

IMMIGRATION CONTROLS AND “MODERN-DAY SLAVERY”

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INTRODUCTION

The term “modern-day slavery” has been used in many different contexts and to describe abusive practices happening all over the world, ranging from forced labor and debt bondage to, especially, trafficking in persons. International, governmental and non-governmental organizations have asserted that modern-day slavery, particularly trafficking in persons, has reached global crisis levels. The UN Office on Drugs and Crime explained in 2009: “The term trafficking in persons can be misleading: it places emphasis on the transaction aspects of a crime that is more accurately described as enslavement After much neglect and indifference, the world is waking up to the reality of a modern form of slavery” (UNODC 2009: 6). The US government proclaims each January to be “National Slavery and Human Trafficking Prevention Month,” and has announced a number of efforts to strengthen anti-trafficking measures both domestically and abroad, and those efforts have been widely lauded.¹

There is further a robust presence in civil society of anti-trafficking advocacy, much of which understands itself in anti-slavery terms. The Polaris Project, an influential civil society group in the United States, states on its website: “Fact: There are more individuals in slavery today than at the height of the trans-atlantic slave trade” (Polaris Project 2013). Advocates in this movement frequently employ an analogy to

chattel slavery and, as indicated in the last quotation, often assert that current abuses exceed those of the past.²

Similarly, the news corporation CNN, in explaining its charitable support of anti-trafficking efforts, has relied on the arguments of commentators like Kevin Bales and Siddharth Kara stating, “In previous centuries, when slaves were captured and traded each had a significant market value. Although their ill-treatment was often horrific, the reality was that it made economic sense to keep a slave alive and functioning, to protect what was usually a significant investment, made with a view to the long term. That is not so today” (Maddox 2011). The sociologist and advocate Kevin Bales made this argument initially in his 1999 book, *Disposable People*. A pioneer of the revival of the use of the term “slavery” to describe modern exploitative conditions, Bales has achieved extraordinary impact through his work with the US NGO Free the Slaves as well as his sequel published in 2010 coauthored with Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today*. Siddharth Kara has made similar arguments specifically with respect to sex trafficking in his 2009 book *Sex Trafficking: Inside the Business of Modern Slavery*. These thinkers along with organizations like Anti-Slavery International, have helped to create a strong contemporary self-styled abolitionist movement. The portrayal by some of these abolitionists of chattel slavery as less significant in scale than modern-day slavery has however not gone uncontested. The sociologist Orlando Patterson for instance has pointed to a “serious problem of defining slavery in the modern world . . . in any historically informed or conceptually rigorous” way (Patterson 2012a). Based on those perceived problems, Patterson published a critique of Bales’ 1999 work, to which Bales has partially conceded.³

Though this comparative rhetoric between transatlantic slavery and modern-day slavery may be misguided at times (Bravo 2007; O’Connell Davidson, this volume),⁴ what emerges clearly are the good intentions of committed advocates to combat modern-day injustices in a world of stark inequality. Moreover, the attention garnered by the more salacious elements of advocates’ appeals, particularly around sex trafficking, may hold potential for helping the cause of less sensational forms of trafficking, such as migrant farm labor or domestic work. As with Kara’s work, much of the early commentary on trafficking has focused on the sex trade, but the discourse has of late shown some receptiveness to expanding the focus to include other kinds of labor abuse (Gallagher 2009: 811).

Despite this attention to extreme exploitation, I argue in this chapter that the frame of modern-day abolitionism, with its focus on the wrongful acts of individuals, may fail to throw light on an important adjacent issue, which is the impact of immigration controls. I argue that in a world in which legal slavery is abolished, and formal legal equality is enjoyed by people in many if not most domains – and yet, desperately exploitative conditions persist amongst many of the world’s people causing the term “modern-day slavery” to arise – immigration controls remain the single most *formal and legally permitted* basis for discrimination and coercion that contributes to those exploitative conditions. My objective is to show how documentary status leads directly to precarious and abusive conditions and treatment that advocates identify as amounting to enslavement.

Toward this end, my chapter begins by outlining the basic argument: a critique that the importance of irregular immigration status in exacerbating contemporary exploitation has not been sufficiently recognized in anti-slavery discourse. The chapter proceeds by discussing some core legal realist insights into irregular migration status: first, through an examination of the formal legal components of irregularity, analyzed through the lens of jural relations defined by American legal thinker Wesley Hohfeld; and second, through an assessment of the impact of background socioeconomic conditions as they interact with formal legal status or the lack thereof as highlighted by American law professor Robert Hale, to produce conditions for vulnerability that in turn give rise to extreme labor exploitation. I conclude by reiterating my central argument that immigration controls form the single, greatest formal legal contributor to conditions of exploitation often described as “modern-day slavery.”

This argument resists conflating chattel slavery and modern-day slavery. It draws on American legal realism to delineate the relationship between various juridical concepts and their relationship to both formal legal rules and economic bargaining power. Here it is worth noting that legal realist tools were developed to help show the internal analytical incoherence, and the external negative impact, of conservative legal interpretations that sought to stave off shifts in the early twentieth-century legal and institutional landscape which accompanied disruptions caused by a global economic depression and the rise of industrialization. I propose that they may be helpful in awakening us to something similar in today’s unsteady, globalizing, legal and economic terrain.

