



University of San Francisco School of Law

University of San Francisco Law Research Paper No. 2010-30

SLAVERY AS IMMIGRATION?

Rhonda V. Magee

Slavery as Immigration?

By RHONDA V. MAGEE*

Prologue

As an African-American woman and legal scholar,¹ I have long been troubled by the absence of sustained discourse within the legal academy on the legacies of American chattel slavery and its multifaceted impact on contemporary United States law and policy.² Since entering the academy, I have puzzled, mostly in silence, over the continued absence of scholarship drawing a link between slavery and contemporary law and policy in the areas in which I teach. Presently, this inquiry leads me to consider the implications for immigration law, and to this effort at breaking this

* Professor of Law, University of San Francisco. Special thanks to those who assisted me in the research for this essay, including research librarian John Shafer, and research assistants Craig Hawkins and Susan Jost, and the editors of the USF Law Review. I am grateful for the comments of Gerald Neuman, Richard Delgado, Bill Ong Hing, Kevin Johnson, and Devon Carbado; participants in the USF Faculty Scholarship workshops; participants in the Lutie Lytle Black Women Law Faculty Conference, and especially, Asmara M. Tekle. All remaining mistakes of fact, law or judgment are, of course, my own.

1. For a classic treatment of the relevance of “subject position” in legal scholarship, see PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND LAW* (1991). For a contemporary consideration of subject positionality and narrative as among several methodologies useful to a thoroughgoing critical race approach, see Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005). For a recent elaboration on the value of narrative methods as analogous to qualitative autoethnographic data, and aids in personal, holistic understanding and transformation, see Rhonda V. Magee, *Towards an Integral Critical Approach to Thinking, Talking, Writing and Teaching about Race*, 43 U.S.F. L. Rev. __ (2008).

2. Indeed, my first piece of legal scholarship focused on the case for African American reparations for slavery and segregation, highlighting the failure of mainstream racial remedies scholars to adequately consider these claims. See Rhonda V. Magee, *The Master’s Tools, From the Bottom Up: The Curious Response to African-American Reparations in Mainstream and Outsider Remedies Discourse*, 63 Va. L. Rev. 863 (1993).

*silence.*³

Introduction.

Several questions, both conceptual and legal, have occupied me over the past few years since I've taken up the study and teaching of immigration law: As a conceptual matter, was a first generation "chattel slave" also, in some sense, an immigrant? That is: Might the involuntarily enslaved African, forcibly brought to the United States for condemnation to a life in chattel slavery, be more accurately considered a certain type of immigrant? And, if so, what are its implications for understanding the origins and operations of United States immigration law? If transatlantic⁴ slavery was, in part, the earliest system for immigration in the United States, what legacies of that system should scholars of immigration law recognize, and what are the implications of that history for immigration law and policy today? That is to say: From the standpoint of immigration law, might the chattel slavery system be more accurately considered a compound institution system comprised of not only labor and sociocultural structures but a state-sponsored, pernicious system of immigration?

This essay is directed at two audiences within the legal academy, recognizing the overlap, in some cases, between the two. The first is those who teach and/or write about immigration law; the second, those who focus on race and law. I call upon Immigration law professors to study the importation systems of transatlantic slavery. As the earliest and most egregious examples of what contemporary immigration law would classify as "forced migration immigration" into the United States, and the system by which over one-third of the population of the North American colonies and early states were populated by laborers in the country's first three

3. *Compare* Janice Mirikitani, *SHEDDING SILENCE: POETRY AND PROSE* (1987). In her poem *Prisons of Silence*, Mirikitani writes:

From this cell of history
 this mute grave
 we birth our rage.
 We heal our tongues.
 We listen to ourselves
 Korematsu, Hirabayashi, Yasui.
 We ignite the syllables of our names.
 We give testimony.
 We hear the bigness of our sounds freed
 like many clapping hands,
 thundering for reparations.
 We give testimony.
 Our noise is dangerous.

Id. at 8-9.

4. My focus here is on transatlantic slavery. *See infra* part II.

centuries, these systems should be noted among the most significant historical antecedents of contemporary immigration law and policy, with legacies that reverberate through immigration law and policy in the United States up to the present day.

In addition, I call upon race law scholars and critical race theorists to look more carefully at the importation components of the larger system of slavery – including the infamous middle passage – as a particularly horrific form of what contemporary historians in law and social science are now calling forced migration immigration.⁵ Those of us who study race have an obligation to more effectively understand the connection between this component of the slave trade, historic and contemporary battles over immigration law and policy, and the making and remaking of persistent racial hierarchy in America.

Each of these groups of scholars must work together to enrich our understanding of the role of race in the making of United States immigration policy, and the role of United States immigration policy in the making of race. And each of us must confront the legacies of racism that infect the scholarly lenses through which these subjects are traditionally viewed. Racism rendered the enslaved victims of these systems of forced immigration invisible. Yet, from the point of view of enslaved people, slavery came about by the capture, kidnapping and forcible migration of human beings from their African villages across the Atlantic to the colonies and later United States. That migration, however pernicious, significantly transformed early American culture, and the immigration lens is an important one for understanding how our current immigration and naturalization system reflects this history. Rather than unwittingly continue to view the matter primarily through the lens of the racist oppressors of these early involuntary immigrants, we should endeavor more fully to represent the experience of the enslaved forced migrants themselves and to understand how they were not merely victims, but immigrants.

5. Compare Lolita Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DePaul L. Rev. 85 (1999), who takes up the conceptual questions and answers them deftly in the affirmative:

The black American experience is an immigrant experience..... The [immigrant] situation in which blacks find themselves is different. The general failure of assimilation has made the black American experience unique among immigrant experiences in that it is an unremitting immigrant experience – an experience of continued exclusion. Blacks are part of a de facto immigrant class.

Id. at 85-6. This essay expands upon the work of Buckner Inniss by making the case for incorporating the law and policy governing the importation system of chattel slavery into treatments of the historical foundations of immigration law within immigration law scholarship and teaching.

Accordingly, I call upon each of these groups of scholars to engage with me in a reconsideration of the historical underpinnings of today's immigration system, including the relevant law and policy regulating the transportation of enslaved people as part of the slavery system. It is not my objective here to posit the slavery era as "just another wave of immigration." Instead, I want to show that while the experience of enslaved migrants must continue to be analyzed through the broader lens of slavery, the immigration lens is relevant as well. Specifically, the experience of forced migration slavery, among other things, was a singularly horrific form of *immigration* experience, and one which shares many of the distinctive features of immigration experience, but one which ultimately has no parallel in the experiences of other immigrant groups. Considered carefully, this singular experience can teach us much about the current system of immigration, its core objectives, functions, and consequences for a society founded upon democratic principles.

My main claims here may be summarized as follows: that the hundreds of thousands of people of African heritage forcibly transported to the British North America under the chattel slavery system were a certain sort of *immigrant* under; and that chattel slavery was, among very many other things, *a compulsory form of immigration, the protection and regulation of which, under federal and state law, was our nation's first system of "immigration law."* As a consequence, the formal system that developed inculcated the notion of a permanent, quasi-citizen-worker underclass, and privileged white ethnics under naturalization law, with legacies that we can see up to the present day.

The project ultimately has two important goals: (1) to reframe the notion of the immigrant to include the Black forced immigrant experience under the system of chattel slavery; and (2) to reframe immigration law to include, as relevant historical antecedents, the law and policy of chattel slavery at both the federal and state level. This proposed reframing has substantive implications for the study and practice of immigration.⁶ First, the law and policies of *transatlantic* chattel slavery should be considered as among the earliest formulations of US immigration law and policy, or, at the very least, centrally important historical antecedents of contemporary immigration law. And secondly, contemporary practitioners should examine the ways that current policies and practices reflect the legacies of compulsory immigration law strategies and commitments, and more effectively to link *contemporary* strategies of resistance to the law and

⁶ There are, of course, implications for other areas of law as well, such as labor law. *See, e.g.,* Juan Perea, [insert title] __ USF L. Rev. __ (2009) (Jack Pemberton Lecture) (summary needed here).

policy by which transatlantic and domestic chattel slavery were dismantled.

