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Article (Accepted Version)

Paz-Fuchs, Amir (2016) Badges of modern slavery. *Modern Law Review*, 79 (5). pp. 757-785. ISSN 0026-7961

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Badges of Modern Slavery

Amir Paz-Fuchs^φ

It is hard for us to appreciate that in spite of great efforts made by the emancipators and their successors, in spite of the revolution in public opinion as regards all forms of slavery, in spite of the plethora of international agreements for the suppression of slavery (some 300 of them), the problem of slavery in the twentieth century is as great, indeed greater than it was in the 1830s.¹

Abstract

Notwithstanding the 19th century formal abolition of slavery as legal ownership of people, modern slavery and forced labour have not been consigned to the past. In fact, their existence is more widespread, and made more difficult to tackle due to the lack of formal, legal criteria. This article suggests that reference to the past, historical institutions reveals seven ‘badges of slavery’ that are helpful in identifying occurrences of modern slavery and forced labour. These are: humiliation, ownership of people, exploitation of the vulnerable, lack of consent, terms and conditions of employment, limits on the power to end the employment relationship, and denial of rights outside the work relationship. These aspects constitute modern slavery as such, and thus distinguishes it from other instances of exploitative employment relations, however problematic. In addition, even where the label of modern slavery is misplaced, the identification of particular badges of slavery in contemporary employment relations may assist in highlighting their troubling facets.

Keywords: Slavery, forced labour, employment, exploitation, migrant workers, free choice.

1. Introduction: Badges of Slavery and the Long Shadow of the Institution

In Mohsin Hamid’s novel, *The Reluctant Fundamentalist*, the narrator muses: ‘once admitted I hired a charioteer who belonged to a serf class lacking the requisite permissions to abide legally and forced therefore to accept work at lower pay; I myself was a form of indentured servant whose right to remain was dependent upon the continued benevolence of my employer’.² This ‘indentured servant’, it should be immediately noted, was not a member of an excluded caste working in a sweat shop in a developing country, but rather a Princeton graduate working in New York city for a major investment firm. So could he seriously be considered an ‘indentured servant’?

^φ Senior Lecturer, School of Law, University of Sussex; Research Associate Fellow, Centre for Socio-Legal Studies, University of Sussex. Jo Bridgeman, Tom Frost, Judy Fudge, Virginia Mantouvalou and Lindsay Stirton have offered very helpful comments to this paper, for which I am thoroughly grateful.

¹ Lord Wilberforce, ‘Introduction’ in R. Sawyer, *Slavery in the Twentieth Century* (London: Routledge, 1986), vii.

² M. Hamid, *The Reluctant Fundamentalist* 178 (London: Penguin, 2008)

The reason this question is not complete hyperbole is because, while trade in slaves was made illegal in the UK in 1807, and across the British Empire in 1834,³ it is only one particular instance of slavery, namely the legal, formal ownership of people, which has been eradicated. In fact, it is abundantly clear that ‘slavery is not a horror safely consigned to the past’.⁴ A few indicators to that effect may be mentioned. In 2004, the European Parliamentary Assembly stated that it ‘is dismayed that slavery continues to exist in Europe in the twenty-first century. Although, officially, slavery was abolished over 150 years ago, thousands of people are still held as slaves in Europe, treated as objects, humiliated and abused’.⁵ In Britain, the Modern Slavery Act⁶ (MSA) received Royal Assent on 26th March, 2015, and the first prosecution under the MSA was launched in August 2015.⁷ In 2016, the Associated Press won the Pulitzer Prize for its year-long investigative report on slavery in the seafood industry in Asia.⁸ Slaves were forced to work 20-22 hours a day, were locked up, drank filthy water and ate few spoons of rice, and were not permitted to contact their families. The report led to the rescue of over 2000 slaves.⁹

So how we are to reconcile the existence of slavery with its formal abolition? It has become clear that the very abolition of formal, legal slavery, exemplified in the *ownership* of an individual by another, has obscured the situation significantly, particularly in the employment context.¹⁰ In fact, the term modern slavery has been attached to discussions ranging ‘from prostitution to child labour to illegal immigration to female circumcision to

³ *British Emancipation Act 1834*.

⁴ K. Bales, *Disposable People* (Revised Edition, Berkeley: University of California Press, 2004) 3.

⁵ Parliamentary Assembly Report (Recommendation 1663, Doc. 10144) *Domestic Slavery: Servitude, Au-Pairs and Mail-Order Brides* (2004), para 1.

⁶ Modern Slavery Act 2015 c 30.

⁷ F. Lawrence, ‘Lithuanian migrants trafficked to UK egg farms sue “worst gangmaster ever”’ *The Guardian* (10 August 2015).

⁸ R. McDowell, M. Manson and M. Medoza, ‘Slaves may have caught the fish you bought’ *The Associated Press* (25 March 2015)

<http://www.ap.org/explore/seafood-from-slaves/ap-investigation-slaves-may-have-caught-the-fish-you-bought.html>

⁹ E. Htusan and M. Mason, ‘More than 2,000 enslaved fisherman rescued in 6 months’ *Associated Press* (17 September 2015).