THE ABSENCE OF IMMIGRATION CONTROLS IN THE DISCOURSE OF MODERN-DAY ABOLITIONISM

Advocates fighting “modern-day slavery” focus on situations involving undocumented migrants who agree to work under inhuman conditions, for little or no pay, tolerating violence and abuse. In the first pages of *The Slave Next Door*, Bales and Soodalter describe the plight of a Mexican girl, Maria, who is recruited to work as a maid by an American woman living in Texas who drives across the US–Mexico border and smuggles Maria across the border (Bales and Soodalter 2009: 3–5). They speak of a Guatemalan boy, Alejandro, an “orphaned street kid” who was lent money by a trafficker to come to the United States and then “thrown into a barracks . . . with twenty other trafficked workers” (Ibid.: 12). Finally they narrate the story of Ruth, a West African woman who came to the United States to work as a domestic worker for a diplomat in Washington DC and then became a “prisoner in the home” because the family threatened to call authorities who would deport her (Ibid.: 19–20).

In response to the rhetorical question, “how many slaves are we talking about?” the authors draw a larger picture of between 14,500 and 17,500 people “trafficked into the United States and enslaved each year” (Ibid.: 6). But what is the primary source of coercion that compels these victims of trafficking to remain under enslavement? The authors mention violence, intimidation and psychological abuse, however the question remains as to why trafficked workers would remain in such conditions rather than seek legal recourse or simply leave. Certainly, the vulnerability of these persons, due to youth, inexperience, social isolation or victimization through abuse, may play a role. But more concretely, coercion is established through the manipulation of immigration controls. Victims of trafficking stay in exploitative conditions because they are threatened with deportation by their abusers, or because they are afraid to go to the authorities on their own for fear of deportation, or because their travel documents are withheld or are invalid, so that they fear that attempting to cross the border and return home could result in their arrest. It is the lack of valid immigrant documentation and status that enables these conditions of coercion.

Consider the counterfactual hypothesis: a context in which the protagonists in the narratives of Bales and Soodalter have no reason to fear escaping or going to the police because there is no chance that they will be deported or imprisoned; in which they know that they have the right

to work and so can find alternative means of employment and survival. Alejandro, the Guatemalan teenager who becomes a trafficked worker, knows he can leave and find a job elsewhere; Ruth, the West African domestic, knows she can call the police. Arguably the world in which Alejandro and Ruth exercise such legal rights without fear is a world without strict immigration controls.

Despite the statement by Bales and Soodalter that “[n]ot all slavery in America involves undocumented immigrants” (Ibid: 14), the majority of “modern-day slaves” that the authors discuss are individuals who are smuggled or trafficked across an international border and thereafter compelled into conditions that the authors dub enslavement in large part as a result of illegal documentary status and the fear of reprisal and punishment that this induces. The threat that makes such coercion effective, of arrest and/or deportation by authorities, exists only because of immigration controls. Documentary status either deprives, or is perceived to deprive, unauthorized immigrants of certain legal rights: the right to work, the right to remain in the destination country and the right to seek help from authorities. In a world in which formal legal equality has been almost universally granted, and in which very few status-based categorical distinctions are permitted legally, documentary status is one of those few remaining legal statuses. As a recent op-ed contributor put it, immigration controls form the barrier between unauthorized immigrants and “full equality” under law (Keller 2013).

One might then ask how we reconcile exclusion on the basis of documentary status with human rights law. After all, we live in an “age of human rights,” an age in which “no individual – regardless of gender, ethnicity or race – shall have his or her human rights abused or ignored” (Annan 2000). Yet documentary status is one of the few broad and categorical exceptions to this rule. Just how much of an exception it is, is a topic currently under debate in international law. While some assert states’ rights – namely of the right to sovereignty – others have argued that the basic nondiscrimination guarantee of international human rights law extends to all persons regardless of documentary status. The core human rights treaties establish that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*,” but left unanswered is whether “other status” extends to documentary

status. The Human Rights Committee has asserted that, with the exception of rights against expulsion and freedom of movement, aliens enjoy human rights regardless of documentary status (Human Rights Committee 1986). Further, there is some evidence of emerging international legal norms that restrain even the expulsion of unauthorized migrants (International Law Commission 2014). However, the UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (1985) has limited other rights, such as labor rights, to persons with lawful status. Such limitations are discernable in other international agreements as well, such as the 2003 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and ILO conventions on migrant workers (Thomas 2011b).

The international law on this status-based discrimination is unsettled. A 2002 UN Report noted that “certain techniques akin to slavery affect migrant workers in particular” (Weissbrodt and Anti-Slavery International 2002: 16). Such tactics include the confiscation of travel documents and the manipulation of workers’ illegal status so that they are “forced into an exploitative relationship that may include . . . slavery or slavery-like practices” (Ibid.: 17). Notwithstanding this recognition of the vulnerability of migrant workers, emerging international laws and institutions have not done much to relieve the effect that border controls have in exacerbating abusive practices. If anything, the instruments that countries have adopted in current times to combat trafficking have rationalized and reinforced border control practices by states.⁵ Since the bodies that make international law are composed of states, it is not surprising that international law privileges sovereign territorial control. Moreover, states’ prerogatives over border control, Anne Gallagher has recalled, “was never seriously questioned” during the drafting process that led to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (Trafficking Protocol) (Gallagher 2009: 790).

