To The Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 174-76, 183 (1951).

17. C. FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, at 1147 n.91, 1156 (1971).

18. 42 U.S.C. § 1981 (1982) (originally enacted as Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144); 42 U.S.C. § 1982 (1982) (originally enacted as Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27); 42 U.S.C. § 1983 (1982) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13). The above statutes proscribe the denial of the right to enter into contracts, the right to own property, the right to vote, and the right to invoke the judicial process, all of which were traditionally regulated by state law. *Id.*

19. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. Harlan, decrying the various incidents of servitude, which denied blacks the right to intermarry, the right to own property, and the right to redress legal wrongs in the courts).

20. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan).

21. See generally, Hamilton, *supra* note 13; Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 10 NAT'L. B.J. 7 (1952) (discussing peonage and involuntary servitude history in the United States). See also CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864). Senator Howard commented:

I think it is well understood, well comprehended by the people of the United States, and no court of justice, no magistrate, no person, old or young, can misapprehend the meaning and effect of that comprehensive clause.

Id. See also Civil Rights Cases, 109 U.S. 3, 22 (1883) (noting that slavery and the various badges of servitude were well understood). Contemporary sources fail to adequately define the word "slave;" e.g., "one deprived of freedom, a drudge." N. WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 280 (Hartford: Hudson & Goodwin; New Haven: Increase Cooke, 1806). A slave is a "person who is held in bondage to another; one who is wholly subject to the will of another; one who has no freedom of action." WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 1241 (Goodrich & Porter ed. 1864).

22. CONG. GLOBE, 39th Cong. 2d. Sess. 238, 240 (1867) (statements of Sen. Sumner).

23. Act of March 2, 1867, ch. 187, § 1, 14 Stat. 546. The original peonage statute provided

became section 1581 of the Crimes and Criminal Procedure Code.²⁴ Reports from the Southwest Territories and documents from the Committee on Military Affairs detailed the ongoing practice of peonage in the Territories.²⁵ Congress decided to prohibit the practice of peonage after determining that, since great difficulty existed in distinguishing voluntary from involuntary peonage, the practice should be abolished altogether.²⁶ Moreover, Congress decided to eliminate the practice of peonage immediately, rather than wait for the eventual curtailment and abolition of the practice by the Territorial courts.²⁷

For inexplicable reasons, in the late 1800's, the original federal antipeonage statute was broken up into three provisions. One statute provided the definition of peonage, and declared it null and void.²⁸

in pertinent part:

[T]he holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all . . . laws . . . which have heretofore established, maintained or enforced . . . the voluntary or involuntary service . . . of any persons as peons, in liquidation of any debt or obligation . . . are . . . declared null and void, and any person . . . who shall hold . . . any person to a condition of peonage, shall . . . be punished by fine not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one nor more than five years. . . .

Id.

24. 18 U.S.C. § 1581 (1982) (originally enacted as Act of June 25, 1948, ch. 645, 62 Stat. 772). The peonage statute provides that "[w]hoever holds or returns any person to a condition of peonage or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than \$5,000 or imprisoned not more than five years, or both." *Id.* The accepted definition of peonage is a condition of coerced labor based upon an alleged or real indebtedness. *See* Clyatt v. United States, 197 U.S. 207, 215 (1904) (setting forth the legal definition of peonage).

25. S. REP. No. 156, 39th Cong., 2d Sess. 324 (1867). Chief Justice Kirby Benedict of the Southwest Territory deposed that Navajos had repeatedly been bought and sold by Navajos. In his estimation, the approximate number of peons in captivity was well over 2000 people. *Id.* at 326-27. *See* Jaramillo v. Romero, 1 N.M. 190, 195-97 (1857) (Benedict, C.J.) (first case discussing this legal and social practice). Governed by intricate rules, the system of peonage was designed to protect both master and servant. Both Mexican and Spanish Civil Law stated that the contract was an individual one, restricted to a fixed object and a predetermined time period. *Id.* at 198. The parties were required to sign and authenticate the contract. *Id.* at 197-98. If the peon died, children of that peon did not have to pay the decedent's balance due or serve the master. *Id.* at 207. Finally, whipping was prohibited, as was the loss of political or citizenship rights during the contractual period. *Id.* at 198, 207.

26. CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867) (statement of Sen. Davis).

27. *Id.* at 1572 (statement of Sen. Buckalew).

28. "The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States, and all acts, laws, resolutions, orders, regulations or usages . . . which have heretofore established, maintained or enforced . . . directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, are declared null and void." REV. STAT. § 1990, at 349 (Act of March 2, 1867, ch. 187, § 1, 14 Stat. 546).

The second and third statutes were enforcement mechanisms, and provided penalties for violators.²⁹

The legislative record reveals that some senators questioned the necessity of retaining the involuntary servitude provisions during the debates in 1908 over the proposed Criminal Code revision.³⁰ Consequently, Congress never discussed the peonage provisions.³¹ Thus, Congress simply enacted the peonage provisions as sections 269 and 270 of the new 1909 Criminal Code.³²

In 1948, Congress again examined the peonage provisions and consolidated sections 269 and 270 of the 1909 Criminal Code.³³ Congress made only minor changes in the phraseology of the peonage statute.³⁴ However, the declaratory statement prohibiting peonage was left separate from the enforcement provisions, and remains so to this day.³⁵

B. Legislative History of Section 1584 of the Crimes and Criminal Procedure Code

Judicial interpretation of a statute begins with an analysis of the language of that statute, since the plain meaning of the statute will control in the absence of clear legislative intent to the contrary.³⁶ The original statutes which section 1584 evolved into were enacted to prohibit the enslavement of blacks.³⁷ With the explicit insertion of the

29. See *infra* note 32 (text of original antipeonage enforcement statutes, which were reenacted without changes in the 1909 Criminal Code revision).

30. 42 CONG. REC. 1114-22 (1908) (statements of Sen. Hale, Sen. Heyburn, and Sen. Lodge). As a result of this debate, the Clerk of the Senate was prohibited from even reading the peonage portions of the Criminal Code. *Id.* at 1114.

31. *Id.* at 1114.

32. Section 269 of the 1909 Criminal Code provided that: "Whoever holds, arrests, returns, or causes to be held, arrested or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both." Act of March 4, 1909, ch. 321, § 269, 35 Stat. 1142 (formerly REV. STAT. 5526, at 1071). Section 270 of the 1909 Criminal Code provided that: "Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of the section last preceding [section 269], shall be liable to the penalties therein prescribed." Act of March 4, 1909, ch. 321, § 270, 35 Stat. 1142 (formerly REV. STAT. § 5527, at 1071).

33. H.R. Rep. No. 304, 80th Cong., 1st Sess. A110 (1947) (comments of the Revisor).

34. *Id.*

35. "The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations or usages of any Territory or State, which have heretofore established . . . the voluntary or involuntary service or labor of any person as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void." 42 U.S.C. 1994 (1982).

36. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (in the absence of clearly expressed legislative intent to the contrary, statutory language which exhibits no ambiguity is regarded as conclusive).

37. See *infra* note 54 (text of the prior antislavery statutes).

words "any person" into the involuntary servitude statute,³⁸ however, the protections of the thirteenth amendment and the involuntary servitude statute were extended to all races.³⁹ Also, the thirteenth amendment and statutes enacted pursuant to the amendment prohibit the enslavement of all persons, regardless of the citizenship or stateless status of the victim.⁴⁰ Section 1584 regulates purely private conduct,⁴¹ unlike other constitutional provisions which require a showing of governmental action.⁴² Finally, the involuntary servitude statute expressly provides for a requirement of *mens rea*.⁴³

The present involuntary servitude statute⁴⁴ is a consolidation of sections 248 and 271 of the 1909 Criminal Code.⁴⁵ Section 271 is

38. 18 U.S.C. § 1584 (1982) (originally enacted as Act of June 25, 1948, ch. 645, 62 Stat. 773). The involuntary servitude statute provides that "[w]hoever knowingly and wilfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person so held, shall be fined not more than \$5,000 or imprisoned not more than five years, or both." *Id.*

39. 42 CONG. REC. 1114 (1908) (statement of Sen. Heyburn).

40. Slaughter-House Cases, 83 U.S. 36, 72 (1872) (asserting that the thirteenth amendment prohibits the existence of Mexican peonage or the Chinese coolie labor system in the United States).

41. Legislation enacted pursuant to the thirteenth amendment may be direct and primary, acting upon private acts, whether sanctioned by state legislation or not. Civil Rights Cases, 109 U.S. 3, 23 (1883).

42. See, e.g., U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides in pertinent part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added)." *Id.*

43. See *supra* note 38 (text of the involuntary servitude statute, specifically, use of the words "knowingly and wilfully"). Before 1948, a cause of action arose under the involuntary servitude statute only if a victim was enslaved, escaped, and finally forced back into a condition of involuntary servitude. See Brodie, *supra* note 2, at 369 (discussing this loophole in the wording of the involuntary servitude statute). In 1948, however, with the revision of Title 18, the Crimes and Criminal Procedure Code, section 1584 was changed to prohibit the initial subjugation of a person, by the addition of the phrase "holds to a condition of involuntary servitude." See Address by Arthur B. Caldwell, Chief, Civil Rights Section, Department of Justice, (July 16, 1953) (The Civil Rights Section, Its Functions and Its Statutes 26, prepared for delivery before the Civil Rights Class of the Summer Session of the University of Pennsylvania, Philadelphia, Pennsylvania) (unpublished manuscript). See also *supra* note 38 (text of the involuntary servitude statute).

44. 18 U.S.C. 1584 (1982).

45. Act of March 4, 1909, ch. 10, 248, 35 Stat. 1139 (1909) (formerly REV. STAT. § 5377, at 1043) (repealed 1948). Section 248 of the 1909 Criminal Code stated as follows:

Whoever brings within the jurisdiction of the United States, in any manner whatsoever, any person from any foreign kingdom or country . . . or holds, sells, or otherwise disposes of, any person so brought in, as a slave, or to be held to service or labor, shall be fined not more than ten thousand dollars . . . and . . . shall be imprisoned not more than seven years.

Id. Act of March 4, 1909, ch. 10, § 271, 35 Stat. 1142 (1909) (formerly REV. STAT. § 5527, at 1071) (repealed 1948). Section 271 of the 1909 Criminal Code stated as follows:

[W]hoever shall knowingly and wilfully bring into the United States or any place subject to the jurisdiction thereof, any person inveigled or forcibly kidnapped in any

derived from the 1874 Padrone statute.⁴⁶ The purpose of the 1874 statute was to protect people of foreign birth against involuntary servitude.⁴⁷ In the late 1800's, the Padrone system was prevalent in major United States cities on the East Coast.⁴⁸ Under the Padrone system, Italian boys were brought to the United States in violation of Italian law⁴⁹ and were forced to work as street musicians, beggars, and bootblacks.⁵⁰ In the 1874 Congress, one representative commented that consent would be a defense to the type of involuntary servitude prohibited by the Padrone statute if this consent was not extorted by "duress or violence."⁵¹

other country, with intent to hold such person so inveigled or kidnapped in confinement or to any involuntary servitude . . . shall be fined not more than five thousand dollars and imprisoned not more than five years.