<http://www.ap.org/explore/seafood-from-slaves/more-than-2,000-enslaved-fishermen-rescued-in-6-months.html>

¹⁰ In Britain, the denial of the existence of chattel slavery is associated with Lord Mansfield’s speech in *Somerset v Stewart* (1772) Lofft 1, 98 ER 499. And yet, Lord Mansfield’s decision in *The Zong – Gregson v Gilbert* (1783) 3 Dougl 232, 99 ER 629 points to the limits of the *Somerset* ruling. As TT Arvind explains, “the entire transatlantic slave trade was based around treating slaves as if they were chattel”, and Lord Mansfield was not willing to rule in a manner that would have severe implications for the British economy – “‘Though it Shocks One Very Much’: Formalism and Pragmatism in the *Zong* and *Bancoult*’ (2011) *Oxford Journal of Legal Studies* 1, 29.

begging to organ trading'.¹¹ But it holds an even more uncomfortable place for those concerned with employment rights and employment relations. The lack of a clear definition as to what forms of exploitative labour relations may be regarded as slavery has allowed critics of agency work,¹² workfare schemes,¹³ privatisation,¹⁴ the regulation of migrant workers¹⁵ and even the treatment of professional athletes,¹⁶ to align these practices with forced labour, or even slavery. In some cases, these comparisons are no more than rhetorical tools, designed to attract attention to a particular claim.¹⁷ In other cases, however, the comparison between the historical institution of slavery and contemporary employment practices may be instructive.

The growing appreciation for the need to find a more open-ended term that addresses the problems with voluntariness in contemporary labour markets, without the need to refer to every such instance as slavery, servitude or forced labour, has led to the term 'unfree labour' to appear more prominently in the literature in recent years.¹⁸ Unlike forced labour or slavery, "unfree labour" is not a legal concept, nor should it aspire to be'.¹⁹ To an extent, it offers an additional, less intimidating, and yet still conceptually problematic, way of criticising the regulation of migrant work²⁰ and temporary work

¹¹ J. O'Connell Davidson, *Modern Slavery – The Margins of Freedom 3* (Basingstoke: Palgrave Macmillan, 2015)

¹² J. Denys, 'Challenges for Temporary Agency Work in the Information Society', in R. Blanpain and R. Graham (eds), *Temporary Agency Work and the Information Society* (London: Kluwer Law, 2004) 9, 11, noting that 'Some still consider the industry as a modern form of slave labour'.

¹³ B. Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford: OUP, 2013) 150; The argument that workfare is forced labour was raised before the British Supreme Court, the European Court of Human Rights, and American Courts – respectively: *R (Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68; *Talmon v the Netherlands* (1997) EHRLR 448 and *Schuitemaker v the Netherlands* (2010) ECHR 820; *Brogan v San Mateo County*, 901 F.2d 762 (9th Cir. 1990). See also: S. Duffy, 'Workfare is Modernised Slavery', *Huffington Post* (27 February 2013)

http://www.huffingtonpost.co.uk/dr-simon-duffy/workfare-is-modernised-slavery_b_2773051.html (all URLs were last accessed on 15 May 2016).

¹⁴ In the Israeli case of *The New Histadrut Workers' Union v The Israeli Aerospace Industry*, minority judge Elisheva Barak of the National Labour Court argued that transferring workers from the public to the private sector against their will is modern slavery.

¹⁵ V. Mantouvalou, "'Am I Free Now?' Overseas Domestic Workers in Slavery' (2015) 42 *Journal of Law and Society* 329; When the Israeli Supreme Court struck down a policy binding migrant workers to a particular employer, Justice Cheshin referred to the practice as 'modern slavery' – H CJ 4542/02 *Workers Hotline v the Government of Israel* (2006).

¹⁶ I. Herbert, 'Ronaldo: I am a slave' *The Independent* (11 July 2008); S. Leahy, 'Adrian Peterson: Players' Place in NFL 'like modern day slavery'" *USA Today* (15 March 2011).

¹⁷ On the problem of using the same concept for historical and contemporary practices see Rebecca Scott, "Under Color of Law: *Siliadin v France* and the Dynamics of Enslavement in Historical Perspective" in J. Allain (ed) *The Legal Understanding of Slavery – From the Historical to the Contemporary* 152 (2012).

¹⁸ Anderson, n 13 above, 148.

¹⁹ C. Costello, "Migrants and Forced Labour" in A. Bogg et al *The Autonomy of Labour Law* (2014).