While several commentators have noted that migration controls often contribute significantly to the abusive conditions of modern-day slavery, the focus of policy solutions tends to range from criminal law enforcement of anti-trafficking laws to the protection of the human rights of victims, but with little or no direct discussion of the destructive impact of strict immigration laws. Perhaps somewhat more surprising has been the fact that, even in many of the anti-trafficking advocacy and policy circles in civil society, relaxing immigration constraints has

also not received an emphasis that is concomitant with its relevance. An element of pragmatism may also lead the focus away from immigration issues. However, if, as I argue here, immigration controls are the single most important, distinctive, formal, legal characteristic contributing to conditions of “modern-day slavery,” then civil society actors involved in combating trafficking should redouble efforts to question sovereign territorial prerogative. This is because formal, legal territorial exclusion interacts with background conditions of gravely unequal bargaining power to produce an environment in which severe exploitation of undocumented migrants is possible. This oppressive dynamic may well be exacerbated by the ramping-up of border policing and immigration control by countries of the global North as part of their reforms to immigration laws.

CHATTEL SLAVERY AND MODERN-DAY SLAVERY – SOME DIFFERENCES IN LAW

In the course of highlighting the role of immigration rules in increasing vulnerability to modern-day slavery, I should hasten to mention some important qualifications as I am not claiming that the conditions facing undocumented migrants are identical to slavery. Unlike many of the participants in this debate, I am uninterested in establishing equivalence between modern-day abuses and those of the past. In fact, I contend that it is perhaps useful to keep in mind that there are many relevant *differences* between chattel slavery and modern-day slavery beyond the obvious one arising from the legal abolition of formal slavery.

First, the penalty imposed on an unauthorized migrant upon capture would be deportation or expulsion – a forcible return to the migrant’s home country or another territory. Intuitively this seems a much less onerous penalty than being returned to conditions of chattel slavery. On the other hand, “runaway” migrants seem to be as desperate to escape their home conditions as were runaway slaves in that they risk death. Border controls make death increasingly likely by driving unauthorized migrants to attempt increasingly perilous routes of entry. A US Government Accountability Office study found that “following the implementation of [border patrol strengthening] strategy, there was an increase in border-crossing deaths . . .” (US GAO 2006). To return to the distinction, however, at least formally, the penalty imposed upon capture is far less severe.

Second, unauthorized migrants do enjoy formal legal equality on many issues, regardless of their documentary status (Bosniak 2008). Most importantly for purposes of this chapter, they do not have equal legal rights to work or to reside in the host state, but they do have equal rights in other areas. For example, the US courts have extended the Equal Protection Clause of the US Constitution to undocumented immigrants so that they can access state provision of public education.⁶ This jurisprudence has not entirely resolved the question in the United States, since both state and federal statutes have also foreclosed access to various other kinds of governmental services for undocumented aliens, from the provision of driver’s licenses to aid to families with dependent children (Lopez 2005). A complex patchwork has thus emerged: some cities, for example, seeking to break ranks with the more conservative governments of the states in which they are located have created local administrative systems that carefully avoid registering documentary status (de Graauw 2014).

Some scholars have argued that the term “informal citizenship” best describes this situation, where migrants do not enjoy full equality but, while it is sometimes assumed that the national state is a homogenous block, unambiguously excluding illegal migrants from the body politic, it turns out to be an ambiguous system involving significant inclusive mechanisms (Chauvin & Garces-Mascreñas 2012). Unlike slaves held as chattel, migrants without proper documentation are not relegated to second-class status across the full range of possible legal rights. My argument here, consequently, stops well short of making such a universal claim: but there do remain *some* legal arenas in which such second-class status and formal inequalities – persist, and those formally permitted discriminations do exercise significant negative impact.

A final disclaimer is that I wish to set aside for present purposes the *prescriptive* questions of, first, whether undocumented migrants *should* enjoy “full equality” or rather whether they should be punished for illegal entry, residence and/or work; and, second, what *alternative* schemes to strict border policing *might* be introduced in order to relax immigration controls in a manageable way to avoid the kinds of problems discussed here. Both of these issues command considerable attention and debate in several discourses, and examining them here would involve a range of challenges, from philosophical to regulatory, that exceed the scope of this chapter. For my purposes here, one only need accept the self-evident premise that large numbers of people *do* (whether they

should or not) continually enter, work and reside in countries such as the United States without legal authorization, and that their fears of arrest and deportation in such cases exert powerful influence.

THE TOOLS: LEGAL REALISM

To expound the argument, I will rely on complementary analytical techniques developed by two canonical scholars of the legal realist period, Wesley Hohfeld and Robert Hale. Wesley Hohfeld introduced his schema of jural correlatives and opposites in a 1913 article titled "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (Hohfeld 1913). Ten years later, Robert Hale published his analysis of the relationship between economic coercion and the law in "Coercion and Distribution in a Supposedly Noncoercive State" (Hale 1923). Both scholars were reacting to conservative legal interpretations put forward by courts that stood in the way of organized labor movements, which were mobilizing to achieve improvements in working conditions through the legislative process and through workplace collective bargaining. Such actions were prohibited by courts of the early twentieth century on the basis that they interfered with "liberty of contract," most famously in the US Supreme Court's 1905 decision, *Lochner v. New York*.⁷

In the *Lochner* era, courts routinely intervened to protect employers against "interference" by organized labor, citing the need to protect the principle of liberty of contract held to be foundational to both private law and public law, by overturning state regulation supporting unions and by issuing injunctions against specific organizing efforts. Legal realist scholarship of the same era often sought to demonstrate the errors of this conservative judicial reasoning. Hohfeld and Hale went about this task in two very different ways. Hohfeld argued that the error of the courts lay in their technical conflation of two disparate legal entitlements, namely, liberties and rights. A precise understanding of the distinction between legal liberties and legal rights would demonstrate that liberty of contract could not impose a duty of non-interference, as these courts had erroneously reasoned; only rights, and not liberties, entailed corresponding duties in law. In short, liberty of contract constituted a privilege rather than a right. Consequently, other parties were under no duty not to interfere with contracts.

