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Slavery and Its Definition

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Had the abolitionists of the past, the likes of Abraham Lincoln or William Wilberforce, been able to see into the twenty-first century, what might have struck them as very strange was that while we had come far in ending slavery and suppressing human exploitation, we seemed to have lost sight of what the term "slavery" means. This, despite the fact that for more than eighty-five years there has been a consensus in international law as to the legal definition of slavery. Likewise, despite this international legal consensus and the fact that most states have constitutional or legislative provisions prohibiting slavery in their domestic legal order, very little has been done to prosecute individuals for enslaving another person—until recently.

A Neo-Abolitionist Era

We say "until recently", as it can be said that we are currently living through a "neo-abolitionist era", one that goes beyond its historical predecessor, which focused on ending legal slavery, to a contemporary movement meant to end slavery in fact. Distinctive parallels exist between the abolition of old and the current, neo-abolitionist, movement. Just as Quaker social activism and Anglican evangelicalism laid the foundation for the British abolitionist campaign, which ultimately led to the abolition of legal slavery, so, too, should we acknowledge the parallel roles of human rights activism (still including Quakers) on the one hand and the "Religious Right" in the United States on the other and their joint influence on Congress in passing the 2000 *Victims of Trafficking and Violence Protection Act*.[1] Similarly, just as its dominance of the seas during the nineteenth century allowed Britain to end the slave trade, so, too, has the current dominance of the United States allowed it, through legislation dealing with trafficking, to force other countries to get serious about prosecuting cases of slavery.[2]

The dominant position which the United States holds in both soft and hard power has allowed it, through informal empire, to require states to pass legislation that criminalises the movement of persons through coercion, fraud, or deceit, with the intent of exploiting them. The most recent manifestation of the 2000 Victims of Trafficking Act, the *William Wilberforce Trafficking Victims Protection Re-authorization Act* of 2008, makes it the policy of the United States not to provide non-humanitarian, non-trade related foreign assistance to any government that (1) does not comply with minimum standards for the elimination of trafficking; and (2) is not making significant efforts to bring itself into compliance with such standards.

These minimum standards relate to legislating criminal liability for those involved in trafficking in persons and require that the state "should make serious and sustained efforts to eliminate severe forms of trafficking in persons".[3] Thus, in the case of trafficking, the United States is requiring other countries to go beyond legislation to actual suppression.

Before continuing, it should be made plain that trafficking is not in itself slavery, but a process by which slavery can be achieved. However, the moves of the United States to suppress trafficking have a knock-on effect regarding slavery. This is so because the trafficking legislation which has emanated from the US Congress is modelled upon, and an offshoot of, the United Nations' 2000 Palermo Protocol—the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Palermo Protocol, for its part, sets out a definition of trafficking that establishes a crime related to a chain of movement of a person into situations of "exploitation" as a result of violence or other means. The Palermo Protocol gives examples of the types of exploitation that are meant to be addressed. These include forced labour, servitude, and, most importantly for our consideration, slavery.[4] As a result, if countries are meant to suppress trafficking where it involves slavery, it is rather difficult to turn a blind eye to cases of slavery on their territory that do not involve trafficking, in the sense of this chain of movement.

The other influence that the United States has had on the emergence of the neo-abolitionist era is rather more equivocal as it relates to the crime against humanity of enslavement within the jurisdiction of the International Criminal Court. While the United States remains opposed to becoming party to the court, it has also utilised it instrumentally, allowing the UN Security Council to act against the leaderships of both Sudan and Libya. Where the international crime of enslavement is concerned, what places us on firmer ground with regard to US influence is Washington's leading role in creating the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, which acted as precursors, and thus cleared the way for the establishment, of the International Criminal Court.[5] For many of the 120 states that have signed up to the International Criminal Court, doing so has meant the introduction of domestic legislation to ensure that the court can function in a complementary fashion within the domestic legal order. Part of that legislation inevitably addressed the crimes under the jurisdiction of the International Criminal Court, and a number of states, including Burundi, Malta, Niger and Romania, have incorporated "enslavement" into their domestic legislation.

