PRIVATE HABEAS

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ABSTRACT

Half a century ago, Abraham Maslow demonstrated that conditioning a person's physical safety on their participation in some higher-order social project is sheer madness. Yet this is exactly what federal immigration law does to undocumented victims of human trafficking. To receive a visa, victims must first convince Donald Trump's immigration officials—who have a strong interest in deporting them—that they are, in fact, victims. They also must cooperate fully in the prosecution of their trafficker, a process over which they have no real control. This is not a new complaint. Advocates have been frustrated by this myopia for a long time.

It's time we do something about this—not as lobbyists, but as lawyers. The federal habeas corpus statute requires courts to order the release of people detained "in violation of the Constitution or laws of the United States." These cases are usually brought against the government. But the Thirteenth Amendment and its enforcing statutes are not so limited, and neither the State nor the federal courts have ever confined habeas law to state actors. Abolitionist lawyers used the Great Writ to wrest freed slaves from the clutches of their masters when the political branches lacked the will to help. We can follow their example. Private Habeas proceedings allow advocates to bypass a hostile executive branch and—most importantly—order the legal process according to the victim's hierarchy of needs.

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Introduction

Imagine the following situation: Your name is Maria Lopez-Sandoval. You came to the United States on an employer-sponsored visa to work as a full-time maid in a hotel near the Laredo International Airport in south Texas. You have two children, a boy in high school and a girl in seventh grade. Your employer has always kept your immigration status current.

In 2014, however, the hotel got a new owner. A month later, your paychecks stop coming in the mail. You approach the manager to ask if there is a problem. He tells you that your immigration status has lapsed, you are now an illegal alien, and that he will no longer be paying you. Furthermore, he tells you that if you do not keep working full-time in the hotel, he will report you to U.S. Immigration and Customs Enforcement ("ICE") and have you and your children deported.

Terrified, you continue to work. You came to the United States from El Salvador, trying to save your children from becoming casualties in the gang war between MS-13 and Barrio 18.[1] You and your children are evicted and forced to move into the hotel, while the owner uses "rent" as another excuse for not paying you. Two years later, you see a flyer left behind by a guest, saying, "Has someone forced you to work for them? Are you being threatened? Call 1-(888)-373-7888 for help."

You are a good mother. You call from a pay phone. The person on the phone forwards your call to a local legal aid center. The lawyer takes your personal information and says they can help, but you must come in and tell an ICE officer your story. If the officer believes you, and if you cooperate in investigating the hotel owner, you can apply for a permanent visa for yourself and your children. If United States Citizenship and Immigration Services ("USCIS") grants the visa—a process that can take several months—you can

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[1] Jonathan T. Hiskey et al., *Understanding the Central American Refugee Crisis* 3, AM. IMMIGRATION COUNCIL (Feb. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/understanding_the_central_american_refugee_crisis.pdf.

stay in America.[2] You ask the lawyer if ICE could deport you if the officer doesn't believe your story or if something else goes wrong. Constrained by the rules of professional conduct, the lawyer says, "Yes, but we'll try to make sure that doesn't happen."

You are a good mother. You hang up. It would be nice if you could legally stay in the country and get paid for your work. You suppose it's possible a lawyer could get you a visa. But you doubt it. There are televisions in the hotel, and you are neither blind nor deaf. You've heard the stories. Your people, according to the President of the United States, are bringing drugs, they're bringing crime, they're rapists, and only some might be decent people. His chief lawyer has promised to whip up a "deportation force."[3] Even the supposed decent people—the paragons of Hispanic-American youth—are being arrested because they cannot afford the Deferred Action for Childhood Arrivals ("DACA") renewal fees.[4]

But you are alive here. Your children are alive. And the chances of them living to adulthood, getting married, and having full lives are far smaller if you and they are deported back to a war zone. Life comes first.[5] Even if it is lived inside a nightmare.

This is a hypothetical. But only in the sense that the specific facts are conjured to make a point. We all must work to live, but

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[2] USCIS Processing Time Information, U.S. CITIZENSHIP & IMMIGRATION SERVICES (n.d.), https://egov.uscis.gov/processing-times (select "I-914 | Application for T Nonimmigrant Status" from the drop-down menu; next select an option form the "Field Office or Service Center" drop-down menu; then click "Get processing time").

[3] Jeff Sessions, *Unleashed at the Border*, N.Y. TIMES (Apr. 13, 2017), https://www.nytimes.com/2017/04/13/opinion/jeff-sessions-unleashed-at-the-border.html?_r=0.

[4] Jamiel Lynch, *DREAMer Speaks Out on Immigration, Gets Arrested by ICE*, CNN (Mar. 2, 2017, 6:41 PM), http://www.cnn.com/2017/03/01/us/dreamer-arrested-jackson-mississippi; *see also* Michael D. Shear & Julie Hirschfield Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html?mcubz=1.

[5] *See generally* A.H. MASLOW, A THEORY OF HUMAN MOTIVATION (1943) (describing how human psychology naturally prioritizes physical safety and physiological needs over more complex desires, such as the desire to be treated as an equal member of society).

people like Ms. Lopez-Sandoval must do so without protection from the fundamental labor guarantees that U.S. Citizens take for granted. In theory, the immigration laws protect them from abuse; in practice, they are seriously flawed.

Ms. Lopez-Sandoval's situation can be viewed from three different perspectives. First, it is beyond doubt that she is a victim of labor trafficking under federal law, and is eligible for immigration relief under the Trafficking Victims Protection Act ("TVPA"), a landmark federal law passed to protect people who are trafficked to the United States from other countries.[6] However, as the dutiful legal-aid attorney informed her, in order to receive a visa, she must comply with all "reasonable request(s) for assistance" from the government or be "unable to cooperate with a request" due to trauma.[7] This requirement has been the subject of withering criticism by scholars and advocates, who contend that it prioritizes the government's agenda over victims' needs.[8] For undocumented immigrants, the burden of cooperation is even heavier—particularly in a state like Texas where both local and federal law enforcement are now particularly likely to ignore signs of trafficking in favor of Donald Trump's draconian deportation goals.[9]

Second, it is equally certain that the hotel operator has committed a federal crime. There is little dispute that the current federal laws make it illegal for a person to "obtain the labor or services of a person . . . by means of the abuse or threatened abuse of

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[6] *See* Trafficking Victims Protection Act [TVPA], 22 U.S.C. § 7102(1), (3), (9), (14) (2015); 8 U.S.C. § 1101(a)(15)(T) (2014).

[7] 8 U.S.C. § 1101(a)(15)(T)(i)(III) (2014).

[8] Jennifer M. Chacon, *Misery and Myopia: Understanding the Failure of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3024-27 (2006). *See generally* Charles Song & Suzy Lee, *Between a Sharp Rock and a Very Hard Place: The Trafficking Victims Protection Act and the Unintended Consequences of the Law Enforcement Cooperation Requirement*, 1 INTERCULTURAL HUM. RTS. L. REV. 133 (2006).

[9] *See generally* Jeff Sessions, *Unleashed at the Border*, *supra* note 3 (describing the anti-immigrant sentiment in the current administration and in certain border states); *see also* Kelly E. Hyland, *Protecting Human Victims of Trafficking*, 16 BERKELEY WOMEN'S L.J. 29, 43-44 (2001) (describing the difficult burden of cooperation under a relatively immigrant-friendly administration).

the legal process."[10] Under the statute, "abuse of process" includes:

> [T]he use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.[11]

The fact that ICE could have lawfully arrested Ms. Lopez-Sandoval is irrelevant. Immigration laws do not exist to give employers leverage over their workers—thus, any use of those laws to compel a person to work is unlawful.[12] This was one of Congress's explicit concerns in passing the Trafficking Victims Protection Act.[13]

Third, this situation is frustrating to advocates. It is hard for us to understand how there can be such a blatant violation of the law but yet such fierce institutional resistance to a remedy. Even ICE officers who are well-trained and willing to set aside the deportation priorities of their superiors for the good of victims often do not correctly identify victims as such.[14]

The issue becomes easier when law enforcement is willing to exercise their authority to rescue victims. In states where local law enforcement and ICE are focused on apprehension and deportation, however, they are unlikely to divert resources to humanitarian ends.[15] Legal advocates in these jurisdictions must therefore turn to

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[10] 18 U.S.C. § 1589 (2008).

[11] *Id.* § 1589(c).

[12] *See* United States v. Calimlim, 538 F.3d 706, 713 (7th Cir. 2008) (citing RESTATEMENT (SECOND) OF TORTS § 682) ("[T]he immigration laws do not aim to help employers retain secret employees by threats of deportation, and so [any] 'warnings' about [deportation are] directed to an end different from those envisioned by the law and [are] thus an abuse of the legal process.").

[13] 106 H.R. REP. 487 Part II, 106th Cong., 2d Sess. at § 2(b)(17) (2000).

[14] I have been personally involved in one such case where—legally—there was no question about the person's status as a trafficking victim. ICE agents whom our team knew to be well-trained and open-minded still concluded that further investigation was not warranted. The victim remained in the custody of their trafficker.

[15] *See* Barbara E. Armacost, *Sanctuary Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1222-41 (2016) (describing the

alternate means.