Whereas Hohfeld elaborated technical distinctions of legal doctrine, Hale's reaction to the *Lochner* courts and their jurisprudence of liberty of

contract was to go beyond the law on its face, and show how law interacted with economic realities. Hale argued that contracts were never entirely free, and indeed that markets depended for their functionality on the deployment of countervailing economic coercions by contracting parties. The only question was the distribution of relative powers of coercion: contracts under the *Lochner* status quo distributed more bargaining power to employers than to employees. Legislative or negotiating strategies that supported workers would not alter the level of coercion present in the market but only redistribute its effects and benefits by equalizing bargaining power between employers and employees.

It is not surprising that analytical tools from this era would prove useful in today's debates. The socioeconomic and legal challenges posed by globalization today, in the early twenty-first century, rival the challenges posed by the rise of the administrative state in the early twentieth century (Thomas 2000). Where do the fault lines lie in today's struggles over the meaning of legal justice? One might provocatively argue that advocates of immigrants' rights are assuming the mantle borne by previous generations of labor rights advocates. Of course, and unfortunately, domestic labor rights struggles are not only far from over, they are often deeply implicated and even embattled by the immigration issue. Indeed, it is precisely the question of undocumented immigrants *as workers* and the competition they pose to domestic workers that takes up most of the space in the debates.

In drawing on American legal realism to reflect on the challenges posed by globalization, I recollect that the distinguishing legal characteristic of a slave is, according to international law experts, “some destruction of the juridical personality” (Gallagher 2009: 808). This is accompanied by severe social isolation and degradation (Patterson 1991: 9).⁸ My goals are to transpose Hohfeld and Hale by showing how immigration laws produce both of these effects for undocumented immigrants, particularly undocumented migrant workers. First, using Hohfeld, I demonstrate that undocumented migrant workers do experience “some destruction of the juridical personality” in that there are some legal rights to which they are not entitled; where others exercise rights, these migrants exercise what Hohfeld would call “no-rights.” Second, using Hale, I show how the interaction of these “no-rights” with the background dynamics of current modes of globalization dramatically reduces bargaining power and leads to the conditions of immiseration and degradation that many advocates term “modern-day slavery.”

Hohfeld: The Relationality of Legal Entitlements and the Centrality of the State

This section delineates the kinds of formal legal entitlements created by immigration law, using Hohfeld’s analysis of jural relations listed below in Figure 1. Hohfeld was not only concerned with analytical clarity for its own sake, but rather in explicating the ways in which the state’s coercive power was interwoven in private law; an area that conservative courts erroneously deemed to be generally free of legal interference – an effort very much of a piece with the legal realists more generally (Fried 2001). More specifically, he asked whether the state could intervene to protect the ends of the owner (as legal claimant) as against other parties, or not? Even more explicitly, when is the coercive power of the state invoked, and on whose behalf? This is where the articulation of the functional consequences of legal entitlements becomes crucial, and it is those consequences I turn to now in discussing the legal status of undocumented migrants and especially undocumented migrant workers.

Hohfeld developed a complicated framework of jural correlatives in which he carefully distinguished the legal consequences flowing from *rights* as opposed to *other kinds of legal entitlements* such as privileges, powers and immunities (Hohfeld 1913). For example, a *right* imposed a corresponding *duty* on other parties not to interfere with the action protected by the right. By contrast, a *privilege* imposed no such corresponding duty. An actor was free to engage in the activity as long as other parties did not interfere; other parties could try to interfere with the activity but had *no right* to prevent it from occurring.

Jural Opposites	Rights	Privilege	Power	Immunity
	No-rights	Duty	Disability	Liability
Jural Correlatives	Right	Privilege	Power	Immunity
	Duty	No-right	Liability	Disability

Figure 1 Hohfeld’s Typology of Fundamental Legal Relations

Although Hohfeld’s categories were technical enough to proclaim him as the lawyer’s lawyer, they focused on functional consequences

of categorical differences as opposed to innate characteristics (Hohfeld 1913: 30). The true meaning of a legal rule, contra classical legal formalists, arose not out of its deduction from principle but rather through its application by a judge making a ruling in a court of law. To illustrate, the US Supreme Court Justice Oliver Wendell Holmes, Jr. is attributed as being among the first to argue this point, famously proclaiming in *The Path of the Law* that:

The primary rights and duties with which jurisprudence busies itself, again, are *nothing but prophecies*. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in a moment, is that theory is apt to get the cart before the horse and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that *if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right*. (Holmes 1897: 1) (italics added)

Like Holmes, Hohfeld was interested in the functional consequences of rights and other legal entitlements, and the distinctions between those consequences. In other words, he was interested in categorical differences not for their own sake, but to determine what results they would produce for particular parties in particular contexts. This is why Hohfeld argued that:

attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of ‘opposites’ and ‘correlatives,’ and then proceeding to exemplify their *individual scope and application in concrete cases*. (Hohfeld 1913: 30)

Moreover, Hohfeld’s work showed that in order to draw out those consequences, an understanding of the relationship between the holder of the entitlement, other parties and courts – that is the state – was necessary. So, Hohfeld’s typology communicated two additional insights: the first that the meaning of legal entitlements is fundamentally *relational* – my right has no real meaning until it tells me what I am permitted to do or not do as against you. Second, that the *state* is intrinsically involved in shaping this context: the reason my right has meaning, that it permits me to act free of your interference, is that the state – in the form of a court, for example – will enforce my right against you.

