

The Thirteenth Amendment in Family Law: The “Involuntary Servitude” of Support Obligations

by

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Introduction

At first blush, raising Thirteenth Amendment concerns in a family law case seems almost blasphemous, a trivialization of our original sin of slavery.¹ Nonetheless, the court’s ability to coerce

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¹ Margaret Howard expressed a similar discomfort in addressing Thirteenth Amendment concerns in bankruptcy law: “[I]t might seem an affront to the history of slavery in this country to suggest that similar concerns are raised by an expectation that debtors pay their debts. Nevertheless, certain aspects of the Bankruptcy Code present genuine constitutional difficulties under the Thirteenth Amendment.” Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191.

This squeamishness might explain the historical paucity of examinations of the Thirteenth Amendment as opposed to the Fourteenth Amendment. See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 976 (2019) (“In July 2018, I conducted two dozen research queries to determine the gap in scholarly attention between these two [Thirteenth and Fourteenth] constitutional amendments. At a glance, the findings show that between 1865 and 1956, only twelve law review articles even mention the Thirteenth Amendment in a title. By contrast, for a similar period almost 250 articles directly address the Fourteenth Amendment Consequently, the Thirteenth Amendment legal canon, while expanding as evidenced by diverse contributions from distinguished legal scholars, remains to some degree, emergent.”). Further, there has always been a reticence to apply constitutional law to family law. Akhil Reed Amar & Daniel Widawsky, *Commentary, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1385 n.106 (1992) (“Because constitutional law and family law fall on different sides of the ‘public’ law/‘private’ law divide, they are studied by different sets of scholars.”); Douglas NeJaime, *The Family’s Constitution*, 32 CONST. COMMENT. 413, 415 (2017) (“On the conventional un-

both payment and specific behavior in a family law case does raise the spectre that in some instances, the court has overstepped its authority into constitutionally forbidden action. This article seeks to explore the limits, if any, of the court's general and coercive powers under the Thirteenth Amendment in family law cases, focusing on child support and spousal support.² First,

derstanding, family law and constitutional law exist in relatively separate spheres, but occasionally meet when constitutional law, exercising power in a top-down way, dictates new directions for family regulation.”).

² Other aspects of the Thirteenth Amendment's intersection with family law include: the relations of family members between and among themselves, see Julie Novkov, *The Thirteenth Amendment and the Meaning of Familial Bonds*, 71 MD. L. REV. 203, 226 (2011) (discussing the role of marriage promotion as a policy priority during Reconstruction and the “new social order,” and arguing “the denial of recognition for the marital and familial relationship is a contemporary badge of servitude or at least of deep inferiority”); domestic violence, see Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 408 (1993); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097 (1998); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 216 (1992); surrogacy, see Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 CORNELL L. REV. ONLINE 114, 125 (2019); Margaret D. Townsend, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 476 (1982); and division of property at divorce, in particular professional licenses, e.g., *Severs v. Severs*, 426 So.2d 992, 994 (Fla. Dist. Ct. App. 1983) (“The wife's claim to a vested interest in the husband's education and professional productivity, past and future, is unsupported by any statutory or case law. Indeed, such an award by the trial court would transmute the bonds of marriage into the bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution.”); *O'Brien v. O'Brien*, 489 N.E.2d 712, 720 (N.Y. 1985) (Meyer, J., concurring) (discussing the forced-labor aspect of holding that a person's career is property); see also Harold J. Stanton, *Community Property and the Celebrity's Potential Right of Publicity*, L.A. LAW., Mar. 1986, at 22 (examining the potential for a form of involuntary servitude if a career is held to be marital property).

Indeed, as stated by one scholar,

[T]he Thirteenth Amendment unquestionably had profound legal implications for the family, not only because of the links between slave law and other branches of family law, but also because emancipation led to new rights for former slaves in their capacities as spouses and parents . . . and because slavery itself was an institution often characterized by blood and sexual ties between masters and slaves.

Sally F. Goldfarb, “*No Civilized System of Justice*”: *The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 529 n.253 (2000).

the article will give a short primer on the history of Thirteenth Amendment jurisprudence. Second, the article will explore the arguments litigants have made under the Thirteenth Amendment to avoid paying child support or spousal support altogether, to avoid seek-work orders, to avoid incarceration as a punishment for failure to pay, either by civil or criminal contempt, or to avoid garnishment of wages. The article will conclude that the only successful arguments concerning the Thirteenth Amendment are those that challenge seek-work orders that demand a party seek and find a particular job in a particular field, or that a party employ the other party.

I. The Thirteenth Amendment: A Short Primer

The Thirteenth Amendment to the U.S. Constitution, passed by Congress on January 31, 1865, and ratified on December 6, 1865, provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.³

By its simple and forthright terms, the Thirteenth Amendment prohibits slavery and involuntary servitude, except as punishment for a crime,⁴ and provides Congress with the power to enforce this prohibition via appropriate legislation.⁵

These intersections of the Thirteenth Amendment and family law are beyond the scope of this article.

³ U.S. CONST. amend. XIII.

⁴ It is worth noting that on December 2, 2020, a joint resolution was introduced in the House and Senate, seeking to remove the punishment clause. A new section would read; “Neither slavery nor involuntary servitude may be imposed as a punishment for a crime.” S.J. Res. 81, 116th Cong. (2020). The primary sponsor, Oregon Senator Jeff Merkley, hopes to reintroduce the joint resolution in the next session.

⁵ Excellent discussions of the history of the Thirteenth Amendment may be found in James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426 (2018); Michael Scimone, *More to Lose than Your Chains: Realizing the Ideals of the Thirteenth Amendment*, 12 N.Y. CITY L. REV. 175 (2008); Dawinder S. Sidhu, *Threshold*

Congress first used this authority to pass the Civil Rights Act of 1866,⁶ which provided that any citizen has the same right that a white citizen has to make and enforce contracts, sue and be sued, give evidence in court, and inherit, purchase, lease, sell, hold, and convey real and personal property. Additionally, the 1866 Act guaranteed to all citizens the “full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and . . . like punishment, pains, [and] penalties.”⁷ Congress again used its power under the Thirteenth Amendment to pass the Civil Rights Act of 1875, which provided that “all persons . . . shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.”⁸

The first major case to interpret the Thirteenth Amendment was *The Slaughter-House Cases*.⁹ In this case, a number of butchers collectively challenged a Louisiana state law that required butchers in New Orleans to use only one particular slaughterhouse. The butchers claimed that the law created “an involuntary servitude” in violation of Section One of the Thirteenth Amendment. The Court held that the Thirteenth Amendment could not provide relief, because its “pervading purpose,”¹⁰ at “the most

Liberty, 37 *CARDOZO L. REV.* 503 (2015); see also Samuel M. Strongin, *When Thirteen Is (Still) Greater than Fourteen: The Continued Expansive Scope of Congressional Authority Under the Thirteenth Amendment in a Post - City of Boerne v. Flores World*, 102 *V.A. L. REV.* 501 (2016) (discussing the implications for Thirteenth Amendment jurisprudence in light of the Supreme Court’s decision in *City of Boerne v. Flores* which restricted the enforcement provisions of the Fourteenth Amendment). See generally ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* (2004).