Id. See *infra* notes 157-60 and accompanying text (discussing the definition of involuntary servitude set forth in *United States v. Kozminski*).

46. Act of June 23, 1874, ch. 464, § 1, 18 Stat. 251 (1874). The Padrone statute stated: [W]hoever shall knowingly and wilfully bring into the United States . . . any person inveigled or forcibly kidnapped in any other country, with intent to hold such person . . . in confinement or to any involuntary service, . . . and whoever shall knowingly and wilfully sell, or cause to be sold, into any condition of involuntary servitude, any other person so sold and bought, shall be deemed guilty of a felony, and . . . be imprisoned for a term not exceeding five years and pay a fine not exceeding five thousand dollars. *Id.* The definition of "inveigle" means to "seduce, allure, entice, [or] wheedle"; in other words, the use of fraud or deceit. N. WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 164 (Hartford: Hudson & Goodwin; New Haven: Increase Cooke, 1806). Chapter 464 (the Padrone statute) was repealed by Act of March 4, 1909, ch. 321, § 341, 35 Stat. 1153-54 (1909), and subsequently reenacted as Act of March 4, 1909, ch. 321, § 271, 35 Stat. 1139 (1909).

47. Act of June 23, 1874, ch. 464, § 1, 18 Stat. 251. "Chap. 464. An Act to protect persons of foreign birth against forcible constraint or involuntary servitude." *Id.*

48. 2 CONG. REC. 4443 (1874). The bill was "intended to prevent the practice of enslaving, buying, selling, or using Italian children, a practice which [was] so common in the large cities of our country." *Id.* (statement of Rep. Cessna).

49. Senator Sumner alleged that 5000 Italian boys were presently in a state of involuntary servitude, and proposed that legislation be enacted to combat this practice. 2 CONG. REC. 2 (1873). His proposal became the 1874 Padrone statute. See *supra* note 46 (text of the Padrone statute).

50. See 42 CONG. REC. 1122 (1908) (statement of Sen. Lodge, detailing the practice).

51. 2 CONG. REC. 5373 (1874) (statement of Rep. Thurman). See generally 1 W. BLACKSTONE, COMMENTARIES *131 (1st Am. ed. 1771). The definition of duress is that the victim is in fear of imminent loss of life or limb. *Id.* See also 2 CONG. REC. 4443 (1874). Arguably, Congress was concerned with protecting a certain class of persons, namely, protecting children who were unable because of their age to protect themselves from such predatory practices, and not with protecting a certain ethnic class. *Id.* The government will argue before the United States Supreme Court in *United States v. Kozminski*, 821 F.2d 1186 (6th Cir.) (en banc), cert. granted, 108 S. Ct. 225 (1987), that a threat to burn down a servant's house or a threat to destroy or confiscate all of the servant's property constitutes a violation of section 1584. Brief for the United States 17-18, *United States v. Kozminski*, ____ U.S. ____ (1988) (No. 86-2000). From a legal standpoint this position is slightly incorrect. See 1 W. BLACKSTONE, COMMENTARIES *131 (1st Am. ed. 1771) ("the fear of having one's house burned, or one's goods taken away and destroyed" does not constitute duress). Consequently, the government's position that a psychological coercion standard "is not unduly broad and does not present vagueness concerns" is debatable. Brief for the United States, *supra*, at 32. See *United States v. Harris*, 347 U.S. 612, 617 (1954) (holding that a

The United States Constitution provided that after January 1, 1808, Congress could prohibit the migration or importation of slaves into the United States,⁵² by the exercise of the power of Congress to regulate commerce with foreign nations.⁵³ In response to the newly unrestricted power of Congress to regulate the slave trade, Congress enacted the precursors to section 248.⁵⁴ The parent statutes of section 248 prohibited the importation of blacks into the United States to be used as slaves.⁵⁵ No further revision of the earlier antislavery statutes occurred until Congress debated and rephrased the involuntary servitude provisions as a part of the massive 1909 Criminal Code revision.⁵⁶

During the 1908 debate over the involuntary servitude provision, some senators questioned the propriety of promulgating "elaborate

criminal statute which contains ambiguity as to the conduct which is forbidden is unconstitutional as a violation of due process); *Giacco v. Pennsylvania*, 382 U.S. 399, 402 (1966) (holding that a statute which leaves judges and juries free to determine without any legally fixed requirements what is and is not prohibited in a particular case is unconstitutionally vague). The government has presented similar examples of allegedly prohibited coercion in the past. In *Shackney*, the government "manfully" asserted that preventing an employee's son from achieving a much desired admission to Yale would be enough to convict the employer of involuntary servitude. *United States v. Shackney*, 333 F.2d 475, 480 (2d Cir. 1964). The Second Circuit delicately refuted this assertion by stating that in their opinion, the government's example of coercion "was . . . [not] quite what Congress had in mind" when it enacted the involuntary servitude statute. *Id.*

52. U.S. CONST. art. I, § 9, cl. 1.

53. U.S. CONST. art. I, § 8, cl. 3.

54. Act of March 2, 1807, ch. 22, § 6, 2 Stat. 427. The original 1808 statute provided:

[I]f any person . . . shall, from and after the first day of January, one thousand eight hundred and eight, purchase or sell any negro, mulatto, or person of colour, for a slave, or to be held to service or labour, who shall have been imported or brought from any foreign kingdom, place, or country, . . . after the last day of December, one thousand eight hundred and seven, knowing at the time of such purchase or sale, such negro, mulatto, or person of colour, . . . such purchaser and seller shall severally forfeit and pay for every negro . . . so purchased or sold . . . eight hundred dollars.

Id. Act of April 20, 1818, ch. 91, 3 Stat. 452. The statute as modified in 1818 stated as follows:

[I]f any person or persons whatsoever shall . . . bring within the jurisdiction of the United States, in any manner whatsoever, any negro, mulatto, or person of colour, from any foreign kingdom, place, or country, or from sea, or shall hold, sell or otherwise dispose of, any such negro, mulatto, or person of colour, so brought in, as a slave, or to be held to service or labour, . . . [such person or persons] shall, on conviction thereof by due course of law, forfeit and pay, for every such offence, a sum not exceeding ten thousand nor less than one thousand dollars . . . and . . . shall suffer imprisonment, for a term not exceeding seven years nor less than three years.

Id. For chronological reasons the argument that any of the predecessors of section 1584 (enacted in 1808 and 1818) were passed under the power of Congress as embodied in section two of the thirteenth amendment (enacted in 1865) is untenable. There are indications, however, that the involuntary servitude and peonage provisions in the 1909 Criminal Code were enacted under the thirteenth amendment. *See, e.g.*, 42 CONG. REC. 1115-16 (1908) (statements of Sen. Bailey and of Sen. Heyburn). Consequently, ascertaining the intent of the 60th Congress becomes even more imperative.

55. *See supra* note 54 (text of the original antislavery statutes).

56. *See infra* notes 57-64 and accompanying text (Congressional debates over the involuntary servitude statute).

provisions" prohibiting slavery.⁵⁷ Senator Heyburn⁵⁸ stressed the necessity of not only retaining the relevant antislavery provisions, but of broadening the scope of these provisions to protect all persons,⁵⁹ not just "negroes, mulattos, or persons of color."⁶⁰ More importantly, Senator Heyburn informed his colleagues that the proposed statute was intended to protect certain nonracial classifications of persons including immigrants, children, and those who could not protect themselves.⁶¹ Furthermore, Senator Heyburn suggested that the proposed statutes⁶² required an examination of the types of coercion used to enslave people.⁶³ Other senators, however, suggested that the statutes required

57. See, e.g., 42 CONG. REC. 1114-15 (1908) (statements of Sen. Hale and of Sen. Bailey). The senators who made such comments were of the erroneous belief that slavery had "disappeared absolutely into the dead past," thus the antislavery statutes were no longer necessary. *Id.* at 1114 (statement of Sen. Hale).

58. Great weight should be accorded to the statements of Senator Heyburn, since he was the Senatorial Head of the Joint Conference Committee and manager of the bill for the revision of the entire Criminal Code. See 42 CONG. REC. 1114 (1908) (statement of Sen. Hale).

59. 42 CONG. REC. 1114 (1908) (statement of Sen. Heyburn).

60. 42 CONG. REC. 3598 (1909) (statement of Sen. Heyburn). After certain senators requested that amendments and revisions from the joint conference committee be read in their entirety, Senator Heyburn angrily accused a minority of the Senate of attempting to abrogate all civil rights legislation by means of procedural delaying tactics. *Id.*

61. 42 CONG. REC. 1115 (1908) (statement of Sen. Heyburn). Senator Heyburn stated in part that the proposed statutes would:

enable the law to reach *those who come here* without being a party to the disposition of their services or the control of their rights whether they be *children of irresponsible years and conditions* or whether they be people who, *because of their environment or the conditions of their lives, cannot protect themselves*. . . .

Id. (emphasis added).

62. Act of March 4, 1909, ch. 10, § 248, 35 Stat. 1139 (1909) (formerly REV. STAT. § 5377, at 1043). Section 248 of the 1909 Criminal Code was enacted as follows:

Whoever brings within the jurisdiction of the United States, in any manner whatsoever, any person from any foreign kingdom or country . . . or holds, sell, or otherwise disposes of, any person so brought in, as a slave, or to be held to service or labor, shall be fined not more than ten thousand dollars . . . and . . . shall be imprisoned not more than seven years.

Id. Act of March 4, 1909, ch. 10, § 271, 35 Stat. 1142 (1909) (formerly REV. STAT. § 5527, at 1071). Section 271 of the 1909 Criminal Code was enacted as follows:

Whoever shall knowingly and willfully bring into the United States or any place subject to the jurisdiction thereof, any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement or to any involuntary servitude . . . shall be fined not more than five thousand dollars and imprisoned not more than five years.

Id.