This proposed reframing has sociocultural implications. One of the legacies of racial hierarchy is a tendency towards racial projects of compartmentalization and distribution of resources by race.⁷ This is as true for the production of knowledge around “the immigrant” as elsewhere. That is, the notion of “the immigrant” has been elaborated and coded in ways which render invisible the experience of early Africans forcibly brought to the United States. In fact, upon arrival these early migrant workers underwent processes that reflect, among other things, an important, and perhaps singular, kind of “immigrant experience.” Indeed, it is my contention that this failure of educators to fully appreciate the immigration consequences of slavery is itself both a product of the classical racialism of our shared past, and an agent in the ongoing reiteration of racial subordination and privilege within contemporary American society. In other words, thinking of Black Americans whose ancestors were enslaved as merely descendents of slaves, without acknowledging the migration and acculturation stories worthy of excavation and study, transports the racism of our past into our present, giving it new life.⁸

Further, I by both action and inaction, the United States endorsed and legalized American transatlantic chattel slavery, engaged in directly, and on the federal government’s behalf, by the states, and in so doing, endorsed and legalized chattel slavery’s importation laws and policies – making them, in effect, the first major pillar of the immigration system in the United States. In other words: transatlantic *slavery was*, in significant part (though hardly exclusively) *an immigration system* of a particularly reprehensible sort: a system of state-sponsored forced migration human trafficking, endorsed by Congress, important to the public fisc as a source of tax revenue, and aimed at fulfilling the need for a controllable labor population in the colonies, and then in the states, at an artificially low economic cost.

The notion of reframing the immigrant experience to include that of those imported into this country via slavery is controversial. Thus, after discussing the grounds for my claims, I survey the advantages and disadvantages of such a reframing. I conclude that Immigration law scholars should work to end what one historian years ago referred to as the “artificial cleavage” between slavery and immigration. I briefly suggest the

7. Devon W. Carbado, symposium remarks, “The Evolving Definition of the Immigrant Worker: The Intersection Between Employment, Labor and Human Rights Law, February 27, 2009 (notes on file with author) (hereinafter, “USF Employment, Labor and Human Rights Symposium”).

⁸ See *supra* notes ___-___ and accompanying text.

some of the implications of such a change for the study and teaching of immigration law, and for a healing reconstruction of the American narrative as a whole.

I. Slavery as Immigration

A. Transported Africans as Forced Immigrants

As seen through the lens of contemporary immigration law, Africans transported to British North America under the system of transatlantic slavery were in fact a certain kind of immigrant – what we would today call a “forced migration immigrant.”⁹ Contemporary historians agree that approximately 12 million Africans were forcibly migrated from West and Central Africa to colonies in the Americas.¹⁰ Comparatively few of these, between 400,000 and 500,000, were transported to the North American colonies and states.¹¹ They were transported for sale and distribution through the complex and varied system of abject exploitation of labor through physical and cultural transplantation that historians refer to as chattel slavery.¹² Thus, an important aspect of this complicated system, one which we most commonly think of as “a means of organizing society and extracting labor,”¹³ was function of enabling the involuntary, forcible, virtually permanent transportation of people from one part of the globe to another. In other words, it was, in significant part, a system of involuntary, forced immigration.

Indeed, within the last generation, immigration historians have taken up the call to “end the artificial cleavage” between immigration and slavery.”¹⁴ For example, Roger Daniels, in his *COMING TO AMERICA: A*

9. See Martin, Aleinikoff et al., *FORCED MIGRATION LAW AND POLICY*, *infra* note 18 at 5-13 (defining “forced migration immigration” to include persons “trafficked” or “smuggled.” Trafficked migrants are those “moved by deception or coercion for the purposes of exploitation.” *Id.* at 10. Smuggled migrants are those “moved illegally for profit.” *Id.* Some analysts further distinguish smuggling as being entirely mutual. See *SNAKEHEAD*....Although importation of enslaved people under the Spanish and Portuguese systems is significant to the history of modern-day Florida and perhaps other states, and hence, is relevant to United States immigration history, my focus in the balance of this study is on the importation of enslaved people to British North America. See, e.g., TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65* 34 (1998) (summary of relevant phrasing here).

10. ROGER DANIELS, *COMING TO AMERICA* at 61.

11. *Id.*

12. See IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 2* (1998).

13. *Id.* at 4.

14. Roger Daniels, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* at 55-56 (cataloguing efforts to address this cleavage that had not, at the time of

HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE, writes that “[T]he slave trade was one of the major means of bringing immigrants to the New World in general, and the United States in particular.”¹⁵ Aaron Fogleman is among historians of American immigration to explicitly discuss the social dynamics that have led to the tendency of historians to exclude enslaved Africans among studies of early immigrants:

In the 1970s, Peter H. Wood and C. Vann Woodward lamented the exclusion of African slaves from the ranks of “immigrants.” They attributed it to racism and the tendency of immigration historians to begin their studies in the nineteenth century, as African immigration into the United States was ending. Too often historians have used the European model to explain immigration and the immigrant story in American history – whatever does not fit that model may not be understood as immigration. In my view, however, immigrants were people who came from somewhere else to the mainland colonies or the United States (as opposed to having been born there). The immigrant story critical to the demographic, economic, and cultural development of the United States is an ongoing, complex, and changing tale that enlists a cast of characters from nearly all parts of the globe. In the past generation that view has become more accepted, as historians have given increasing attention to slaves in the colonial period as forced African immigrants.¹⁶

I refer to this tendency to exclude Blacks from treatments of United States immigration history as the “no-Black” paradigm.¹⁷ It is the normal science by which the experience of enslaved African people disappears from cognition as an immigrant experience.¹⁸ Fogleman explicitly disrupts this paradigm in his work by describing the immigrant population in colonial and early America so as to include enslaved Africans in the opening paragraph of his study of the changing character of immigration in America prior to the war with Britain: “[F]rom the founding of Jamestown

his writing “gone far enough.”)

15. *Id.* at 61.

16. Aaron S. Fogleman, *From Slaves, Convicts, and Servants to Free Passengers: The Transformation of Immigration in the Era of the American Revolution*, *J. Am. Hist.* 43, 50 (June 1998),

17. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* [page] (1970). Compare Juan Perea et al., *The Black-White Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 *Cal. L. Rev.* 1213 (1997). As Perea correctly points out, “Omitting important history from the narrative of civil rights history becomes extraordinarily damaging, since it distorts history and contributes to the marginalization of non-Black peoples of color.” *Id.* I suggest that the same might be said of the omission of Blacks from the narrative of *immigration* history: it “becomes extraordinarily damaging, since it distorts history and contributes to the marginalization of [Blacks]” within our culture. See also Richard Delgado, *Rodrigo’s Fifteenth Chronicle: ...[insert complete title] (discussing a number of specific ways a narrow paradigm of race marginalizes those falling outside it).*

¹⁸ Kuhn, *supra* note 16 at ____.

until the Revolution, nearly three-fourths of all immigrants to the thirteen colonies arrived in some condition of unfreedom.¹⁹ Even more recently, historian Paul Spickard has gone further, naming the forced migration of Africans into America, along with the decimation of Native Americans as “the two founding facts of American history... [and] central facts in the story of American immigration.”²⁰ Speaking about the early enslaved immigrants, Spickard states that that “Africans were in fact migrants, though compelled, and . . . they have undergone processes that are in some ways very similar to those of other immigrant groups—and in some ways profoundly different. It is essential to see [both] the similarities (many of which have to do with cultural processes) and the differences (which have to do with race and power).”²¹ Among the essential differences that Spickard acknowledges as between forced African migrants and other migrants is, of course, the harrowing journey across the Atlantic on ships especially outfitted for human cargo in what became known as “The Middle Passage.”²² The brutal circumstances of their transport, and the policy of stripping enslaved people of their culture and heritage are important distinctive features of African forced migration that bear consideration by immigration scholars interested in contemporary parallels.²³

Indeed, the *vast number* of forced migration immigrants brought into the so called “New World,” from African nations, and the fecundity of their descendents, renders the failure to consider the implications of their importation from the standpoint of immigration law hard to justify. Historian Spickard points out that:

[M]ost U.S. historians would be surprised to learn that, in the generation before the American Revolution, between 1720 and 1760, more African migrants came to the thirteen colonies than European migrants: 159,000 Africans compared to 105,000 Europeans. African American migration dominated the demography of that era to an even greater extent than did European migration dominate the last decades of the nineteenth century and the first decades of the twentieth century.²⁴

The peak period of forced migration came in the decades between the ratification of the Constitution and the cessation of the trade by Congress

19. Fogleman, *supra* note 18 at 43.

20. PAUL SPICKARD, *ALMOST ALL ALIENS* 63 (2007).

21. *Id.* at 9 (2007).

22. *Id.* at 63-4.

23. *See, e.g.*, Karen E. Bravo, Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade, 25 B.U. Int'l L. J. 207 (2007).