²⁰ *Ibid.*

agencies,²¹ for example, without resorting to the legally imbued terms such as slavery and forced labour.²² But it deflects, rather than addresses, the core issue: how can we ascertain where we are on that continuum, or ‘hierarchy of denial of personal autonomy’,²³ from slavery, through forced labour, unfree labour, and on to everyday, commodified labour in a capitalist economy?²⁴

To complicate matters further, we should clarify that while slavery is a core term signifying ‘unfree labour’, it is not the only term. Indeed, several parallel concepts surround ‘slavery’, and at times (but not always) are viewed as comparable, rhetorically and legally. These include servitude (and, at times – indentured servitude), serfdom, debt bondage or peonage and, primarily, forced labour. Some view them as ‘proxy categories’ for modern slavery.²⁵ Others, such as the ILO, state very clearly that ‘Slavery is one form of forced labour’,²⁶ whilst also acknowledging that national laws sometimes treat the two as two different instances and ‘tend to reflect an assumption that forced labour is the least serious of these offences’.²⁷ In some countries, such as Brazil, forced labour is defined as existing when one reduces a person to a condition ‘analogous to that of a slave’.²⁸ One can easily agree that the relationship between the two ‘is not always quite clear’.²⁹ The British Modern Slavery Act (MSA) offers no assistance on the matter. Indeed, as it covers slavery and forced labour,³⁰ one could imagine a situation of forced labour, which is not slavery under ILO definitions (for slavery is but one form of forced labour) and yet still considered ‘modern slavery’, as it is covered by the MSA.

Against the background of this conceptual quagmire, I would suggest that forced labour and slavery are concepts that have significant overlaps, but also areas of mutual

²¹ J. Fudge and K. Strauss (eds) *Temporary Work, Agencies, and Unfree Labour: Insecurity in the New World of Work* (New York: Routledge, 2014).

²² cf K. Strauss, “Coerced, Forced and Unfree Labour: Geographies of Exploitation in Contemporary Labour Markets” (2012) 6 *Geography Compass* 137, 139 in which she suggests that “unfree labour is, therefore, a broad category of which forced labour and slavery are subsets”.

²³ *R v SK* [2011] EWCA Crim 1691 [39].

²⁴ K. Strauss ‘Unfree Labour and the Regulation of Temporary Work Agencies in the UK’ in Fudge and Strauss, n 21 above, 164, 174.

²⁵ Davidson, n 11 above, 8.

²⁶ ILO, *A Global Alliance Against Forced Labour: Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* (2005) 8.

²⁷ *Ibid*, 20.

²⁸ *Ibid*, 21.

²⁹ N. Lassen, ‘Slavery and Slavery Like Practices: United Nations Standards and Conventions’ (1988) 57 *Nordic Journal of International Law* 197, 205.

³⁰ Section 1(2) of the Modern Slavery Act.

independence. For if slavery is closely associated with ownership, forced labour is defined with direct reference to the world of work, as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntary’.³¹ Thus, in April 2016 the first British man was convicted for forcing his wife into domestic servitude.³² While she was forced to cook, clean and feed the family, the core of the modern slavery conviction was based on the fact that this was a forced marriage, characterised by ‘physical and mental torture’, including severe beatings, abuse and threats. In other words, the domestic work itself was a relatively minor element, and the slavery charges would arguably have stood regardless of their existence.

And yet, instances abound where slavery and forced labour overlap, and those spheres form the main focus for this article, which asks: how are we to distinguish modern slavery from various forms of labour that, while objectionable to many, have become part and parcel of contemporary employment relations? This question has academic, policy and legal implications, as recent studies indicated that ‘national researchers, as well as their respondents, had great difficulty understanding the concept [of forced labour] and in distinguishing it from extremely exploitative, but nonetheless ‘freely chosen’, work’.³³ Additional practices such as trafficking and debt bondage, commonly associated with modern slavery, will be discussed only insofar as they are pertinent to the task at hand.

A central premise in what follows is that the weight of history may be helpful in this regard. Slavery, servitude and forced labour are social and legal institutions whose social and intellectual meaning has over the course of centuries. When twenty-first century academics, activists, politicians and courts address contemporary legal, social and economic ills by reference to these concepts, they do so by bridging the historical institutions into what they see as their modern variations. In some cases, the bridge is short, clear and straightforward, as the historical and contemporary have much in common. In other cases, however, the juxtaposition of the two requires more explanation and justification. But this is not to say that the said juxtaposition is forced. Quite the contrary – at times, the true

³¹ ILO, Forced Labour Convention, 1930, Article 2(1).

³² P. Walker, ‘Briton who made wife live like slave is first to be jailed for domestic servitude’ *The Guardian* (1 April 2016)

<http://www.theguardian.com/uk-news/2016/apr/01/man-made-wife-live-like-slave-domestic-servitude-faces-jail>

³³ ILO, *Global Alliance*, n 26 above, 42.

understanding of modern slavery and forced labour can only be truly understood against the background of history.

In particular, the term ‘badges of slavery’, derived from American constitutional discussions concerning the 13th Amendment suggests that particular elements associated with the core concept of slavery are still visible today, and in a manner that demands our attention. During the congressional debates, Senator Trumbull argued that ‘any statute that is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is ... in fact a badge of servitude’.³⁴ And yet, identifying such an element or practice does not *necessarily* imply that we have before us a manifestation of (modern) slavery. In other words, the logical move connecting

- (1) A practice P was centrally relevant to the institution of slavery, and
 - (2) Slavery was a terrible institution, that must be eradicated
- to
- (3) Therefore, P must be eradicated

is not absurd or unreasonable, but is also not completely necessary. The logic may be suggested as an analytical formulation of the term ‘badges of slavery’. It could well be that such a badge is an indication that this practice changes an employment relationship, for example, to something that is far more odious. In other situations, however, it may only be a warning sign, suggesting that this trait should be recognised and its ramifications taken carefully into account. This paper, therefore, assesses the main legal themes associated with the institution of slavery, and that may be identified in contemporary practices.