⁶ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982).

⁷ *Id.*

⁸ Civil Rights Act of 1875, 18 Stat 335, 336.

⁹ 83 U.S. 36 (1872).

¹⁰ *Id.* at 71.

cursory glance,”¹¹ was the destruction of the institution of slavery.¹²

While the Court refused to offer relief to the plaintiffs in the case, the Court stated that the purpose was the eradication of the institution of slavery as it existed, and continued that *all* involuntary servitude, not just that of the African Americans, was forbidden:

[W]hile negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.¹³

The promise of this rich rhetoric was denied in *The Civil Rights Cases*.¹⁴ In this case, the Court held that the provisions of the Civil Rights Act of 1875 banning certain private misconduct against African Americans exceeded Congress’s authority under the Thirteenth and Fourteenth Amendments. The Court explained that “[u]nder the Thirteenth Amendment, it has only to do with slavery and its incidents,”¹⁵ and those terms are tethered to their history:

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master’s will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution.¹⁶

¹¹ *Id.* at 67.

¹² *Id.* at 71. One author has opined that because the parties were *not* African American, the *Slaughter-House* opinion contained language “seemingly very helpful to African Americans, describing, for example, how the Fourteenth Amendment protected them.” Scott W. Howe, *Atoning for Dred Scott and Plessy While Substantially Abolishing the Death Penalty*, 95 WASH. L. REV. 737, 756 n.141 (2020).

¹³ 83 U.S. at 72.

¹⁴ 109 U.S. 3 (1883).

¹⁵ *Id.* at 23.

¹⁶ *Id.* at 22.

Consequently, while the authority of Congress under Section 2 of the Thirteenth Amendment to eliminate “the badges and incidents of slavery” was broad,¹⁷ it was not unlimited. In striking down the Civil Rights Act of 1875, the Court wrote:

Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the *social rights of men and races* in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.¹⁸

As stated by one author, with these cases and their progeny,¹⁹ “Most scholars of this period agree that the Supreme Court betrayed the spirit and letter of the Civil War Amendments.”²⁰ Indeed, this same author opines,

Had the Civil Rights Cases gone the other way—had the Court upheld the power of Congress to prevent segregation in inns, restaurants, transportation, and other public accommodations – *Plessy* and the “separate but equal” doctrine would never have arisen for most aspects of American society. The Louisiana statute at issue in *Plessy* might never have been passed because it would have obviously violated the Civil Rights Act of 1875.²¹

The Supreme Court overruled *The Civil Rights Cases* in *Jones v. Alfred H. Mayer Co.*,²² and by doing so reinvigorated the quiescent Thirteenth Amendment.²³ In *Jones*, the Court held that

¹⁷ *Id.* at 20; *see also id.* at 35 (Harlan, J., dissenting) (“That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation, the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable.”).

¹⁸ 109 U.S. at 22 (emphasis added).

¹⁹ *E.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Berea College v. Kentucky*, 211 U.S. 45 (1908).

²⁰ Paul Finkelman, *The Hidden History of Northern Civil Rights Law and the Villainous Supreme Court, 1875-1915*, 79 U. PITT. L. REV. 357 (2018).

²¹ *Id.* at 364. Stated more poetically, “[T]he slave went free; stood a brief moment in the sun; then moved back again toward slavery.” W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880* 26 (Routledge 1st ed. 2012).

²² 392 U.S. 409, 433-40 (1968).

²³ This is not to say that the Thirteenth Amendment was completely forgotten in the years 1883 to 1968. For example, Justice Brandeis wrote, upon consideration of an anti-strike injunction against labor, that an injunction against a refusal to work was an “instrument for imposing restraints upon labor

“Congress has power under the Constitution to do what Section 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property.”²⁴ This power is derived from the Thirteenth Amendment, which, unlike the Fourteenth Amendment has no “state action” limitation: “Thus, the fact that Section 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem.”²⁵ Importantly, the Court reasoned, Section 2 of the Thirteenth Amendment gave Congress the “power to enforce [the amendment] by appropriate legislation.”²⁶ This section necessarily “clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery.’”²⁷ Furthermore, “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery”²⁸ and to pass laws

which reminds one of involuntary servitude.” *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n.*, 274 U.S. 37, 65 (1927) (Brandeis, J., dissenting). Further, in *Bailey v. Alabama*, 219 U.S. 219, 240-41 (1911), the Court seemingly repudiated the *Civil Rights Cases*’s notion of tethering involuntary servitude to the history of slavery when it stated, “While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag. The words involuntary servitude have a larger meaning than slavery.” *See also* *United States v. Reynolds*, 235 U.S. 133 (1914) (holding that an agreement to work for a surety who assumed financial responsibility for a fine was independent of the prior criminal proceeding and thus fell outside the penal exception to the Thirteenth Amendment); *Clyatt v. United States*, 197 U.S. 207, 215 (1905) (upholding the Anti-Peonage Act, passed pursuant to the enforcement powers of the Thirteenth Amendment, defining “peonage,” as that word is used in the Act: “What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness.”).

²⁴ *Jones*, 392 U.S. at 437.

²⁵ *Id.* at 438.

²⁶ *Id.*

²⁷ *Id.* at 439 (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

²⁸ *Id.* at 440. *See also* *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971) (relying on *Jones*, upholding the constitutionality of 42 U.S.C. § 1985(3), by stating that the right to travel by way of the interstate highways was a privilege of national citizenship and concluded that Congress was within its power granted by the Thirteenth Amendment when it created “a statutory cause of action for [African-American] citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.”). For additional examples of deci-

prohibiting them.²⁹ “In so holding, the Court resurrected the Thirteenth Amendment as a potentially significant source of civil

sions utilizing the post-*Jones* approach to the Thirteenth Amendment, see *United States v. Kozminski*, 487 U.S. 931, 961 (1988) (Brennan, J., concurring); *City of Memphis v. Greene*, 451 U.S. 100, 124-29 (1981); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971).