A Contested Term

These are the dynamics at play that have brought slavery back into legal focus in the context of the early twenty-first century. Yet, today, the very term "slavery" and its contours are contested, even though an international definition of slavery was established in 1926, was confirmed in 1956, and was replicated in substance as the definition of enslavement included in the 1998 Statute of the International Criminal Court. However, it may also be said that the legal contours of slavery remain contested not necessarily despite the 1926 definition of slavery, but because of it. This is because the definition looks rather opaque at first glance:

> Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

One's immediate impression might be that of the importance of ownership—that a person must own another for slavery to be said to exist. But this is not so.

As the Australian equivalent of the US Supreme Court made clear in its 2008 *Tang* case, the 1926 definition has contemporary relevance in situations where a person does not legally own another, as they did in days of old. What the High Court of Australia determined was that while the 1926 definition applied in *de jure* situations—that is, where a person legally owns another—it also applied in *de facto* situations where a person exercised the *powers* attaching to the right of ownership instead of exercising the *right* of ownership over a person. In other words, a person could be in a condition of slavery without legal ownership, if it could be shown that he or she was treated like a slave in fact, if not in law. Let us provide some examples to illuminate this *de jure–de facto* difference.

Consider the case of a bigamist. In most countries, it is illegal for a married person to marry a second time. Let us say that a man gets married a second time. For that man, the second marriage is illegal, the courts will not recognise it; thus, he is not married *de jure*. However, from the courts' perspective he is married *de facto*, which allows for the bigamy case to proceed.

A further example brings us closer to a consideration of the essence of the definition of slavery. Consider the dispute between two drug dealers over a kilogram of heroin. While neither has a *de jure* right of ownership of the drugs, the courts will recognise the exercise of a power attaching to such a right of ownership in a *de facto* sense so as to hold one or the other in violation of the laws related to possessing controlled substances. This example is instructive as it functions within a property-law paradigm that is also applicable in cases of contemporary slavery. While the judge could make a determination of *de facto* ownership if a drug dealer was caught selling heroin, typically such cases are resolved on the simple issue of possession: did the individual have control over the heroin, did she possess it?

In the case of slavery the element of possession is fundamental. It allows us to drain the swamp and leave the definitional quagmire which has marginalised the legal definition of slavery. The definition has been often bogged down, since at least the 1930s, by individuals and organisations trying to expand the notion of slavery to fit their agenda and thus benefit from the visceral power of the claim that what they are railing against is "slavery". Consider, for instance, attempts within the United Nations during the 1960s to equate colonialism and apartheid to slavery; or UN studies in the 1990s that considered incest and juvenile detention under the heading of contemporary forms of slavery.

A Sociological Reading

With the legal definition of slavery marginalised, people looked elsewhere to define slavery. A survey of the academic literature on contemporary slavery—including much of the legal literature on the subject—would show that, in the main, it has turned to the work of Kevin Bales and his sociological reading of what constitutes slavery. For more than fifteen years, Bales has attempted to build discussions on contemporary slavery and propose an agenda for both research and effective intervention.[6] In essence, Bales's definition turns on the following elements: the use of violence, and the ability to control, for economic exploitation.[7] The primary indicator of slavery is that of control—control that diminishes the agency of the slave, normally demonstrated by the physical control of the slave that prevents escape from enslavement and forces him or her to work. The primacy of control is often additionally demonstrated by the slaveholder's sexual use of the slave's body, as well as other forms of exploitation.

Bales also argues that slavery as a status or condition is not defined by the customs, practices, methods, or mechanisms of enslavement. A person might be taken into slavery by many paths, but the means of enslavement, the vehicle by which a person arrives in the state or condition of slavery, while important for understanding the nature of a particular case, does not determine that state; it is simply the means by which a person arrives under the control of another.