Some advocates I know have suggested using the threat of a civil damages lawsuit to force exploiters to release their workers. Federal forced labor laws allow this, and it may help in some cases.[16] But this does not help people like Ms. Lopez-Sandoval—the time it would take for service, discovery, and judgment under the Federal Rules of Civil Procedure allow the exploiter ample time to turn her over to ICE.[17] Without a plaintiff, the lawyer has no case; without a case, damages are not a deterrent.[18]

I propose a solution to this problem. The solution lies not in new statutes, but in one of the first and oldest weapons in the Western legal arsenal. The Writ of Habeas Corpus, otherwise known as the Great Writ, has long been a thorn in the side of executive officials more intent on enforcement or prejudice than on human liberty. For example, abolitionist lawyers routinely used the writ of habeas corpus to free African-Americans unlawfully held in servitude by their old masters. We can use it today to free victims of forced labor without involving immigration enforcement at all. I call this concept "Private Habeas."

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distortion of state policing when it merges with federal immigration priorities).

[16] 18 U.S.C. § 1595 (2015). On October 6, 2016, Homeland Security Investigations (HSI) implemented a policy where a victim could request "Continued Presence" by sending a copy of a § 1595 complaint to HSI. Email from Kelly Hyland, Associate Counsel for HSI (Apr. 13, 2017) (on file with author). Continued Presence ("CP") is a form of deferred action, usually granted by an ICE officer, that gives the victim temporary immigration status while legal action is pending. *See* 22 U.S.C. § 7105(c)(3) (2018). If HSI grants CP, the victim must provide the agency with quarterly case updates. *See* Email from Kelly Hyland, *supra* note 16. It remains to be seen if this policy continues under the Trump Administration. In any event, it still does not solve the core problem—the victim is forced to bargain with a government agency that has a strong ulterior motive.

[17] *See* DONNA STIENSTRA, A STUDY OF CIVIL CASE DISPOSITION TIME IN U.S. DISTRICT COURTS 23-26 (2016) (reporting that the fastest U.S. District Courts disposed of the average civil rights case in 237 days, and the average labor law case in 291 days. The slower courts disposed of the average civil rights employment case in 403 days).

[18] *See* 18 U.S.C. § 1595 (2015). Section 1595 also does not expressly authorize injunctions, a tool particularly useful to victims in this situation. Although it is possible that the courts would imply equitable authority anyway, I am aware of no case where the federal courts have done so.

The obvious hiccup here is that habeas corpus is traditionally used to release a person from unlawful government detention, not tortious private conduct.[19] But there is no *formal* state-action requirement in habeas law.[20] The habeas statute allows relief if a person is restrained "in violation of the Constitution or laws . . . of the United States."[21] Most violations of the Constitution inherently require state action.[22] The Thirteenth Amendment, however, does not.[23] Moreover, federal forced-labor statutes are based squarely on the Thirteenth Amendment.[24] Thus, the hotel owner who was holding Ms. Lopez-Sandoval was not only breaking federal law, he was violating the Constitution of the United States.

Using Private Habeas in these situations has several distinct advantages. The respondent must answer the Writ within three days or face the a federal judge armed with contempt powers.[25] The respondent must also produce the body of the person detained to the Court.[26] The Court must summarily try the law and the facts and dispose of the case within five days.[27] If the judge orders discharge, the Court's enforcement powers are enormous, and the doctrines of *res judicata* and contempt can be speedily invoked if the trafficker disobeys.

This procedure traps the exploiter, not the victim. The

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[19] *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 939-1035 (7th ed. 2016).

[20] Indeed, the Supreme Court has expressly acknowledged that habeas corpus can be used to free people from private custody. Peyton v. Rowe, 391 U.S. 54, 58 (1968); *see also* Nyugen Da Yen v. Kissinger, 528 F.2d 1194, 1202-03 (9th Cir. 1975). State courts also routinely hear Private Habeas cases, particularly in the child-custody context since their jurisdiction does not typically hinge on state action. Jones v. Cunningham, 371 U.S. 236, 240 n.12 (1963).

[21] 28 U.S.C. § 2241(c)(3) (2008).

[22] The Civil Rights Cases, 109 U.S. 3, 30 (1883); Robertson v. Baldwin, 165 U.S. 275, 282 (1897); Clyatt v. United States, 197 U.S. 207, 216-17 (1905); United States v. Kozminski, 487 U.S. 931, 939-943 (1988).

[23] *See id.*

[24] *See* Kozminski, 487 U.S. at 339-43; 22 U.S.C. § 7101(a), (b)(12)-(14) (2000).

[25] 28 U.S.C. § 2243.

[26] *Id.*

[27] *Id.*

trafficker cannot turn over the victim to ICE, because appearing before an Article III judge empty-handed will not end well for him. The trafficker may deny the exploitation, but the judge will not return the petitioner's body to him unsupervised. In short, he faces a procedure where it is virtually impossible for him to carry out a threat to the victim's bodily integrity—which is precisely the protection the victim needs.

This procedure is a win–win arrangement for the victim. The Writ's first purpose is to safeguard physical liberty.[28] The words "habeas corpus" literally mean "*you have the body.*"[29] Thus, using the Writ provides the advocate with an expedient judicial procedure to meet the immediate physical needs of the client. When victims try to present their case to an ICE agent, they are, as a practical matter, trying to persuade an adverse party. But victims who present their case to a federal judge speak to the only truly neutral officials in our government. If the petition succeeds, the advocate will not only have an official statement that their client is a victim—they will have a *judgment* supported by the full authority of Article III. Even if issue preclusion does not bar USCIS from denying the victim a T-Visa, it will have a much harder time impugning the credibility of a federal judge than a victim's affidavit.

In this Article, I first trace the history of Private Habeas in the American judicial system. I then turn to the language and procedure of the modern habeas statute and address some of the potential barriers to wielding it against a private actor. Finally, I expand on the benefits of using Private Habeas in forced labor cases and the techniques advocates might employ to do so.

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[28] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

[29] *Habeas Corpus*, BLACK'S LAW DICTIONARY (10th ed. 2014).

I. The History of Private Habeas

The most visible historical case of Private Habeas was *In re Turner*.[30] The petition was filed in the Federal Circuit Court for Maryland on behalf of a former slave and her daughter, against "restraint and detention by Philemon T. Hambleton . . . in alleged contravention of the constitution and laws of the United States."[31] She claimed that two days after abolition, she and other freed slaves were collected together and bound to their former masters by indentures.[32]

Hambleton returned the writ and brought Turner and her child to the Court.[33] The indentures did not comply with any of the requirements for white apprentices under Maryland law, and described the master's authority over her person as "property and interest."[34] Turner's counsel alleged that she was: (1) being held in involuntary servitude contrary to the Thirteenth Amendment, and (2) that the indenture denied her equal protection of the law under the Civil Rights Act of 1866, passed under § 2 of the Thirteenth Amendment.[35]

The Chief Justice of the United States, Salmon P. Chase, ordered Hambleton to release the petitioners on two grounds.[36] First, the indenture was "involuntary servitude, within the meaning of those words in the Amendment."[37] In the alternative, the indenture was invalid because it violated the equal protection clause in the Civil Rights Act.[38] Thus, the detention violated "the constitution and

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[30] *In Re* Turner, 24 Fed. Cas. 337 (C.C. Md. 1867).

[31] *Id.* at 339.

[32] *Id.* at 339.

[33] *Id.* at 338.

[34] *Id.* at 339. White apprentices were legally entitled to an education and could not be transferred at the sole will of the master. Ms. Turner's indentures gave no such protections. *Id.*

[35] *In Re* Turner, 24 Fed. Cas. at 338-39.

[36] *Id.* at 339.

[37] *Id.* at 339.

[38] *Id.*

laws of the United States."[39]

Although the Chief Justice was likely unaware at the time, he was not the first to order discharge under the Amendment. Five months earlier, a Tlingit Native American in Alaska petitioned for habeas relief, alleging he was being held as a slave by the customs of the tribe.[40] The judge, finding that "slavery in its most shocking form has been thoroughly interwoven" in the tribe, discharged the prisoner.[41]

Another case, decided around thirty years later, established that habeas can be a remedy for forced labor. Petitioners were being coerced to work on a vessel in port at Tacoma, Washington, after the vessel was conscripted into military service.[42] The Captain argued first that even if their rights were being violated, a habeas petition was not the appropriate remedy.[43] The District Court, however, held that they were "being coerced to labor . . . against their will . . . in violation of the thirteenth amendment."[44] In such cases, "the writ of habeas corpus is a right which cannot be denied."[45]

These are the only federal Private Habeas cases invoking the Thirteenth Amendment. But Private Habeas was alive well before we abolished slavery. The landmark case of *Somerset v. Stewart*—in which Lord Mansfield declared that rights to slavery would not be enforced on English soil—was decided under the English Habeas Corpus Act of 1679.[46] Writs of habeas corpus were also frequently issued against masters in the antebellum United States to free people

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[39] *Id.* at 340.

[40] *In re* Sah Quah, 31 F. 327, 327-28 (D. Alaska 1867). The judge misspelled the name of the tribe as "Thinglet" in the opinion. *Id.*

[41] *Id.* at 330-31.