24. *Id.*

some 20 years later – precisely consistent with the power granted Congress under the Importation and Migration clause. During that 20 year period of federal protection of the slave trade, nearly 200,000 Africans were forcibly imported into states.²⁵ “In terms of absolute numbers, more Africans than Europeans crossed the Atlantic to the Americas until some time in the third decade of the nineteenth century.”²⁶ Indeed, over the years from 1607 until 1819, when the first official passenger lists were compiled, historical records indicate that approximately 33% of the total immigrant population arriving in the colonies and early states were enslaved men, women and children, presumably from West Africa.²⁷ As changes on the world stage in the late 18th century led to changes in accepted practices, forced migration of Africans fell into disfavor on both sides of the Atlantic and the characteristics of the immigrant population began to shift. As Fogleman summarizes:

These developments transformed an immigration primarily of slaves, convicts, and indentured servants into one of free subjects. By the 1820s, when the United States government began keeping official statistics, the transformation was already so complete that it obscured the changes that had occurred before, during and after the Revolution.²⁸

With Congress’ outlawing of slavery in 1808, the United States government’s protection of forced migration of Africans came to an official end. Informally and unofficially, however, the trade continued through the first half of the 19th century, and with it, the forced migration into this country of an additional 50,000 or so Africans who would become Americans.²⁹

Thus, United States immigration historians have reasoned that enslaved Africans were immigrants of a specific kind. These scholars have debunked the notion of an undifferentiated definition of “immigrant,” elaborating on the term to include the experience of forced migrants, including enslaved African peoples during the era of chattel slavery in America, and others whose arrival from elsewhere was not voluntary, as well as categories of migrants whose presence was less than completely so.³⁰ Enslaved Africans were forcibly migrated immigrants whose *brutal*

25.

26. *Id.* at 67.

27. Fogleman at 44 (Table 2). The balance of the immigrant population at that time included 4% convicts and prisoners, 17% indentured servants, and 46% free persons. *Id.*

28. *Id.* at 45.

29. Although some authorities state that the last known slave ship docked in South Carolina in 1854, others suggest that the illegal importation of enslaved Africans – in a sense, America’s first “illegal immigrants” – continued to 1870. Daniels, *supra* note __ at __.

30. See Fogleman, *supra* note 18 at 43, passim (discussing migrations of “slaves, convicts

transportation to this country *was mediated and obscured* through the broader evils of the system of slavery.³¹ The law and policy governing their forced transportation and importation into the early states are relevant, then, as historical antecedents to United States immigration law and policy today. It is curious, then, that immigration law scholars have done so little so far to incorporate these understandings into historical overviews of immigration and contemporary immigration law texts.

B. Treatment of Chattel Slavery Within United States Immigration Law History.

Notwithstanding these facts and recent developments within the scholarship on United States immigration history, immigration law scholars tend to eschew considering enslaved Africans as immigrants and thus fail to consider slavery and its law and policy as significant antecedents of contemporary law and policy. This is true even of those immigration law scholars who have greatly advanced the project of viewing immigration through the lens of race.³²

A review of the dominant casebooks on immigration law confirms that only one included a brief reference to the importation systems of transatlantic chattel slavery as an antecedent to United States immigration law.³³ None goes so far as to characterize chattel slavery as comprising a system of forced migration immigration whose basic imperatives helped

and servants” as “playing a key role in the demographic, economic, social, and cultural development of the colonies.”).

31. Many, many Africans died during the transportation process. Exactly how many is unknown, but the number is regularly estimated as being in the millions. Spickard *supra* note 16 at 67.

32. See, e.g., Kevin Johnson, *Race Matters: Immigration Law and Policy Scholarship*, *Law in the Ivory Tower and the Legal Indifference of the Race Critique*, 2000 Ill. L. Rev. 525, 526, 532 (2000) (encouraging further racial critique of immigration law, but focusing only on voluntary migration of Africans); Gabriel Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 275, 280 (1996) (discussing restrictions on immigration of Africans in federal law in the 20th century and corresponding low numbers of voluntary immigrants from Africa); Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 How. L. J. 237 (1994) (discussing reasons for low voluntary immigration of Africans and racial restrictions in federal immigration law after the Civil War).

33. See Alexander Alienikoff, David A. Martin, Hiroshi Motomura, Maryellen Fullerton, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 159 (6th ed., 2007) (“Not all came of their own free will....Beginning in Virginia in 1619, 350,000 slaves were brought from Africa until the end of the slave trade in 1807.”) (internal citation omitted). Compare Stephen H. Legomsky and Christina M. Rodriguez, IMMIGRATION AND REFUGEE LAW AND POLICY 13-4 (5th ed. 2009) (no mention of slavery in brief historical overview excerpted from “the leading immigration law treatise”); and Richard A. Boswell, IMMIGRATION AND NATIONALITY LAW (2nd ed.) (1992) (no mention of enslaved immigrants).

shape our modern tendency toward racialized, exploitable immigrant quasi-citizen-workers. At most, the leading texts typically refer to slavery tangentially, as part of the discussion of the origins of the plenary powers doctrine.³⁴

Of the most widely available treatises, only two mention “slaves” as among the immigrants to early America.³⁵ The National Lawyers Guild Treatise acknowledges that enslaved people had been “imported” for their labor, as subsequent immigrants would be.³⁶ Fragomen’s IMMIGRATION LAW AND BUSINESS notes, briefly, that the foreign nationals arriving in the United States during the country’s first century did include slaves.³⁷

The text whose title promises most to include a thoroughgoing discussion of the importation systems of chattel slavery is a recent offering entitled FORCED MIGRATION IMMIGRATION.³⁸ Though focused on contemporary forced migration law and crises, the authors describe a broad range of situations in which individuals today and throughout history have been forced to leave their homes and travel across international borders.³⁹ Among these are “trafficked people,” defined by the authors as “people who are moved by deception or coercion for the purposes of exploitation,” and “smuggled people,” defined as “migrants moved illegally for profit.”⁴⁰

The reader of FORCED MIGRATION IMMIGRATION who is interested in the connection between the ancient system of chattel slavery and these more contemporary forms is not entirely disappointed. The authors state a connection in the first chapter: “Clearly, the Atlantic slave trade, which brought more than 10 million captured and enslaved Africans to the Americas, constituted forced migration.”⁴¹ Apart from that single sentence, however, the authors appear to leave chattel slavery and its

34. See, e.g., Alienikoff, Martin et al., *supra* note 21, at 202-3; Legomsky and Rodriguez, *supra* note 21, at 116-18 (citing debate over the relevance of the Importation and Migration clause to Congressional power to regulate immigration).

35. See National Immigration Project of the National Lawyers Guild, IMMIGRATION LAW AND DEFENSE, vol. 1, Section 2:2, 2:3 (2008) (“Immigrants arrived in North America as slaves and landowners, indentured servants and merchants, seekers of religious freedom and seekers of fortune,” and noting that following the ending of the slave trade in the 1850s, “immigrants were imported for specific jobs.”) . See also Austin T. Fragomen, Jr., Alfred J. Del Rey, Jr., and Sam Bernsen, IMMIGRATION LAW AND BUSINESS, vol. 1 (2009).

36. *Id.*

37. Fragomen, *supra* note 20 at section 1:2.

38. David A. Martin, T. Alexander Aleinikoff, Hiroshi Motomura, Maryellen Fullerton, FORCED MIGRATION LAW AND POLICY (2007).

39. Martin et al., *supra* note 24 at 1-32.

40. *Id.* at 10. See *supra* note 7.

41. *Id.* at 11.

consequences for American forced migration immigration law and policy in the dim reaches of American legal history. The failure to consider chattel slavery and its implications more thoroughly here and elsewhere in the most readily available immigration law texts is inconsistent not only with the trends in contemporary general immigration history described earlier, but it also fails to cohere with the definition of “forced migration immigration” currently in use under contemporary immigration law.

In short, the major casebooks and treatises in immigration law presently fail to treat the forcible importation and migration systems of American chattel slavery as a significant aspect of, or even important antecedent to, our early immigration history, law and policy. Thus, here as elsewhere in contemporary law, the legal history of slavery and the experience and implications of enslaved people under the law are under-acknowledged. As the appearance of the text by Martin and others might suggest, this “Black out” is all the more surprising given the recognition increasingly given to the concept of forced migration immigration in contemporary law.

C. Forced Migration Immigration in Contemporary Law

Contemporary immigration law in the United States recognizes, but does not endorse, forced migration immigration or slavery. The law recognizes forced migration immigration, including trafficking in persons and slavery, as a grounds for affirmative remedy and relief in the form of a recently adopted nonimmigrant visa under INA Section 101(a)(15)(T)(ii) (known as the T-Visa).⁴²

42. INA 1101(a)(15)(T)(ii) (“T” nonimmigrant visa); 22 USC Sec. 7101 et seq. (“Trafficking Victims Protection Act”) (2000) (and as amended):

(a) Purposes

The purposes of this chapter are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.

(b) Findings

Congress finds that:

- (1) as the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.

[...]

- (3) Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.

[...]