A number of examples help to shed light on this last distinction and clear up the confusion arising from disparate definitions based on pathways to enslavement as opposed to the condition of slavery itself. Imagine there are four women, all of whom are experiencing the following conditions: all four women are held under the physical control of another person against their will; this control prevents them from exercising agency or leaving the place where they are held; the activities of each woman are managed by the person in control, and each is required to undertake activities that benefit the person who controls her; the control is such that any of the women can be transferred to another individual against her will, or destroyed by the person who controls her; each women experiences intermittent rape at the hands of the person controlling her, as well as by other men as allowed by the person who controls her.

What is telling is that while few would disagree that these four women are enslaved based on this description, some commentators would argue that some of these women are not in slavery when the means by which they were enslaved are introduced. Now let us assume that the first woman arrived at this condition after being falsely arrested, "fined", and then handed over to the person who controls her to "work off her fine" in an open-pit mine in eastern Congo. The second woman, seeking a better life, paid a smuggler to help her enter another country and upon arrival was handed over to, and then sexually assaulted by, the person who would control her. The controller also told her that she owed a sum of money in addition to what she paid to be smuggled. The woman was then placed in a brothel in the United States owned by the person controlling her where she was sold for sex. The third woman arrived in the condition of control when her husband took out a loan and placed himself and his family as collateral against that loan. The family continued the agricultural work in India they had previously performed but which now profited the person who controlled them. The fourth woman entered this situation as a child when her parents were offered the opportunity of a "placement", a sort of apprenticeship, for their child in the family of the person who would come to control her in Haiti.

There are proponents of specific definitions of slavery that rely on reference to mechanisms of acquisition or to cultural context who would deny these women are enslaved. And yet there are three important points to make about these four women: (1) these are not hypothetical examples—all of these are real women, living today;[8] (2) most would recognise the situations of each of these women to constitute slavery; (3) the path or mechanism by which they arrived at this condition is important in understanding their situation but is not relevant in the determination of whether they are slaves.

This last point is especially important. For example, in the case of the first woman, some academic commentators, as well as members of local power elites, and specifically the leaders of the rebel groups illegally operating the mines of eastern Congo and exercising control over the first woman as slaveholders, would argue that she is not enslaved but simply in a situation of *peonage*, a legitimate exercise of legal control over miscreants. In the case of the second woman, some commentators, and typically criminals who engage in human

trafficking for commercial sexual exploitation, would argue she was not in slavery because she was in a situation of debt obligation; other commentators would argue that she was not a slave but a *sex-trafficking victim*. In the case of the third woman, some commentators, and typically the slave-masters of India, would argue that she was not in slavery because this form of hereditary *debt bondage* is not slavery but a traditional contracting of obligated labour. And some commentators, and typically the adults in the households exploiting her labour and using her sexually, would argue that the fourth woman was not in slavery because she was in fact benefiting from a traditional practice of *placement* that allows the poor access to alternative ladders of opportunity.

Put simply, it is illogical to name the mechanism of acquisition of a person as an essential component in defining whether a person is in slavery. Slavery is a status or condition, not the means by which a person is removed into that state or condition of control.

Possession and Control

However, for most academics and practitioners, turning to Bales's sociological definition of slavery leaves us with a dilemma: on the one hand, it provides us with the nearest approximation to the lived experience of a slave today, serves well as a methodological tool supporting predictive validity in the social-scientific study of slavery, but is not legally binding; on the other, the failure to engage with the legal definition has made it redundant as an anti-slavery tool within the rule of law.