[42] *In re* Chung Fat, 96 F. 202, 202-04 (D. Wash 1899).

[43] *Id.* at 203.

[44] *Id.* at 203-04.

[45] *Id.* at 204. The Court did not discharge the seamen, because it was concerned about depriving the government of the use of the vessel. However, it required the Captain to post bond as a surety that he would not exploit them after the ship returned to the seamen's home port. *Id.* at 204-06.

[46] Somerset v. Stewart, 98 ER 499 (1772).

wrongfully held in slavery.[47]

The phrase "Private Habeas" may seem like an oxymoron. But it is neither foreign to our law nor inconsistent with the current federal habeas statutes. Indeed, the law permits petitions alleging that confinement is "in violation of the Constitution or laws or treaties of the United States"[48]—precisely the language used by Chief Justice Chase in *Turner*.[49]

II. The Modern Habeas Statute

Habeas law terrifies most lawyers. It is usually employed by prisoners complaining about constitutional errors in their trial, conviction, or sentence.[50] Many of these lawsuits are frivolous.[51] Judges and legislators have constructed a mind-bending procedural

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[47] Dallin H. Oaks, *Habeas Corpus in the States*, 32 U. CHI. L. REV. 243, 267-70 (1965); *see also, e.g.*, Arabas v. Ivers, 1 Root 92 (1784); DeLacy v. Antoine, 34 Va. (7 Leigh) 438, 444 (1836); Renney v. Field, 5 Tenn. (4 Hayw) 165, 165-70 (1817); Thornton v. Demoss, 13 Miss. (5 S. & M.) 609, 611, 618 (1846); Field v. Walker, 17 Ala. 80, 81-83 (1849); Clark v. Pat, 8 Fla. 360, 361, 367 (1859); Commonwealth v. Barker, 11 Serg. & Rawle 360, 360 (Pa. 1824); United States *ex rel.* Wheeler v. Williamson, 28 Fed. Cas. 682 (E.D. Pa. 1855). It is important to note that a writ of habeas corpus could not adjudicate a slave's freedom; it could only be used by a free person unlawfully held as a slave. *See cases cited Id.* This is why the southern courts refused to recognize freedom granted on habeas petitions in free states, because such cases could not actually adjudicate freedom. *See, e.g.*, Lewis v. Fullerton, 22 Va. (1 Rand.) 15, 15-24 (1821). States that recognized slavery ordinarily recognized a tort action to try the right to freedom where a jury would make the ultimate decision. Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 567-68 (2004); Oaks, *supra*, note 47, at 268.

[48] 28 U.S.C. § 2241(c)(3).

[49] *In re* Turner, 24 Fed. Cas. 337, 340. (C.C. Md. 1867).

[50] Chemerinsky, *supra* note 19, at 939-47 (giving an overview of the purposes and uses of habeas law).

[51] *See generally* Kyle P. Reynolds, Comment, *"Second or Successive" Habeas Petitions and Late-Ripening Claims after* Panetti v. Quarterman, 74 U. CHI. L. REV. 1475, 1489 (2007).

labyrinth to weed out unmeritorious claims.[52] The wisdom of this system is a contentious issue, but it is irrelevant to our discussion.

Pre-conviction habeas is not controversial at all. Indeed, the core of the Writ is to protect against extrajudicial detention,[53] and the Court has stated that "it is in th[is] context that [the Writ is the] strongest."[54] The hostility to post-conviction habeas stems from the finality inherent in a jury verdict, the pull of *res judicata*, and the respect for state courts.[55] Pre-conviction habeas involves only one of these issues, and then only obliquely.[56] The barriers to Private Habeas under the modern statute are therefore generally issues of statutory interpretation and the common law, not questions of constitutional magnitude.

A. Pre-Conviction Habeas Procedure

Under the habeas statute, the Writ is available to a "prisoner" who alleges that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States."[57] A petition may be granted by any judge having jurisdiction over the territory where the person is

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[52] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (104th Cong., Apr. 24, 1996); 28 U.S.C. §§ 2241(d), 2244, 2254, 2255 (making it incredibly difficult for a convicted prisoner to have his or her conviction overturned by the federal courts, even if he can show that the constitution was probably violated).

[53] Omar v. Harvey, 479 F.3d 1, 8 (D.C. Cir. 2007), *vacated on other grounds sub nom. by* Munaf v. Green, 553 U.S. 674 (2008).

[54] Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301 (2001).

[55] *See, e.g.*, Harrington v. Richter, 562 U.S. 86, 102-04 (2011).

[56] *Ex parte* Virginia, 100 U.S. 339, 343 (1879) ("[W]hen a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior Federal court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all.")

[57] 28 U.S.C. § 2241(c)(3) (2008). There are no rules of procedure governing § 2241 petitions. However, in its discretion, the Court may apply the rules governing state-court habeas petitions to miscellaneous habeas claims. *See* R. GOVERNING § 2254 CASES 1.0(b) [Hereinafter FED. HABEAS R.].

held.[58] The petition must allege the facts establishing a violation, the name of the person with custody, the person's claim to authority over him,[59] and must demand the right to be released from custody.[60]

If the petition alleges unlawful detention, the Court acquires Article III jurisdiction over the case at that time.[61] For the purposes of the case-or-controversy requirement, it does not matter if there is a second party before the Court.[62] If the petitioner is illegally confined, they have pled a concrete dispute within the meaning of the Constitution.[63] So long as the victim remains unlawfully restrained,[64] the habeas statute gives the Court authority to order unconditional release, even if the petition is uncontested.[65] It follows that the victim can also seek appropriate declaratory relief based on the Court's habeas jurisdiction.[66]

After receiving the petition, the Court must immediately determine ex parte if the claim is plausible on its face.[67] If it is, he or she must immediately either (a) issue the writ; or (b) issue a show-cause order to the respondent demanding why the writ should not issue.[68] A habeas petition automatically receives priority over other cases in the court's docket, and cannot be delayed merely because of

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[58] 28 U.S.C. § 2241(a) (2008).

[59] *Id.* § 2242.

[60] United States v. Kramer, 195 F.3d 1129, 1130 (9th Cir. 1999).

[61] *Ex parte* Milligan, 71 U.S. 2, 112-14 (1866); Spencer v. Kemna, 523 U.S. 1, 7 (1998).

[62] *See* Spencer, 523 U.S. at 7.

[63] *See id.*

[64] *Id.* at 7-8 (noting that some form of live restraint or collateral consequences must exist for habeas jurisdiction to remain after release from actual custody).

[65] Milligan, 71 U.S. at 112 ("But it is argued, that the proceeding does not ripen into a cause, until there are two parties to it. This we deny. It was the *cause* of [petitioner] that was presented to the Circuit Court. . . . It was the only one by which he could recover his liberty. He was powerless to do more.").

[66] 28 U.S.C. § 2201 (2018); Coal. for Gov't Procurement v. Fed. Prison Indus., 365 F.3d 435, 458-59 (6th Cir. 2004).

[67] 28 U.S.C. § 2243 (stating that the judge need not go further if "it appears from the application that the applicant or person detained is not entitled" to the writ).

[68] *Id.*

congestion.[69] The writ must be returned within three days, unless the judge permits no more than an additional twenty days on a showing of good cause.[70] The judge may issue any order necessary to obtain compliance.[71]

On return of the writ, the respondent must "certify the true cause of the detention."[72] Unless the case involves a pure issue of law, the respondent must produce the body of the person to the Court.[73] After return, a hearing on the writ must occur within five days unless the judge grants a good-cause extension.[74] At the hearing, the person detained may be sworn and testify as to any relevant facts.[75] Evidence may also be taken by deposition or by ex parte affidavit, if the judge allows.[76] The Court must then "summarily hear and determine the facts, and dispose of the matter as law and justice require."[77]

If the judge finds that the custody is unlawful, he or she must discharge the prisoner. This discharge has less preclusive effect than other judgments, because the only issues actually litigated and determined are the lawfulness of the detention.[78] That said, the discharge *does* have preclusive effect on this one issue and on "the issues of law and fact necessarily involved in that result."[79] In some circumstances, this preclusion will migrate with full force to removal proceedings.[80] The restrictive appellate review sections of the habeas

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[69] *See* Johnson v. Rogers, 917 F.2d 1283, 1284 (10th Cir. 1990).

[70] 28 U.S.C. § 2243.

[71] *Id.* § 1651.

[72] *Id.* § 2243.

[73] *Id.* Indeed, in trafficking cases, the *only* questions will be factual ones. Unlike a warden, the trafficker has no colorable legal claim to hold the victim in his custody.

[74] *Id.*

[75] *Id.*

[76] *Id.* § 2246. If affidavits are used, the opposing party may file affidavits of their own and propound interrogatories to the affiant. *Id.*

[77] *Id.* § 2243.

[78] Collins v. Loisel, 262 U.S. 426, 430-31 (1923).

[79] *Id.*

[80] *See, e.g.*, Paulo v. Holder, 699 F.3d 911, 917-18 (9th Cir. 2011).

statute do not apply to these types of proceedings.[81] Review may therefore be had under the general appellate jurisdiction statutes, subject to the final judgment rule.[82]

B. Potential Issues in Adapting § 2241 to Private Habeas

The current habeas statute is not designed for private use.[83] It was enacted in the late 1940s, long after anyone had used the writ in favor of former slaves.[84] Thus, a victim who files a petition will have to overcome several statutory-interpretation and common-law hurdles at the ex parte stage to obtain the writ.