The T-Visa provision provides a firm basis in contemporary immigration law for the argument that the African-heritage people forcibly transported into the United States under the system of chattel slavery were compulsory immigrants in a sense compatible with the use of the term by immigration scholars and practitioners today. As noted above, the recent emergence of a casebook devoted to the various forms of forced migration immigration suggests the growing interest among legal scholars in modern practices that echo the ancient system of chattel slavery.⁴³

D. Legal Scholarship on the Intersection of Chattel Slavery and Immigration Law

If, as immigration law scholars have shown, transatlantic chattel slavery is and was a form of immigration; and therefore, the state laws governing the importation and migration of enslaved people should be considered part of the body of law we call “immigration law,” what follows from that? I argue that the law and policy which permitted the states to operate systems of slavery should be reconceived of as important elements of our first *federal* law and policy regarding Immigration, and that failure of to do so amounts to a “no-Black” paradigm within immigration law that cannot stand. Consider the legal scholarship which provides a sound basis for a reconsideration of this “no-Black” paradigm and incorporating slavery as forced migration immigration within studies of the underpinnings of United States immigration law.

1. Slavery as Immigration

As Mary Bilder has persuasively argued, two great systems of imported and bound labor lie at the heart of the call for a conceptual reconsideration of the origins of American immigration (and labor) policies.⁴⁴ These systems are chattel slavery and indentured servitude.⁴⁵

(21) Trafficking in persons is an evil requiring concerted and vigorous action by countries of origin, transit, or destination, and by international organizations.

(22) One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their creator with certain unalienable rights. The right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. [...].
[more on trafficking as international crime at (23) and (24)]

43. Martin *et al* at ____.

44. Bilder, *supra* note __ at 751.

Each of these systems is under-theorized in immigration law.⁴⁶ The law governing each has implications for contemporary immigration law and policy, and more must be written about the importance of indentured servitude and other forms of bonded labor as antecedents to modern immigration law. My focus here is on the relevant legal scholarship relating to slavery.

As Bilder has shown, slavery was not merely a degrading, exploitative economic system, legal status assignment and existential condition, it was also a means of transporting men and women from Africa and the diaspora into the colonies and slave-importing southern states.⁴⁷ In other words slavery was “both a labor relationship and a way of moving people” from one national landscape to another.⁴⁸ Enslaved people were “simultaneously individuals who increased population and a pool for bound

45. Bilder at ____. Clearly, these systems represent very different mechanisms for securing a similar purpose: the importation of laborers to work in the US. The conditions, abuses, terms and existential implications of the two distinct categories are of ongoing importance. Indentured servitude was the more or less voluntary system by which the vast majority of Europeans entered the US from the founding generations through about 1820, and were placed under contract to work, generally for 4, 5 or 7 years, to pay the cost of their passage. Recent historians estimate that ½ to 2/3 of all “white” immigrants into the country from the 1630s to the war for independence came under indenture, numbering some 600,000 men and women. Once their indenture was completed, however, their status changed, and these formerly bound white laborers were free, after 1790, to become naturalized US citizens. Bilder at ____.

Slavery, on the other hand, as we all know, was entirely *involuntary* (about which more may be found *infra*, section III.A.1.), and represented qualitatively, a different order of socially-constructed dehumanization by fusing bound laborer status, or slave status, with race, and the development of an ideology of black sub-humanity to sustain it. Thus did slavery degenerate, over the 17th and 18th centuries, into what Ralph Waldo Emerson saw it to be in his own lifetime: “an institution for *converting* men into monkeys.” Selected Writings of Ralph Waldo Emerson (Signet 1965) at __ (emphasis added). Not until the Civil War and the enactment of the Reconstruction Amendments – notably the 13th and 14th – was slavery barred and African Americans unambiguously deemed “persons” and, after 1870, permitted to naturalize as US citizens. So, as a matter of socioeconomic, cultural and institutional consequence, the two systems must be understood as separate and distinct.

The differential status assigned to “slave” and “indentured servant” was made virtually permanent by the very different terms and conditions that characterized enslaved versus indentured people. Indeed, the complete human debasement that was slavery during the 19th century continues to fuel calls for its characterization as an official “crime against humanity” and redress via payment of restitution and reparations to descents of slaves in Western nations, and to the African countries whose indigenous population suffered from the trade in the 17th and 18th centuries. These controversial aspects of our complicated and in many ways shameful history have for centuries clouded our capacity to see those aspects of chattel slavery (and indentured servitude) that mark their incontrovertible contributions to immigration history, law and public policy.

46. *Id.*

47. At the time of the signing of the ratification of the Constitution, only South Carolina and Georgia were engaged in the importation of slaves from Africa. Berns *supra* note __ at ____.

48. Bilder, *supra* note __ at 761.

labor.”⁴⁹

In another important contribution, Walter Berns focused on the protection slavery received under the United States Constitution, particularly in clauses limiting Congressional authority to interfere with the trade.⁵⁰ The Constitution’s explicit protections for the forced migrations of Africans through the system of slavery are commonly listed among the “compromises” between disputing regions and factions necessary to forming the union. Seldom are they discussed as central, if not crucial, to the forced migration system’s smooth functioning. Specifically, the most important provision for our purposes is found at Article 1, Section 9, the Importation and Migration clause. Under that clause:

The migration and importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.⁵¹

This clause provides constitutional protection of the forced importation of Africans by barring Congress from exercising its powers to prohibit the “Importation and Migration” of such persons until 1808. In so doing, it provides us the constitutional law governing the importation of persons into the country. Most scholars agree that this phrase was originally intended to pertain to the forced migration of enslaved Africans.⁵² Further, Article 1, section 9 explicitly permits Congress to collect taxes on the importation of enslaved persons, although Congress apparently never did so, preferring instead to raise revenue on enslaved persons indirectly – through the federal taxes on real property.⁵³ In this way, the Congress endorsed slavery as federal government policy and an important revenue generating source for the young nation.

It is important to consider the role of the Founders in setting the course for immigration law and policy during their generation, and beyond. Recall the “Migration and Importation clause” at Article I, Section 9, Clause 1:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit shall not be prohibited by the

49. *Id.*

50. Walter Berns, *The Constitution and the Migration of Slaves*, [].

51. U.S. Const. Art I, Section 9, clause 1. The importation and migration of Africans for what was very likely slave labor had been ongoing since 1619, when the first continuous British colony was established at Jamestown, Virginia, [cite] and perhaps a century earlier in the Spanish colonies of present-day Florida [cite].

52. Cite Neuman; Bilder; Berns articles.

53. Erik Jensen, *THE TAXING POWER* at 172-3.

Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.⁵⁴

Note the use of the word “Persons” in this clause, and the drafters’ decision not to mention slavery expressly. The phrasing assuaged the concerns of some who refused to permit the Constitution to acknowledge the right to property in persons, but also gave rise to arguments that, in using the words “Persons,” the drafters could not have been referring to enslaved people.⁵⁵ On its face, this clause involves a limitation of whatever powers the national legislative body might possess to regulate, or even prohibit, the “importation” of “such Persons as any of the States” might admit. Since the founding, its relationship to Congress’ power to regulate either slavery or, considered separately, immigration, has been contested.⁵⁶

However, historical records confirm that the clause was aimed to serve as a limitation on Congress’ power to regulate slavery. Given slavery’s function as a system of immigration, it might fairly be argued that this clause reflects a constitutional limitation on Congress’ power to regulate this form of immigration for some twenty years, and hence, an endorsement of the system by the Founders. Nevertheless, the history of the Supreme Court’s treatment of this clause confirms that since “slaves” were a form of commerce, and immigrants could not be, this clause had “nothing to do” with immigration.⁵⁷

Considered today, entire lines of case law that might be said to bear on this matter are problematic. They are not only anachronistic but morally reprehensible. Thus I argue that modern courts and commentators must acknowledge them as such – as relics of state-sponsored white supremacy that we have, as a nation, thoroughly disavowed – and endorse interpretations of these federal provisions in light of their objective consequences. Unarguably, these provisions protecting the business, practice and policy of importing Africans from their home countries into the United States, under circumstances that would today be considered state-sponsored forced migration immigration. Hence, they are historical antecedents of modern immigration law and policy.

54. U.S. Const., Art. 1, Sect. 9, cl., 1.

55.

56.

57. See, e.g., *The Passenger Cases*, 48 US 7 How. 283 (1849). Compare *In re Ah Fong*, 1 F. Cas. 213, 216 (1874) (“[W]e cannot shut our eyes to the fact that much of that which was formerly said upon the power of the state [to exclude any person it may deem dangerous to its citizens asserted by Taney in the Passenger cases] in this respect, grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits.”)