63. *Id.* Senator Heyburn commented that the proposed involuntary servitude statutes "dealt not with the holding of slaves within any place over which the United States exercised jurisdiction, but it dealt with the *process* by which persons were enslaved." *Id.* (emphasis added) Senator Heyburn also stated that the word slavery was not coined to apply solely to antebellum conditions. *Id.* at 1116. The Senator, however, also mentioned that slavery "was older than the foundations of this country," thus suggesting that his concern was targeted at more traditional manifestations of slavery. *Id.* See also *Slaughter-House Cases*, 83 U.S. 36, 39 (1872) (noting that the word "involuntary servitude" was inserted to prohibit serfdom and vassalage which the word "slavery"

an inquiry into the effect of coercion on the victim, as opposed to requiring the government to prove that the defendant utilized certain types of coercion against the victim.⁶⁴

The most recent revision of the involuntary servitude statute was in 1948. The prior 1909 statutes, sections 248 and 271 were consolidated into one.⁶⁵ The result was that contrary to the statements of the Revisor of the 1948 revision of the Criminal Code,⁶⁶ the intent of the 1909 Congress was slightly changed.⁶⁷ By proscribing the "holding" of another to involuntary servitude,⁶⁸ Congress arguably abolished the notion that involuntary servitude exists only where a victim has been forced back into slavery after escaping.⁶⁹ The new version prohibits the initial holding of a person in a state of involuntary servitude.⁷⁰ In summary, therefore, the 1948 revision of the Crimes and Criminal Procedure Code substantially retains the intent and scope of prior antislavery statutes.

JUDICIAL INTERPRETATION OF THE PEONAGE AND INVOLUNTARY SERVITUDE STATUTES

There are four definitions for involuntary servitude that have developed in the federal courts. First, involuntary servitude is defined as the use of physical force, or threats of force or legal process to compel

might not cover). Senator Heyburn's interpretation of the statutes seems to have been supported by his colleagues, since other senators equated slavery with "bondage." 42 CONG. REC. 1119 (1908) (statement of Sen. Stone). See N. WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 33 (Hartford: Hudson & Goodwin; New Haven: Increase Cooke, 1806). Bondage is defined as "slavery, captivity, [or] imprisonment," thus indicating that the use of both physical force or legal incarceration was sought to be prohibited. *Id.* Senator Lodge commented that no justification for abolishing such statutes existed merely because the thirteenth amendment abolished slavery. 42 CONG. REC. 1122 (1908). He reminded his colleagues of the Padrone system, where Italian boys were imported and forced to do menial labor, a condition of "practical slavery." *Id.*

64. 42 CONG. REC. 1114 (1908) (statement of Sen. Heyburn). But see Folsom, *A Slave Trade Law in a Contemporary Setting*, 29 CORNELL L.Q. 203, 215 (1944) (suggesting that this assertion which argued that the effect of coercion on the victim as dispositive was instead an attempt to rebut the arguments of senators who believed that the involuntary servitude and peonage provisions were obsolete).

65. See *supra* note 62 (text of sections 248 and 271 of the 1909 Criminal Code).

66. Although the new Crimes and Criminal Procedure Code was enacted into positive law, both the Senate Judiciary Committee and the Revisor stated that their task was merely to consolidate the two statutes, while preserving the original scope of the statute. S. Rep. No. 1620, 80th Cong., 2d Sess. 1 (1948).

67. Brief for the United States, *supra* note 51, at 27.

68. See Address by Arthur B. Caldwell, *supra* note 43.

69. See *supra* note 62 (text of sections 248 and 271 of the 1909 Criminal Code).

70. *Id.*

a person to perform labor.⁷¹ Second, involuntary servitude is defined as psychological coercion to force the victim to work.⁷² A third definition of involuntary servitude requires either a showing of fraud or deceit used against certain persons, or use of physical force or threat of legal process to compel a person to enter a state of involuntary servitude.⁷³ A final definition of involuntary servitude states that the techniques utilized to effectuate labor are irrelevant, where the result of the coercion is to force a victim to become a slave.⁷⁴

A. *The Use of Force or Threat of Legal Process*

For the first time, in *United States v. Shackney*,⁷⁵ a court defined involuntary servitude as the use of physical force, or threats of force or law to compel service.⁷⁶ In *Shackney*, the defendant hired three Mexican families to work on his chicken farm.⁷⁷ One family, the Oros, agreed to a seven day workweek.⁷⁸ The defendant paid for visas and transportation costs to the United States.⁷⁹ Mr. Oros signed promissory notes to repay these expenses.⁸⁰ The defendants were subsequently indicted and convicted for violating the involuntary servitude and peonage statutes.⁸¹

At trial, the Oros testified as to the following: The money they earned was used to pay off the promissory notes, their children were

71. See, e.g., *United States v. Warren*, 772 F.2d 827 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986); *United States v. Harris*, 701 F.2d 1095 (4th Cir.), *cert. denied*, 463 U.S. 1214 (1983); *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981); *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964); *United States v. Lewis*, 644 F. Supp. 1391 (W.D. Mich. 1986), *argued*, No. 87-1040, 87-1041, 87-1042, 87-1072, 87-1073, 87-1074 (6th Cir. 1987) (docket numbers of the several consolidated cases that have been argued before the Sixth Circuit); *United States v. Ingalls*, 73 F. Supp. 76 (S.D. Cal. 1947).

72. See *United States v. Mussry*, 726 F.2d 1448 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984).

73. See, e.g., *United States v. Kozminski*, 821 F.2d 1186 (6th Cir.) (en banc), *cert. granted*, 108 S. Ct. 225 (1987); *Peonage Cases*, 123 F. 671 (D.C.M.D. Ala. 1903); *United States v. Ancarola*, 1 F. 676 (C.C.S.D.N.Y. 1880). The specific classes protected are immigrants, children, and mental incompetents. *Kozminski*, 821 F.2d at 1192.

74. See, e.g., *Clyatt v. United States*, 197 U.S. 207 (1904); *United States v. Bibbs*, 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978); *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945); *Bernal v. United States*, 241 F. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918).

75. 333 F.2d 475 (2d Cir. 1964).

76. See generally *Folsom*, *supra* note 64 (suggesting in 1943 that such a conflict in defining involuntary servitude might arise in the future).

77. *Shackney*, 333 F.2d at 477.

78. *Id.*

79. *Id.*

80. *Id.* at 477-78.

81. *Id.* at 476.

not allowed to attend school, their mail was censored by the Shackneys, and the defendant threatened to deport the Oros family if they refused to work.⁸² The Oros admitted that Mr. Shackney never used force or threats of force against them.⁸³ The Oros further testified that they did not leave the chicken farm because they were afraid that they would be deported.⁸⁴

The Second Circuit reasoned that the meaning of "servitude" as stated in section 1584 of the Crimes and Criminal Procedure Code had a broader meaning than "slavery" as used in early antislavery statutes.⁸⁵ The court examined United States Supreme Court cases relating to civil rights matters in general.⁸⁶ The court then concluded that the intent of Congress was to abolish incidents of slavery such as the use of legal process to either capture the fugitive or subject him to criminal penalties.⁸⁷

The *Shackney* court held that involuntary servitude in an employment relationship existed when the employee was prohibited from leaving employment by "superior and overpowering force" perpetrated by the

82. *Id.* at 477-79.

83. *Id.* at 479. Because the Shackneys left the Oros to undertake teaching duties at a nearby town, the Oros had ample opportunity to leave the chicken farm. *Id.*

84. *Id.* at 477-79.

85. *Id.* at 485 (citing *Slaughter-House Cases*, 83 U.S. 36, 69 (1873)) ("involuntary servitude" is broader than the word "slavery" since the latter phrase might not cover other manifestations of the practice such as the apprenticeship system in the West Indies, or serfdom). See Public General Acts, An Act for the Abolition of Slavery, *supra* note 1 (English statute abolishing slavery created three classes of apprenticed laborers in the Colonies, one of which was the West Indies); see *supra* note 54 (for text of 1808 and 1818 antislavery statutes). See also Shelby, *The Thirteenth and Fourteenth Amendments*, 3 So. L. Rev. 524, 531 (1874). Even contemporaries of the Civil War Amendments who advocated retention of miscegenation statutes freely conceded that the word servitude was broader than slavery, and encompassed incidents of Mexican peonage and the Chinese coolie labor system. *Id.* The *Shackney* court did not examine the complete legislative history of section 1584, citing as justification that this statute had been enacted into "positive law." *Shackney*, 333 F.2d at 482. See BLACK'S LAW DICTIONARY 1046 (5th ed. 1979) (defining positive law as law specifically enacted by proper authority for the ordering of a society). See also H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 299 (2d ed. 1911) (the reenactment of a statute following judicial construction of that statute enacts the construction as part of the statute, since a presumption arises that the legislature was aware of the prior construction and would have changed the law if it desired to alter the prior judicial interpretation).

86. *Shackney*, 333 F.2d at 485 (citing *Slaughter-House Cases*, 83 U.S. 36, 69 (1873); *Civil Rights Cases*, 109 U.S. 3 (1883); *Butler v. Perry*, 240 U.S. 328 (1916)).

87. *Shackney*, 333 F.2d at 485-86. As an example, the court noted that prior to the Civil War state statutes permitted the capturing of fugitive slaves and the imposition of fines on captured slaves. *Id.* But cf. *Jones v. Alfred Mayer*, 392 U.S. 409 (1968) (holding that Congress intended to prohibit not only badges of servitude under color of state law, but also purely private conduct under the Civil Rights Act of 1866). But see C. FAIRMAN, *supra* note 17, at 1219 (criticizing *Jones* on grounds that by removing section 1 of the original draft of the 1866 Act which contained a general prohibition against discrimination, Congress was concerned only with those incidents of slavery which arose under color of state law or custom, not with purely private discrimination).

employer.⁸⁸ According to the court, involuntary servitude does not result when an employee has a choice between freedom and continued servitude, even if the consequences of terminating the employment relationship might be "exceedingly bad," as long as the use of force or legal process which would result in incarceration of the victim was not in existence.⁸⁹ Accordingly, the defendants could not be convicted of involuntary servitude since a threat of deportation still left the Oros with a choice between continued service and freedom.⁹⁰ Under *Shackney*, therefore, involuntary servitude results when service is compelled by force, or the threat of force or legal process.⁹¹

88. *Shackney*, 333 F.2d at 486 (citing *Hodges v. United States*, 203 U.S. 1, 34 (1906) (Harlan, J., dissenting)).

89. *Id.* at 486.

90. *Id.* The court made clear that while a credible threat of deportation might come "close to the line" of being involuntary servitude, the threat could not be equated with a credible threat of imprisonment. *Id.* The *Shackney* court was concerned that if section 1584 would be interpreted to cover more situations than just the use of force or legal process, employees would use the statute as a tool of blackmail against their employers. *Id.* at 486-87. Consequently, a more expansive interpretation might unduly infringe upon the negotiating process between labor and management, thus undermining the foundations of capitalism, specifically, a system of "completely free and voluntary labor." See *Pollack v. Williams*, 322 U.S. 4, 17 (1944). The Supreme Court in *Pollack* stated that where coercion is present, an employee lacks the power to redress grievances and the employer has no incentive to alleviate egregious working conditions. *Id.* at 18.