1. Prisoner

The word "prisoner" evokes an image of a person convicted and incarcerated. But that is not the only use of the word.[85] Indeed, in many of the historical habeas cases, the courts used the word "prisoner" as a term of art to describe the petitioner, even when he

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[81] *See* 28 U.S.C. § 2253.

[82] *See id.* §§ 1291, 1254(a).

[83] It is tempting to argue that the Constitution requires the Writ be made available in these cases even if the victim cannot satisfy the statutory hurdles in § 2241. This may well be true, considering that the Suspension Clause codified the Writ as it existed in 1789 and that Congress cannot restrict habeas relief by omission. However, it is well established that Congress can restrict the habeas jurisdiction of the federal courts, and the courts-of-limited-jurisdiction principle applies with full force to habeas law. *See Ex parte* Dorr, 44 U.S. 103 (1845); *Ex parte* Parks, 93 U.S. 18 (1876). Wading into the void between constitutional and statutory habeas is a dangerous enterprise with no clear answers. *See* Rasul v. Bush, 542 U.S. 466 (2004); Boumediene v. Bush, 553 U.S. 723 (2008). It may therefore be better to stick to the Court's predilection to construe the pre-conviction habeas rules liberally (something that all of the Justices generally agree upon), instead of trying to establish a free-standing claim for relief emanating from the Constitution itself.

[84] Act of June 25, 1948, ch. 646, 62 Stat. 964.

[85] *Prisoner*, BLACK'S LAW DICTIONARY (10th ed. 2014) (third definition) ("[S]omeone who is taken by force and kept somewhere").

was held in servitude by a private actor.[86] The historical use of this word and of the writ should be enough to clear this hurdle, since "[t]he availability of federal habeas corpus depends upon functional reality, not upon an infatuation with labels"[87] If the petitioner can satisfy the custody requirement, he can justly be called a prisoner under the statute.

2. Custody

Custody is crucial to the subject-matter jurisdiction of a habeas court.[88] However, the writ is not a formalistic remedy,[89] and the courts have construed this word to extend beyond strict physical confinement.[90] The custody requirement in § 2241 is satisfied whenever someone "significantly restrain[s] petitioner's liberty to do those things which in this country all free men are entitled to do."[91] A more recent test requires restraints not shared by the public generally that significantly confine or limit freedom.[92] There is no "final list" of cases where the custody requirement is satisfied.[93] Importantly, the petitioner must actually be in custody at the time the

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[86] *See, e.g.*, De Lacy v. Antoine, 34 Va. 438, 444 (1836); Respublica v. Gaoler, 2 Yeates 258, 258 (Pa. 1797); Commonwealth *ex rel.* Johnson v. Holloway, 3 Serg. & Rawle 4, 6 (Pa. 1817); United States *ex rel.* Wheeler v. Williamson, 28 Fed. Cas. 682 (E.D. Pa. 1855).

[87] Lefkowitz v. Newsome, 420 U.S. 283, 290 n.7 (1975).

[88] *See* Maleng v. Cook, 490 U.S. 488, 490 (1989) (holding that the Writ only reaches people whose liberty is restrained in some meaningful way).

[89] Jones v. Cunningham, 371 U.S. 236, 243 (1963) ("Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.").

[90] *See id.* at 241-43.

[91] *Id.* at 243.

[92] Lehman v. Lycoming Cty. Children's Servs. Agency, 458 U.S. 502, 510-11 (1982).

[93] SECT. 2254 R. 1 Advisory Comm. Notes.

petition is filed.[94] Doubt about the court's jurisdiction should be resolved in favor of the applicant.[95] "Restrictions upon [the Writ's] availability must be narrowly construed, must be clear and unequivocal, and not imposed by judicial gloss."[96]

Appropriate definitions of "coercion" and "restraint" have proven elusive. Prior to the Supreme Court's 1988 decision in *United States v. Kozminski*, there was a deep circuit split over whether the words "involuntary servitude" in a federal statute prohibited nonphysical coercion.[97] A sharply divided court held that Congress intended to cover only physical and legal coercion.[98] Congress abrogated this rule twelve years later.[99]

The paradigmatic case of private custody would be a person held by beatings and threats of violence. The image of trafficking victims being imprisoned in basements and warehouses by their traffickers is a common one.[100] But Congress envisioned unlawful labor coercion much more broadly. The statute, as currently written, defines involuntary servitude as servitude induced by "any scheme,

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[94] Spencer v. Kemna, 523 U.S. 1, 7 (1998). Once the petition is filed, subsequent discharge from custody does not destroy the Court's jurisdiction.

[95] *See* Peyton v. Rowe, 391 U.S. 54, 64-65 (1968); Kinnell v. Warner, 356 F. Supp. 779, 781 (D. Haw. 1973) ("[T]he Constitution confers a substantive right to habeas corpus which cannot be denied by an omission in a federal jurisdictional statute, and any such construction should, if possible, be avoided.").

[96] United States *ex rel.* Norris v. Norman, 296 F. Supp. 1270, 1273 (N.D. Ill. 1969).

[97] United States v. Kozminski, 487 U.S. 931 (1988); United States v. Shackney, 333 F.2d 475, 486-87 (2d Cir. 1964); United States v. Harris, 701 F.2d 1095, 1100 (4th Cir. 1983); United States v. Mussry, 726 F.2d 1448, 1453 (9th Cir. 1984); United States v. Warren, 772 F.2d 827, 833-34 (11th Cir. 1985).

[98] Kozminski, 487 U.S. at 952-53 (O'Connor, White, Scalia, Kennedy, JJ., and Rehnquist, C.J.); *id.* at 953 (Marshall & Brennan, JJ., concurring in the judgment only); *Id.* at 965 (Stevens & Blackmun, JJ., concurring in the judgment only).

[99] 22 U.S.C. § 7101(12)-(14) (2000).

[100] *See, e.g.*, Madeline Buckley, *They Got Young Girls Hooked on Drugs, Feds Allege. Then They Forced Them Into Prostitution*, INDIANAPOLIS STAR (Apr. 17, 2017, 4:36 PM), http://www.indystar.com/story/news/crime/2017/04/17/they-got-young-girls-hooked-drugs-feds-allege-then-they-forced-them-into-prostitution/100568196/.

plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint."[101]

Traditional habeas law lines up with Congress's view of coercion and restraint. The English courts issued the writ in cases where the restraint was psychological[102] or drawn from a perverted legal relationship.[103] American courts have freely held that the Writ can act on "all cases of illegal restraint or confinement."[104] Setting aside the state-action question for a moment, the Supreme Court granted the writ to a person on probation because he was "confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission . . . [H]e must live in fear that a single deviation, however slight, might be enough to result in his being returned to prison."[105] The same logic has been applied to community service[106] and mandatory rehabilitation programs.[107]

This language, if stripped of the state-action veneer, sounds remarkably like Ms. Lopez-Sandoval's predicament. Through the threatened abuse of the legal process, she is being confined to a particular area, during particular times, to labor in violation of the U.S. Constitution. She cannot go as she pleases.[108] Her restraint is

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[101] 22 U.S.C. § 7102(6)(a) (2015).

[102] Earl of Weastmeath v. Countess of Westmeath, *cited in* Jones v. Cunningham, 371 U.S. 236, 239 n.8 (1963) (discharging children from the wrongful custody of another parent).

[103] Rex v. Delaval, 97 Eng. Rep. 913 (K.B. 1763) (involving a servant who had been indentured by her master to another man "for bad purposes").

[104] *E.g.*, Nyugen Da Yen v. Kissinger, 528 F.2d 1194, 1202 (9th Cir. 1975).

[105] Jones, 371 U.S. at 242.

[106] Barry v. Bergen Cty. Prob. Dept., 128 F.3d 152, 161 (3d Cir. 1997) (holding that a person required "to be in a certain place . . . to perform services" is in custody because he "is clearly subject to restraints on his liberty not shared by the public generally.")

[107] Dow v. Circuit Court *ex rel.* Huddy, 995 F.2d 922, 923 (9th Cir. 1993) (holding the custody requirement satisfied when his "physical presence" is required "at a particular place.").

[108] *See* Rex v. Clarkson, 93 Eng. Rep. 625 (K.B. 1722) (using this as the test for custody under the English habeas statute).

specific to her and is not shared by the public at large.[109] This is an unlawful restraint on liberty, no less than a slave under the whip of a plantation owner. The trafficker is "significantly restrain[ing] petitioner's liberty to do those things which in this country all free [wo]men are entitled to do"—quit her job.[110] The difference between the antebellum slave and Ms. Lopez-Sandoval is one of degree, not of kind. Their restraints are therefore a form of custody that the Writ can reach.

3. Equity

Habeas Corpus is an extraordinary writ, and is not available when there is an adequate remedy at law.[111] Neither will a court, sitting in equity, grant relief to one with unclean hands.[112] Traffickers are particularly likely to raise objections on the latter grounds if the victim has somehow violated immigration laws.[113] But neither equitable objection stands up to scrutiny.