²⁹ Relying on its power as stated by *Jones*, Congress has used the Thirteenth Amendment recently to pass the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, div. E., § 4702(7), 123 Stat. 2190, 2835 (2009) (codified at 18 U.S.C. § 249 (2012)); the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); and the Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (codified as amended at 42 U.S.C. § 1981).

Most interestingly, the Victims of Trafficking and Violence Protection Act of 2000 was passed to expand the definition of “involuntary servitude” beyond that defined by *Kozminski*, 487 U.S. 931, for victims of trafficking as defined in the statute. In *United States v. Dann*, 652 F.3d 1160, 1169-70 (9th Cir. 2011), the court explained as follows:

Legislative history suggests that Congress passed this act to correct what they viewed as the Supreme Court’s mistaken holding in *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988). *Kozminski* limited the definition of involuntary servitude to “physical” or “legal” coercion. *Id.* at 952, 108 S.Ct. 2751. In § 1589, Congress intended to “reach cases in which persons are held in a condition of servitude through nonviolent coercion.” Victims of Trafficking and Violence Protection Act of 2000 § 102(b)(13).

Congress concluded that the means used by modern-day traffickers are “increasingly subtle.” H.R. Rep. No. 106-939, at 101, 2000 U.S.C.C.A.N. 1380, 1392-93 (2000) (Conf. Rep.), 2000 WL 1479163, at *91. And therefore § 1589 defines harm broadly as:

any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

18 U.S.C. § 1589(c)(2). In other words, someone is guilty of forced labor if he intends to cause a person in his employ to believe that if she does not continue to work, she will suffer the type of serious harm—physical or nonphysical, including psychological, financial, reputation harm—that would compel someone in her circumstances to continue working to avoid that harm. See, e.g., *United States v. Calimlim*, 538 F.3d 706, 712, 714 (7th Cir.2008) (finding threat to stop paying victim’s poor family members constitutes serious harm).

rights protections after more than one hundred years during which the Amendment had largely been treated as obsolete.”³⁰

Modern cases, as well as modern scholarship,³¹ embraced the revivification of the Thirteenth Amendment. For example, in *United States v. Nelson*,³² the Court took as “long established” the power of Congress to reach conduct outside the strict parameters of slavery, and the badges and incidents thereto, to regulate both governmental and private conduct:

Thus it has long been settled that the Thirteenth Amendment “is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.” *Civil Rights Cases*, 109 U.S. at 20, 3 S.Ct. 18. And accordingly, “[u]nder the Thirteenth Amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.” *Id.* at 23, 3 S.Ct. 18; *see also Runyon v. McCrary*, 427 U.S. 160, 179, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (noting that it “has never been doubted” that the power granted Congress by the Thirteenth Amendment “includes the power to enact laws . . . operating upon the acts of individuals” (quotation marks and citation omitted)); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438–39, 88 S.Ct.

³⁰ William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1313 (2007).

³¹ Ruben J. Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 NEV. L.J. 479 (2018) (“The Thirteenth Amendment is undergoing a renaissance in scholarship and advocacy. Labor scholars and advocates are looking at the Thirteenth Amendment as a new source of constitutional rights for several reasons”); Chad G. Marzen, *Law, Popular Legal Culture, and the Case of Kansas, 1854-1856*, 14 WYO. L. REV. 189, 190 n.5 (2014) (“A vast number of legal scholars have discussed the Thirteenth Amendment in law review articles,” citing nineteen articles on the Thirteenth Amendment that had been published in the years 2012-214); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 310 (2004) (“Even though the Thirteenth Amendment was ratified in 1865, its jurisprudence is relatively nascent.”). In the last five years, numerous symposia have been dedicated to the Thirteenth Amendment. *E.g.* Symposium, *Reviving the Thirteenth Amendment*, 104 CORNELL L. REV. ONLINE (Sept. 2019); Symposium, *The Thirteenth Amendment and Economic Justice*, 19 NEV. L. J. (Winter 2018); Symposium, *The Original Meaning and Continuing Relevance of the Thirteenth Amendment*, 15 GEO. J. L. & PUB. POL’Y (Winter 2017); Symposium, *The Thirteenth Amendment Through the Lens of Class and Labor*, 39 SEATTLE U. L. REV. (Spring 2016).

³² 277 F.3d 164 (2d Cir. 2002).

2186, 20 L.Ed.2d 1189 (1968) (“If Congress has power under the Thirteenth Amendment to eradicate conditions . . . , then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals.”).³³

Likewise, in *United States v. Diggins*,³⁴ the court matter-of-factly stated, “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery. Therefore, if Congress rationally determines that something is a badge or incident of slavery, it may broadly legislate against it through Section 2 of the Thirteenth Amendment.”³⁵

While Congressional power under the Thirteenth Amendment cannot be gainsaid, the ability of a private person to assert governmental or private action as a badge or incident of slavery without Congressional say-so has met with considerably less success.³⁶ An assertion of involuntary servitude³⁷ is likewise difficult,³⁸ despite the existence of the Anti-Peonage Act,³⁹ though

³³ *Id.* at 175-76.

³⁴ 435 F. Supp. 3d 268 (D. Me. 2019).

³⁵ *Id.* at 271-72 (citation omitted).

³⁶ William M. Carter, Jr., *Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination*, 39 SEATTLE U. L. REV. 813, 823 (2016) (“[C]ases where courts have rejected litigants’ claims based upon the badges and incidents of slavery theory of the Thirteenth Amendment itself are legion, while cases accepting that theory are few and far between. The track record regarding assertions that nonracial subordination amounts to a badge or incident of slavery is equally dismal.”).

³⁷ As stated by the Supreme Court, the Thirteenth Amendment prohibits “involuntary servitude enforced by the use or threatened use of physical or legal coercion through law or the legal process.” *Kozminski*, 487 U.S. at 944. The temporal duration of the involuntary servitude need not be long; it “can be slight.” *United States v. Pipkins*, 378 F.3d 1281, 1297 (11th Cir. 2004), *vacated on other grounds, but later reinstated*, 412 F.3d 1251 (11th Cir. 2005).

³⁸ *E.g.*, *Dillard v. Morris Cnty. Prosecutor’s Office*, No. 19-19089, 2020 WL 4932527 (D. N.J. Aug. 24, 2020) (“The Complaint alleges that Defendants forced King into involuntary servitude by refusing to accept or process his resignation “and/or” by taking other unidentified action to prevent him from leaving his employment. Absent is any allegation that Defendants did so through the use or threatened use of physical or legal coercion. The Thirteenth Amendment claim is therefore dismissed.”).