Through reference to the historical antecedent, the analysis identifies and analyses seven central ‘badges of slavery’. It does not suggest that each badge is necessary nor sufficient for the assertion that slavery exists. Rather, it highlights the fact that modern slavery is a constitution of parts that, put together, may pass a critical threshold. In putting forward this argument, the paper outlines these seven badges, within two clusters. While highlighting their relevance to the employment relationship, Section 2 analyses legal and

³⁴ L. Kares ‘The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine’ (1985) 80 *Cornell Law Review* 372, 376 note 19. The term “badge of slavery” was used by in the dissenting opinion of Justice Bradley in U.S. Supreme Court case *Blyew v United States* 80 US (18 Wall) 581, 599 (1871).

moral principles of general application: humiliation, ownership of the individual, exploitation of vulnerability, and denial of free choice. Section 3 then turns to legal doctrines that were central to the constitution of slavery and forced labour in the past, and are uniquely applicable in the employment relationship. These are: sub-standard terms and conditions of employment, and restrictions on the power to end the relationship.

2. Badges of Slavery of General Application

A. Dignity/Humiliation

The legal principle of dignity has acquired a prominent status in contemporary jurisprudence. Revered by many legal scholars as no less than the foundation of human rights,³⁵ dignity is a force to be reckoned with. In some respects, one may understand the importance of dignity as a contrast to the humiliating treatment that individuals were subject to, during the Holocaust and, prior to that, under slavery. And yet, as this section shows, dignity and the protection against humiliation have limited value as indicators of modern slavery. However, its historic prominence and its contemporary reign in human rights theory merit some discussion.

For Orlando Patterson, the most important aspect of slavery is the complete exclusion of the slave from the social order, and his or her routine subjection and humiliation. This exclusion must be absolute and permanent, denying the slave any opportunity to ‘acquire’ dignity.³⁶ The mirror image of the slave’s condition in this respect is the master’s absolute power to humiliate the slave, as his own dignity correlated to his ability to do so. Patterson notes that this principle underlies the American custom of addressing adult slaves as ‘boy’. Similar expressions were common in other languages.³⁷ Following Hobbes, Hegel and Marx, Patterson explains that the humiliation instigated by the master, and lack of dignity on the part of the slave, are not only important in their own right, but also because of their association with power. The negation of a slave’s legal and social standing enables the negation of his dignity as a person. As Hegel shows, the lack of dignity, in turn, enables the diminished legal and social standing, preserves it as such, and

³⁵ R. Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 332-339; J. Tasioulas “Human Dignity and the Foundations of Human Rights” in C. McCrudden (ed) *Understanding Human Dignity* (Oxford: OUP, 2013)

³⁶ O. Patterson, *Slavery and Social Death* (Cambridge, MA: Harvard University Press, 1982) 79, 86.

³⁷ *Ibid*, 88

makes the slave completely dependent on the master.³⁸ In this respect, the exploitation of the slave's labour was a means to an end, rather than the main purpose. In fact, slaves were, at times, a financial burden on their masters.³⁹

The role of dignity, sometimes referred to interchangeably as honour,⁴⁰ had concrete consequences. Blacks were not allowed to testify in court, because giving truthful statements was a sign of honour, and since blacks were viewed as inherently dishonourable, they will surely lie.⁴¹ Support for this position may be found in Robert Cover's analysis of a Massachusetts case from 1781, during which a white man was convicted of assaulting and imprisoning his slave. In his defence, he argued that he may do with his slave as he pleases. The court refused to accept the claim, and fined him 40 shillings. Cover concludes that by viewing the slave as a person worthy of protection, the court dealt a 'mortal wound to slavery in Massachusetts'.⁴² Underlying this conclusion we find the link between the power to humiliate a person, treating him as an object devoid of humanity, and the sustainability of the institution as a whole.

We find, therefore, that the denial of dignity, manifested publicly as 'social death' and facilitated by extreme and constant humiliation, was an inherent feature of the early institution of slavery.⁴³ To what extent is this a useful badge of modern slavery? Some countries, such as Brazil and Belgium, view slavery as, centrally, a violation of human dignity.⁴⁴ The UK has taken a different course and the concept of dignity (or, for that matter, of humiliation) does not appear in the Modern Slavery Act, or in the accompanying Explanatory Notes. What can explain this omission? The important case of *Siliadin* may offer some guidance. There, the French Criminal Code made it an offence 'to subject an individual to working or conditions that are incompatible with human dignity', as part of the effort to combat modern slavery.⁴⁵ But when the Versailles Court of Appeal found that

³⁸ G.W.F. Hegel, *The Phenomenology of Mind* (J.B. Baillie – trans, New York: Dover, 2003) 108

³⁹ Patterson, n 36 above, 100.