The unclean-hands doctrine only applies when the conduct is "unconscionable" and has "an immediate and necessary relation to the equity" a party seeks.[114] Immigration violations are not generally of the unconscionable kind, particularly when they are induced by the fraud of another. The Sixth and Ninth Circuits have touched on

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[109] Lehman v. Lycoming Cty. Children's Servs. Agency, 458 U.S. 502, 510-11 (1982). *Lehman* involved a mother challenging the custody determination of a state probate court. Aside from the general trepidation of federal courts to interfere in family law matters, the Court distinguished this case from *Jones v. Cunningham* by noting that the child was subject to the same liberty restraints under the custody order as all other children. *Id.*

[110] Jones v. Cunningham, 371 U.S. 236, 243 (1963); Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2022 (2009); RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (AM. L. INST. 1981).

[111] Stack v. Boyle, 342 U.S. 1, 6-7 (1951); Ali v. Beers, 988 F. Supp. 2d 89, 94 (D. Mass. 2013).

[112] McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 360 (1995).

[113] *Cf.* United States v. Sanga, 967 F.2d 1332, 1333-35 (9th Cir. 1332) (involving a trafficker who made this exact argument in a restitution case).

[114] H*e*nderson v. United States, 135 S. Ct. 1780, 1783 n.1 (2015).

this point in restitution cases and have rejected traffickers' arguments on these grounds.[115] Neither does any kind of immigration fraud have a "necessary" relation to the equity sought, release from the trafficker's custody, because the fraud only harms the government, not the trafficker.[116]

The adequate-remedy-at-law doctrine meets a similar fate. Adequacy is measured by whether a legal claim would "cover the entire case" made by the equitable claim.[117] When a legal claim lacks the completeness, practicality, and efficiency of equity, the equitable claim is not precluded.[118] The victim's remedy at law would be a state tort for false imprisonment or a federal tort for forced labor.[119] But these legal remedies are inadequate for two reasons. Both suffer from the delay discussed above, and injunctions are generally not available under either claim.[120] The core of the victim's claim is that they want to be released, *now*. Habeas is the only judicial procedure that gives them that remedy.

4. Exhaustion

Another potential issue is exhaustion. The elaborate exhaustion requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") only apply to post-conviction petitions.[121] However, the exhaustion doctrine typically applies in §

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[115] *See, e.g.*, Sanga, 967 F.2d at 1333-35; United States v. Nazzal, 644 F. App'x 655, 662 (6th Cir. 2016).

[116] *Cf.* Dennis v. United States, 384 U.S. 855, 860-61 (1966) (noting that one of the primary objects of the federal conspiracy statute is to punish people for "impairing, obstructing, or defeating the lawful function of any department of government"). The conspiracy statute is often used to prosecute people for immigration fraud. *E.g.*, Nazzal, 664 F. App'x at 657.

[117] Hillsborough Tp. v. Cromwell, 326 U.S. 620, 629 (1946).

[118] Stolt-Neilsen, S.A. v. United States, 442 F.3d 177, 187 (3d Cir. 2006).

[119] *See* 18 U.S.C. § 1595 (2015); Torres v. Jones, 26 N.Y.3d 742, 759 (2016).

[120] 18 U.S.C. § 1595 (2015); *see, e.g.*, Todzia v. State, 278 N.Y.S.2d 291, 203 (Ct. Cl. N.Y. 1967) (holding that habeas corpus is the exclusive remedy for present restraints on personal liberty, and tort claim for false imprisonment was therefore unavailable).

[121] 28 U.S.C. § 2254(b) (1996).

2241 cases as well.[122] Although there is no state court judgment to review, a judge may reasonably ask why the victim has not asked law enforcement for help before coming into court. The thrust of this question is essentially whether the executive should have the first opportunity to solve the problem without judicial intervention.[123]

If Congress is silent, exhaustion is a matter of discretion, not jurisdiction.[124] Even so, courts prefer that petitioners exhaust available administrative remedies.[125] However, the courts will generally excuse this requirement if the administrative remedy is inadequate,[126] inappropriate,[127] or futile.[128] The courts are also concerned with discouraging the deliberate bypass of a congressionally created administrative scheme.[129] Futility claims are particularly disfavored; a petitioner cannot claim futility just because the agency might be unsympathetic to the claim.[130]

The advocate can raise several arguments to avoid the exhaustion requirement. First, the victim should point out that there is no *existing* state or agency decision on which the court will trample by entertaining the petition. This makes the traditional federalism and separation-of-powers concerns less important.[131]

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[122] *See* FED. HABEAS MAN. § 9C:2.

[123] *Cf.* Rose v. Lundy, 455 U.S. 509, 518 (1982) (holding that the point of the exhaustion doctrine is to respect state courts by withholding federal coercion until the state has had an opportunity to correct its own mistake).

[124] *See Ex parte* Royall, 117 U.S. 241, 250 (1886); *see also* McCarthy v. Madigan, 503 U.S. 140, 144 (1992); *see also* FED. HABEAS MAN. § 9C:4. Congress, can, of course, make exhaustion mandatory by statute.

[125] *See, e.g.*, Noriega-Lopez v. Ashcroft, 335 F.3d 874, 881 (9th Cir. 2003).

[126] Goonsuwan v. Ashcroft, 252 F.3d 383, 389 (5th Cir. 2001).

[127] *Id.*

[128] *Id.*; *see also* Garza v. Davis, 596 F.3d 1198 (10th Cir. 2010).

[129] Noriega-Lopez, 335 F.3d at 881.

[130] *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 130 (1982); FED. HABEAS MAN. § 9C:5.

[131] *See* Rose v. Lundy, 455 U.S. 509, 518 (1982); Noriega-Lopez, 335 F.3d at 881 (noting that one factor in deciding whether to require exhaustion is whether the procedure would "allow the agency to correct its own mistakes."); Boumediene v. Bush, 553 U.S. 723, 793 (2008) ("Most [exhaustion] cases [a]re brought by prisoners in state custody . . . and thus involved federalism concerns that are not relevant here.").

Next, the advocate should argue that contacting ICE is inadequate and inappropriate due to the nature of the traffickers' threats.

Note that this is not a futility argument. It does not invoke the agency's hostility to justify avoiding exhaustion. Rather, it is based on the inherent inability of ICE to meet the victim's psychological needs. In the context of the trafficker's threats, involving ICE is neither an appropriate nor an adequate remedy. In other words, it lacks the "fit" that usually accompanies an appropriate remedy.[132]

This is also the answer to the legitimate concern that allowing habeas relief would encourage people to bypass the agency. But allowing habeas relief does not bypass the agency: If the victim wants immigration relief, she still must go through USCIS. Habeas only bypasses ICE's role in extracting the victim from her unlawful custody. In the T-Visa context, Congress has recognized that—as a matter of public policy—victims should be able to bypass ICE to obtain status in some circumstances.[133] That is also the case here. If the victim can bypass ICE to obtain discretionary immigration relief, then it is hard to imagine that Congress intended to *preclude* bypass in cases of physical safety—a practical prerequisite to that relief.

Finally, removing the victim from the custody of their trafficker has nothing to do with immigration law. Exhaustion is designed to prevent people from "gaming" the system set up by the government to facilitate a policy goal. But that is not the case here. The dispute before the court in a Private Habeas case is whether the victim has a right to release from the trafficker. It is a purely private dispute involving rights *independent* of the immigration system. Requiring a victim to call ICE before filing a habeas petition would be just as unwise as a policy where courts dismissed all physical injury cases where the victim did not call the police first.

Admittedly, no contemporary § 2241 case provides perfect guidance on this question. However, the courts can find guidance by reaching further back into our history. When several seamen petitioned for habeas relief, arguing that they were being forced to

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[132] *Cf.* City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997) (applying similar reasoning to the word "appropriate" in the Fourteenth Amendment).

[133] 8 U.S.C. § 1101(a)(15)(T)(i) (2018).

work in violation of the Thirteenth Amendment, the court rejected the respondent's claim that habeas was inappropriate.[134] In such cases, the court held, "[T]he writ of habeas corpus is a right which cannot be denied."[135]

Ultimately, the advocate should return to the court's discretion. By accepting the case, the Court does not frustrate any existing activities of the political branches or of the states. By rejecting the case on exhaustion grounds, the court risks foreclosing the only practical remedy for an egregious constitutional violation. Constitutional concerns can be outweighed by considerations of federalism and finality—as they often are in post-conviction habeas—but those concerns are not present in Private Habeas claims. The weight of the Constitution, therefore, ought to turn the scale in a doubtful case.

5. State Action

The only other potential problem is the state action doctrine. The U.S. Supreme Court has consistently said that the Thirteenth Amendment has no state action requirement.[136] But these statements have mostly been dicta; none of the Court's holdings have rested on that footing with enough clarity to be unmistakable precedent.[137] If a district court judge is presented with a habeas petition that requires the judge to decide the state-action issue in order to dispose of the

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[134] *In re* Chung Fat, 96 F. 202, 202-04 (D. Wash. 1899).

[135] *Id.* at 204.