³⁹ Ch. 187, 14 Stat. 546 (1867) (codified as amended in 18 U.S.C. § 1581 (2000) & 42 U.S.C. § 1994 (2000)). *See Clyatt*, 197 U.S. at 215 (upholding the constitutionality of the Anti-Peonage Act, but holding on the merits that the

not unheard of.⁴⁰ Can a party ever assert a claim of involuntary servitude under the Thirteenth Amendment in a child support or spousal support case without being laughed out of court, or worse, sanctioned?⁴¹

actions complained of did not meet the definition of peonage, and defining peonage as follows: “What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness.”).

⁴⁰ One example of “involuntary servitude” prohibited by the Thirteenth Amendment that has been accepted is specific performance of a personal services contract.

A claim for breach of contract, particularly a contract for personal services, does not typically warrant injunctive relief. *Fox v. Williams*, 244 Cal. App. 2d 223, 235 (1966) (“It is a familiar rule that a contract to render personal services cannot be specifically enforced.”). “An unwilling employee cannot be compelled to continue to provide services to his employer either by ordering specific performance of his contract, or by injunction.” *Beverly Glen Music, Inc. v. Warner Commc’ns, Inc.*, 178 Cal. App. 3d 1142, 1144 (Ct. App. 1986). To do so runs afoul of the Thirteenth Amendment’s prohibition against involuntary servitude. *Id.* (citing *Poultry Producers Etc. v. Barlow*, 189 Cal. 278, 288 (1922)).

Softball v. Cayton, No. 5:20-cv-01661-EJD, 2020 WL 4349848, *2 (N.D. Cal. July 29, 2020).

Another area in which a Thirteenth Amendment claim has met with some success is bankruptcy. *See, e.g., Toibb v. Radloff*, 501 U.S. 157, 165-66 (1991) (Congress’ primary concern about a debtor being forced into a Chapter 13 case was to avoid compelling debtors “to toil for the benefit of creditors in violation of the Thirteenth Amendment”); *In re Snyder*, 509 B.R. 945, 955 (Bankr. D.N.M. 2014) (“there are potential constitutional problems with compelling an individual chapter 7 debtor to convert to chapter 11.”); *In re Graham*, 21 B.R. 235, 238 (Bankr. N.D. Iowa 1982) (citing legislative history that a mandatory chapter 13 plan would constitute involuntary servitude.). See the excellent article by Margaret Howard, *supra* note 1, also drawing the analogy of involuntary servitude under bankruptcy law to child support orders.

⁴¹ *Knight v. City of Mercer Island*, 70 F. App’x 413, 415 (9th Cir. 2003) (holding that the district court properly entered a litigation bar preventing Knight from filing any further frivolous filings regarding the constitutionality of his child support order); *Agur v. Wilson*, 498 F.2d 961, 964 n.3 (2d Cir. 1974) (deeming frivolous the argument that incarcerating a person for not paying child support would violate the Thirteenth Amendment); *Bowerman v. Lyon*, NO: 17-cv-13903, 2018 WL 3639848, *3 (E.D. Mich. June 20, 2018) (“Count 6 attempts to juxtapose an obligation to pay court-ordered child support with slavery. Such an argument is laughably devoid of merit.”); *Adams v. Cty. of Calhoun*, No. 1:16-CV-678, 2018 WL 1324465, *2 (W.D. Mich. Mar. 15, 2018)

II. The “Involuntary Servitude” of Child Support and Spousal Support.

While the Thirteenth Amendment’s primary purpose was to abolish the institution of slavery as it had existed in the United States at the time of the Civil War, “the phrase ‘involuntary servitude’ was intended to extend ‘to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.’”⁴² “Involuntary servitude” therefore encompasses peonage, where a person is forced, through a threat of legal sanctions, to work off a debt.⁴³

(“There is no comparison between paying court-ordered child support and compulsory, involuntary servitude.”); *McCarthy v. McCarthy*, 276 N.E.2d 891, 895 (Ind. Ct. App. 1971) (“To further entertain the manifold questions raised by appellant with regard to the constitutional validity [under the Thirteenth Amendment] of installment alimony would do no more than to clutter this opinion with subject matter for midnight kitchen discussion.”); *Child Support Enforcement Agency v. Doe*, 125 P.3d 461, 474-75 (Haw. 2005) (holding a father subject to sanctions for filing a frivolous appeal in an action in which he challenged the child support award on the grounds that the child support award infringed on his right to be free from involuntary servitude; the court determining the contentions were palpably without merit and long ago put to rest by well-settled precedent); *McKenna v. Steen*, 422 So.2d 615, 618 (La. Ct. App. 1982) (finding the allegations that a child support order imposed on a law student amounted to an imposition of involuntary servitude by forcing him to continue in his previous occupation “so ludicrous that they hardly dignify a response”); *Fox v. Fox*, 221 A.3d 126, 129 (Me. 2019) (“In his reply brief, Elwood cites to the Thirteenth Amendment to the United States Constitution, which outlaws slavery, and asserts that the District Court’s enforcement of his child and spousal support obligations is akin to modern-day involuntary servitude. This is a frivolous and contumacious argument, indicative of the baselessness of Elwood’s claims on appeal.”); *Barrett v. Department of Soc. Servs., Division of Child Support Enforcement ex rel. Minor*, No. 0074-19-3, 2020 WL 622952, *10 (Va. Ct. App. Feb. 11, 2020) (“Barrett alleges that if the child support statute does not violate the Virginia Constitution, a trial court awarding support to a child that has reached the age of majority, but not yet graduated high school, violates the Thirteenth Amendment to the United States Constitution. Finding Barrett’s contentions without merit and wholly frivolous, we disagree.”).

⁴² *Kozminski*, 487 U.S. at 932, quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916).

⁴³ See, e.g., *Bailey v. Alabama*, 219 U.S. 219, 243 (1911); *Clyatt*, 197 U.S. at 215-16.

In essence, the choice is work or imprisonment or some other legal sanction.⁴⁴

Child support and spousal support do not fall within this definition of involuntary servitude, because if the obligor pays, there is no imprisonment or other legal sanction. In other words, merely ordering the payment of child support or spousal support does not itself constitute involuntary servitude.⁴⁵ Further, a num-

⁴⁴ The Supreme Court remarked that “in every case in which [it] has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction.” *Kozminski*, 487 U.S. at 943. Citing to *Kominski* for the proposition that “the phrase ‘involuntary servitude’ was intended . . . ‘to cover those forms of compulsory labor akin to African slavery,’” the U.S. Court of Appeals for the Third Circuit has found that “[m]odern day examples of involuntary servitude have been limited to labor camps, isolated religious sects, or forced confinement.” *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 540 (3d Cir. 2012), quoting *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 999 (3d Cir. 1993).