91. *Shackney*, 333 F.2d at 487. A more recent case dealt with the use of physical force to coerce labor in the context of religious cults. See *United States v. Lewis*, 644 F. Supp. 1391 (W.D. Mich. 1986), *argued*, No. 87-1040, 87-1041, 87-1042, 87-1072, 87-1073, 87-1074 (6th Cir. 1987). In *Lewis*, one defendant was the spiritual leader of a cult, which taught that corporal punishment was necessary to ensure that cult members follow the teachings of the Bible, as interpreted by the defendant. *Lewis*, 644 F. Supp. at 1399. Approximately 100 cult members stayed at a camp patrolled by other members carrying firearms. *Id.* The detained members were prohibited from leaving the camp unaccompanied, and their mail was censored. *Id.* In March of 1982, the leader of the cult required all adult members to give his lieutenants permission to inflict punishment on their children. *Id.* at 1396. Punishment in the form of whippings, beatings, burning, and stoning were inflicted on many children, and one child died as a result of the punishments. *Id.* The "sins" perpetrated by the children consisted primarily of failing to properly follow work orders. *Id.* At trial, the children testified that they did not leave the camp because they feared further punishment. *Id.* The court held that since the evidence established that the children were compelled to work by means of physical torture, the defendants had placed the victims into a state of involuntary servitude. *Id.* at 1398, 1401. In *Lewis*, the parents did not protect their children, but instead consented to the acts of physical violence. *Id.* at 1396, 1403. Because of the severity of the punishments involved, however, the court held that the state could interfere and protect the children where the parents had refused. *Id.* at 1403. In other words, since "[these] children of irresponsible years . . . [could] not protect themselves," the protections of the law extended to this nonracial classification of persons. See *supra* note 61 and accompanying text (statement of Sen. Heyburn). The only issue presently before the Sixth Circuit in this case is whether the parental consent given was valid, given the religious context and the violence involved. Telephone interview with Irving L. Gornstein, Attorney, Appellate Section, Civil Rights Division, United States Department of Justice (Dec. 17, 1987) (notes on file at the *Pacific Law Journal*); Telephone interview with Mr. Albert Glenn, Criminal Section, Civil Rights Division, United States Department of Justice (Sept. 18, 1987) (notes on file at the *Pacific Law Journal*). See also *Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I. 1978), *aff'd*, 602 F.2d 458 (1979). In *Turner*, the plaintiff alleged that disciples of the defendant brainwashed and forced the plaintiff to work long hours

In the concurring opinion in *Shackney*, Judge Dimock disagreed with the majority's interpretation of section 1584.⁹² He argued that the victim's state of mind should be the focus of an involuntary servitude prosecution, not the means by which the servitude was imposed.⁹³ If the actions of the defendant caused the victim to believe that a state of involuntary servitude resulted, a cause of action under section 1584 would arise.⁹⁴

The Fourth Circuit dealt with conditions of involuntary servitude in the agricultural industry in *United States v. Harris*.⁹⁵ The defendants in *Harris* supervised migrant farm workers.⁹⁶ The government alleged in this section 1584 prosecution that the defendants subjected farm workers to a state of involuntary servitude by means of physical acts of violence.⁹⁷ Many of the workers were recruited by either deceit or actual kidnapping.⁹⁸ The workers were charged high prices for their meals and were guarded and confined for attempting to escape.⁹⁹ One farm worker died of heatstroke after being overworked in the fields.¹⁰⁰

The *Harris* court did not provide a concrete definition of involuntary servitude.¹⁰¹ The court reasoned that an interpretation of section 1584 should take into account "Twentieth Century" manifestations of slavery.¹⁰² According to the court, the threats and use of physical confinement by the defendants constituted sufficient evidence for a finding of involuntary servitude.¹⁰³

for no pay. *Id.* at 371. The court dismissed all causes of action, in part because of the status of the defendant. *Id.* at 378. See also Lucksted & Martell, *Cults: A Conflict Between Religious Liberty and Involuntary Servitude*, 51 FBI L. ENF. BULL. 16 (April 1982); 51 FBI L. Enf. Bull. 16 (May 1982); 51 FBI L. Enf. Bull. 16 (June 1982) (discussing *Turner* and the first amendment implications of certain involuntary servitude prosecutions).

92. *Shackney*, 333 F.2d at 487 (Dimock, J., concurring).

93. *Id.*

94. *Id.* at 488. But see Note, *Involuntary Servitude: Modern Conditions Addressed In United States v. Mussry*, 34 CATH. U.L. REV. 153, 172 (1984) (arguing that a victim might rationally choose a condition of involuntary servitude over other available options).

95. 701 F.2d 1095 (4th Cir.), cert. denied, 463 U.S. 1214 (1983).

96. *Harris*, 701 F.2d at 1098.

97. *Id.* at 1098. Specifically, the defendants first recruited the victims, and then deducted living expenses from workers' wages, guarded workers at night, picked up "escapees," and thwarted contemplated escape attempts or labor inefficiency through the use of actual or threatened physical violence. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1100.

102. *Id.* (quoting *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981)). The *Harris* court did not define exactly what "Twentieth Century" manifestations of slavery are. But see *supra* note 2 (statistics listing involuntary servitude complaints for the past three and one-quarter fiscal years).

103. *Harris*, 701 F.2d at 1100. A similar case, *United States v. Booker*, applied the *Shackney*

In *United States v. Ingalls*,¹⁰⁴ a case involving threats of legal process, a servant performed household labor in exchange for poor living quarters, substandard food, and no vacations or monetary compensation for a period of twenty-five years.¹⁰⁵ The servant was also physically abused by the defendants.¹⁰⁶ Mrs. Ingalls applied coercion by threatening to reveal to the authorities the servant's prior adulterous relationship with Mrs. Ingalls' first husband.¹⁰⁷ Mrs. Ingalls also threatened to disclose the fact that an abortion was obtained as a result of that relationship.¹⁰⁸

According to California law in 1947, both adultery and procuring an abortion were punishable by prison terms and fines.¹⁰⁹ After escap-

test, which interpreted section 1584, to a cause of action arising under section 1583. *United States v. Booker*, 655 F.2d 562, 564 (4th Cir. 1981). See 18 U.S.C. § 1583 (1982). The kidnapping statute provides as follows:

Whoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave . . . shall be fined not more than five thousand dollars or imprisoned not more than five years, or both.

Id. In *Booker*, the defendant withheld all wages, required all purchases to be made at the camp, and threatened to seriously injure or kill farm workers if the workers left the camp before any alleged debts were satisfied. *Booker*, 655 F.2d at 563. After attempting to leave, two victims were choked, beaten with axe handles, and warned that more physical abuse or death would be forthcoming if another attempt to leave was initiated before the alleged debts were paid. *Id.* at 563-64. The court defined a slave as "a person who is wholly subject to the will of another, one who has no freedom of action and whose person and services are wholly under the control of another." *Id.* at 566 (citing *United States v. Ingalls*, 73 F. Supp. 76, 78 (S.D. Cal. 1947)). See *infra* notes 104-18 and accompanying text (discussing the *Ingalls* case). Because of the physical violence involved, the court did not have to reach the issue of whether other forms of coercion might be actionable under section 1583, thus leaving the phrase "wholly subject to the will of another" ambiguous. *Booker*, 655 F.2d at 566. The court merely stated that the acts of physical violence perpetrated by the defendant were enough to place the victim in a state of involuntary servitude as defined by the *Shackney* court. *Id.* at 566-67. As in the *Harris* case, *United States v. Warren* involved the recurrent problem of slavery in migrant agricultural labor camps. *United States v. Warren*, 772 F.2d 827, 830 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986). The defendants originally recruited the victims under the false pretext of offering them work and eventually transported them against their will to Florida. *Id.* at 830-31. The defendants told the victims that they owed money for the food provided by the defendants. *Id.* at 830. After working for 45 days, one victim had received no pay and only one meal per day. *Id.* at 831. Furthermore, workers were beaten for complaining about the lack of pay. *Id.* The migrant farm workers were repeatedly warned not to attempt to escape, otherwise they would be "whooped." *Id.* at 830. Since the case of the government focused on the use of physical force to compel labor, the *Warren* court did not define the term "involuntary servitude." *Id.* at 833. Nevertheless, the Eleventh Circuit stated that the use of physical violence was the "most grotesque example" of coercion. *Id.* at 833-34. This dictum arguably hints that less egregious facts might make the evidentiary determination a more difficult one.

104. 73 F. Supp. 76 (S.D. Cal. 1947).

105. *Ingalls*, 73 F. Supp. at 77.

106. *Id.*

107. *Id.*

108. *Id.*

109. See CAL. PENAL CODE § 275 (West 1987 Supp.) This statute, which was originally enacted in 1872, states that the solicitation or procurement of an abortion by a woman is punishable by

ing, the servant went to the Berkeley, California police station.¹¹⁰ While the servant was at the police station, the defendant arrived and repeated, to the victim, the threats to have the victim incarcerated.¹¹¹ Because she feared that the threats would be carried out, the servant left the police station in the custody of the defendant.¹¹² Arguably, therefore, *Ingalls* stands for the proposition that the use of legal process, through the mechanism of abortion and adultery statutes, sufficed to place the victim into a condition of involuntary servitude.

According to commentators, the *Ingalls* court expanded the legal definition of involuntary servitude to include psychological coercion, by focusing on the poor working conditions and physical abuse perpetrated by the defendants.¹¹³ If the defendants in *Ingalls* initially held the servant to a state of involuntary servitude,¹¹⁴ the existing statute precluded prosecution, because the initial confinement of a person did not constitute involuntary servitude.¹¹⁵ Only with the addition of the word "holding" by Congress to section 1584 one year later, was the initial confinement of a person through coercive means made illegal.¹¹⁶ Thus, the *Ingalls* court merely applied the language of the statute to the facts of the case, the servant escaping and then being forced back into a state of involuntary servitude, and did not

imprisonment in the state prison. *Id.* See also 1975 Cal. Stat. ch. 71, §§ 5, 6, at 133 (repealing CAL. PENAL CODE § 269(a) (West 1955)) (stating that cohabitation and adultery are punishable by a fine not exceeding one thousand dollars or imprisonment not to exceed one year).

110. *Ingalls*, 73 F. Supp. at 77-78.

111. *Id.* at 78.