[136] The Civil Rights Cases, 109 U.S. 3, 23 (1883); Robertson v. Baldwin, 165 U.S. 275, 282 (1897); Clyatt v. United States, 197 U.S. 207, 216-17 (1905); *see also* United States v. Kozminski, 487 U.S. 931, 939-43 (1988) (observing that this rule is "clear and undisputed.")

[137] *See generally* Ryan D. Walters, *The Thirteenth Amendment "Exception" to the State Action Doctrine: An Originalist Reappraisal*, 23 GEO. MASON U. CIV. RTS. L.J. 283 (2013). The Court has made necessary assumptions that the Thirteenth Amendment lacks a state-action requirement. *See, e.g.*, Kozminski, 487 U.S. at 939-43. But a Private Habeas claim invokes this doctrine with a strength that no other case has, and the lack of an explicit holding from the Court may require more vigorous argument than one might expect.

case, he or she may not feel bound by the Court's quasi-dicta. Thus, the petitioner's attorney must be prepared to make this argument on the merits.[138]

There are four principal reasons that the Amendment has no state action requirement. First, the text of the Thirteenth Amendment does not refer to state action.[139] The Reconstruction Congresses were not at a loss for words: They used such language in the Fourteenth Amendment a few years later, drawing from the multiple uses of "no state shall" in Article I, § 10.[140] Had the framers intended to impose a state action requirement on the Thirteenth Amendment, they could have easily borrowed from the original Constitution and inserted a phrase that mirrored the language they placed in the Fourteenth Amendment.[141] Congress was not a hapless victim of the limits of language: The Constitution itself provided examples that Congress could have used to impose a state action requirement. Congress just

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[138] *See* Chris Kozak, *Originalism, Human Trafficking, and the Thirteenth Amendment*, 11 S.J. POL'Y & JUST. 62, 68-77 (2017) (outlining the argument against the state-action doctrine, summarized below); Nathan B. Oman, *supra* note 110, at 2096-97 (explaining the historical argument against a state action requirement).

[139] U.S. CONST. amend XIII.

[140] *See* U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States."); *See* U.S. CONST. art. I, § 10, cls. 1-3.

[141] *See* U.S. CONST. amend. XIV, § 1. Generally, when a text omits language readily available from other parts of the same instrument, the interpreter should presume a change in meaning. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW § 8, at 93 (West 2012) (Omitted-Case Canon) ("[A] matter not covered is to be treated as not covered."), § 25, at 170 (Presumption of Consistent Usage) ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning."); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 792 (1999) ("And so we are left with the following: When we seek to prove that a word could mean *X*, a single example from the Constitution illustrating this is stronger than an entry from the standard dictionary because the example proves that the authors of the Constitution itself—and not simply some 'approved authors' somewhere—understood usage *X*.") (emphasis in original). Although Professor Amar is specifically addressing word-to-word usage comparisons and not presence-absence comparisons, the logic still holds: A contention that a court should interpret a constitutional text to implicitly require *X* is severely undermined when the Constitution itself uses express language elsewhere to impose an identical requirement. *See id.* at 792.

chose not to use it.

Second, history suggests that any association with state action was incidental. As Professor Nathan Oman observes, "[T]he Amendment is not ultimately directed at any legal category per se. . . . Rather, it forbids the actual existence of a particular set of *conditions* within the United States."[142] Both slavery and involuntary servitude were uniformly characterized as a "condition" or a "status" by the judges and lawyers of the time.[143] To be sure, slavery was a legal relationship before abolition. But the Amendment did not aim at the legal relationship—it aimed at the status and condition of the African-American.

Third, attaching a state action requirement to the Amendment leads to absurd conclusions. It is absurd to say that a former master—acting outside the bounds of the law after abolition—would be immune from legislation, or writs of habeas corpus, based on the Amendment if he used threats of physical violence to keep a former slave "employed" as a Help in his kitchen.[144] This would contradict

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[142] Oman, *supra* note 110, at 2096-97.

[143] *See, e.g.*, Neal v. Farmer, 9 Ga. 555, 561, 579 (1851) (referring to "a condition of downright servitude" and "the status of the slave"); George v. State, 37 Miss. 316, 319 (1859) (holding that the common law is not applicable to "the status of the slave" (emphasis in original)); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 96 (1834) (speaking of someone "held in slavery"); Cleland v. Walters, 19 Ga. 35, 40 (1855) (describing a slave as "being in a state of servitude"); *Servitude*, BLACK'S LAW DICTIONARY (1st ed. 1891) (describing servitude as "the condition of one who is liable to the performance of services"); *Involuntary Servitude*, 33 CORPUS JURIS 812 (1st ed. 1924) ("the condition of a person compelled to do services for another").

[144] It is true that the absurdity canon is generally reserved for statutory interpretation. *See* SCALIA & GARNER, *supra* note 141, § 37; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2485 (2003). But the Court has not shied away from the absurdity canon when parties insist on formalistic interpretations of the Constitution that would flummox the basic assumptions of its drafters. Hans v. Louisiana, 134 U.S. 1, 15 (1890) ("The letter is appealed to now, as it was then, as a ground for sustaining a suit . . . [But if the text meant this], can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face."). Imposing a state action requirement on the Thirteenth Amendment falls squarely into this category. It is inconceivable that the Abolitionist Congress—not to mention the Union States that ratified the Amendment—meant to insulate former slave-owners clever enough to use purely

both common sense and the historical use of the writ against private actors. Fourth, and finally, if both interpretations are so plausible that construction is necessary, then the Court should err in favor of liberty by rejecting a state action requirement.[145] To err the other way—in favor of a state action requirement—risks that victims of private forced labor schemes will be improperly denied their federal right to be free from involuntary servitude.

These arguments are particularly acute in the habeas context. The Writ "is not now and has never been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[146] Erring in constitutional law is undesirable; but the Thirteenth Amendment is fundamental to our constitutional democracy, and Thirteenth Amendment habeas more fundamental still. Without it, pseudo-slavery could be reestablished by 270 votes of the Electoral College, for want of political will.

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private means to retain free labor.

[145] *See generally* Chris Kozak, *The Rule of Liberty* (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948761. *See Harry v. Decker & Hopkins*, 1 Miss. (1 Walk.) 36, 42-43 (1818) ("Admitting it was a doubtful point, whether the constitution was to be considered prospective in its operation or not, the [masters] say, you take from us a vested right arising from municipal law. The [slaves] say you would deprive us of a natural right guaranteed by the ordinance and the constitution. How should the Court decide, if construction was really to determine it? I presume it would be in favour of liberty."); III WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at 88-89 n.19 ("But remedial statutes must be construed according to the spirit; for, in giving relief against fraud, or in the furtherance and extension of natural right and justice, the judge may safely go beyond even that which existed in the minds of those who framed the law."); RANDY BARNETT, RESTORING THE LOST CONSTITUTION 126 (2004) (quoting *United States v. Fisher*, 6 U.S. 358, 390 (1805) (Opinion of Marshall, C.J.) ("Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.")). The general system of our laws favors physical liberty, and any construction of the Amendment ought to reflect that. *See* Harry, 1 Miss. at 42-43.

[146] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

III. Private Habeas and Labor Exploitation

Let's now return to Ms. Lopez-Sandoval to see how this would play out in her specific case. There are three stages to this process: Filing and initial review of the petition; the return and the hearing; and the judgment and the aftermath. Before beginning, there are two basic advantages of this procedure that are worth noting.

First, the person who directs this process is, by law, conflict-free. The victim's *lawyer*—not ICE, the U.S. Attorney, or Homeland Security Investigations ("HSI")—gets to control the timing and pace of the process. The lawyer gets to control what is said to whom, and what strategic moves to make. They cannot threaten the victim with deportation. The lawyer—hopefully—will know how to avoid re-traumatizing the victim. And they *must* do what the victim says. As one well-known advocate says to new clients: "I am your lawyer. That means you are the boss of me."[147]

Second, the adjudicator is also conflict-free. Even more than the lawyer, the Article III judge is beholden to no one. The odds of these individuals fumbling a legal question is small. And the odds of them intentionally obfuscating a legal issue in favor of political goals is nonexistent. Given the choice between persuading a federal judge and persuading an ICE agent that his client is a victim, the advocate will choose the judge every time.

A. Filing and Initial Review

Go back to the phone call made by Ms. Lopez-Sandoval to the local legal aid center. During the call or in subsequent interviews, the lawyer can obtain the facts described in the introduction without ICE or law enforcement present. The lawyer may then fill out the standard § 2241 habeas form on the client's behalf.[148] Note,

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[147] Bridgette Carr, Director, University of Michigan Law School Human Trafficking Clinic.

[148] *Petition for a Writ of Habeas Corpus Under § 2241,* ADMINISTRATIVE OFFICE OF THE U.S. COURTS (n.d.), http://www.uscourts.gov/forms/habeas-corpus-

however, that these forms are designed for post-conviction claims, not Private Habeas petitions. Thus, the lawyer will constantly have to mark "other" and explain the nature of the Private Habeas claim in the lines provided.[149] It may therefore be more coherent to draft a standalone pleading.