Thus, while imprisoning a person for failure to pay a debt can run afoul of the Thirteenth Amendment, see *Pollock v. Williams*, 322 U.S. 4, 18-19 (1944), holding that imprisonment for contempt for failure to pay support is not constitutionally prohibited. See *infra* discussion at III(B).

⁴⁵ See, e.g., *Greenberg v. Zingale*, 138 F. App’x 197, 199–200 (11th Cir. 2005) (alimony is not the type of subject matter the Thirteenth Amendment was designed to address); *Adams v. Cty. of Calhoun*, No. 1:16-CV-678, 2018 WL 1324465, *2 (W.D. Mich. Mar. 15, 2018) (“There is no comparison between paying court-ordered child support and compulsory, involuntary servitude.”); *Loubser v. United States*, 606 F. Supp. 2d 897, 915 (N.D. Ind. 2009) (finding that an order of alimony which would compel employment does not violate the prohibition on involuntary servitude); *Hicks v. Hicks*, 387 So.2d 207, 208 (Ala. Civ. App. 1980), *writ denied* 387 So.2d 209 (Ala.1980) (“A court order in a divorce judgment directing one party to pay alimony to the other party does not impose involuntary servitude upon the payor”); *In re Marriage of Smith*, 396 N.E.2d 859, 864 (Ill. App. Ct. 1979) (husband’s argument that requiring him to support his ex-wife constitutes involuntary servitude found to be “completely without merit”); *Peake v. Peake*, No. 0262–15–3, 2015 WL 5822883, *6 (Va. Ct. App. Oct. 6, 2015) (the mere entering of an order for child support or spousal support does not make out a violation of the Thirteenth Amendment). See also *Gerow v. Covill*, 960 P.2d 55, 62 (Ariz. Ct. App. 1998) (“As his fourth issue, Husband claims the trial court’s award violated his constitutional right against indentured servitude. He contends that the court improperly conveyed an interest in his post-dissolution income and earning potential. This argument ignores the nature of the relief awarded. Wife has been awarded only half of the stock, representing her portion of an intangible asset, goodwill, created during the marriage. She received no portion of Husband’s future income.”). *But cf.* *Simmons v. Simmons*, 708 A.2d 949, 962 (Conn. 1998) (“To conclude that the plain-

ber of cases have held that child support and spousal support are not considered a “debt”; they are considered a duty.⁴⁶

Can a child support order or spousal support order, however, violate the Thirteenth Amendment’s prohibition on involuntary servitude if the obligor is ordered to work *outside* of and

tiff’s medical degree is property and to distribute it to the defendant as such would, in effect, sentence the plaintiff to a life of involuntary servitude in order to achieve the financial value that has been attributed to his degree.”).

⁴⁶ *Gibson v. Bennett*, 561 So.2d 565, 570 (Fla. 1990) (because the courts are enforcing a duty not a debt, enforcement of spousal or child support by contempt, under both federal and state law, is not a violation of Florida’s constitutional prohibition against imprisonment for debt); *Walter v. Gunter*, 788 A.2d 609, 616 (Md. 2002) (“[t]his Court historically has recognized a distinction between a standard debt and a legal duty in domestic circumstances, specifically with respect to child support, and subscribes to the theory that child support is a duty not a debt”); *Commonwealth v. Pouliot*, 198 N.E. 256, 257 (Mass. 1935) (“Manifestly, it is not slavery or involuntary servitude, as thus authoritatively defined, to sentence this defendant if he fails to perform his duty to support his family. The obligation of a husband and father to maintain his family, if in any way able to do so, is one of the primary responsibilities established by human nature and by civilized society. The statute enforces this duty by appropriate sanctions”); *Warwick v. Warwick*, 438 N.W.2d 673, 679 (Minn. Ct. App. 1989) (order requiring a husband to make and report on efforts to find a new job does not violate state and federal constitutional prohibitions against involuntary servitude); *Edens v. Edens*, 109 P.3d 295, 303 (N.M. Ct. App. 2005) (enforcement of the voluntary MSA awarding the wife lump-sum alimony does not amount to involuntary servitude that violates the Thirteenth Amendment); *Damstoft v. Damstoft*, No. 2010–T–0076, 2011 WL 2638729, *3 (Ohio Ct. App. June 30, 2011) (spousal support is not viewed as a pecuniary obligation; instead, it is deemed a moral duty that one spouse owes to the public as well as the other spouse; therefore, an order for spousal support does not impose involuntary servitude); *In re J.S.Q.W.*, No. 04-03-00740-CV, 2004 WL 2387095, *1 (Tex. App. Oct. 27, 2004) (because child support is not considered a debt, but a duty, enforcement of that duty does not violate the Thirteenth Amendment’s prohibition against slavery); *See generally* *Gilbert v. Gilbert*, 447 So.2d 299, 301 (Fla. Dist. Ct. App. 1984) (the obligation to pay alimony is a duty, not a debt); *In re Roisman*, No. 01-20-00828-CV, No. 01-21-00093-CV, 2022 WL 480145, *9 (Tex. App. Feb. 17, 2022) (because the obligation to pay child support is a duty, not a debt, a person may be held in contempt and imprisoned for failing to pay child support). *See also* Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2088 (2009) (“state courts have uniformly rejected the claim that orders to pay alimony constitute involuntary servitude”). For a contrary argument, see Alfred J. Sciarrino & Susan K. Duke, *Alimony: Peonage or Involuntary Servitude?*, 27 AM. J. TRIAL ADVOC. 67, 69 (2003).

in addition to the order to pay?⁴⁷ Further, does imprisonment or garnishment of wages for failure to pay child support or spousal support violate the Thirteenth Amendment?⁴⁸

A. *Seek-Work Order*⁴⁹

A recent example of a parent appealing a “seek-work order” on constitutional grounds is *Haley v. Antunovich*.⁵⁰ At a child support modification hearing, the court issued a seek-work order to the mother, stating, “the policy of the State of California is that both parents should work and provide support for their minor child, so I will issue a seek-work order for [Antunovich] to find work with her skills and experience.”⁵¹ The court also found the order was in the “best interest of the child.”⁵² Citing Califor-

⁴⁷ See Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927 (2016); see also Julie A. Nice, *Making Conditions Constitutional by Attaching Them to Welfare: The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 971, 986-87 (1995).