All these qualities of Hohfeld's typology – the functional distinctions between legal entitlements, their significance for determining relative scope of action amongst various parties, and the centrality of the state in enforcing that scope – are important for the application of the typology to my argument. Hohfeld encourages us to identify the precise contours of legal rules that shape entitlements as enforced by the state. If we try to unpack what legal rules contribute to modern-day slavery, we are confronted with the fact that border controls do a lot of this work of shaping entitlements. I set out aspects of these entitlements below.

The “No-Rights” of Undocumented Migrants and Hohfeldian Analysis

To view this application to undocumented migrant workers, we can begin by reviewing the basic argument put forward earlier. The distinction between persons with valid immigration status (citizens and lawful aliens) and those without is one of the very few remaining identifiable status-based distinctions now permitted as a basis for discrimination in legal treatment. Those with papers – citizens and authorized migrants – enjoy a variety of entitlements that those without papers do not. By no means does this distinction apply to all aspects of life – there are many domains in which such discrimination is not legally permitted and in which persons are deemed meritorious of formally equal protection under the law regardless of documentary status. However, there are a few domains where this distinction applies and which are crucial in establishing conditions of economic coercion. Here are three formally permissible distinctions in legal entitlements of those with valid immigration status as opposed to those without. The first is that citizens and authorized migrants have a *right* to work; unauthorized migrants have *no right* to work. By “right to work,” I mean the right to be eligible for work, not the right to be given work. Second, in some cases, the right to work extends to the availability of remedies under labor and employment law. For example, a citizen or authorized migrant has a *right* to some remedies under US labor law to which unauthorized migrants have *no right*.⁹ Third, citizens and authorized migrants have a *right* against expulsion from the country; unauthorized migrants have (in most cases) (ILC Draft Articles on Expulsion of Aliens 2014) *no right* against expulsion.

Figure 2 folds these into Hohfeld’s framework:

Jural Opposites	Citizens and documented migrants	Rights to work, to some labor law remedy, against expulsion	Privilege	Power	Immunity
	Undocumented migrants	No-rights to work, to some labor law remedies, against expulsion	Duty	Disability	Liability
Jural Correlatives	Citizens and documented migrants	Rights to work, to some labor law remedy, against expulsion	Privilege	Power	Immunity
	Undocumented migrants	Duty	No-rights to work, to some labor law remedies, against expulsion	Liability	Disability

Figure 2 Hohfeld’s Typology of Fundamental Legal Relations – Applied to Rights and No-Rights of Workers Based on Immigration Status

By themselves, these distinctions may not a priori exert coercive power on unauthorized migrants. However, most readers will immediately intuit that these legal entitlements and the absence thereof *in fact* will directly affect bargaining power in the marketplace. This is where the analysis of my second legal realist, Robert Hale, becomes crucial.

Bargaining Power Asymmetries: Drawing on Robert Hale

This section explores the interaction between the formal legal entitlements described in the previous section within the larger social context, using the analysis of Robert Hale. The notion of bargaining power, and of bargaining in the shadow of the law, is now so widely accepted as to perhaps be assumed (Mnookin and Kornhauser 1979). Robert Hale was an important early US legal analyst of the dynamics of coercion

in the marketplace as a critique of the legal principle of freedom of contract. The concept is straightforward: that contracting does not occur in pristine conditions of total freedom, but rather that contract terms are set by parties as compelled by market forces.

Again, this was a reaction to the *Lochner* era courts' decisions in favor of employers against interference by organized labor, citing the need to protect liberty of contract. Hohfeld's reaction as we have reviewed above was to show that liberty of contract constituted a privilege rather than a right. Consequently, other parties were under no duty not to interfere with such contracts. Courts erred when they mistook the privilege of contracting for a right, and intervened to impose a non-existent duty on other parties to respect that right. Hale's reaction to the *Lochner* courts and their jurisprudence of liberty of contract was to show that contracts were never entirely free; and that contracts under the status quo simply distributed more bargaining power to employers than to employees.