Berns' analysis details the battle over the meaning of this clause, which played out in the courts, Congress and state legislatures over the better part of the 19th century.⁵⁸ He describes the important stakes that shaped the Supreme Court's interpretation of this clause, and the corresponding reach of Congressional power over immigration. He concludes that the unsettled and bitter contests concerning the respective powers of the federal branches over the states rights to regulate slavery prohibited the development of comprehensive immigration law until the settlement of these issues through the Civil War.⁵⁹

Another clause is important to a full understanding of the protections that the drafters granted the slave trade in the Constitution. The Constitution's Article V provides:

[N]o amendment which shall be made prior to the year one thousand eight hundred and eight shall affect the first clause of the ninth article.⁶⁰

Read, as it must be, in conjunction with Article 1, Section 9, the Importation and Migration clause, this provision makes plain the Founders' intent to support and protect slavery, and operates as well as an important founding federal law respecting forced migration immigration into the United States.

The final important law in this trilogy of federal regulation of forced migration immigration is the Act by Congress making good on the threat implied by the enactment of Article 1, Clause 9. As foreshadowed above, in March, 1807, Congress under President Jefferson enacted a law outlawing the importation of African slaves, to take effect on January 1, 1808. With this law, Congress withdrew its support of the forcible transatlantic migration of Africans and their transportation to the United States for sale. Although some 50,000 additional Africans were imported in the years between 1808 and the start of the Civil War, this law signaled, at least, Congress' intent to bar the transatlantic migration system of slavery – a system so odious that its common name was never used in the Constitution itself.⁶¹ Nevertheless, historians report that this law was under-enforced, which resulted in the continuation of international forced migration under even more ignoble means, including illegal smuggling.

58. Berns, *supra* note __ at __.

59.

60. U.S. Const. Art. V. In addition to these important provisions, the various other slavery compromises provide additional indication of the Congress' commitment to slavery, including the 3/5ths clause; and the fugitive slave clause.

61. Berns at __. Indeed, some consider the importation of Africans for enslavement to be an example of systemic illegal immigration. Daniels at 63.

In 1865,⁶² Congress finally disavowed slavery as direct or indirect United States policy in the 13th Amendment. Section one of the Amendment reads:

Neither slavery nor involuntary servitude, except for punishment of a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.⁶³

In this way, Congress for the first time explicitly disavowed not only the formal transatlantic trade in slavery, but the internal (or intracontinental) version, and with it, the forced migrations and displacements which had made the illegal transatlantic forced immigrations and trading in slavery a viable (and many say, tacitly permitted) option between the time of the passage of the 1808 Act and the 13th Amendment.

My purpose has been to identify the key pieces of legal scholarship that lay a strong foundation for arguing that the importation system of slavery was a system of government (and ultimately federal government) - sponsored immigration. To summarize, slavery included: (1) the systematic forcible importation of people from various nations, primarily in Africa, into the colonies, territories, and later, various states, (2) by explicit protection under provisions of the United States Constitution. Thus, it may be said that, using both active and passive law and policy, the state and federal governments concurrently regulated this what we might call early immigration law of slavery. This was so from the founding in 1787 until 1865, when Congress enacted the 13th Amendment, an assumption of Congressional authority over the right to regulate slavery which was ratified in 1876 by the Supreme Court's grant of exclusive jurisdiction over immigration law to Congress in *Henderson v. New York*.⁶⁴

In short, the myth of an unregulated first one-hundred years of federal immigration under law depends on the embrace of certain fictions. Among these, that enslaved people were not immigrants; and that the constitutional and federal laws protecting slavery, beginning with the slavery compromises in the constitution, were not forms of immigration law. These fictions are born of the legal, ideological, epistemological and

62. The Thirteenth Amendment to the US Constitution was proposed on January 31, 1865, and ratified on December 6, 1865. See Terry L. Jordan, *The U.S. Constitution and Fascinating Facts About It* 49 (2003). It was followed by the Fourteenth Amendment, which was proposed on June 13, 1866, and ratified on July 9, 1868, and the Fifteenth Amendment (granting Blacks the right to vote, proposed on February 26, 1869 and ratified on February 3, 1870. *Id.* at 49-50.

63. US Const, Admt 13. Clause 2 of the 13th Amendment gave Congress the power to enforce this Amendment by appropriate legislation. In this connection, it is notable that although the amendment passed by 2/3 of the states in 1865, southern states often took quite a while to follow suit. Mississippi, for example, did not ratify the 13th Amendment until 198__.

64. *Henderson v. Mayor of New York*, 92 US 259 (1875) (granting Congress' exclusive powers to regulate immigration as existing under the Commerce clause).

ontological imperatives of slavery. They are fictions that have played an important role in the processes by which slavery and immigration have themselves operated as technologies of racial and citizenship formation, and of racially-structured subordination.⁶⁵ Now consider whether good reasons argue for perpetuating these myths.

II. Arguments Against Considering Slavery-Related Importation and Migration Law as Immigration Law

In his seminal article *The Lost Century of American Immigration Law (1776-1875)*,⁶⁶ Professor Gerald Neuman identified state and federal enactments prohibiting the importation of African slaves as among the laws that might be considered “lost” immigration laws. Professor Neuman briefly noted several factors for and against considering such laws “immigration”-related.⁶⁷ His arguments provide a good place to begin a new analysis of this question.

A. Professor Neuman and the Reframing Question

The key factors identified by Professor Neuman as militating against reframing immigration law to place slavery at its origin include: (1) that slavery was involuntary; (2) that enslaved people were deemed less than fully human; and (3) the concern that viewing slavery as immigration may be euphemistic.

1. Slavery Was Involuntary

The first factor that Neuman identifies as counseling against including slavery-related laws under the rubric of immigration is that slavery was involuntary. Consequently, immigration law scholars may be uncomfortable with the notion that slavery should be considered within the field most often dedicated to voluntary forms of migration across borders. Instead, the thinking goes, despite the obvious fact that people were permanently transported as part of slavery, it was an entirely separate and distinct system from what would become our immigration system.

Immigration scholars are not alone in this preference for an exceptionalist approach to slavery. Lawyers and lay people of all backgrounds tend similarly to express a lack of interest, if not outright

65. Compare MICHAEL OMI AND HOWARD WINANT, RACIAL FORMATIONS IN THE UNITED STATES __ (1994).

66. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833 (1993).

67. *Id.* at 1837 n. 18.

confusion, when asked to consider the two together.

Moreover, African Americans especially may chafe at the comparison. Indeed, “*my people were brought here in chains,*” is a phrase often uttered by Black students in their earliest critiques of the romanticized narrative of America as a welcoming “nation of immigrants.” Most Blacks who entered the country during the founding centuries *were* “brought here in chains,” having been captured and sold, often by Africans from competing tribes, into slavery. For many Blacks and their sympathizers, the notion of considering slavery as a form of immigration seems like an inappropriate comparison.

But as Neuman and Martin have shown, *modern* immigration laws apply to involuntary as well as voluntary migration.⁶⁸ Indeed, “forced migration immigration” has evolved as a distinct area of conduct, universally banned, but properly considered under the rubric of immigration law.⁶⁹ The mere fact that slavery was an involuntary condition, then, is no longer a sound basis for failing to incorporate laws governing the importation of enslaved persons into the body of law analyzed by students and scholars of immigration as immigration law.

2. Enslaved “Immigrants” As Less Than Fully Human

Classical racialism⁷⁰ provided the pseudoscientific basis for slavery. By dividing humankind into a handful of categories and ranking the categories in order of Eurocentric values and features, early slave-holding societies like the colonies and original states were able to rationalize the contradictions between natural and “inalienable” rights and a systematized denial of those rights to categories of men and women.⁷¹ Scientific understanding has evolved to reveal the lack of a basis for the notion of race, let alone the notion that Blacks were “not fully human” in the 18th and 19th centuries. Nevertheless, some would argue that since early lawmakers did hold such views, the laws they made to regulate the slave trade in all relevant respects are wholly distinct from the laws relating to the migration and naturalization of those recognized at the time as fully human beings.

68. *Id.* See also, Martin et al, *supra* note 24 et seq. and accompanying text.

69. Here Neuman cites *Plyler v. Doe*, 457 U.S. 202, 219-20 (1982); and *D’Agostino v. Sahli*, 230 F.2d 668, 670-71 (5th Cir., 1956) See, e.g., David A. Martin, T. Alexander Aleinikooff, Hiroshi Motomura, and Maryellen Fullerton, FORCED MIGRATION LAW AND POLICY 10-11 (2007) (defining forced migration to include both “smuggled” and “trafficked” people).