We believe that there is a way out of the dilemma; and it is here that our earlier discussion of possession comes into play. It was not realised until recently, when property lawyers sat down with slavery experts—both historians and contemporary scholars—that not only could the 1926 definition be read in a manner consistent with what would be considered in social-scientific terms as slavery, but that such a reading was, in fact and in law, internally consistent with a reading of the legal definition.[9]

That reading turns on the understanding that possession is about control, which is very much the orthodoxy in property law. In a seminal article, now more than fifty years old, Antony Honoré wrote that possession is "the foundation on which the whole superstructure of ownership rests".[10] Thus, when considering the 1926 legal definition of slavery and seeking to apply it to a contemporary case, one should look for the exercise of control over a person tantamount to possession. Possession is the *sine qua non* of slavery—it is, as in the case of illegal drugs, what judges and prosecutors should focus upon. Why? Because possession is the most important of the—in the language of the 1926 definition—powers attaching to the right of ownership. This is so as the other powers do not catch the essence of slavery unless control tantamount to possession is present.

In the language of property lawyers, ownership entails a number of rights. Thus, there "is the right to walk about the field, to till it, to allow others to till it … to sell it … to give it away … and so forth".[11] Yet, as Honoré makes plain, what underlies these rights is possession. You cannot sell a thing or profit from it to the exclusion of others unless you possess it. And possession in law ultimately turns on demonstrating control.

The same can be said about contemporary slavery. There would be no case to answer over a charge of slavery when a manager determines—within the limits of the law—what, where,

and how her employees are deployed. This is so because the essential ingredient of possession is lacking. Now consider the opposite: the only manner to buy or sell a person is through effecting control tantamount to possession as a precondition. That is a banal way of saying that, in a typical case of the selling of a slave, the enslaved has been beaten, often raped, until he or she can no longer resist being the object of such a transaction. Slavery, after all, is not pretty; it is a nasty business where control tantamount to possession is achieved through violence. In such instances, personal liberty is lost; the free will of the person has been taken away, transferred from the slave to the owner—the slaveholder. Once this is achieved, the slave can then be exploited, his or her labour used, his or her sexual autonomy disregarded, all at the whim of the person who now possesses the enslaved.

Slavery in Law and in Fact

We have already mentioned that in a case of slavery, once someone has established control tantamount to possession, they can manage or sell the person controlled. These, along with possession, are three prime examples of the exercise of "the powers attaching to the right of ownership" which are central to the legal definition of slavery. Further examples of such powers are the use, profit, and transfer of a person, as well as the treating of a person as though he or she were disposable. This reading is an important breakthrough which gives fundamental traction to the law as an anti-slavery tool. Property lawyers recognise that a correct reading of the exercise of the powers attaching to the right of ownership speaks to the contemporary understanding of what constitutes slavery in fact. Those leading property scholars and slavery experts who first sat down together in Italy and later in the United States give pay to their reading of the legal definition of slavery by developing the *Bellagio–Harvard Guidelines on the Legal Parameters of Slavery*.[12] While these guidelines unpack the various powers attaching to the right of ownership just mentioned, they recognise fundamentally that:

In cases of slavery, the exercise of "the powers attaching to the right of ownership" should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually this exercise will be supported by and obtained through means such as violent force, deception and/or coercion.

From the 1930s until recently, the general outlook towards the legal definition of slavery has been a negative one: why it is *not* applicable to cases of slavery. Spurred on by the determination of the High Court of Australia that the legal definition was applicable to contemporary cases of *de facto* slavery, a group of property scholars and experts in slavery set about unpacking those powers attaching to the right of ownership. Much to their surprise, there is no true gap existing between a legal reading of ownership and the factual circumstances of contemporary enslavement. As such, what is left to be done is to harness the latent potential of the accepted definition of slavery and simply hold people responsible for enslaving others.