Hale's contribution however goes beyond outlining the components of economic coercion. What he also argued was that these economic coercions were, themselves, *legal*. They were the product of background legal rules, constructs so deeply embedded as to be conceptually invisible. Central among these was, simply, the notion of private property. Hale wrote:

In protecting property the government is doing something quite apart from merely keeping the peace. It is exerting coercion wherever that is necessary to protect each owner, not merely from violence, but also from peaceful infringement of his sole right to enjoy the thing owned. That, however, is not the most significant aspect of present-day coercion in connection with property. The owner can remove the legal duty under which the non-owner labors with respect to the owner's property. He can remove it, or keep it in force, at his discretion. To keep it in force may or may not have unpleasant consequences to the non-owner—consequences which spring from the law's creation of legal duty. To avoid these consequences, the non-owner may be willing to obey the will of the owner, provided that the obedience is not in itself more unpleasant than the consequences to be avoided It would be either absence of wages, or obedience to the terms of some other employer. If the worker has no money of his own, the threat of any particular employer to withhold any particular amount of money would be effective in securing the worker's obedience in proportion to the difficulty with which other employers can be induced to furnish a "job." If the non-owner works for anyone, it is

for the purpose of warding off the threat of at least one owner of money to withhold that money from him (with the help of the law). Suppose, now, the worker were to refuse to yield to the coercion of any employer, but were to choose instead to remain under the legal duty to abstain from the use of any of the money which anyone [else] owns. *He must eat. While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community – and that law is the law of property.* (Hale 1923: 472) (italics added)

For Hale, the primary source of coercion in the market was so pervasive as to be invisible – the property laws which require us to enter into market exchange to procure fulfillment of our needs and desires. If property law did not bar workers from simply taking the food they needed, we would not feel compelled to work to earn enough money to buy the food under available market terms.

Hale’s further innovation was to notice that these dynamics of coercion were actually pervasive in the marketplace. All parties sought to exercise market dynamics, leveraged by background rules of property that reinforced a scarcity of resources, to coerce other parties through market power. Shifting the rules would shift the distribution of that bargaining power, but not the basic dynamic.

As already intimated . . . the owner’s coercive power is weakened by the fact that both his customers and his laborers have the power to make matters more or less unpleasant for him – the customers through their law-given power to withhold access to their cash, the laborers through their actual power (neither created nor destroyed by the law) to withhold their services. Even without this power, it is true, he would have to give his laborers enough to sustain them, just as it is to his own interest to feed his horses enough to make them efficient. But whatever they get beyond this minimum is obtained either by reason of the employer’s generosity and sense of moral obligation, or by his fear that they will exercise the threat to work elsewhere or not at all. If obtained through this fear, it is a case where he submits by so much to their wills. It is not a “voluntary” payment, but a payment as the price of escape from damaging behavior of others. (Ibid.: 474)

Changing rules in favor of employees did not reduce or expand liberty of contract – it simply changed the distribution of profits from the exercise of economic coercion by one party over the other:

But a careful scrutiny will, it is thought, reveal a fallacy in this view, and will demonstrate that the systems advocated by professed upholders of

laissez-faire are in reality permeated with coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of “equal opportunity” or of “preserving the equal rights of others.” Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable . . . Since coercive restrictions are bound to affect the distribution of income and the direction of economic activities, and are bound to affect the economic interests of persons living in foreign parts, statesmen cannot avoid interfering with economic matters . . . (Ibid.: 470)

Importantly, for Hale the forces of coercion are multidirectional: he does not claim that owners and employers always exercise superior bargaining power over employees. Workers are entirely capable of harnessing the same powers of market coercion in their favor; if the background conditions of the market and/or labor organizing efforts are such that employers face a lack of labor supply, they too will feel market pressures, in this case to offer better wages to workers. In this sense the laws of property affect all sides. Firms out to make a profit must do so under legal terms set by property. They cannot simply take the money they seek for profit, it must be procured through market exchange; nor can they simply take the inputs they require for production, as they must be purchased. And of course since slavery is illegal, workers must be paid wages.

All of this is to show that market “coercion” is very much the product both of background conditions and of background laws. However, the point about these is that they affect all workers. So, if it is economic coercion that is making people desperate so that they become modern-day slaves, shouldn’t this apply not just to women who feel forced to enter the sex trade but rather to all workers who feel forced to accept jobs in substandard conditions?

Turning then to other sources of coercion; beyond economic desperation, what is the next most commonly cited factor? Invariably, it is the fact that trafficked persons were bound by some version of control related to their immigration status. Either their passports were held so that they could not travel; or they knew that their illegal status in the country meant they were vulnerable. These domains of permissible discrimination directly affect the ability to bargain in the marketplace of employment contracts. Under market conditions in which the means of survival are controlled through property and contract, such

distinctions enable background market forces to exert far greater power than they would otherwise.

To consider the situation of unauthorized migrants, the organization of various rules relating to the right to work, the right to labor and employment law remedies, and the right against expulsion all affect the bargaining power of undocumented migrant workers. Figure 3 connects the insights from Hale and Hohfeld. The absence of access to economic coercion for unauthorized migrants takes the legal form of the opposite of a right, a *no-right*. Since the jural correlative of a *no-right* is a *privilege*, one may say that employers exercise legal *privileges* to use their market coercion power, à la Hale, as far as they can to exploit undocumented migrant workers; workers have legal *no-rights* to stop them and have recourse only to their own bargaining power and powers of market coercion, which in these cases are minimal.

These *no-rights* effectively create the ultimate “at will” employment context, in which the employer and employee bargain for terms wholly on the basis of their individual power vis-à-vis each other. Moreover, the unauthorized migrant’s *no-right* to reside, work or resist expulsion means there is no legal remedy against an employer for confiscating travel documents, threatening to call immigration authorities leading to deportation or exercising other forms of coercion that cause a migrant not only to concede to deeply unfavorable terms, but to remain willing to work under those terms.