112. *Id.* In other words, the victim exercised a choice between continued servitude to the defendant by means of the threats of incarceration, as opposed to being incarcerated by the state upon conviction of the abortion and adultery charges, if the defendant informed the authorities. Such a "choice" is in contrast to the mere threat of deportation in *Shackney*. See *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir. 1964). See also *United States v. Reynolds*, 235 U.S. 133, 146 (1914) (noting that coercion resulting from constant fear of imprisonment under the criminal laws renders the work compulsory in the same fashion as arresting the victim).

113. See, e.g., Brief for the United States, *supra* note 51, at 29 n.16. The government will argue before the United States Supreme Court that the *Ingalls* case "involved facts strikingly like those present" in *United States v. Kozminski*, 821 F.2d 1186 (6th Cir.) (en banc), cert. granted, 108 S. Ct. 225 (1987), by extensively listing the harsh working conditions under which the victim labored. Brief for the United States, *supra* note 51, at 29 n.16. In the appellate brief, however, the fact is conspicuously omitted that the victim in *Ingalls* was also working under threat of legal process, specifically, statutes which prohibited a woman from procuring an abortion. *Ingalls*, 73 F. Supp. at 77. See *supra* note 109 and accompanying text (anti-abortion and adultery statutes in force in California during 1947). Nowhere in the Sixth Circuit opinion in *Kozminski* is there mentioned the fact that the victims were placed into a state of involuntary servitude by means of the threat of incarceration presented by state statutes.

114. As opposed to the servant escaping and being subsequently forced back into slavery.

115. See *supra* notes 65-70 and accompanying text (discussing the addition of the word "holding" to section 1584 in 1948 and the *Ingalls* case).

116. *Id.*

change the definition of section 1584. Moreover, the primary type of coercion used against the victim was the threat of legal process, not the totality of the circumstances as argued by some commentators.

The above cases suggest that the government must prove that coercion resulted in an actual denial of liberty. The types of coercion used such as physical force or the threat of legal process evidences such a denial of liberty. Moreover, one case, *United States v. Ingalls*, is a legal process case rather than a psychological coercion case, as the government has impliedly asserted.¹¹⁷ A more recent case has attempted to expand the definition of involuntary servitude to include coercion by psychological means.¹¹⁸

B. Use of Psychological Coercion

In *United States v. Mussry*,¹¹⁹ the government alleged that the defendants illegally brought Indonesian workers to Los Angeles and forced them to work fifteen hours per day.¹²⁰ The workers were required to cook, clean, and do landscaping and gardening tasks.¹²¹ The servants lived in the homes of the defendants.¹²² The Indonesians lacked education, job skills, and familiarity with the English language.¹²³ The government sought to prove that the defendants used their knowledge of Indonesian culture to psychologically coerce the workers to accede to these substandard working conditions.¹²⁴ If the workers did not reimburse the defendants for the cost of the airline fare which brought

117. See, e.g., Brief for the United States, *supra* note 51, at 29 n.16.

118. See *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984).

119. 726 F.2d at 1448, 1453 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984). The defendants in *Mussry* were prosecuted under sections 1581, 1583, and 1584 of the Crimes and Criminal Procedure Code. *Id.* See *supra* notes 24, 35, 38, 103 (text of the involuntary servitude, peonage, and kidnapping statutes).

120. *Mussry*, 726 F.2d at 1451. No vacation breaks were permitted, and the compensation of the workers was far below the minimum wage. *Id.*

121. *Id.* at 1450.

122. *Id.*

123. *Id.* at 1453.

124. *Id.* at 1453-54. Apparently, the defendants were aware that Indonesian provincial laws required all citizens to possess an identification card at all times. See Note, *supra* note 94, at 76 (citing page 12 of the Appellate Brief for the United States in the *Mussry* case). Anyone not in possession of an identification card was subject to arrest. *Id.* Such laws were enforced more rigorously against those Indonesian citizens who were not residents of a town they were passing through. *Id.* Moreover, the defendants encouraged the belief that failure to carry an identification card or passport in the United States would lead to the arrest of the servants. *Id.* After this psychological coercion standard was handed down, a jury convicted the four defendants in *Mussry*. Three of the defendants were sentenced to probation and the payment of fines and restitution to the victims. See 1985 ATT'Y GEN. ANN. REP. 165 (citing *United States v. Mussry*, CR. No. 82-802-RG (C.D. Cal.)).

them to the United States,¹²⁵ the defendants threatened to not return the workers' airline tickets and passports.¹²⁶

According to the court, modern manifestations of involuntary servitude usually involve the enslavement of migrant farm workers or domestic servants.¹²⁷ Moreover, modern victims could be Hispanic, Asian, or members of another racial classification other than black.¹²⁸ The court stated that the *Shackney* test was too circumscribed to fully implement the purpose of the thirteenth amendment and the enforcing statutes.¹²⁹ According to the court, section 1584 prohibits a defendant from coercing a victim to work through wrongful or improper conduct which is intended to cause the victim to believe they have no alternative but to perform.¹³⁰ Because the court did not describe the types of wrongful conduct prohibited by section 1584,¹³¹ the standard to apply in cases involving involuntary servitude is unclear. Nevertheless, scholars interpret the *Mussry* test as requiring a showing of psychological coercion to convict a defendant of the crime of involuntary servitude, even where there is an absence of physical force or threats of legal process perpetrated against the victim.¹³²

125. *Mussry*, 726 F.2d at 1451.

126. *Id.*

127. *Id.* at 1450. See *supra* note 2 (statistics on types of involuntary servitude complaints and prosecutions). See 1985 ATT'Y GEN. ANN. REP. 165, 170 n.15 (citing *United States v. Kimes & Kimes*, CR No. LV 85-134 (D. Nev.)). *Kimes* included charges filed by the government against two wealthy homeowners who recruited illegal aliens to perform domestic work in their homes in Hawaii, California, and Nevada. The victims were misled as to working conditions and subjected to physical abuse. *Id.*

128. *Mussry*, 726 F.2d at 1451. The court hastened to add that under certain circumstances, caucasians might become victims of slavery. *Id.* at 1451 n.4. The statutory history of section 1584, however, implies that Congress intended to protect nonracial classes of persons. See *supra* notes 36-70 and accompanying text (detailing the legislative history of section 1584). Moreover, the use of racial classifications to evidence a condition of involuntary servitude is evidently an unworkable definition when an appellate court concedes that members of all races can be forced into a condition of involuntary servitude.

129. *Id.* See *supra* notes 1, 24, 35, 38, 103 (text of the thirteenth amendment and enforcing statutes). The court cited Judge Dimock's concurring opinion in *Shackney*, which argued that the meaning of the word "involuntary" necessarily meant the only determination necessary is whether the will of the servitor has been subjugated. *Mussry*, 726 F.2d at 1452 (citing *United States v. Shackney*, 333 F.2d 475, 487-88 (2d Cir. 1964)).

130. *Mussry*, 726 F.2d at 1453.

131. *Id.* As an example of a permissible use of coercion, the court pointed out that an employer who either truthfully notified the employee that no other jobs existed in the market, or offered low wages, or took advantage of circumstances created by others was not guilty of involuntary servitude. *Id.*

132. See, e.g., *United States v. Kozminski*, 821 F.2d 1186, 1193 (6th Cir.), cert. granted, 108 S. Ct. 225 (1987). Even though the government had presented the interpretation of psychological coercion as early as *Shackney*, no appellate court had adopted such a test until the decision of the Ninth Circuit in *United States v. Mussry*. See Shapiro, *Involuntary Servitude: The Need for A More Flexible Approach*, 19 RUTGERS L. REV. 65, 67 n.12 (1964) (citing page 17 of the Appellate Brief for the *United States* in the *Shackney* case).

C. Use of Fraud, Deceit, Force, or Legal Process to Compel Service

The most recent definition of involuntary servitude not only adheres to the intent of Congress, but also takes account of cases which interpreted prior antislavery statutes only a few years after those statutes were enacted. The new definition takes judicial notice of prior attempts by courts to protect persons the law considers incapable of protecting themselves from involuntary servitude imposed by fraud or deceit. For example, in *United States v. Ancarola*,¹³³ a case which interpreted the Padrone statute only six years after it was enacted, Italian boys were purchased by the defendant.¹³⁴ The defendant promised to teach them music, take them to America, and allow them to work as street musicians for approximately four years.¹³⁵ The defendant further promised to send the resulting wages from the labors of the boys to their parents.¹³⁶

The defendant took the boys to London, and then to New York.¹³⁷ A depot superintendent in New York prohibited the boys from continuing on their journey with the defendant because he suspected that the boys were not related to the defendant.¹³⁸ Six days later the defendant was arrested¹³⁹ and charged with bringing into the United States children, having inveigled them in Italy, with intent to keep the boys in a state of involuntary servitude.¹⁴⁰

The *Ancarola* court denied the defendant's motion for a new trial, holding that the consent given by the boys was of no legal consequence because of their age.¹⁴¹ Specifically, the court found that the boys' consent was a "sham" since their age made them susceptible to being enticed into a condition of involuntary servitude by fraud or deceit.¹⁴² According to the court, the fraud perpetrated against the Italian boys was a clear violation of the 1874 Padrone statute.¹⁴³

133. 1 F. 676 (C.C.S.D.N.Y. 1880).

134. *Ancarola*, 1 F. at 678, 683.

135. *Id.* at 678-80.

136. *Id.* at 680, 687.

137. *Id.* at 679.

138. *Id.*

139. *Id.*

140. *Id.* at 677. The defendant was convicted by a jury and motioned for a new trial. *Id.*

141. *Id.* at 683.

142. *Id.*

143. *Id.* at 676, 683. The rationale of the *Ancarola* court can arguably be construed as a concern by the court for the immaturity of the victims and, to a lesser extent, their ethnicity. *But*

Ancarola and the *Peonage Cases*¹⁴⁴ are the genesis of a partial definition of involuntary servitude based on the type of coercion involved and whether the victim was a member of a nonracial classification, namely, children or the mentally retarded. The most recent judicial treatment of the crime of involuntary servitude has recognized the importance of these two cases. Specifically, the Sixth Circuit Court of Appeals implicitly combined the concern for mental incompetents found in the *Peonage Cases* with the express concern for the welfare of minors as evidenced in *Ancarola*, in a novel definition of involuntary servitude.¹⁴⁵

In *United States v. Kozminski*,¹⁴⁶ a dairy farmer, his wife and son were convicted under section 1584 for the involuntary servitude of two mentally retarded farm workers. The victims had very low intelligence quotients,¹⁴⁷ and both agreed to work on the defendants' dairy farm in exchange for food and living quarters.¹⁴⁸

At trial, government witnesses testified that the victims' lodging was filthy and lacked running water.¹⁴⁹ The victims were provided only maggot-infested food.¹⁵⁰ The witnesses also testified that at various times the victims were slapped, kicked, and choked by Mr. Kozminski.¹⁵¹ On occasion the victims would "sneak" away from the defen-

see Note, *supra* note 94, at 159 (suggesting that the case is unclear as to whether the types of coercion used were irrelevant, or whether the focus was in reality on the victims' immaturity). See also E. FARNSWORTH, CONTRACTS § 4.3 (1982) (minors lack the capacity to contract); *United States v. Kozminski* 821 F.2d 1186, 1193 (6th Cir.) (en banc), cert. granted, *United States v. Kozminski*, 108 S. Ct. 225 (1987) (noting that the law of contract does not recognize that a minor possesses the legal capacity to enter into contracts).