⁴⁰ See eg R. Goodin, 'The Political Theories of Choice and Dignity', (1981) 18 *American Philosophical Quarterly* 91, 97-99.

⁴¹ W.W. Fisher III "Ideology and Imagery in the Law of Slavery" in P. Finkelman (ed) *Slavery and the Law* (Oxford: Rowman and Littlefield, 1997) 43, 62.

⁴² R. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1984) 45.

⁴³ Patterson, n 36 above, 5.

⁴⁴ K. Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* (London: Joseph Rowntree Foundation, 2010) 10, 12.

⁴⁵ Article 225-14 of the French Criminal Code. See *Siliadin v. France* [2006] E.H.R.R. 16 [48]

‘carrying out household tasks and looking after children throughout the day could not by themselves constitute working conditions incompatible with human dignity, this being the lot of many mothers’,⁴⁶ the applicant turned to the ECtHR, claiming that reliance on human dignity has turned the offence into one that is ‘particularly vague, and ... subject to random interpretation’.⁴⁷ The Court accepted the claim, and found that the existing articles in the French Criminal Code do not deal specifically with the rights guaranteed under Article 4, and that an offence which is grounded in the concept of dignity is far too restrictive.⁴⁸ Instead, the Court noted that states should make positive efforts to protect children and vulnerable people, in the form of effective deterrence, against serious breaches of their personal integrity. In conclusion, it seems that while dignity is a theoretical favourite, and even has an indirect impact on the understanding of modern slavery, courts and parliaments prefer more direct, concrete applications of legal principles when addressing modern slavery. One may surmise that the ECtHR’s reserved approach to an offence that has the violation of dignity as its axis may have led the British legislature to prefer other legal principles, such as exploitation, which we discuss below (section 2.C).

B. *Ownership of People*

The core concept of slavery, and the contemporary revulsion from it, is strongly associated with the idea that one individual can *own* another. Article 1(1) of the 1926 Slavery Convention stated that ‘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’. The Explanatory Notes to the Modern Slavery Bill tread the similar path when describing the phenomenon: ‘Modern slavery is a brutal form of organised crime in which people are *treated as commodities* and exploited for criminal gain’.⁴⁹ And yet, in the first case under the Act, six Lithuanian migrants who worked on egg producing farms reported being debt bonded, physically abused, had their pay withheld, intimidated and threatened, and sheltered in inhumane conditions. They were not ‘bought and sold’, *strictu sensu*; and their exploitation was driven, it would seem, by profit and not ‘for criminal gain’. So is this modern slavery?

⁴⁶ *Ibid*, [45]

⁴⁷ *Ibid*, [101]

⁴⁸ *Ibid*, [142]

⁴⁹ Modern Slavery Bill [HL Bill 51], Explanatory Notes, [4] [emphasis added].

The approach taken by the Explanatory Notes reflects the legalistic approach to slavery. And yet, as we see below, the aspect of ownership is not necessary nor sufficient to identify slavery, and is even less related to forced labour, a practice addressed by the MSA. Professional football players are often ‘sold’, sometimes against their will, and yet are not usually seen as slaves.⁵⁰ In contrast, millions of people who are kept in what may be termed ‘slavery conditions’ may, formally, not be owned by anyone. Can, and should, ownership still be used as a badge of *modern* slavery?

Employment scholars seek to distinguish positive employment relations from odious exploitation by reference to the ILO’s 1944 Declaration of Philadelphia: ‘labour is not a commodity’. As one central textbook of labour economics explains: ‘Labor services can only be rented; workers themselves cannot be bought or sold’.⁵¹ But apart from the noble rhetoric, or the legal semantics, are the two truly distinct?⁵² Some scholars argue that the rhetoric is essentially empty of content, masking the reality of slavery that is taking place today.⁵³ It has been suggested that this subject/object dichotomy is part of a more general, selective vision of binary thinking, which separates ‘past’ from ‘present’, ‘status’ from ‘contract’ and, crucially, ‘slavery’ from ‘free waged labour’.⁵⁴ Others go further, suggesting that ownership has now been obscured and disguised, embedded into the logic of contractarian market individualism, thus intentionally making it even more difficult to tackle.⁵⁵

Moving beyond criticism to constructive approaches, one may accept the lack of *de jure* possession, and still focus on the powers attached to the right of ownership, as indicative of *de facto* possession, which ‘reflects the lived experience of contemporary slaves’.⁵⁶ But, as with slavery in general, the identification of *de facto* ownership is not obvious. The difficulty stems from the fact that a central facet that is to distinguish

⁵⁰ S. L. Engerman, ‘Slavery, Serfdom and Other Forms of Coerced Labor: Similarities and Differences’ in M.L. Bush (ed) *Slavery and Serfdom: Studies in Legal Bondage* (Cambridge: Pearson, 1996) 18, 19; H. Temperley ‘New World Slavery, Old World Slavery’ in Bush, *ibid*, 144, 146. But see some exceptions in note 16.