Along with the petition, the lawyer should file a brief outlining the legal basis for a Private Habeas claim, if court rules allow. Otherwise, the lawyer risks confusing a law clerk stuck in the post-conviction habeas labyrinth and suffering an immediate dismissal. In Ms. Lopez-Sandoval's case, the lawyer would then file the petition in the U.S. District Court for the Southern District of Texas, Laredo Division.[150]

The judge's initial review is ex parte[151] and only for basic legal sufficiency.[152] Service of process on the respondent will occur only after this point, although the respondent will have a chance to quash the writ on legal grounds and assert affirmative defenses.[153] Habeas petitions are construed liberally, and the petitioner need only allege sufficient non-conclusory facts establishing a claim for relief.[154] It is at this stage that a judge is likely to make initial decisions on the validity of Private Habeas.[155]

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petitions/petition-writ-habeas-corpus-under-28-usc-ss-2241.

[149] This will be the case with questions 3-5. Questions 6-10 and 12 will be inapplicable. Question 11 (immigration proceedings) is also not applicable, since we are assuming the immigration authorities are not involved.

[150] 28 U.S.C. §§ 2241(a) (2008), 124(b)(3) (2004).

[151] *Ex parte* Endo, 323 U.S. 283, 305 (1944); *Ex parte* Quirin, 317 U.S. 1, 24 (1942); *Ex parte* Milligan, 71 U.S. 2, 112-14 (1866).

[152] 28 U.S.C. § 2243.

[153] *See, e.g.*, Williams v. Calderon, 52 F.3d 1465, 1483 (9th Cir. 1995).

[154] Gibbs v. Burke, 337 U.S. 773, 779 (1949); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995).

[155] However, keep in mind that these are *initial* decisions. Chief Justice Chase lamented the fact that the respondent was unrepresented in *Turner*, wishing instead that he could hear arguments for both sides, particularly on the constitutional questions. *In re* Turner, 24 Fed. Cas. 337, 339 (C.C. Md. 1867). The fact that he was the Chief Justice of the United States probably played no small part in his willingness to decide the case at all. *See id.* Thus, the advocate can expect a judge to give the respondent a chance to oppose the Private Habeas theory on return.

If the judge determines that Private Habeas does not exist or that the petition is otherwise invalid, he or she may summarily dismiss it.[156] Appeals at this stage will also be ex parte, even on certiorari.[157] This is the first great advantage of using Private Habeas: Until the court issues the writ or a show-cause order, the trafficker will remain ignorant. Even if the Fifth Circuit or the Supreme Court must sort out the legal nuances of Private Habeas, and even if the Court ultimately decides the claim does not exist, the victim's physical security will remain precisely as it was before. The trafficker, if the lawyer is careful, will not be able to exact revenge.

B. The Return and the Hearing

The writ is an order to produce the body of the person detained. A show-cause order requires the respondent to convince the court why it should not issue the writ as a matter of law. If the petition demonstrates that the case involves any issue of fact, the traditional practice is to issue the writ, not a show-cause order.[158] In order to secure the victim's safe transit and to protect against retaliation, the lawyer should press the court to order U.S. Marshals to bring the victim to Court after they serve process.[159] It is worth

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[156] *Ex parte* Quirin, 317 U.S. 1, 24 (1942); 28 U.S.C. § 2243.

[157] *Id.*; SUP. CT. R. 20(4)(b).

[158] *See* Walker v. Johnson, 312 U.S. 275, 284-85 (1941) The Court in *Walker* noted that the show-cause order was devised to prevent the "useless grant of the writ" when no facts were in dispute and the case involved a pure question of law. This practice "deprives the petitioner of no substantial right," because his presence has no impact on a question of law; it also saves the parties the expense of producing the prisoner to the Court. On the other hand, if it is clear that there are contested issues of fact, the writ is the preferred device, as the Court will need to test credibility. Since most Private Habeas cases will involve disputed facts, the courts should ordinarily issue the writ, not the show-cause order.

[159] Ordinarily, judges in habeas cases do not bother issuing these types of collateral orders, i.e., expressly ordering the respondent to turn over the petitioner's body to the Marshals or ordering the respondent not to transfer custody of the respondent to anyone pending the outcome of the case. This practice is due to their general confidence in the wardens' respect for the process. Recent cases have, however, shown that judges are willing to take this extra step if he or she

noting that a trafficker who receives a writ may fail to return it. In such cases, the Court will continue to hear and decide the case ex parte.[160]

This process provides two more advantages to the trafficking victim. Unlike in a civil or criminal trial, the respondent has no constitutional right to confrontation in a habeas hearing.[161] The statute expressly allows the Court to hear evidence by affidavit if it chooses to do so. It would follow that a Court could also hear live ex parte testimony if an advocate could convince the court that the trafficker's presence would obscure the truth because of the victim's fear.[162] The Courts of Appeals generally hold that ex parte affidavits may not alone resolve substantial disputed questions of fact.[163] However, the rights of the respondent are adequately protected by cross-examination by interrogatory, not necessarily by live cross-examination.[164]

Second, once the body of the victim is produced to the court, an advocate can request that the court retain custody of the victim

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does not trust the respondent to play fair. *See* Charlie Savage, *American Detained by U.S. Military Says He Wants to Sue*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/us/politics/american-isis-suspect-military-detention.html (reporting that U.S. District Judge Tanya S. Chutkan ordered the Government not to transfer a detainee to Saudi Arabian custody until his lawyers could discuss a habeas petition with him and reporting that his lawyers subsequently requested that the restriction remain in place until the litigation resolved).

[160] Although this is unusual, it does not deprive the courts of Article III jurisdiction. *Ex parte* Milligan, 71 U.S. 2, 112-14 (1866).

[161] *See* Anderson v. Johnson, 371 F.2d 84, 94 (6th Cir. 1966) (allowing cross-examination by interrogatories in a special case). One Circuit has suggested that the *petitioner* might have a constitutional right to cross-examination, considering the restraint on his liberty is constitutionally suspect. *See* Campbell v. Minnesota, 487 F.2d 1, 4 (8th Cir. 1973).

[162] Such testimony is treated as an oral affidavit. To establish credibility, this procedure may be more helpful to a judge than a paper affidavit. Mason v. Ciccone, 517 F.2d 73, 74 (8th Cir. 1975).

[163] Copenhaver v. Bennett, 355 F.2d 417, 421 (8th Cir. 1966); Jordan v. Estelle, 594 F.2d 144, 145-46 (5th Cir. 1979); Anderson, 371 F.2d at 94.

[164] Anderson, 371 F.2d at 94. Affidavits may also be corroborated by independent evidence in the record. *See also* Jordan, 594 F.2d at 145-46.

until the matter is decided.[165] The court probably will not think such a request is unreasonable, as it will not interfere with any criminal justice machinery. Even if the trafficker uses the time between the return and the hearing to alert ICE[166] and follow through on his threat, ICE agents will be precluded, at least in theory, from seizing the victim at least until the hearing is over.

After the victim is safely under the protection of the court, the advocate can prepare for the hearing. At the hearing, the petitioner must prove the allegations in the petition by a preponderance of the evidence.[167] If immigration officials do become aware of the proceeding, they will be forced to work inside the victim's framework if they want to participate.[168] In other words, the only facts relevant in a habeas proceeding are those that pertain to the lawfulness of the detention. The Rules of Evidence will therefore prevent the government from presenting a heavy-handed focus on *immigration violations*. Presenting a case to a life-tenured, apolitical judge provides a much better opportunity to persuade the government of the petitioner's victimization than a T-Visa application to USCIS.

C. The Judgment and the Aftermath

If the judge orders discharge, that order is a judicial act holding the confinement unlawful or unconstitutional.[169] In Ms. Lopez-Sandoval's case, it would mean a judgment that she was

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[165] This is traditional in Habeas Corpus proceedings. Barth v. Clise, 79 U.S. 400, 402 (1870) ("By the common law . . . upon return of a writ of *habeas corpus* and the production of the body of the party suing it out . . . the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made. . . . Pending the hearing, he may be . . . committed to any other suitable place of confinement under the control of the court.").

[166] At least in theory, the judge would have power to enjoin the trafficker from speaking to ICE until after the case was over.

[167] Walker v. Johnston, 312 U.S. 275, 286 (1941).

[168] FED. R. EVID. 401.

[169] In theory, this order could also take the form of a Declaratory Judgment. *See* 28 U.S.C. § 2201.

compelled to work for the hotel owner through threats of the abuse of the legal process. In addition to all the facts regarding her experience in the United States, the Court would also likely make findings of fact regarding her fear of returning to El Salvador, which was crucial to the effectiveness of the trafficker's threat.

Habeas judgments are backed by the contempt powers of the court.[170] Additionally, since habeas is an equitable remedy, the district court has broad discretion to tailor an order to the situation.[171] In a Private Habeas case, the judge could theoretically fashion an injunction like a personal protection order, prohibiting the trafficker from harassing Ms. Lopez-Sandoval and likely enjoining him from talking to ICE about her. But the judgment also has a secondary effect. The doctrines of *res judicata* and issue preclusion can bar the re-litigation of certain claims and issues that were previously decided.

In order to be eligible for a T-Visa, an applicant must show: (1) they are a victim of a severe form of trafficking in persons; (2) they are physically present in the United States on account of such trafficking; (3) they have complied with all reasonable requests for assistance from law enforcement or are too traumatized to do so; and (4) they would suffer "extreme hardship" if removed to their home country.[172] The hearing on the habeas petition would necessarily resolve element one, and probably elements two and four. If ICE and law enforcement are unaware of the hearing, element three is easily met. If no requests have been made, the victim can easily say she has complied. The statute requires them to comply with "any" requests. If no requests are made, this element is not applicable.