144. 123 F. 671 (D.C.M.D. Ala. 1903). Added insight into a partial definition of involuntary servitude can also be seen in the *Peonage Cases*. In response to questions posed by a grand jury contemplating the indictment of certain persons, one portion of the judge's answer focused on protecting a victim who possessed certain mental deficiencies. *Id.* at 682. Specifically, the grand jury was instructed to indict the defendant if they found that a judge colluded with the defendant to induce the victim, "being of weak mind, or of little intelligence," to work off a nonexistent fine levied against the victim by the judge and paid by the defendant in exchange for the victim's freedom from incarceration. *Id.* Eighteen indictments were later handed down. See Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era; Part 2: The Peonage Cases*, 82 CALIF. L. REV. 646, 666-67 (1982) (citing P. DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969* 52, 54-55, 57 (1972)). Two defendants pleaded guilty, one trial ended in a conviction, and one ended in a hung jury. *Id.*

145. *United States v. Kozminski* 821 F.2d 1186 (6th Cir.) (en banc), cert. granted, *United States v. Kozminski*, 108 S. Ct. 225 (1987).

146. 821 F.2d 1186 (6th Cir.) (en banc), cert. granted, 108 S. Ct. 225 (1987).

147. One victim possessed an intelligence quotient of 60 and the other victim was found to have an intelligence quotient of 67. *Kozminski*, 821 F.2d at 1188.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1189.

dants to see friends or family members.¹⁵² The defendants always brought the victims back and discouraged them from leaving again.¹⁵³ The victims were also instructed not to converse with visitors.¹⁵⁴

A panel of the *Kozminski* court affirmed the defendants' convictions,¹⁵⁵ but the court sitting *en banc*, while declining to grant a judgment of acquittal, disapproved of the panel's reasoning.¹⁵⁶ By examining the legislative history of the 1874 Padrone statute,¹⁵⁷ the court sitting *en banc* determined that the drafters intended not only to prohibit force and threats of force to compel involuntary servitude, but also intended to combat the evils of compelling the services of persons incapable of giving legally valid consent.¹⁵⁸ Taking judicial notice of applicable precedent, the court held that involuntary servitude occurs when an individual believes that no viable alternative exists other than to perform because of the threat or use of physical force or legal process.¹⁵⁹ The court also held that the use of fraud or deceit to procure labor from a minor, an immigrant, or a mental incompetent constituted involuntary servitude.¹⁶⁰

The court disapproved of the overbroad definition of involuntary servitude articulated in *United States v. Mussry*.¹⁶¹ The *Kozminski* court criticized the *Mussry* decision, since it criminalized all forms of psychological coercion without the presence of deceit, fraud, threats of force, or legal coercion, perpetrated against "particularly vulnerable"

152. *Id.*

153. *Id.*

154. *Id.* Witnesses also testified that the defendants mentioned to neighbors and visitors that the victims were wards of the state and were in their custody. *Id.* The Kozminskis were fully aware of the fact that the men had limited mental abilities. See Brief for the United States, *supra* note 51, at 8.

155. *United States v. Kozminski*, No. 84-1228 (6th Cir. 1986), *rev'd on other grounds*, *United States v. Kozminski*, 821 F.2d 1186, 1193 (6th Cir. 1987) (*en banc*), *cert. granted*, *United States v. Kozminski*, 108 S. Ct. 225 (1987). See also Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, *United States v. Kozminski*, 72a, 79a (June 15, 1986, United States Supreme Court) (contains full text of the unreported panel decision).

156. *United States v. Kozminski* 821 F.2d 1186, 1193 (6th Cir. 1987) (*en banc*), *rev'd on other grounds*, *United States v. Kozminski*, No. 84-1228 (6th Cir. 1986), *cert. granted*, *United States v. Kozminski*, 108 S. Ct. 225 (1987).

157. *Kozminski*, 821 F.2d at 190-93. See *supra* notes 46-51 and accompanying text (discussing the meaning of the Padrone statute, as evidenced by senators' statements).

158. *Kozminski*, 821 F.2d at 1191.

159. *Id.* at 1192.

160. *Id.* The court held that in order to prove that this test is satisfied, the government must establish that the victim was under a disability to recognize or resist fraud or deceit because of the victim's vulnerability as a member of one of the specific classes mentioned above. *Id.*

161. *Kozminski*, 821 F.2d at 1193 (citing *United States v. Mussry*, 726 F.2d 1448 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984)). See *supra* notes 119-32 and accompanying text (discussing the *Mussry* decision).

victims.¹⁶² The *Kozminski* court then disapproved of the use of a general psychological coercion jury instruction by the trial court and remanded the case for a new trial on additional grounds.¹⁶³ In declining to order a judgment of acquittal, however, the court surmised that the jury might have found the victims to be mentally incompetent and that the defendants practiced deceit and fraud upon them in order to procure their services.¹⁶⁴

The *Kozminski* definition of involuntary servitude covers situations of either certain types of coercion or certain nonracial classifications of persons. Furthermore, the *Kozminski* test precludes convictions where, for example, the victim does not possess great educational or cultural disabilities.¹⁶⁵ However, the inclusion of immigrants in the *Kozminski* test apparently constitutes *dictum*, as no facts in the case suggest that the victims were immigrants.

D. Results-Oriented Test for Involuntary Servitude

A minority of courts look favorably upon a test which examines only the effect of coercion perpetrated against the victim.¹⁶⁶ In *Bernal*

162. *Id.*

163. *Id.* The *Kozminski* court concluded that expert testimony relating to the victims' experiencing a type of "captivity" syndrome arising from prolonged physical captivity was inappropriate, since no evidence was presented which suggested that the victims were placed in a state of actual captivity, unlike, for example, prisoners of war. *Id.* at 1194-95. See *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977) (requiring that expert testimony must be in conformity with a generally accepted explanatory theory). In a concurring opinion, Judge Cornelia Kennedy took exception to the majority's use of a subjective standard of involuntariness. *Kozminski*, 821 F.2d at 1198 (Kennedy, J., concurring). Judge Kennedy stated that a jury should determine whether the intent of the defendant evidenced through the defendant's conduct caused the victim to remain in a state of involuntary servitude. *Id.* The concurring opinion of Judge Kennedy implied that the problem of involuntary servitude is fundamentally an evidentiary one. *Id.* Judge Wellford, also concurring, expressed a desire to adhere to a definition which would be met if a certain amount of coercion had resulted. *Id.* (Wellford, J., concurring). The dissent argued that the new fraud/deceit prong focused only on some means (to the exclusion of other means) used to enslave people. *Id.* at 1212 (Guy, J., Lively C.J., Martin, J., and Jones, J., dissenting). Noting that the Padrone statute used the words "any person," the dissenters asserted that nonimmigrants were entitled to the benefits of the statute. *Id.* Consequently, Judge Dimock's concurring opinion in *United States v. Shackney* was more desirable than the majority's holding. *Id.* See *supra*, notes 92-94 and accompanying text (discussing Judge Dimock's concurring opinion). See also Brief for United States, *supra* note 51, at 17 (neither the thirteenth amendment nor section 1584 prescribe the means whereby involuntary servitude is achieved, nor does either provision suggest that the type of conduct prohibited is limited to legal or physical coercion or fraud and deceit).

164. *Kozminski*, 821 F.2d at 1193.

165. *United States v. Mussry*, 726 F.2d 1448 (9th Cir.), cert. denied, 469 U.S. 855 (1984). If, for example, the victims in *Mussry* were well educated or knew a great deal about American society, presumably they would have realized that they had been placed in a state of involuntary servitude. Thus, merely because a victim is also an immigrant does not automatically mean that any employment situation entered into apparently constitutes involuntary servitude. Hence the need to prove that fraud or deceit existed.

166. In contrast with the comprehensive listing of types of coercion offered by the *Kozminski*

v. United States,¹⁶⁷ the government alleged that the defendant offered a Mexican alien a job as a chambermaid at the defendant's hotel in San Antonio, Texas.¹⁶⁸ The defendant agreed in advance to pay the alien's railroad fare back to Laredo, Texas if the arrangement became undesirable.¹⁶⁹ The victim refused to prostitute for customers at the defendant's brothel.¹⁷⁰ The defendant then demanded reimbursement of the railroad fare, and threatened to reveal the victim's alien status to the immigration authorities who would imprison the victim for five years if the railroad fare was not reimbursed.¹⁷¹ The court recognized that the facts clearly proved that because the victim was indebted to the defendant, the definition of peonage was satisfied, and the conviction was thus upheld.¹⁷² The court also took notice of suggestions by the United States Supreme Court that the effect on the victim is dispositive.¹⁷³ A different inquiry not previously noticed by the judiciary, however, can be made by noting the similarity between *Bernal* and *United States v. Ingalls*.¹⁷⁴ In both these cases, the defendant(s) offered the victim a choice between continued servitude and incarceration.¹⁷⁵

The case of *United States v. Bibbs*¹⁷⁶ spotlights the recurrent practice of involuntary servitude in the agricultural products harvesting business. In *Bibbs*, the workers were constantly indebted to the defendants, since the defendants charged exorbitant prices for prepared meals, groceries, housing, and other items.¹⁷⁷ When attempting to leave, the

court, the United States Supreme Court case of *Clyatt v. United States*, 197 U.S. 201 (1904), has held that the thirteenth amendment as enforced by the peonage statute, prohibits a status or condition of involuntary servitude. *Clyatt*, 197 U.S. at 216. Accordingly, the types of coercion used by the defendant are irrelevant. *Id.* However, the focus of a statement which defines peonage in terms of the degree of coercion used against the victim is constitutional interpretation of the thirteenth amendment as enforced by the peonage statute, as opposed to statutory construction of the involuntary servitude statute.

167. 241 F. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918).

168. *Bernal*, 241 F. at 341.

169. *Id.*

170. *Id.*

171. *Id.* *Bernal* and *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964), are distinguishable. The victim in *Bernal* was threatened with actual imprisonment by the state, whereas the victims in *Shackney* were only faced with a threat of deportation, not a threat of incarceration. *See supra* notes 75-94 and accompanying text (discussing the *Shackney* case).