⁵¹ R. Ehrenberg and R. Smith, *Modern Labor Economics: Theory and Public Policy* (12th ed., London: Routledge, 2015) 2.

⁵² Cf B. Langille, ‘Labour Law’s Theory of Justice’, in G. Davidov and B. Langille (eds) *The Idea of Labour Law* 101, 114 (2011)

⁵³ Patterson, n 36 above, 9.

⁵⁴ Davidson, n 11 above, 14.

⁵⁵ R. Steinfeld, *The Invention of Free Labor* (Chapel Hill, NC: University of North Carolina Press, 1991) 90.

⁵⁶ J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Leiden: Neijhoff, 2013) ix.

ownership from a normative employment relationship is ‘control tantamount to possession’.⁵⁷ This approach was embraced by the ICTY in *Kunarac*, emphasising that enslavement will encompass not only ‘chattel slavery’, but also ‘the exercise of powers *attaching to* the right of ownership’.⁵⁸ The the interpretation of slavery in international criminal law may not be immediately applicable to other bodies of law. And yet, it is worth noting the emphasis placed on control by the court: ‘control of someone’s movement, control of physical environment, psychological control, ... , control of sexuality and forced labour’.⁵⁹ The problem that arises with the central role that ‘control’ plays in the construction of slavery is that it also has a fundamental role in the construction of the employment relationship. Control over the work itself (how, where and to what degree it should be done) is, unsurprisingly, not sufficient to identify the relationship as one of slavery. In contrast, control over *other aspects* of an individual’s life should not, *prima facie*, fall under the employer’s remit and when it exists – it should be a cause for concern.

So we find that while the core idea of ownership is still a constitutive element of slavery, courts are incrementally expanding the reach of ownership to cover more peripheral aspects, and thus to include them within ‘slavery’. The motivation for this change in jurisprudence is clear, but perhaps it would be analytically preferable to assess these factors under a separate heading, such as terms and conditions of employment (section 3.A) or restriction of freedom outside the employment relationship (section 3.C), instead of artificially extending the idea of ownership.

But while control is less helpful in this context, a direct derivative of an ownership right is the power to buy, sell or transfer the object.⁶⁰ This power is justly noted in Guideline 4 of the *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, and should be addressed in detail.⁶¹

The master’s power to sell his right in a slave, a servant or an apprentice was an important implication of their property rights. And, indeed, slaves could be transferred to

⁵⁷ Id; Guideline 2 of the *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery* reproduced in 14 *Global Dialogue* (2012).

⁵⁸ *Prosecutor v Kunarac* at [117] [italics added]

⁵⁹ Id, at [119].

⁶⁰ Steinfeld, n 55 above, 67.

⁶¹ *Bellagio-Harvard Guidelines*, n 57).

repay a debt,⁶² used as security for a loan or gambled over.⁶³ Slaves could also be temporarily rented out to third parties, since their services were their master's, and not their own.⁶⁴ Interestingly, in the fourteenth century a man was accused of retaining servants only in order to hire them out to others.⁶⁵ The analogy to contemporary agency work corporations, which shift millions of workers from one employer to another, sometimes across national borders, subject to quotas and for a percentage of their pay, suggests that, in some ways, the regulation of labour was stricter 700 years ago than it is today.⁶⁶

In this context, one recurring contemporary example that is mentioned in discussion of modern slavery is the case of professional athletes who sometimes earn unimaginable sums and enjoy iconic status, and yet are referred to as being 'bought' and 'sold', sometimes to pay for the club owner's debt.⁶⁷ To some, the comparison to contemporary victims of slavery in India, Nepal, Mauritania, Thailand or Burma/Myanmar, is ludicrous, or even infuriating. The fact that the American Internal Revenue Service (and the HMRC) allow clubs to deduct the 'loss of value', a form of 'human depreciation' of players throughout their career, is treated as anecdotal.⁶⁸ And yet, perhaps the control of club owners over their players' career and where they will be employed, should be treated more seriously.

In 1970, the American Supreme Court ruled in the case of an elite baseball player, Curt Flood, who discovered that his team had transferred him without his knowledge, and naturally – without his consent. He wrote the Baseball Commissioner: 'I do not feel like a piece of property to be bought and sold irrespective of my wishes'. His case reached the courts, targeting the 'reserve clause' which was routinely included in players' contracts, and which stated that a player's rights are owned by the club even after the contract has ended, and therefore he cannot negotiate employment with another team without his employer's consent. He was unsuccessful, and the Supreme Court denied the appeal, on the grounds that judicial regulation of business should be kept to a minimum.⁶⁹ Similarly, in Britain,

⁶² Steinfeld, n 55 above, 88, 90.

⁶³ Fisher, n 41 above, 44.

⁶⁴ Steinfeld, n 55) 46; Karen Orren *Belated Feudalism* (Cambridge: Cambridge University Press, 1991) 78-81.

⁶⁵ Steinfeld, n 55 above, 46.

⁶⁶ Cf Fudge and Strauss, n 21 above.