70. See, e.g., Ronald S. Sullivan, Jr., *Classical Racialism, Justice Story and Margaret Morgan’s Journey From Freedom to Slavery: The Story of Prigg v. Pennsylvania*, in RACE LAW STORIES 59, 73 (2008) (Devon W. Carbado and Rachel F. Moran, eds).

71. *Id.* at 73-86 (describing classical racialism and its justificatory role in American political life).

However, at least one well-known United States history scholar has “deplor[ed] the artificial cleavage between black history and immigration history.”⁷² Indeed, such a cleavage can be seen as an important and still–potent legacy of the thought-system that provided the basis for slavery. The persistence and continued appeal of this cleavage, and the racism beneath it, are, in fact, chief among the ways the legacies of slavery and white supremacy continue to operate amidst semi-conscious cultural denial and learned amnesia.

I cannot put aside my own moral condemnation of this aspect of the system of slavery and its legal justification—the assignment of human beings imported for profit from Africa into categories of “lesser” human beings, or animals. This was a sophisticated and widely accepted practice, but it was wrong. It was a lie questioned by some at the time, but ultimately accepted by the majority. The practice of such systematic assignment of human beings as subpersons presupposes the social, legal and political construction of elaborate systems of epistemological (prescribing norms for cognition) and ontological (providing norms for meaning and value) discourses and trainings based on ignorance, exaggerations, lies and silence.⁷³ The establishment and maintenance of what W.E.B. DuBois called “the color line”⁷⁴ required, in our early history as it does to this day, countless misconceptions and deceptions. Amnesia and silence about these deceptions continue to influence law and public policy in the United States today.⁷⁵ The ongoing assignment of slavery into a separate, completely distinct and wholly exceptional system is an important aspect of the epistemological and ontological systems that perpetuate the lie that classical racialism and racism, historically and in the present day, has some grounding in fact, that white supremacy is or was supported by legitimate rationale.

72. Neuman, *supra* note 4 at 1837 n. 18 (citing Roger Daniels, *COMING TO AMERICA*).

73. See Charles Mills, *THE RACIAL CONTRACT* 11 (2001) (describing the “Racial Contract” as a set of agreements or meta-agreements between one set of humans defined by a shifting set of “racial” criteria as “white” and “co-extensive (with due allowance for gender differentiation) with the class of full persons” to describe another subset of humans as “nonwhite and of a different, inferior moral status, subpersons, so that they have subordinate civil standing in white or white-ruled polities[...]” the “general purpose of which is always the differential privileging of whites as a group with respect to nonwhites as a group, the exploitation of their bodies, land and resources, and the denial of equal socioeconomic opportunities to them.”)

74. W.E.B. DuBois, *THE SOULS OF BLACK FOLK* () (“The problem of the 20th century will be the problem of the color line.”)

75. Compare Sioban, *Queering the Color Line* at ___ (about silences required...).

3. Is Viewing Slavery as Immigration is Euphemistic?

For some critics, viewing slavery as immigration minimizes the singularity of American chattel slavery. To these critics, any consideration of slavery as a form of immigration perpetuates an unacceptable euphemism.

Admittedly, to conceptualize these experiences as immigration—even if clearly “forced migration immigration” – runs some risk of minimizing its singularity. But it need not do so. To the contrary, it underscores the ways in which the particular immigration experience of African Americans transported via slavery was a singular *immigration* experience. This opens the door to new conversations about the similarities and differences between the experiences of African Americans and others who arrived in this country, or were forcibly “brought in” via conquest. We can, and I believe we must, understand the different consequences of forced immigration to one legally assigned the status of “slave” (an assignment into a system Congress itself has called “evil”⁷⁶) when compared to the consequences of legal assignment into the other available statuses -- “native,” “indentured servant,” or “free person.”

B. The Technical Legal Case For Characterizing Slavery Law as Immigration Law

Walter Berns and Mary Sarah Bilder have each conducted substantial analyses of the technical, textual arguments regarding the Constitutional law applicable to govern the great debates over the immigration and the migration of enslaved people.⁷⁷ Berns focuses on the “importation and migration” clause, Article 1, Section 9, and argues persuasively that neither legislative intent nor consensus political objectives make clear any plausible consensus understanding regarding the availability of the clause to permit Congress to regulate slavery.⁷⁸ He shows that the intent of the drafters regarding the full scope and reach of the “migration and importation” clause is far from ascertainable by the surviving legislative history or other contemporaneous documents, and the comments and interpretations of the drafters themselves seemed to shift radically over time. As the debate over the future of slavery within the slave states reached a fever pitch in the years following cessation of the trade in 1808, defenders of slavery found less and less to be embarrassed about in the

76.

77. Walter Berns, *The Constitution and the Migration of Slaves*, 78 Yale L.J. 198 (1968); Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 Ms. L.Rev. 743 (1996).

78.

institution, and correspondingly less evidence of previous Congressional intent to permit the regulation of slavery using the importation and migration clause.⁷⁹ Given the historical debate over the meaning of this clause, many might be unpersuaded that the clause represents the Founders' endorsement of slavery as a labor importation system. However, as Mary Sarah Bilder suggests, the connection between this clause, slavery, and immigration exists as an historical fact.

Bilder's analysis focuses on the dominant explanations for the "century-long struggle" over the authority to regulate immigration, finding that they fail to focus adequately on the imperatives of a political economy built on slavery and indentured servitude.⁸⁰ She argues that the long struggle may be explained by the Constitution's failure to identify immigration as one of the areas subject to Congress' lawmaking discretion.⁸¹ For Bilder, slavery and indentured servitude exert undue influence over the Court's decisions regarding the intersection of immigration with the commerce clause. She demonstrates that immigration, commerce and chattel slavery were connected "less by analogy and general influence" than as "an integral historical factor" explaining the development of these areas within the doctrine.⁸² In careful detail, she shows how the struggle to define immigrants as either persons or articles of commerce became increasingly bound up with the questions of federalism animating the debate over Congress' powers to regulate either slavery or the immigration of whites and free Blacks.⁸³ Bilder demonstrates persuasively that the real reason for the centuries-long debate over whether people were "articles of commerce," and therefore whether the businesses engaged in importing these articles were engaged in commerce subject to Congressional regulation under the Commerce clause (as federal immigration law and policy, or otherwise), was the risk posed to slavery by the possibility of an affirmative answer to these questions.⁸⁴ Assuming that

79. See Berns, *supra* note 11 at ___.

80. Bilder, *supra* note 12 at 747.

81. *Id.*

82. *Id.* at 746 n. 7 and accompanying text.

83. *Id.* at 792-824, *passim*; see also Devon Carbado, *Racial Naturalization* {cite}, and USF Employment, Labor and Human Rights Symposium remarks (notes on file with author) (*infra* note 7).

84. See Bilder, *supra* note ___ at 807-08. (Noting that the issue of whether persons were "articles of commerce" subject regulation "had become inextricably bound to perceptions of distinctions between 'persons' and black slaves, and citing and discussing, as an example, the *Groves v. Slaughter* case, 40 U.S. (Pet.) 449 (1841) involving a seller of enslaved people's right to collect on a defaulted note for their purchase and ultimately raising the question whether slaves were "articles of commerce" the transportation of which could be regulated by Congress.)

today, immigration law has no interest in adhering to the rationales that protected chattel slavery, little reason exists to prefer interpretations of these laws and policies developed with those objectives in mind.

C. A Doctrinal Coherence Argument

Reorienting immigration law and policy from the standpoint of slavery would amount to a sea change within immigration law scholarship, but one that is highly desirable.

To begin with, immigration law is about the movement and migration of people, and the law's role in its regulation and restriction. From that standpoint, the aspects of chattel slavery that bear on the movement of enslaved people into the territory that became the United States are by definition the subject of immigration law. Failure to include the law of slavery as an antecedent to present-day United States immigration law and policy, then, is simply unsound. Indeed, the ongoing failure adequately to locate the law of slavery as among immigration-related law providing shape to the understanding of immigration in the early historical period represents a miseducation about the relevant foundational law. Scholars should no longer be forgiven for stating that “[a]t the Founding, there was essentially no federal immigration policy.”⁸⁵ We should be teaching and training immigration lawyers who have a more nuanced understanding of the relevant constitutional compromises that gave rise to the current law and policy to assist students and practitioners in better understanding the challenges they face today.

For example, if we take as a given that forced migration immigration was our primary immigration *system* of choice for the country's first one hundred years, it follows that our immigration law and policy originated out of and thus very likely reflects at least some of the rationales, conflicting motivations, and political imperatives of chattel slavery. For example, we know that like slavery, the United States immigration law that officially emerged as a federally-regulated system in the post-slavery era was founded upon classical racialism and the related commitments to racialized economic, labor relations and politics which dominated the Congress from the founding and well into the 19th century.⁸⁶ Those original commitments exert more than a little influence over the system operating today.