If ICE and law enforcement participate in the hearing, the victim may have to respond to these requests. Although the victim may not want to do this, there are two factors that make it less burdensome in this kind of case. First, the victim is no longer dependent on law enforcement for a judgment that they are a victim. Neither are they dependent on ICE for their personal security.

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[170] *See, e.g.*, Mason v. Mitchell, 729 F.3d 545, 549 (6th Cir. 2013).

[171] Wolfe v. Clarke, 718 F.3d 277, 285 (4th Cir. 2013).

[172] 8 U.S.C. § 1101(a)(15)(T)(i) (2010).

Second—and most important—if the U.S. government participates in the hearing, issue preclusion will bar them from disputing *any* of the facts or legal issues determined in the hearing during a subsequent visa application process or a removal proceeding.[173] The habeas judgment can therefore act as a shield, protecting the victim's personal security even after the case is over.

Even if the court does not give the judgment preclusive effect, the order will be powerful in the application process. USCIS can easily defend a denial to the Board of Immigration Appeals ("BIA") if an affidavit from the victim comprises the entire record. All they need to say is, "We don't believe her." In contrast, USCIS will find it substantially more difficult to controvert findings of fact made by a U.S. District Judge. In an odd case, the BIA might affirm the denial even in the absence of significant evidence to contradict the habeas judgment. But the victim would have a strong argument during judicial review that such a decision is clearly unreasonable.[174]

D. Two Problems

1. Refusal to Discharge

A few procedural oddities linger after this discussion. If the judge denies the petition at the ex parte stage, everything remains the same. But what if the judge holds a hearing, does not believe the victim, and dismisses the case? In a case involving government custody, the courts simply return the prisoner to the valid, official custody from whence she came. But unlike state law enforcement, the trafficker has no *legal* authority allowing him to force Ms. Lopez-Sandoval back to the hotel. If the body of the victim has been produced to the Court for the hearing, it is almost as if she has been discharged anyway.

This is almost true. In theory, once the victim is released from the U.S. Marshals' custody, her lawyer can take her from the

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[173] *See, e.g.*, Paulo v. Holder, 669 F.3d 911, 917-18 (9th Cir. 2011).

[174] 8 U.S.C. § 1252(b)(4) (2005).

courthouse and proceed with a petition for immigration relief from scratch—just as if the judge had ordered release. There are, however, a few bumps in the road ahead.

First, the trafficker's threat is still live. With no injunction barring contact with ICE, he is free to retaliate. Although he cannot lead ICE straight to the victim, traffickers have been known to expend tremendous effort to regain control of their victims. Until the advocate can obtain immigration relief, she must exercise the utmost care in arranging the victim's physical safety.

Second, the advocate may have preclusion problems in an application to USCIS. The Supreme Court has held that the losing party in traditional litigation cannot re-litigate the same facts against a different opponent.[175] It is not clear if or how USCIS could invoke this doctrine against a victim in an application for a T-Visa. The advocate should, however, be prepared in case the government raises preclusion arguments.

Finally, ICE may become more difficult to work with if they hear of the habeas petition. Rightly or wrongly, they may be irritated by an end-run around their discretion. If the facts warrant it, the advocate may find it easier to invoke the trauma exception than to get an endorsement from ICE.

2. Threats to Family

Another weakness of Private Habeas deserves further treatment. In an alarming number of cases, traffickers tell their victims that resistance or escape will result in violence against family members outside the United States.[176] The trafficker may not be able to carry out the threat, but that is not important.[177] Many trafficking victims come from countries where organized crime is an unfortunate reality. Placing the victim in the custody of the Court does not solve this problem.

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[175] *See* Parklane Hoisery Co. v. Shore, 439 U.S. 322, 326-27 (1979).

[176] Many thanks to Ms. Carr for raising this problem, *see supra* note 147.

[177] *Cf.* Virginia v. Black, 538 U.S. 343, 359-60 (2003).

The only real way to neutralize threats to family is to have the trafficker arrested. This tactic, however, can mitigate one problem while creating another—law enforcement is now aware of and involved in the victim's legal affairs. Thus, if the trafficker has threatened her with *both* deportation and harm to family abroad, arrest will not give the victim everything she needs; neither will Private Habeas. Using one remedy or the other leaves the victim exposed on some front.

There are never easy answers in these cases. Neither are there perfect remedies—and there never will be. Private Habeas is not the Vorpal Sword[178] of human trafficking cases. It is just one weapon an advocate should have in her arsenal, apt to some uses, but not others. No two victims' fears are identical. No two law enforcement agents' attitudes are the same. Politics vary from state to state. The advocate's experience, instincts, and relationships are crucial in deciding which tool to use, as seen in Figure 1.

Figure 1: Fear Matrix

Immigration Climate	**Hostile**	**Indifferent**	**Sympathetic**
Acute Family Pressure	T-Visa petition under trauma rule[a]	Case-by-case[b]	Arrest
Some Family Pressure	Private Habeas[c]	Case-by-case	Arrest[d]
No family Pressure	Private Habeas	Private Habeas[e]	Arrest[f]
Victim Fears	**Acute Fear of Deportation**	**Middling Fear of Deportation**	**Mild Fear of Deportation**

[178] LEWIS CARROLL, THROUGH THE LOOKING GLASS 21 (1872); *Vorpal Definition*, URBANDICTIONARY.COM, https://www.urbandictionary.com/define.php?term=vorpal (observing that the word is commonly used to describe a "weapon that can possibly kill in one blow").

The fact patterns in the top-right and bottom-left corners are the extreme cases. Ms. Lopez-Sandoval fits in the latter category. The strategies in these situations are relatively clear. The facts in center box are murky and do not lend themselves to abstract analysis. The other six, however, are more nuanced.

Category *a* is the worst-case[179] scenario. These cases usually will involve people with no status who are from the same country as the trafficker. The unfortunate reality is that these cases are unlikely to make it to an advocate. If they do, the victim's fears may be stronger than any probability of relief the advocate can offer. The advocate's best chance at relief is to apply for a T-Visa using the trauma exception, if the facts warrant it.[180] This avoids the requirement that the victim talk to law enforcement and can be done without the trafficker's knowledge. If USCIS grants the T-Visa, the victim's fears of deportation should dramatically decrease. Then, the advocate can report the trafficking to law enforcement, who will (hopefully) take the trafficker into custody.

Category *b* cases are likely to arise when the victim has a family network in the United States and abroad. Their status will appear stronger in these cases, such as when the trafficker arranges a fraudulent marriage *and* threatens family members. Although the threats may be objectively equal, the victim may fear the latter more because she does not *appear* obviously deportable. If law enforcement is indifferent about the trafficking but interested in the visa fraud, the victim may be able to help law enforcement in exchange for immunity or some other official protection.

Category *c* simply recognizes that the victim's fear of deportation is more compelling than their fear of retribution to family members. Private Habeas can be used in this situation to alleviate the first fear and start the process of alleviating the second. As explained above, a favorable habeas judgment makes removing the victim more complicated for ICE. Unless they have a particular dislike of the victim, it may be more cost-effective for the government to punish

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[179] Assuming the only pressures are those present in the matrix—which is by no means the case in the real world.

[180] *See* 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb) (2014).

the trafficker for some immigration or criminal offense.[181] In fact, a habeas judgment might encourage them to do so. Depending on the case, the habeas case may produce evidence of unlawful activity that would be valuable in plea negotiations or in a grand jury hearing. Thus, in category *c* cases, Private Habeas simultaneously *increases* the transaction costs of punishing the victim and *decreases* the transaction costs of punishing the trafficker.

Category *d* is the inverse of category *c*. The victim's acute fears of harm to family and the availability of sympathetic law enforcement make the "traditional" arrest-cooperation-visa approach more desirable. Category *e* involves cases where the victim has some fear of deportation and no fear of reprisals to family. Even though law enforcement does not particularly care about deporting the victim, Loss-Aversion Theory suggests that the victim will overestimate the odds or gravity of a negative reaction in the face of uncertainty.[182] Private Habeas may therefore be a good way to mitigate the victim's fears.

Finally, category *f* involves cases where either option is available because of some other means of coercion predominates over the deportation–family threats. When this is the case, an advocate should opt to strengthen cooperative relationships with law enforcement if she can. Officers may see the Private Habeas procedure as an end-run around their discretion. Although this may be necessary in some cases, needless irritation of law enforcement is not in anyone's best interests.

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[181] This assumes that the government's primary interest is increasing the conviction/deportation rate attributable to their office.

[182] *See generally* Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCH. 341 (Apr. 1984); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (Oct. 1992).

Conclusion

A survivor of trafficking once told me that you can't be safe in your mind if you're not physically safe first. Federal immigration law denies this fundamental rule of human nature. In some cases, lawyers can use Private Habeas to reorder the legal process according to the victim's needs. There are other spillovers in this process that are good for victims, but the most important thing is that the victim's priorities—physical safety first, immigration relief second, and prosecution later—come first.