⁶⁷ Allain, n 56 above, 131-132.

⁶⁸ Patterson, n 36 above, 26

⁶⁹ *Flood v. Kuhn*, 407 U.S. 258

when George Eastman challenged the ‘transfer and retain’ system that allowed a club to refuse to put a player on the transfer list following the end of his contract, Wilberforce J was sympathetic to the plaintiff’s counsel view, which ‘stigmatised [it] as a relic from the Middle Ages, involving the buying and selling of human beings as chattels; and, indeed, to anyone not hardened to acceptance of the practice it would seem incongruous to the spirit of a national sport’.⁷⁰ Despite this, Wilberforce J protected the transfer system as upholding a legitimate interest. So English football (and sport in general) had to wait for another footballer - Jean-Marc Bosman – to challenge the rules that gave power to an employer, even following the termination of the contract. And yet, it is noted that the European Court of Justice accepted Bosman’s claim based on European principles safeguarding freedom of movement, rather than on the right to work at any employment, without restrictions.⁷¹

The example of professional athletes is interesting in its own right, especially because of the discrepancy between fame and fortune, on the one hand, and the association with slavery, on the other hand. But the case of workers being ‘sold’ without their consent is not limited to those cases.

One such case is the matter of transfer of undertaking, which involves the transfer of ownership of a business or of (part of) its functions. The question arises: can employees (or, rather less controversially, their contracts of employment) be ‘sold’ along with the company’s assets, without their consent? The decision of the House of Lords in *Nokes v Doncaster* is authority for the proposition that, under the common law, the answer to that question is no. According to Lord Atkin, the individual’s right to choose for himself whom he would serve constitutes ‘the main difference between a servant and a serf’.⁷²

In a more recent case, *Gabrielle v Peninsula Service*, it was accepted that *Nokes* is still good authority in common law.⁷³ In a similar context, the ECJ ruled that ‘the employee cannot be obliged to work for an employer that he has not freely chosen’,⁷⁴ and an employee’s objection to the transfer terminates the contract of employment. It should be

⁷⁰ *Eastman v Newcastle United FC* [1963] 3 All ER 139 Ch D, 145.

⁷¹ Case C-415/93 *Union Royale Belge des Societes de Football Association ASBL v Jean-Marc Bosman* [1996] 1 CMLR 645.

⁷² [1940] AC 1014, 1026; also Viscount Simon at 1020. The principle was confirmed by Lord Denning in *Denham v Midland Employers’ Mutual Assurance Ltd* [1955] 2 QB 437, 444.

⁷³ UKEAT/0190/11/MAA *Gabriel v Peninsula Service Ltd* (2012).

⁷⁴ Case C-132/91 *Katsikas v Konstandinidis* [1993] IRLR 179.

noted, however, that the EAT in *Gabrielle* applied the common law because the transfer had not taken place under the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations.⁷⁵ Under TUPE, the relevant rules are reversed: a transfer no longer terminates the contract of employment (unlike the situation under the common law), but rather any such contract is seen as if originally made between the person and the transferee, regardless of the transferee's consent.⁷⁶

Other countries take a more expansive view. In Germany, for example, an employee's right to remain employed by the original employer is seen as deriving from constitutional 'right of personality'.⁷⁷ And in Israel, the Supreme Court accepted the German jurisprudence on the matter and added that 'it is obvious that workers are not 'property' of the employer',⁷⁸ and that 'the employer cannot 'transfer' his employees to another ... as if they were an inanimate object or an animal... a person may transfer from one employer to another only upon his consent'.⁷⁹

C. Exploitation of the Vulnerable: Otherness, Race and Sex

Since the protection of dignity and the avoidance of humiliation proved to be less helpful, the British legislature followed the ECtHR in preferring the related (though surely not identical) concept of 'exploitation',⁸⁰ defined in section 3 of the MSA as including sexual offences, removal of organs, securing services by fraud or deception, or securing services from children and vulnerable people. Though, to some, exploitation may suggest identifying unfree labour as an essential part of modern capitalism,⁸¹ this (unsurprisingly) is not the approach of the MSA. In particular, the Act directs courts to take into account

⁷⁵ SI 2006/246.

⁷⁶ TUPE 2006, reg 4(1).

⁷⁷ M. Weiss and M. Schmidt, *Labour Law and Industrial Relations in Germany* (4th ed, The Hague: Kluwer Law, 2008) 143.

⁷⁸ HCJ 8111/96 *The New General Histadrut v The Aerospace Industry* PD 48(6) 481, 541.

⁷⁹ *Ibid*, 574

⁸⁰ Modern Slavery Act, section 1(4).

⁸¹ T. Brass, *Towards a Comparative Political Economy of Unfree Labour* (London: Frank Cass, 1999); T. Brass, 'Why Unfree Labour is not "So-Called": The Fictions of Jairus Banaji' (2003) 31 *Journal of Peasant Studies* 101-136. But cf Mohan Rao 'Freedom, Equality, Property and Bentham: The Debate over Unfree Labour' (1999) 27 *Journal of Peasant Studies* 97-127.