172. *Id.* at 342. *See supra* note 24 (defining peonage).

173. *Id.* *See supra* note 165 (discussing *Clyatt*).

174. 73 F. Supp. 76 (S.D. Cal. 1947).

175. *Compare id. with Bernal v. United States*, 241 F. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918).

176. 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978).

177. *Id.* at 1167. The defendants required the workers to eat at a camp kitchen while in North Carolina. *Id.* When the workers were transported to Florida, the defendants permitted them to shop at a local grocery store, but paid for the goods, and then charged the workers for these

workers were threatened with bodily harm, and were severely beaten.¹⁷⁸ The victims remained in the employ of the defendant because they feared for their lives.¹⁷⁹

The *Bibbs* court initially examined the validity of the charges with reference to the effect of coercion on the victims.¹⁸⁰ The court stated, however, that a showing of actual physical violence is necessary to determine whether the victims refrained from escaping because of their fear of the defendants.¹⁸¹ Thus, while the *Bibbs* court attempted to prohibit all forms of involuntary servitude by analyzing the effect of coercion on the victim, in practice the court focused on the types of coercion used by the defendants to place the victims in a state of involuntary servitude.¹⁸²

The above cases demonstrate that the Fifth Circuit Court of Appeals favors a results-oriented test for peonage prosecutions.¹⁸³ An examination of the *Bernal* and *Bibbs* cases, however, suggest that the types of coercion used by the respective defendants were highly relevant to an analysis of whether the victims were placed into a state of involuntary servitude. Consequently, while in theory the Fifth Circuit applies a results-oriented definition, in practice courts ultimately fall back upon an examination of the types of coercion utilized to compel service.

E. Analysis

The four definitions of involuntary servitude employed by the federal courts can be broadly categorized as a conflict between those cases

groceries. *Id.* The farmers provided lodging for the workers for which the crew bosses were not charged. *Id.* at 1166. The crew bosses did demand, however, that the workers pay rent to them for such housing. *Id.*

178. *Id.*

179. *Id.* See *Peonage Hearings*, *supra* note 2, at 18, 22 (1983) (testimony of Catholic social worker and victims reciting similar accounts of the use of force to instill fear in victims).

180. *Bibbs*, 564 F.2d at 1167. The court noted that the victims who escaped being beaten knew that the defendants had beaten other attempted escapees, and consequently, feared the defendants. *Id.* at 1168.

181. *Id.*

182. *Id.* In another peonage prosecution in the Fifth Circuit, the defendant paid the fines of women incarcerated in the State Prison for various offenses, who were then released into the defendant's custody. *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945). The women agreed to repay the defendant by working for the defendant as waitresses at the defendant's bar and dance club. *Id.* The defendant subsequently forced the women into prostitution, and held them in a state of peonage by means of physical violence. *Id.* As a result of the violence, the victims feared the defendant. *Id.* at 85. The court affirmed the conviction on the basis of the well-established definition of peonage, noting that the victims were retained in a state of peonage by virtue of the monetary debt they owed to the defendant. *Id.* at 86. See *supra* note 24 (defining peonage).

183. See *Clyatt v. United States*, 197 U.S. 207 (1904); *United States v. Bibbs*, 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978); *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945); *Bernal v. United States*, 241 F. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918).

which examine the means utilized to coerce the victims,¹⁸⁴ and those cases which scrutinize the end result of such coercion on the victim.¹⁸⁵ The more useful analysis places proscription of involuntary servitude within the larger context of existing civil rights controversies arising under first¹⁸⁶ and fourteenth amendment¹⁸⁷ adjudication.¹⁸⁸ Under first and fourteenth amendment principles, definitions of involuntary servitude which focus either on the result of coercion on the victim or the use of psychological coercion by the defendant would attempt to measure the degree of coercion. Opposed to such definitions are those which require either a showing of physical force, threat of legal process,

184. See *United States v. Kozminski*, 821 F.2d 1186 (6th Cir.), cert. granted, 108 S. Ct. 225 (1987); *United States v. Warren*, 772 F.2d 827 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1986); *United States v. Mussry*, 726 F.2d 1448 (9th Cir.), cert. denied, 469 U.S. 855 (1984); *United States v. Harris*, 701 F.2d 1095 (4th Cir.), cert. denied, 463 U.S. 1214 (1983); *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981); *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964); *United States v. Lewis*, 644 F. Supp. 1391 (W.D. Mich. 1986), argued, No. 87-1040, 87-1041, 87-1042, 87-1072, 87-1073, 87-1074 (6th Cir. 1987); *United States v. Ingalls*, 73 F. Supp. 76 (S.D. Cal. 1947); *Peonage Cases*, 123 F. 671 (D.C.M.D. Ala. 1903); *United States v. Ancarola*, 1 F. 676 (C.C.S.D.N.Y. 1880).

185. See *United States v. Bibbs*, 564 F.2d 1165 (5th Cir. 1977), cert. denied, 435 U.S. 1007 (1978); *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945); *Bernal v. United States*, 241 F. 339 (5th Cir. 1917), cert. denied, 245 U.S. 672 (1918).

186. Professor Nimmer categorically rejects reliance on an ad hoc balancing test in favor of "definitional balancing" in first amendment adjudication since the latter provides a definite rule for future application. M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 2.02, at 2-10, § 2.03, at 2-17 (1984). Moreover, Professor Nimmer points out that tentative acceptance of such a doctrine can be observed in *Rosenbloom v. Metromedia*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting) (stating that case-by-case analysis in libel actions should not be preferred over utilizing generally applicable rules which instead balance the competing principles at stake), and *Gertz v. Welch*, 418 U.S. 323, 343-44 (1974) (repudiating the ad hoc approach of the *Rosenbloom* plurality and asserting that, since ad hoc balancing leads to "unpredictable results and uncertain expectations," broad principles of general application must be promulgated). M. NIMMER, *supra*, § 2.03, at 2-23.

187. One issue regarding the application of the fourteenth amendment is whether significant state action exists when a facially private act of discrimination occurs. Compare *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding presence of "significant state action" where a private cafe rented space from a city agency and racially discriminated) with *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (granting of a liquor licence to a private club which racially discriminates is not significant state involvement). See Choper, *Thoughts on State Action*, 1979 WASH. U.L.Q. 757, 762, 764-65 (1979) (reliance on subjective balancing inquiry in state action cases eviscerates distinction between state action and private action, which for reasons of "political constraints and collective good sense" would not otherwise occur); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1691 (2d ed. 1988) (describing the significant state action test as a "failure"); Black, *State Action, Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967) (describing the significant state action test as a "conceptual disaster area"). See also Haber, *Notes on the Limits of Shelley v. Kraemer*, 18 RUTGERS L. REV. 811, 813 (1964); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 44-45 (1961); W. LOCKHART, Y. KAMISAR, J. CHOPER, & S. SHIFFRIN, *CONSTITUTIONAL LAW: CASES COMMENTS QUESTIONS* 1437 (6th ed. 1986) (suggesting that inquiry must be whether the state policy preference denied equal protection between conflicting individual claims, rather than whether state action has risen to some quantum level of "significant").

188. Telephone interview with Douglas S. Hobbs, Vice-Chairman and Professor of Political Science at the University of California, Los Angeles (Nov. 5, 1987) (notes on file at the *Pacific Law Journal*). Professor Hobbs has rather eloquently characterized the controversy as "attempting to cut the cake vertically rather than horizontally." *Id.*

or fraud or deceit perpetrated against certain vulnerable persons, which consequently examine specific types of coercion provable by objective criteria. With reference to congressional intent the focus of the courts must be to determine what types of coercion, rather than what degree of coercion, society is unwilling to permit.

Such an analysis does not characterize the cases as involuntary servitude or peonage prosecutions, a differentiation which makes adjudication of specific cases more difficult.¹⁸⁹ Furthermore, this proposed analytical framework has the beneficial effect of drawing upon the wealth of prior judicial and scholarly thought.¹⁹⁰ Finally, since a definition of involuntary servitude evidenced by the types of coercion used to compel service is not based upon a subjective interpretation of the statute, ideological biases are not injected into the judicial process.¹⁹¹

PROPOSAL

For the most part, courts have consistently failed to realize that congressional intent provides a fairly comprehensive definition of involuntary servitude. Since the precise definition of involuntary servitude is incomplete, practitioners, employers, and juries¹⁹² have difficulty determining when the involuntary servitude statute is applicable. The legislative histories of sections 1581 and 1584 indicate that Congress

189. Compare, *United States v. Kozminski* (1986) (panel) (unreported) (full text of opinion printed in *United States of America, Petitioner v. Ike Kozminski, et. al. Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit 72a-106a* (June 15, 1986, United States Supreme Court)) with *United States v. Kozminski*, 921 F.2d 1186 (6th Cir.) (en banc), cert. granted, 108 S. Ct. 225 (1987).

190. See *supra* notes 186-88 (discussing favorable acceptance of definitional balancing and disapproval of ad hoc balancing). See *infra* note 191 (discussing favorable acceptance of definitional balancing and disapproval of ad hoc balancing).

191. See, e.g., *Rosenbloom v. Metromedia*, 403 U.S. 1811 (1971) (Harlan, J., dissenting). In *Rosenbloom*, Justice Harlan commented that in *New York Times v. Sullivan*, 376 U.S. 254 (1964), "we . . . announced a rule of general application not ordinarily dependent for its implementation upon a case-by-case examination of trial court verdicts. . . . At least where we can discern generally applicable rules that should balance with fair precision the competing interests at stake, such rules should be preferred" to an ad hoc balancing approach. *Id.* at 63. Justice Marshall agreed with his conservative colleague's conclusion:

This [ad hoc] balancing scale may arguably be a more finely tuned instrument in a particular case. But whatever precision the ad hoc method supplies is achieved at a substantial cost in predictability and certainty.

Id. at 81 (Marshall, J., dissenting).