⁴⁸ It is worth noting that many federal cases where litigants raised Thirteenth Amendment claims concerning child support and spousal support were dismissed under the *Rooker-Feldman* doctrine, a doctrine of abstention which holds that federal courts do not have subject matter jurisdiction over suits that are better characterized as appeals or reconsideration of state court judgments. *E.g.*, *Dixon v. Rick*, 781 F. App’x. 561 (7th Cir. 2019); *Pinckney v. Superior Ct.*, 757 F. App’x. 198, 200 (3d Cir. 2018); *Jackson v. Dep’t. of Human Res.*, 533 F. Supp. 3d 1100, 1106 (M.D. Ala. 2020); *Troy of Family Carslake v. Dep’t of Child Support Servs.*, No. 18-cv-06176-YGR, 2019 WL 2142036, *7 (N.D. Cal. May 16, 2019).

Other federal cases dismissed the claims under *Younger* abstention, the “domestic relations exception” to federal jurisdiction, or the Eleventh Amendment, all demonstrating the federal courts’ unwillingness to even entertain or discuss the Thirteenth Amendment claims.

⁴⁹ See Jennifer L. McCoy, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U. L. REV. 501, 521 (2005); Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020 (2009); Sciarrino & Duke, *supra* note 46; David Wiese, *Court-Ordered Support and the Thirteenth Amendment’s Prohibition Against Imposition of Involuntary Servitude*, 11 J. CONTEMP. LEGAL ISSUES 419 (2000); Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304 (2020); Zatz, *supra* note 47.

⁵⁰ 76 Cal. App. 5th 923 (Cal. Ct. App. 2022).

⁵¹ *Id.* at 925.

⁵² *Id.*

nia Family Code § 3558,⁵³ the court concluded that the trial court's order was supported by substantial evidence, because the mother's own statements established that her income was insufficient to adequately support the child. The court also stated that the seek-work order was consistent with the law allowing the courts to impute income to underemployed/unemployed parents for purposes of child support: since Antunovich testified she could not make ends meet but had the ability to work, a seek-work order was appropriate.⁵⁴

This seek-work order is a substitute for imputing income, and seemingly violates the prohibitions contained in the Thirteenth Amendment (although this argument was never raised). In addition to the mother's child support obligation as figured by the court based on the mother's income, she was ordered to work, or be imprisoned for contempt. The order to work was *outside* the order for support.

This construction of a seek-work order that would violate the Thirteenth Amendment finds support in *Pavlo v. Pavlo*.⁵⁵ In this case, the court required the wife "to seek full-time employment as a bookkeeper and to accept any offer of employment as a bookkeeper that was commensurate with her experience,"⁵⁶ in addition to imputing income to the wife. Although the wife had a need for alimony, and the husband had the ability to pay alimony, the judge determined that the wife's earnings at the time of trial were not what they could be "through reasonable diligence,"⁵⁷ and thus entered the order. The appellate court reversed, holding that the trial court did not have the authority to

⁵³ CAL. FAM. CODE § 3558 (West 2021) provides:

In a proceeding involving child or family support, a court may require either parent to attend job training, job placement and vocational rehabilitation, and work programs, as designated by the court, at regular intervals and times and for durations specified by the court, and provide documentation of participation in the programs, in a format that is acceptable to the court, in order to enable the court to make a finding that good faith attempts at job training and placement have been undertaken by the parent.

⁵⁴ *Haley*, 76 Cal. App. 5th at 929.

⁵⁵ No. 19-P-1218, 2020 WL 5868332 (Mass. Ct. App. Oct. 2, 2020).

⁵⁶ *Id.* at *1.

⁵⁷ *Id.* at *2.

order a party to work at a specific job; the remedy for underemployment/unemployment is the imputation of income.⁵⁸

The Georgia Supreme Court was also troubled by the provisions of the divorce decree in *Wilson v. Wilson*.⁵⁹ In this case, the trial court's judgment required the husband or his corporation to hire the wife at a salary of \$1,500 per month, and provided that her duties as an employee would be up to her. If the husband or his corporation should terminate the employment, he would then pay her \$1,500 per month as alimony and provide her with the same medical coverage she had as an employee. The appellate court held that while the trial court has the discretion to order alimony, the order that the husband had to employ the wife, and conversely the wife had to be employed by the husband, could not stand:

However, a court "may not compel a person to continue in any particular employment." This principle applies here even though Wife determines her particular duties, since the law implies a duty of loyalty, faithful service and regard for an employer's interest. Thus, virtually forcing her to accept and continue employment, whatever the form, would raise Thirteenth Amendment concerns. If, on retrial, the trial court still wishes to allow the employment of Wife by Husband as a substitute for alimony, its final order should explicitly permit Wife to terminate that employment at any time without being deprived of the benefit of the alternative alimony and medical coverage provisions.⁶⁰

Because most seek-work orders do not require a party to seek a particular employer or particular profession, most cases have held that a general seek-work order is not a violation of the

⁵⁸ *Id.* Although the appellate court opinion does not rely on the Thirteenth Amendment, the argument was raised on briefs and argued before the court. *Id.* at *3 n.6.

⁵⁹ 596 S.E.2d 392 (Ga. 2004).

⁶⁰ *Id.* at 395 (internal citations omitted). *Accord In re Marriage of Carls*, 502 N.E.2d 756, 761 (Ill. App. Ct. 1986) (Heiple, J., dissenting) ("Requiring the respondent to live in a particular place and work at a particular job makes him, in effect, a slave. While the court is not explicitly saying that the defendant must remain in Illinois and work at Consolidated Freightways, it is premising the support order on that imagined set of circumstances. Thus, the effect of the order is a form of economic slavery which, as we all know, was abolished by the Thirteenth Amendment to our Federal Constitution."); *Stewart v. Stewart*, 866 S.W.2d 154, 159 (Mo. Ct. App. 1984) (Gaertner, J., concurring in part) ("[F]orcing one spouse to accept whatever form of employment may be tendered by the other raises a specter of Thirteenth Amendment considerations.").