We live in an era which demands clarification of that influence. Lawmakers, from the Oval Office on down, seem perpetually engaged in

85. See, e.g., Gabriel Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in IMMIGRATION STORIES (2005), and, indeed, citing Neuman for this proposition.

86. See [The Slave Power]

efforts to address aspects of the current system deemed by a broad spectrum of analysts and observers to be “broken.”⁸⁷ Criticisms of our current system include those focused on low- and unskilled labor. A better understanding of the current system demands a closer consideration of how we got here. As will be seen, slavery was the most significant driver of those factors upon which the development of ideas about immigration in the new world came so heavily to depend. For scholars and policymakers interested in meaningful and effective reform, the implications of identifying slavery as the foundation of key components of the modern immigration system in the United States are profound.

First, analyzing slavery as immigration – and more specifically, as forced migration immigration⁸⁸—centers the demand of capital for off-market labor as perhaps the most important of all shapers of immigration policy in United States history.⁸⁹ Despite the importance of labor-based immigration to the powerhouse industries within our economy, and its potentially controversial implication for domestic labor interests, Congress has failed to develop labor-based immigration policies in a systematic and reliably accountable manner. This analysis helps to clarify the reason why, by highlighting under-analyzed aspects of the underlying policy debates – to wit, the irresolvable conflict between popular demands for protection of domestic labor interests and the less obvious but regnant demands of capital for a continuing supply of off-market labor in immigration policy debates and reform proposals.

Secondly, viewing slavery as immigration promotes a more thorough consideration of how the experiences of enslaved and free “noncitizen” Blacks shaped the development of immigration policy in the founding generations. The experiences of “free” and enslaved Blacks as immigrants and as present and future candidates for citizenship in the slavery and post-slavery eras yield important insights about the roots of the social and cultural construction of “noncitizens” and “quasi-citizens” reflected in contemporary political discourse and culture. A better understanding of the role of Blacks in our antebellum political history promotes a richer understanding of the role quasi-citizens and their ambiguous political and status claims continue to play in shaping immigration law in the United

87. See “White House Moves to Ease Guest Worker Program,” NY Times (February 7, 2008)

88. See *infra* note ____.

89. In some ways, this is an obvious point. As Samuel Gompers, one of the early Presidents of the AFL commented in the late 19th century, reportedly said: “we immediately realize that immigration is, in its fundamental aspects, a labor problem.” Vernon Briggs, Jr., Immigration Policy and American Unionism: A Reality Check,” Briggs Papers online at _____.

States today.⁹⁰

Finally, viewing immigration as a function of slavery reveals an important irony: that with respect to immigration, slavery—our racially-based forced migration system—laid a foundation for both a racially-segmented labor-based immigration system, *and* a *racially* diverse (even if racially hierarchical) “nation of immigrants” – legacies which the founders may not have set out to leave, but which are among our history’s most pernicious and most precious gifts to civilization. As we enter the second decade of the 21st century, grappling with such ironies, and integrating new more nuanced narratives of understanding into our national discourses may become central projects in the re-articulation of American history that is the mark of a truly reconstructed America.

D. A Sociology of Knowledge Argument

The sociology of knowledge is the study of the relationship between human thought and the social context in which it arises, and the effects prevailing ideas have on society.⁹¹ Critical Race theory, a sociology of knowledge project focused on the relationship between legal thought and the elements of racism in the social context within which it arises, operates from the assumption that race has played a central, organizing role in American law and policy, including its production of categories of knowledge and related rules and regulations.⁹² From a Critical Race theory perspective, immigration and race are bound together and have been and will be. Nevertheless, we do what we can to ameliorate or to correct the errors of our racist-bound past.⁹³ Indeed, a leading scholar of immigration and critical race theory has argued that “[u]ltimately, immigration scholars face the daunting challenge of ensuring the removal of racial discrimination’s taint on the development of immigration law and policy.”⁹⁴ So the issue from this perspective may well be less *whether* to re-

90. See also Buckner Inniss, *supra* note __ at __ (referring to Blacks in America as permanent “quasi-aliens.”)

91. See PETER L. BERGMAN AND THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966); MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* (1961).

92. See KIMBERLE CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995) at __; RICHARD DELGADO AND JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001); Derrick Bell, *Critical Race Realism*, __ Conn. L. Rev. __ (yr).

⁹³ See, e.g., Linda Greenhouse, “The End of Racism, and Other Fables,” *New York Times*, September 20, 1992 (quoting Derrick Bell on the importance of struggling despite the unlikely chance of success against anti-Black racism)

94. Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference to the Race Critique*, 2000 U. Ill. L. Rev. 525, 526 (2000).

characterize slavery as a form of immigration, but *how* to do so in a way that does not replicate patterns of marginalization and erasure – i.e., epistemological violence – in the act of reframing this subordinated groups’ experiences. Despite the troubling aspects of the consideration of slavery as a form of immigration discussed above, the failure to understand the Black experience of state-sponsored enslavement as one sort of immigration experience (albeit a horrific one), poses a number of risks to justice, when viewed from an antisubordination theory perspective, and to immigration law and policy, that are at least as troubling.

With regard to the equality and antisubordination agenda⁹⁵ at least two consequences follow. First, failing to see slavery as immigration furthers the construction of “the immigrant” as a “white” – or at least, not Black (in a white-over-Black binary racial order where “Black” is a stand in for the perennial Other). Others have noted the “white norm” in the prevailing immigration law narratives of the past – i.e., the tendency to view every immigration experience through the prism of the experience of white Europeans, who are taken as the model or norm.⁹⁶

Second, and relatedly, it contributes to the self-identity among Blacks, and the Other-identity among non-Blacks, of the Black as perpetually alienated from the immigrant experiences of others, and hence, from the “American” experience. Doing so contributes unnecessarily to the political currency of anti-immigrant rhetoric within the Black community, and anti-slavery-descendant-Black racism among more recent immigrants from all over the world.⁹⁷

With regard to substantive immigration law, failure to locate slavery within the terrain that provides the foundation of the contemporary immigration system contributes to a failure to properly grasp one of the most critical drivers of the development and underdevelopment of the system since the founding and up to the present day – the demand for ever more cheap and expendable labor, and the standard racialization of, and racism against, that most expendable immigrant labor pool.⁹⁸ It renders impossible the necessary reckoning with the pro-slavery origins of the

95. See (cite to Mari Matsuda’s and Francisco Valdes’ antisubordination pieces.)

96. See Fogleman, supra note 14 and accompanying text; and others.

97. This includes African-heritage immigrants from other parts of the world, including the Caribbean, and more recent immigrants from African countries, whose discord with African Americans has been the subject of scholarly comment. See, e.g., Buckner Inniss at 119-32.

98. See, e.g., Bill Ong Hing, *Institutional Racism and ICE Raids: The Demonization of Immigrant Workers*, __ USF L. Rev. __, __ (2009) (demonstrating the “inherent racism at the center of ICE raids and, for that matter, other ICE and Border Patrol operations” and calling for a reconsideration of these and other immigration policies as a consequence).

system which continue to weigh heavily, if invisibly and with a high degree of deniability, on the immigration system continuously under construction in the present day, to the benefit of corporate market interests, and to the detriment of domestic and immigrant laborers alike.⁹⁹

Great care should be taken by immigration scholars and teachers so as not to replicate patterns of epistemological violence by rendering invisible, or minimizing, the horrors of the Black experience. Indeed, such work challenges professors and instructors to broaden their base of knowledge and to heighten their skills at handling the often challenging reflections and responses of increasingly diverse students of immigration law.¹⁰⁰

E. General Political Concerns

1. Reparations

Sensitivity around the issue of categorizing enslavement as an involuntary, forced, and presently illegal form of immigration may be related to sensitivity regarding the potential for such a categorization to be used as a support for redress – i.e., for some form of reparations to the survivors of those enslaved. The claim for reparations is one for which, despite the very real complications that would attend any effort at crafting a reparations remedy for slavery, I admit more than a passing degree of interest, and even some sympathy.¹⁰¹ Whatever one's views of the merits of such claims, the possibility that such claims might be bolstered in some ways, and weakened in others, should not be a factor in considering the merits of promulgating the truth: that slavery was in fact forced migration immigration upon which the colonies, states and nation depended mightily for its success through most of the countries first three centuries.

2. Mobilization of Advocates and Immigrants in the Battle for Immigrants' Rights

We live in the midst of an immigration crisis of epic proportions. Immigrant communities today, especially those hailing from south of the Mexican border, face increasing criminalization, detention and threats of deportation, with fewer and fewer protection either in law or process.¹⁰² For

99.