192. The jury system has been severely criticized by one of the most perceptive jurists on the Second Circuit. See J. FRANK, *LAW AND THE MODERN MIND* 180-81 (1930) (concluding that since jurors "are hopelessly incompetent as fact-finders," they make "the orderly administration of justice virtually impossible"). See *Giacco v. Pennsylvania*, 382 U.S. 399, 402 (1966) (holding that a statute which leaves judges and juries free to determine without any legally fixed requirements what is and is not prohibited in a particular case is unconstitutionally vague).

intended to proscribe certain types of coercion in relation to all persons and to protect vulnerable classes of persons by virtue of their status as minors, immigrants, or mentally retarded.¹⁹³ In cases such as *United States v. Mussry*,¹⁹⁴ *United States v. Bernal*,¹⁹⁵ and *United States v. Bibbs*,¹⁹⁶ the legal analysis as to whether psychological coercion was present or whether the use of any means of coercion resulted in a condition of involuntary servitude is so dependent upon the facts that ad hoc decisionmaking is the result.¹⁹⁷ Consequently, the implicit listing of types of coercion provided by Congress is ignored.¹⁹⁸ Finally, reliance on a results-oriented approach or a psychological coercion standard increases the danger of frivolous claims,¹⁹⁹ and increases the possibility of precluding meritorious prosecutions due to the mental deficiencies of the victim.²⁰⁰

193. See *supra* notes 36-70 and accompanying text (discussing the legislative history of the involuntary servitude statute).

194. 726 F.2d 1448 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984). See *supra* notes 119-32 and accompanying text (discussing the *Mussry* case).

195. 241 F.339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918). See *supra* notes 167-75 and accompanying text (discussing the *Bernal* case).

196. 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978). See *supra* notes 176-82 and accompanying text (discussing the *Bibbs* case).

197. Such a balancing test is arguably overinclusive, since a criminal statute "must be strictly construed, and any ambiguity must be resolved in favor of lenity. . . ." *United States v. Enmons*, 410 U.S. 396, 411 (1973). See also *United States v. Shackney*, 333 F.2d 475, 487 (1964) (citing the same proposition as embodied in *Enmons* by reference to *Bell v. United States*, 349 U.S. 81, 83 (1955)). See also Brief for the United States, *supra* note 51, at 38. The government grudgingly concedes that the determination of "whether a person has been held to involuntary servitude may be a matter of degree in a particular case." *Id.*

198. See *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964); *United States v. Kozminski*, 821 F.2d 1186 (6th Cir.), *cert. granted*, 108 S. Ct. 225 (1987). Consequently, this approach is potentially underinclusive.

199. See, e.g., *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972). Plaintiff, a major league professional baseball player, challenged the reserve system of baseball on antitrust, peonage, and thirteenth amendment grounds. *Flood*, 316 F. Supp. at 272. In denying the claim of the plaintiff under section 1581 the trial court referred to the controlling precedent of *Shackney* in pointing out that Flood still could exercise a choice between continued servitude and liberty; namely play for the Philadelphia Phillies, or retire. *Id.* at 281.

200. J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND FOR STATE COURTS ¶ 601[4] (1987). The viability of the *Mussry* test exhibits grave problems where the category of mental incompetency is concerned. By definition, a general objective standard cannot be used to determine whether a person who has already been classified as having a reasoning deficiency felt compelled to labor. A purely subjective test also exhibits problems, even though mental incompetents are usually permitted to testify in court as long as the trial judge is satisfied not only that the testimony is competent, but that the testimony is relevant. *Id.* The value of such testimony is highly suspect by virtue of the nature of the charge, since one is not inquiring into specific events, but instead ascertaining the subjective opinion of the victim. Thus, a mentally retarded person with an IQ lower than 60 or 67 might very well believe himself not to be in a state of involuntary servitude, whereas almost any rational person, when examining the type of coercion which resulted, would vehemently

A workable test for determining whether a state of involuntary servitude exists should first analyze whether the method of coercion is a type society will not tolerate.²⁰¹ The types of coercion listed by the *Kozminski* court²⁰² serve as a benchmark for determining whether this first prong has been met. Second, a test for involuntary servitude must determine whether the victim is denied a real choice between liberty and slavery.²⁰³ By using this bifurcated approach, problems associated with ad hoc decisionmaking are eliminated, and the intent of Congress is closely followed. Finally, additions to the list of types of coercion prohibited may be made, as long as the consensus is that such conduct is a strong indication that the labor was coerced.²⁰⁴

Virtually all of the cases described in this comment can be reconciled by means of this two-pronged test, such that prior case results are left intact. For example, in *United States v. Shackney*,²⁰⁵ neither force nor use of legal process was present, thus the first prong has not been satisfied. Moreover, according to the *Shackney* court, a threat of deportation still afforded the employee a choice between continued servitude and freedom from incarceration, since a threat of deportation by itself fails to physically confine a person.²⁰⁶ Thus, the second requirement had not been met and consequently, according to the

disagree. Consequently, where the mental retardation is so severe that the retardation affects the victim's capacity to observe, remember, and truthfully narrate the event, the judge must bar the testimony completely. *United States v. Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1973). As a result, in certain circumstances, otherwise meritorious prosecutions would have to be foregone due to the mental inability of the victim to testify as to his beliefs. Arguably, the problems inherent in the use of either a purely subjective or a general objective standard tend to intimate that the better alternative is to reject both and adopt what is implicit in *Kozminski*. In other words, in involuntary servitude prosecutions, only specific objective criteria are relevant, namely whether the victim is mentally retarded, immature, or an immigrant.

201. See *supra* notes 146-65 and accompanying text (discussing the *Kozminski* test).

202. Force, threat of force, or legal process, or fraud and deceit in relation to minors, mentally retarded persons, and immigrants, if any of these persons possess certain cognizable deficiencies. See *United States v. Kozminski*, 821 F.2d 1186, 1192 (6th Cir.) (en banc), *cert. granted*, *United States v. Kozminski*, 108 S. Ct. 225 (1987).

203. See *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964); *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945); *United States v. Ingalls*, 73 F. Supp. 76 (C.D. Cal. 1947).

204. This determination may be made by answering the following two questions. First, the new type of coercion must be found to be "equivalent to imprisonment or worse." *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir. 1964). Second, since the inquiry as to the definition of involuntary servitude is primarily a question of statutory construction, the new type of coercion must also have a strong foundation in the legislative history of the involuntary servitude statute. See *supra* notes 36-70 and accompanying text (discussing the legislative history of the involuntary servitude statute).

205. 333 F.2d 475 (2d Cir. 1964). See *supra* notes 75-94 and accompanying text (discussing the *Shackney* case).

206. *Shackney*, 333 F.2d at 486.

court, a state of involuntary servitude did not exist. In contrast, all the defendants in *United States v. Harris*²⁰⁷ and *United States v. Bibbs*,²⁰⁸ to cite just two examples, perpetrated acts of physical violence against their victims, commensurate with the first part of the bifurcated analysis. Because the defendants also prohibited the victims from leaving, none of the victims could exercise a choice between continued servitude and freedom. Consequently, the second part of the proposed test is satisfied. Thus, in all cases discussed above, except in *United States v. Shackney*, a state of involuntary servitude resulted.

In *United States v. Ingalls*²⁰⁹ and *Bernal v. United States*,²¹⁰ the types of coercion used by the defendants were threats to initiate criminal prosecutions which would result in incarceration by the state. This use of legal process to compel labor meets the requirements of the first prong. Moreover, the victims had a "choice" between remaining enslaved to the defendants, or being incarcerated by the state. Consequently, the second part of the proposed test has been satisfied, and the results in both cases remain unchanged.

In *United States v. Ancarola*,²¹¹ children were enticed into slavery by means of fraud or deceit, as were the Indonesian immigrants in *United States v. Mussry*,²¹² and the mentally retarded men in *United States v. Kozminski*.²¹³ Thus, the first prong of the proposed analysis

207. 701 F.2d 1095 (4th Cir.), *cert. denied*, 463 U.S. 1214 (1983). *See supra* notes 95-103 and accompanying text (discussing the *Harris* case).

208. 564 F.2d 1165 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978). *See supra* notes 176-82 and accompanying text (discussing the *Bibbs* case).

209. 73 F. Supp. 76 (S.D. Cal. 1947). *See supra* notes 104-16 and accompanying text (discussing the *Ingalls* case).

210. 241 F. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918). *See supra* notes 167-75 and accompanying text (discussing the *Bernal* case).

211. 1 F. 676 (C.C.S.D.N.Y. 1880). *See supra* notes 133-43 and accompanying text (discussing the *Ancarola* case).

212. 726 F.2d 1448 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984). *See supra* notes 119-32 and accompanying text (discussing the *Mussry* case).

213. 821 F.2d 1186, 1192 (6th Cir.) (en banc), *cert. granted*, *United States v. Kozminski*, 108 S. Ct. 225 (1987). *See supra* notes 146-65 and accompanying text (discussing the *Kozminski* case). The test cannot be applied to the *Peonage Cases*, 123 F. 671 (D.C.M.D. Ala. 1903), since no prosecution was at issue. The outcome in *Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I. 1978), *aff'd*, 602 F.2d 458 (1979), might be particularly troublesome for some scholars, since "brainwashing" does not easily fall into any category described above. Nevertheless, a solution is possible. If a compelling amount of evidence is presented to show by objective criteria that the mind of the alleged victim was so severely altered by the actions of the defendant that the victim was totally unable to choose between continued servitude and liberty, then a victim could be placed into the category of mentally incompetent. An involuntary servitude prosecution thus becomes possible. Caution, however, is necessary to ensure that the free exercise clause of the first amendment is not transgressed. *See United States v. Kozminski*, 821 F.2d 1186, 1193 (6th Cir.), *cert. granted*, 108 S. Ct. 225 (1987) (criticizing the use of section 1584 against the day-to-day activities of "cult groups, communes and religious orders").

has been satisfied. By virtue of their cultural, mental, or juvenile deficiencies, all of the victims were unable to exercise a choice between freedom and slavery. Since the second part of the test is met, none of the convictions in these cases would be reversed under a bifurcated analysis.

CONCLUSION

The meaning of the involuntary servitude statute has been puzzled over by courts for decades. The intent of Congress indicates, however, that all persons are protected from certain types of coercion perpetrated against them in order to compel labor, namely, physical violence or the threat of legal process. Moreover, minors, immigrants, and mental incompetents are protected to an even greater extent than the general population in order that their labor is not coerced by fraud or deceit, even in the absence of force or threat of legal process. Use of a two-pronged test will better effectuate the intent of Congress. First, the types of coercion used should be examined in order to determine whether Congress has prohibited a certain type of coercive conduct. Second, a court must determine whether the employee could exercise a realistic choice between continued servitude and liberty. If this bifurcated test is adopted by the United States Supreme Court, juries and lower courts will be forced to focus on types of coercion, rather than degrees of coercion. Such a test avoids the almost inevitable subjective problems a degree-based analysis entails and the implicit listing of types of coercion provided by Congress is followed. Moreover, such a test precludes the possibility of frivolous claims, and eliminates the possibility of precluding meritorious prosecutions due to the mental deficiencies of the victim. Thus, by the use of this bifurcated test, the purpose of the thirteenth amendment and its enforcement mechanisms are satisfied, while at the same time the foundation of capitalism, a "system of free and voluntary labor," is preserved.

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