Thirteenth Amendment. In *Warwick v. Warwick*,⁶¹ as part of its order on modification of spousal support, the trial court directed the husband to get a job, and report on his efforts to do so. The husband appealed, raising the Thirteenth Amendment's prohibition on involuntary servitude. The court held that a seek-work order did not violate the Thirteenth Amendment, because it was a general seek-work order.⁶²

In *Moss v. Superior Court (Ortiz)*,⁶³ the California Supreme Court also found that

in those decisions in which a Thirteenth Amendment violation has been found on the basis of involuntary servitude, the court has equated the employment condition to peonage under which a person is bound to the service of a particular employer or master until an obligation to that person is satisfied.⁶⁴

The court reasoned that although child support obligations may require a non-custodial parent to seek and accept employment, they do not

⁶¹ 438 N.W.2d 673 (Minn. Ct. App. 1989).

⁶² *Id.* at 679. *See also* *Skelly v. Heidemann*, No. 93-36085, 1994 WL 245892 (9th Cir. June 7, 1994) (holding that the Washington statute that provides, "If the obligor contends at the [contempt] hearing that he or she lacked the means to comply with the support or maintenance order, the obligor shall establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court's order," does not violate the Thirteenth Amendment because it does not require that the alleged contemnor work or face prison; it only requires that the alleged contemnor have sought employment); *Freeman v. Freeman*, 397 A.2d 554 (D.C. 1979) (in a proceeding on a divorced and remarried husband's motion to suspend or reduce child support payments, the trial court's order directing the husband to seek gainful employment commensurate with his abilities and educational background did not violate his constitutional rights, including his Thirteenth Amendment right against involuntary servitude); *Hogan v. Hogan*, 822 A.2d 925, 929 (R.I. 2003) (ordering a parent to seek to generate greater income does not constitute involuntary servitude); *Clark v. Clark*, 278 S.W. 65, 68 (Tenn. 1925) ("there is no merit in the contention made by the defendant that to compel him to pay the monthly sums of alimony fixed in the decree of divorcement, provided he has ability to do so, would have the effect to impose upon him involuntary servitude"); *State ex rel. Schmitz v. Knight*, No. 57547-3-I, 2006 WL 2126327, *1 (Wash. Ct. App. July 31, 2006) (Washington state's seek-work order only required diligent efforts to secure a job, and thus did not force the father into peonage).

⁶³ 950 P.2d 59 (Cal. 1998).

⁶⁴ *Id.* at 66.

bind the parent to any particular employer or form of employment or otherwise affect the freedom of the parent. The parent is free to elect the type of employment and the employer, subject only to an expectation that to the extent necessary to meet the familial support obligation, the employment will be commensurate with the education, training, and abilities of the parent.⁶⁵

Stated otherwise, “Child support is not the type of subject matter the Thirteenth Amendment was designed to address because the Defendants do not employ the use of physical or legal coercion to force a petitioner into involuntary servitude.”⁶⁶

In *Brooks v. D’Errico*,⁶⁷ the court also made clear that a claim under the Thirteenth Amendment requires a seek-work order for a particular employer or particular profession. In that case, the mother worked as an “escort.” When the court entered a child support order against the mother, she claimed by demanding child support from the mother, the father, and therefore the court, was forcing her to continue her sex work to pay the child support, and this constituted a violation of the Thirteenth Amendment. The court dismissed her claim, because there was nothing that required her to continue her sex work. “[S]he has failed to state a claim or provide any legal basis that a child support award adjusted to her income constitutes enslavement, or that by ordering her to pay child support the family court was also ordering her to obtain the money from sex work.”⁶⁸ The mother was free to pursue any profession she chose.

⁶⁵ *Id.* at 67.

⁶⁶ *Jackson v. Child Support*, No. 8:18-cv-2848-T-36SPF, 2018 WL 8754206, *4 (M.D. Fla. Dec. 5, 2018).

⁶⁷ 527 F. Supp. 3d 105 (D. Mass. 2021).

⁶⁸ *Id.* at 109. *Accord* *Williams v. Aetna, Inc.*, No. 1:21-cv-00321-NONE-EPG (PS), 2021 WL 1752047, *8 (E.D. Cal. May 4, 2021); *Sanem v. Smith*, CV 19-6-M-DLC-KLD, 2020 WL 2477641, *4 (D. Mont. Jan. 29, 2020); *Trollope v. Dep’t of Child Support Servs.*, No. CV 18-09220-JLS (JDE), 2019 WL 3927349, *8 (C.D. Cal. June 7, 2019); *Baylor v. Eto*, No. 19-cv-442 (MJD/HB), 2019 WL 3470798, * (D. Minn. May 30, 2019); *Cowan v. Brown*, 2014 WL 662221146, *4 (S.D. Cal. Nov. 20, 2014); *Farley v. Santa Clara Cnty. Dep’t. of Child Support Servs.*, No. C-11-01994-LHK, 2011 WL 4802813, at *4-5 (N.D. Cal. Oct. 11, 2011); *Smith v. Smith*, No. 7:07CV00117, 2007 WL 3025097 (W.D. Va. Oct. 12, 2007). *See also* *Greenberg v. Zingale*, 138 F. App’x. 197, 200 (11th Cir. 2005) (an order to pay alimony does not violate the Thirteenth Amendment because sanctions for the non-payment of alimony, such as being held in contempt of court, do not amount to involuntary servitude).

It is worthy of note that in *Pavlo*, the court directed the wife to seek a job in a particular field, i.e., as a bookkeeper, and she could not choose another field or endeavor. A seek-work order that only requires an obligor or obligee to look for work, any work, and report on his/her/their good effort to do so, will not run afoul of the Thirteenth Amendment, as explained in *Moss* and *Brooks*.

B. *Incarceration for Civil Contempt for Failure to Pay Support*

In all states, to avoid being held in civil contempt for failure to pay a support order, the alleged contemnor must show an inability to pay.⁶⁹ The Supreme Court has upheld the constitutionality of state statutes requiring obligors to show their inability to comply with court ordered child support payments to avoid being held in civil contempt.⁷⁰ It follows, then, that it is not a violation of the Thirteenth Amendment to hold a party in civil contempt for failure to pay support, and order incarceration until the contempt is purged, because the alleged contemnor has the ability to pay.⁷¹

This was stated in *Ehlers v. Gallegos*.⁷² In that case, the husband argued that his incarceration pursuant to a finding of civil contempt, rather than conviction for a crime, violated the Thirteenth Amendment's prohibition of involuntary servitude and slavery. The court made short shrift of this argument. "[T]his court is aware of no case holding that incarceration as a sanction for civil contempt violates the Thirteenth Amendment."⁷³

⁶⁹ *Financial Inability as Defense to Contempt for Failure to Comply with Support Orders*, 24A AM. JUR. 2D *Divorce and Separation* § 785 (Feb. 2022).