Jural Correlatives	Rights of citizens and documented migrants to work, to some labor law remedy, against expulsion	Privilege of employers to exercise economic coercion against undocumented migrant workers without limitation by workers’ rights	Power	Immunity
	Duty of employers to respect rights of citizens and documented migrants	No-rights of undocumented migrants to resist employers’ economic coercion	Liability	Disability

Figure 3 Hohfeld’s Typology of Fundamental Legal Relations – Extended to Privileges and Duties of Employers Based on Workers’ Immigration Status

OTHER COERCIVE RULES AFFECTING
UNDOCUMENTED MIGRANT WORKERS

The foregoing section has showed that documentary status does accomplish a partial “destruction of juridical personality” – which is a defining characteristic of slavery according to international law (Gallagher 2009: 808). Interacting with background economic conditions of desperation produces dynamics of extreme coercion that commentators have described as “modern-day slavery.” There is one further component to be considered in investigating the ways in which immigration controls create “modern-day slavery” and that is to look at the actual *effect* of immigration monitoring and policing – penalties imposed on employers for hiring undocumented workers, raids conducted in workplaces and so on.

In addition to negating specifically the legal personality of enslaved persons, the institution of chattel slavery was buttressed by numerous supporting laws (see also O’Connell Davidson, this volume). Like any form of property ownership, slaveholding would include an array of legal correlatives. For example, the right to demand a person to perform labor without compensation would correlate to a duty to perform the labor and not demand compensation and a no-right of third parties to interfere. This central right was supported by numerous other laws that secured degraded status for slaves including in relation to the legal status of slave testimony, the legal ban on reading and the legal ban on the inheritance of property. Despite the inevitable analytical problems that treating a human being as an inert object of property posed for jurists expounding the rules of slavery,¹⁰ the degradation of slaves was secured and reinforced by the legal system in myriad ways.

Most important among these was the *restriction on freedom of movement* of slaves. This restriction was enforced through the imposition of not only a duty of slaves not to seek escape, but also a duty imposed on third parties to return an escaped slave to the slave’s owner. The primary importance of this restriction to supporting the institution of slavery is reflected by its incorporation into the Fugitive Slave Clause of the original US Constitution which was eventually repealed by the Thirteenth Amendment:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall

be delivered up on Claim of the Party to whom such Service or Labour may be due.¹¹

As the abolitionist movement grew along with tensions around the enforcement of the Constitution’s Fugitive Slave Clause, the antebellum US Congress passed statutes further reinforcing the legal duties of third parties to restrict the freedom of movement of slaves, notably their escape from slavery, in order to respect the property rights of slaveholders. The Fugitive Slave Act of 1793 created a private right of action for slaveholders to seek damages against those who harbored fugitive slaves.¹² The Fugitive Slave Act of 1850 sought further to enforce this duty not to harbor fugitive slaves by imposing public fines and imprisonment as penalties.¹³ These and other laws also required the law enforcement officials to execute warrants of arrest and reclamation of fugitive slaves. For example, the Fugitive Slave Act of 1850 established a process for appointing commissioners whose exclusive role was to oversee the issuance and enforcement of such warrants, and to expand the number of such appointments as necessary. The centrality of the fugitive slave laws to upholding the institution of slavery is indicated not only by the multiple efforts of national and local governments to reinforce them but also by the ways in which the enforcement of these laws became controversial as the debate around the abolition of slavery grew. *Without* such laws, slaves would have enjoyed a privilege of escape, a freedom to seek life and livelihood away from their owners. It was by imposing duties of return and repatriation of slaves on all third parties – not only law enforcement but also any private individual – that the compulsions of slavery could be effectuated.

By now, the analogy to contemporary immigration controls might be clear – they are the foremost remaining *restriction on freedom of movement* permitted under international law. International human rights law establishes a right to freedom of movement within a country’s territory, and rights against expulsion from a country’s territory, only to persons “*lawfully* within the territory.”¹⁴ The rights deemed to attach inalienably to humans nevertheless detach from those humans deemed not to possess lawful status by the state. Immigration laws not only provide for the deportation and repatriation of undocumented migrants but also require cooperation with authorities’ monitoring of documentary status. Employers, for example, are subject to penalties for hiring undocumented migrant workers and thereby aiding and abetting their violation of immigration controls.

Of course, the *disanalogy* between fugitive slave laws and immigration controls will also be clear. Fugitive slave laws required the forcible return of persons to formally sanctioned conditions of forced labor. Immigration laws require the forcible return of undocumented persons to their countries of origin. Few would agree with a characterization of conditions in these countries, however economically desperate, as the equivalent of chattel slavery.

CONCLUSION

How are immigration controls like pro-slavery laws? Most importantly, in the sense that they deprive the person of the *freedom of movement*. Additionally, they also deprive the person of equal legal status in some instances – though in many, many fewer instances than under chattel slavery – today, formal legal equality is generally accorded in many areas regardless of documentary status.

However much we might resist the analogy between modern-day slavery and chattel slavery, does the perceptual gap between these two contexts begin to close when one considers the desperation with which so many undocumented migrants seek escape from their countries? The decisions of refugees and smuggled migrants to attempt extremely hazardous border crossings suggest that, for them, the necessity of escape from their conditions is of utmost urgency. Are those who risk capture by immigration officials, or who risk death, by desert dehydration or by drowning on the high seas, so completely distinct in their desperation from those fugitive slaves who followed the north star under cover of night?