The neo-abolitionist era holds out this promise, as states are in the midst of moving from having slavery on the books to dealing with slavery in the courtroom. For many countries, this is novel. With no established jurisprudence in the area and having to rely, in the main, on constitutional provisions which simply read, "No one shall be subject to slavery", judges and prosecutors will need to seek to understand what, in law, slavery means. Inevitably, they will look to the definition established in international law. In coming together and developing the

Bellagio–Harvard Guidelines on the Legal Parameters of Slavery, we have provided an internally consistent reading of that definition within its property paradigm that fundamentally reflects the lived experience of contemporary slaves. As such, we provide the most coherent reading of the legal definition of slavery, one that gets us beyond the dilemma of having to choose between the legal definition and a definition which reflects reality. As a result, the definition provides the type of legal certainty which is fundamental to any prosecution of contemporary slavery: within an ordinary reading of its terms, based as it is on a property paradigm, it captures the factual reality of slavery.

Endnotes

1. See Christopher Leslie Brown, *Moral Capital: Foundations of British Abolitionism* (Chapel Hill, N.C.: University of North Carolina Press, 2006), and Ronald Weitzer, "The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade", *Politics & Society* 35, no. 3 (September 2007), pp. 447–75.

2. See Jean Allain, "The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade", *British Yearbook of International Law* 78, no. 1 (2007), pp. 342–88; and United States, Department of State, *Victims of Trafficking and Violence Protection Act*, section 110, 28 October 2000.

3. Section 108(a) of the *Victims of Trafficking and Violence Protection Act* spells out those minimum standards for the elimination of trafficking as follows:

> (1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.
>
> (2) For the knowing commission of any act of sex trafficking involving force, fraud, or coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.
>
> (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offence.
>
> (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

4. Article 3(a) of the Palermo Protocol reads:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

5. See John P. Cerone, "Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals", *European Journal of International Law* 18, no. 2 (2007), p. 288.

6. See Kevin Bales, *Disposable People: New Slavery in the Global Economy* (Berkeley and Los Angeles: University of California Press, 1999); Kevin Bales, *Understanding Global Slavery: A Reader* (Berkeley and Los Angeles: University of California Press, 2005); Kevin Bales, *Ending Slavery: How We Free Today's Slaves* (Berkeley and Los Angeles: University of California Press, 2007); Kevin Bales and Zoe Trodd, eds., *To Plead Our Own Cause: Personal Stories by Today's Slaves* (Ithaca, N.Y.: Cornell University Press, 2008); and Kevin

Bales and Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today* (Berkeley and Los Angeles: University of California Press, 2009).

7. See, for instance, "the use of violence to control the slave, the resulting loss of free will, and the economic exploitation that normally precludes the slave receiving any recompense for their work." (Kevin Bales, *Understanding Global Slavery: A Reader*, p. 91.) By Bales's own admission, his definition has evolved as his thinking on the subject has evolved. His most recent understanding of slavery, not yet in print, reads:

> *Slavery* is the control of one person (the slave) by another (the slaveholder or slaveholders). This control transfers agency, freedom of movement, access to the body, and labor and its product and benefits to the slaveholder. The control is supported and exercised through violence and its threat. The aim of this control is primarily economic exploitation, but may include sexual use or psychological benefit.

See Kevin Bales, "Professor Kevin Bales's Response to Professor Orlando Patterson", in *The Legal Understanding of Slavery: The Historical to the Contemporary*, ed. Jean Allain (forthcoming, 2012).

8. These cases are drawn from the files of the Programme Team of the abolitionist Free the Slaves group, and from its partner organisations in Congo, India, Haiti, and the United States. The identities of these survivors are concealed in order to protect them.

9. The property lawyers and slavery experts were brought together as a Research Network through funding provided by the British Arts and Humanities Research Council. They first met at the Rockefeller Foundation's Bellagio Center in Italy in 2010 and later at Harvard Law School.

10. A. M. Honoré, "Ownership", in *Oxford Essays in Jurisprudence*, ed. A. G. Guest (London: Oxford University Press, 1961), p. 113.

11. William Markby, *Elements of Law Considered with Reference to Principles of General Jurisprudence* (1905), para. 307.

12. *The Bellagio–Harvard Guidelines on the Legal Parameters of Slavery* are reproduced in the next article.