⁷⁰ See *Hicks ex. rel. Feiock v. Feiock*, 485 U.S. 624, 637–38 (1988) (holding that contempt proceedings for voluntary failure to comply with court orders constitute a proper exercise of state power).

⁷¹ E.g., *In re Marriage of Dennis*, 344 N.W.2d 128, 140 (Wis. 1984) (Abrahamson, J., concurring) (“Without a finding of willfulness or lack of diligence an order directing the supporting parent to take alternative employment raises questions of due process, equal protection, and involuntary servitude.”).

⁷² No. 16 C 5092, 2020 WL 43010 (N.D. Ill. Jan. 3, 2020).

⁷³ *Id.* at *11. *Accord* *Norman v. Dep’t. of Revenue*, Case No. 8:18-cv-2183-T-30-SPF, 2018 WL 5258581, *3 (M.D. Fla. Sept. 24, 2018); *Hallet v. Ohio*, No: 5:16-cv-238-Oc-32PRL, 2016 WL 10649207, *2 (M.D. Fla. June 9, 2016); *Collins v. Collins*, 746 N.E.2d 201, 205 (Ohio Ct. App. 2000). See also Shawn Seliber, *Taxation Without Duplication: Misattributed Paternity and the Putative*

C. *Incarceration for Criminal Contempt for Failure to Pay Support*

In a clear statement, the Ninth Circuit held in *United States v. Ballek*⁷⁴ that child support “fall[s] within that narrow class of obligations that may be enforced by means of imprisonment without violating the constitutional prohibition against slavery.”⁷⁵ Noting that every state enforces child support obligations with criminal sanctions, the Ninth Circuit found that “ensuring that persons too young to take care of themselves can count on both their parents for material support” was “one of the most important and sensitive exercises of the police power.”⁷⁶ Thus, the father could not state a civil rights claim based on allegations that his child support obligation subjected him to involuntary servitude in violation of the Thirteenth Amendment.⁷⁷

D. *Garnishment of Wages*

Just as incarceration for contempt for failure to pay child support or spousal support is not violative of the Thirteenth Amendment, so too is garnishment of wages not a violation. In *Maley v. Kansas, SRS*,⁷⁸ the court began its discussion by stating that federal law⁷⁹ provides for the withholding of income due or

Father's Claim for Restitution of Child Support, 14 WASH. & LEE J. C.R. & SOC. JUST. 97 (2007) (“The constitutional and statutory prohibitions that forbid imprisoning a debtor to collect a civil debt do not necessarily extend to child support debtors. Rather, child support debtors are often imprisoned for contempt.”), citing DOUG RENDLEMAN, REMEDIES 383 (7th ed. 2006).

⁷⁴ 170 F.3d 871 (9th Cir. 1999).

⁷⁵ *Id.* at 874.

⁷⁶ *Id.* at 875. *See also* *United States v. Morton*, 467 U.S. 822, 826–27 (1984). *But see* *Sykes v. Bank of America*, 723 F.3d 399, 405 (2d Cir. 2013) (*per curiam*) (holding that social security income benefits “are not attachable pursuant to the child support exception in § 659(a) because they do not constitute monies received in remuneration for employment”).

⁷⁷ *Accord* *Agur v. Wilson*, 498 F.2d 961, 964 n.3 (2d Cir. 1974) (deeming frivolous the argument that incarcerating a person for not paying child support would violate the Thirteenth Amendment); *El-Bey v. Peer*, No. Civ. 05–3765(SRC), 2006 WL 231627, *4 (D. N.J. Jan. 30, 2006) (incarceration in the context of child support does not violate the Thirteenth Amendment); *People v. Adams*, No. 276845, 2008 WL 4923036, *3 (Mich. Ct. App. Nov. 18, 2008); *State ex rel. Daly v. Snyder*, 72 P.3d 780, 783 (Wash. Ct. App. 2003).

⁷⁸ 509 F. App'x. 709 (10th Cir. 2013).

⁷⁹ 42 U.S.C. § 659(a).

payable from the United State to enforce an individual's legal obligation to remit child support. Garnishment, like incarceration for contempt, falls within the powers allotted to the government for enforcement of its orders.⁸⁰

CONCLUSION

Tempers run hot in child support and spousal support cases, and the rhetoric tends to the hyperbolic.⁸¹ A claim that a child support or spousal support obligation violates the Thirteenth Amendment will not be successful except if a court enters a seek-work order for a specific job or a specific employer, or if one party to the divorce is ordered to employ the other party. Despite concerns to the contrary,⁸² this will not change. The recent case of *Pavlo v. Pavlo*, however, leaves open the door for a claim under the Thirteenth Amendment under the right circumstances.

⁸⁰ *Accord* Gittens v. Pavlack, 838 F. App'x. 717, 718 (3d Cir. 2021); Kapach v. Intel Corp., No. CV 20-6277 FMO (MAAx), 2020 WL 7889064, *4 (C.D. Cal. Dec. 14, 2020); Sanem v. Smith, No. CV 19-6-M-DLC-KLD, 2020 WL 1527863, *1 (D. Mont. Mar. 31, 2020) (“[L]ike taxation, garnishment of wages to enforce a child support order does not transform paid labor into ‘slavery [or] involuntary servitude.’ ”); Brown v. Coffin, No. 18-22982-CIV-MARTINEZ/AOR, 2019 WL 10945367, *3 (S.D. Fla. Jan. 25, 2019); Griffin v. American Zurich Ins. Co., No. 3:14-CV-2470-P, 2016 WL 3361528, *7 (N.D. Tex. Feb. 16, 2016); Laurienti v. Bicha, No. 14-cv-02592-NYW, 2016 WL 496047 (D. Colo. Feb. 9, 2016).

Similarly, the authority of the state, in partnership with the federal government, to revoke an obligor's passport for non-payment of child support falls within the government's enforcement powers, and does not implicate the Thirteenth Amendment. *Muhammed v. Jesse*, 608 F. App'x. 429, 430 (7th Cir. 2015).

⁸¹ The president of the advocacy group Massachusetts Alimony Reform likened alimony to “indentured servitude.” Christian M. Wade, *Advocates Want Lawmakers to Revisit Alimony Law*, MASS. ALIMONY REFORM BLOG (July 3, 2017), <https://www.massalimonyreform.org/blog/2017/7/3/advocates-want-law-makers-to-revisit-alimony-law>.

⁸² The problems with this jurisprudence are best laid out in *Zatz*, *supra* note 47.