Before the accusations of melodrama or ahistoricism start to fly, allow me to restate that my main point is *not* to argue for such historical equivalence but, rather, to note that, in our times, it is this desperation for escape that renders undocumented migrants willing to tolerate intolerable conditions of exploitation in countries of destination. It is the fact that the law imposes their expulsion from destination countries that gives those who would exploit migrants their primary source of control. The threat of expulsion that is enforced by immigration laws thus contributes materially to the conditions of desperation faced by migrant workers that lead precisely to those abuses characterized as “modern-day slavery.” Accordingly, relaxing immigration controls would likely reduce the incidence of modern-day slavery more than even the most aggressive criminal law enforcement tactics.

NOTES

1. See, e.g., Editorial, *New York Times* 2012: A30. It reads: “Though much remains to be done, the Obama administration has begun meaningful new initiatives against human trafficking – a worldwide injustice that exposes more than 20 million poor and vulnerable individuals, especially women and children, to exploitation and degradation. The most notable of these is a strong executive order aimed at ending human trafficking activities by government contractors and subcontractors.”
2. Cecil 2012: 4A (emphasis added). “A few years ago, in seminary, Tim Vance was shocked by a video that laid out the continuing problem of slavery worldwide – including in the United States. ‘*I’d just assumed slavery was a thing of the past, just like most people. So I was actually surprised to find out that it was worse than before,*’ he said. ‘Obviously it looks a bit different, but slavery is always the same.’ Vance, associate pastor at Gateway Presbyterian Church . . . has organized a public screening of a video, ‘At the End of Slavery,’ . . . The screening is part of a nationwide movement to educate communities on the reality of modern-day slavery and mobilize a response. Modern slavery includes adults and children enslaved for manual labor or for prostitution.”
3. See Allain 2012, which includes the following three essays: Orlando Patterson, *Trafficking, Gender and Slavery: Past and Present*; Kevin Bales, *Professor Kevin Bales’ Response to Professor Orlando Patterson*; and Orlando Patterson, *Rejoinder: Professor Orlando Patterson’s Response to Professor Kevin Bales*.
4. Karen Bravo examines the multiple problems with the analogy move (Bravo 2007: 207): “They may be summarized as (1) the emotional exhortation to action, (2) the diminution of the horror of trans-Atlantic slavery, (3) the assumption of the mantle of righteousness and (4) distancing of our (enlightened) time from theirs or ‘how far we’ve come.’ Running throughout is an inherently contradictory view of trans-Atlantic slavery: it is both (a) the ultimate in evil that never should have been, but is being repeated and (b) less noxious than the modern traffic in human beings (either because more persons are victimized or because human trafficking is happening *today*).”
5. See my description of “the contribution of anti-trafficking efforts to the border control agendas of states . . . at the expense of delivering actual aid to victims of trafficking” in Halley et al. 2006: 388; see also Hathaway 2008: 6 where he observes that “the border control emphasis inherent in the Trafficking Protocol and its companion Smuggling Protocol has provided states with a reason – or at least a rationalization – for the intensification of broadly based efforts to prevent the arrival or entry of unauthorized noncitizens.”
6. The US Supreme Court, for example, struck down a Texas state statute imposing discriminatory fees on children of undocumented immigrants, on the basis that it violated the Equal Protection Clause of the US Constitution and thereby establishing a principle of equality in public education regardless of documentary status. *Plyler v. Doe*, 457 US 202 (1982).

The court established that legal personhood could not be denied to aliens: “whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.” *Plyler* at 210. The court “extended the reach of the Fourteenth Amendment’s Equal Protection Clause to the undocumented.” *Lopez* 2005: 1373.

7. *Lochner v. New York*, 198 US 45 (1905). The court held unconstitutional a New York state maximum-hours statute.
8. *Patterson* 1991: 9 where he notes that “Slavery is the permanent, violent and personal domination of natively alienated and generally dishonored persons.”
9. *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) (which denied workers remedies under the National Labor Relations Act, 1935 due to legal status as undocumented migrants.
10. Many of the scholars of historical slavery, such as Honore and Finkelman, who are included in Jean Allain’s 2012 edited volume helpfully show that the humanity of slaves, though as a general rule not recognized, did exert some pressure on the law of slavery so that slaves were not, in law, entirely without rights or recognition and therefore not entirely legally equivalent to inanimate “things.”
11. Article 4, s. 2, clause 3 of the Constitution [repealed by the 13th Amendment].
12. Art. 4, Fugitive Slave Act of 1793: any person who shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given and declared; or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any Court proper to try the same, saving moreover to the person claiming such labor or service his right of action for or on account of the said injuries, or either of them.
13. Art. 7, Fugitive Slave Act of 1850: That any person who shall knowingly and willingly obstruct, hinder, or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such a fugitive from service or labor, either with or without process as aforesaid, or shall rescue, or attempt to rescue, such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting as aforesaid, when so arrested, pursuant to the authority herein given and declared; or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall, for either of said offences, be subject to a

fine not exceeding one thousand dollars, and imprisonment not exceeding six months.

14. International Covenant on Civil and Political Rights, 1966, Arts. 12 and 13 (UN 1966). For some emerging international law establishing somewhat expanded rights against expulsion for aliens regardless of documentary status, see ILC Draft Articles on Expulsion of Aliens 2014.

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