100. See, e.g., Rhonda V. Magee, *Toward and Integral Critical Approach to Thinking, Talking, Writing and Teaching About Race*, supra note __ at __.

101. See, e.g., Rhonda V. Magee, *The Masters' Tools, From the Bottom Up: The Curious Response to Reparations in Mainstream and Outsider Remedies Discourse*, 79 Va. L.Rev. 863 (1993).

102.

many lawyers and scholars of immigration law, and for the most affected communities today, the issue of the treatment in immigration history of the earliest arriving Americans from an amalgam of countries in Africa might seem, well, rather like watering the foundation of a building with a fire raging in the penthouse. This may be especially true given that African Americans may be less than acutely interested in or sympathetic about the concerns of the latest arriving immigrants, many of whom are seen as taking away formerly available jobs.¹⁰³

Indeed, as many have noted, tensions do exist between and among African Americans, and the dominant immigrant populations today.¹⁰⁴ These tensions are real. Latino and Asian immigrants and their advocates are rightly concerned about staying on messages that maximize efforts to mobilize political groups and individuals to work for changes to current policies. African Americans tend not to embrace these issues. Will discussing slavery as immigration help efforts to reach the groups whose community members are most at risk in the current anti-immigrant environment? Or is it simply a distraction from the most pressing political objectives at hand? If handled well, these discussions may help lay the foundation for greater cooperation between African Americans, Latinos and Asian-Americans and increase the chances that they might work together for their greater freedom.

In addition, the compartmentalization of these issues – slavery and segregation as “Black” issues, immigration as an Asian and Latino issue – may have created a certain sense of “turf” or territory. Some Asian and Latino advocates and their beneficiaries may resent a move that might be seen as Blacks “horning in” on this topic and drawing attention away from their more pressing modern day concerns. Some may believe, in other words, that the White-Latino-Asian immigrant paradigm or No-Black paradigm in immigration history must be defended to keep the political pressures on sharpest point. Perhaps not unrelatedly, there is the unfortunate reality of the complexities and passions of inter-minority group bias and racism.¹⁰⁵ While broadening the immigrant narrative to include greater appreciation for the immigrant struggle within the African American experience, Latino and Asian-American immigrants might find it easier to look upon African Americans with something approaching brotherhood.

103. See, e.g., Hing, *supra* note __ at __ (discussing Black concerns about labor competition from recent immigrants).

104. Hing, *supra* note _ at __.

105. See, e.g., Kang, *supra* note __ at __; see also Buckner Inness, *supra* note __ at __.

Surely, these and other political issues may negatively impact the scholarly and public reception of the analysis and reframing project proposed here. Nevertheless, I firmly believe that discussing these issues with the ultimate objective of broadening the narrative reach of immigration to include the Black American experience has the potential to bring together various communities who, in fact, as I hope I have shown by the foregoing, have much more in common than the standard narratives suggest.¹⁰⁶

As I intend to develop more fully in subsequent work, and touch upon briefly below, the ultimate value of this project goes far beyond the reach of immigration law or race law scholarship and teaching. The ultimate value of this project lies in its potential for restorative, reconstructive justice and healing of the national soul itself.

III. What Is To Be Done?

The foregoing analysis suggests that courses in immigration law systematically fail to present and adequately address the relevant law and history by which a significant portion of the present-day American population arrived in this country. Consider measures that we might adopt now to solve this problem and to better educate students and practitioners of immigration law.

A. Revising Immigration Law Casebooks to Tell the Complete Story

One of the first and most important steps that immigration scholars may make to correct this issue would be to revise the current immigration law casebooks with this criticism in mind. Every relevant casebook should include at least a short discussion of the history of the forced migration of enslaved Africans to the colonies and early American states as a significant component of the system of chattel slavery. By relevant casebook, I mean those immigration law books that seek either to survey immigration law generally (Legomsky, Alienikoff, Boswell, etc.) or those which focus

106. Even our cultural projects often fail to convey the connections and interconnections between and across Black experience in America and the contemporary immigrant experience. For example, the 2004 film “A Day Without a Mexican” received widespread commentary and spawned sympathetic coverage of Latino community issues, almost none of which referred to the 1963 off-Broadway play, “A Day of Absence,” which originate the plot line used in “A Day Without a Mexican” but featured a small southern town grappling with the sudden disappearance of all their “Negro” (or “niggra,” in the dialect) help. *See* Demetria McCain, “‘A Day Without a Mexican’ Déjà vu: Douglass Ward Turner’s Black Theatre Unforgotten,” <http://www.negroensemblecompany.org/index.cfm/bay/content.detail/contentid/26.htm>. (Webpage last visited by author on August 2, 2009.)

particularly on forced migration immigration (presently perhaps only Martin, Alienikoff et al.). By short discussion, I mean enough of an introduction to make the point that although chattel slavery included much more, it was a system of forced migration involving the transportation of Africans from various countries to the colonies and certain of the early American states, and, through the descendants of enslaved people accounted for approximately one-third of the population of the United States at the time of the Civil War. The point should be made that while the highest law at the time condoned these pernicious practices under a variety of Constitutional provisions, colonial and state laws and policies and now thoroughly debunked pseudo-scientific theories we would and do today consider such trafficking illegal. In addition, the policies and imperatives of this system of imported, racialized and permanently enslaved labor continue to reverberate through our immigration and citizenship law and policy today.

B. Encouraging and Conducting Further Scholarship on Chattel Slavery and Immigration

More research should explore the relationship between the system of chattel slavery, including the forced migration component, and the development of immigration law and policy in the United States. So far, the Neuman article stands virtually alone in looking at the law and policy of chattel slavery for clues to the development of federal immigration law. The historical records from the relevant period are likely to be scant. This probability should underscore the importance of getting undertaking work in this area sooner rather than later, so as to head off additional loss of records.

In this connection, I note the potential utility of the recent slavery disclosure ordinance movement. Through efforts of activists in major cities and some states across the country, state and local legislatures have passed laws requiring the disclosure of any relevant documents detailing the involvement in the slave trade of modern corporations.¹⁰⁷ The documents being uncovered and made public as a result of these new laws may aid in accessing what information there is on the importation of enslaved laborers, through the records of insurance companies, banks and other industrial actors involved in the trade.¹⁰⁸ Such scholarship should be actively supported and encouraged.

107.

108.

C. Beyond Immigration and Race Law Scholarship

Bringing chattel slavery's forced migration system into the immigration law canon will have implications far beyond the classrooms in which immigration law is taught. Chattel slavery left an indelible print on the minds of the world. Through that system, the greatest model of freedom the world had ever known sought explicitly to exclude a vital portion of the world's community (Africans) and its own society (African-Americans) from the community entitled to freedom. Grounded by the self-serving proposition that some men and women were more equal than others, and that membership in the political community could be restricted to a privileged racial group, chattel slavery embedded the policy of forcibly importing and migrating a racialized laboring class, creating permanent reliance on that labor while denying that class full participation in the democratic political community. Unpacking chattel slavery, seeing it as a complex system which included, as a significant part, a system of forced immigration with permanent barriers to citizenship, whose legacies remain with us, helps us better understand the dynamics that continue to animate immigration law and policy and debated reforms today.

The long-term impact of such a reframing of the slavery experience cannot be known. For too long, the chasm between Blacks and non-Blacks that undergirded and solidified slavery and segregation has rested in the national memory and membrane, unchallenged by deconstruction of all of its legal foundations. The virus of white supremacy is a legacy of chattel slavery and the privileges of whiteness inherent in racial restrictions on citizenship. It infects us all. By fleshing out the experiences of early African Americans, as forced migration immigrants, enslaved workers and free people (some of whom were exercising the right to vote at the time of the constitution's ratification), we might begin the articulation of a new, more inclusive narrative, one that understands this nation as having been strengthened by the contributions of people of diverse backgrounds from the beginning. It also may assist in healing the rifts between Blacks who trace their heritage to the era of chattel slavery, and more recent Black immigrants from Africa, as we embrace the tattered connections between Africa and America. Ultimately, such narrative reframing has the potential to aid in the deep healing of the American psyche – and that of whites, blacks and every shade in between.

Conclusion

Since the Founding, the United States has had as at least three significantly understated shadow objectives: the importation of immigrant workers under circumstances that may only be described as radically

racialized and exploitative; the maintenance of a permanent, quasi-citizen-worker underclass; and the privileging of whites in the immigration and naturalization process under circumstances that can only be described as racist. Since the Founding, these shadow objectives have found support and sustenance at both the federal and state levels, most notably, through active and passive laws protecting and regulating the importation and legal status of chattel slavery. These public policy objectives, and their elaboration in the law and policy of chattel slavery, are important to understanding United States immigration law and policy today. Indeed, they are its troubling foundations, its broken heart and transgressed soul