‘all the circumstances of the case, including the circumstances that make the victim more vulnerable than others ... This reflects the position in case law’.⁸²

Reviewing the definition of exploitation, we note that four of the five examples of exploitation refer to *acts* (e.g. sexual offences, removal of organs) which, while extremely troubling in their own right, are arguably somewhat remote from the everyday understanding of exploitation. The last category, in contrast, refers to the situation in which a person uses or attempts to use a person (V) to provide services or to receive benefits, and that V was chosen because he or she is a child, has a disability or is family relation, and is thus unlikely to refuse to be used for that purpose. It is this category that seems most relevant for situations which hover on the boundaries between employment relations and slavery.

Thus, in *Kozminski*, two individuals with significant cognitive disabilities worked on the defendants’ farm 16 hours a day, seven days a week. They were not supplied with adequate food, were forbidden to leave the farm, to meet friends and relatives and were routinely beaten. In the U.S. Supreme Court, Justice O’Connor stated that ‘it is possible that threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of *legal coercion* that induces involuntary servitude’.⁸³ In similar vein, the European Court of Human Rights in *Siliadin* concluded that the victim, who was brought from Togo to France at the age of 15, was subject to forced labour and to involuntary servitude by exploiting her young age and her vulnerable immigration status, thus effectively coercing her to work. It stated that servitude, a concept closely related, and yet wider, than slavery, is defined (somewhat confusingly) as ‘an obligation to provide one’s service that is imposed by the use of coercion, and is to be linked with the concept of ‘slavery’’.⁸⁴

What of other categories that may render a person vulnerable, and thus subject to exploitation? I refer, in the main, to race and sex. Neither appear in the MSA, but while implicit attention is given to sex when addressing human trafficking, the role of race is not

⁸² Modern Slavery Act, Explanatory Notes, [15].

⁸³ *U.S. v. Kozminski*, 487 U.S. 931 (1987) 935, 948 (emphasis added). For further cases see B. Azmy ‘Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda’ (2002) 71 *Fordham L. Rev.* 981.

⁸⁴ *Siliadin*, n 45 above, [124]

acknowledged in any meaningful way. This is peculiar, since slavery was never colour blind.⁸⁵ In fact, the ‘association of the slave with the foreigner and the non-citizen draws on a long tradition’.⁸⁶ Although Roman and Jewish laws recognised the right of individuals to keep their fellow men and women as slaves, their status was always distinct from that of slaves of a different ethnic or racial background.⁸⁷ Patterson argues that the racial aspect, and not the idea of ownership or even the denial of civil and political rights, lies at the heart of slavery.⁸⁸ The control of the ‘other’, to the point of eliminating his or her humanity, can be traced to the origins of the institution, which linked the slave to the captive enemy of war, and was thus seen as a constant threat, an enemy from within.⁸⁹

Moving to modern history, the role of race within slavery is obvious. In America, ‘only blacks could be slaves and servants’.⁹⁰ The deep seated racism that engulfed American slavery was made manifest in the infamous case of *Dred Scott*, in which the Chief Justice of the United States Supreme Court stated that black people were ‘so far inferior, that they had no rights that the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his own benefit’.⁹¹

The significance of race was not limited to the master-slave relationship, but pervaded employment relationships as well. A New York state law from 1788 declared that the enforcement of an employment contract must be a rare exception, apart from cases involving people ‘coming from beyond the sea’.⁹² Based on the presumption that whites could never be indentured servants, since 1830 they could not be subject to long term contracts from which they could not unilaterally withdraw.⁹³

But is race relevant to *modern* slavery? For one of the prominent scholars of the phenomenon, Kevin Bales, the answer is no.⁹⁴ He accepts that race, religion and ethnicity

⁸⁵ J. Pope ‘Contract, Race and Freedom of Labor in the Constitutional Law of “Involuntary Servitude”’ (2010) 119 *Yale L. J.* 1474, 1495-1501.

⁸⁶ Anderson, n 13 above, 149.

⁸⁷ Engerman, n 50 above, 30; Patterson, n 36) 30, 40, 176.

⁸⁸ Patterson, n 36 above, 7-8.

⁸⁹ Patterson, n 36 above, 37; Fisher, n 41 above, 57; Cover, n 42 above, 11.

⁹⁰ Steinfeld, n 55 above, 127; Fisher, n 41 above, 43; Paul Finkelman ‘The Centrality of Slavery in American Legal Development’ in *Slavery and the Law*, n 41 above, 3.

⁹¹ *Dred Scott v. Sanford* 60 U.S. 393, 407 (1856).

⁹² Steinfeld, n 55 above, 133.

⁹³ Steinfeld, n 55 above, 171; Patterson, n 36 above, 256.

⁹⁴ Bales, n 4 above, 10. Similarly D. Androff, ‘The Problem of Contemporary Slavery: An International Human Rights Challenge for Social Work’ (2010) 54 *International Social Work* 209, 212.

were important in the past, and that remnants of their significance may still be detectable today, but the common thread that governs slavery in Asia and Africa, he argues, is the juxtaposition of significant economic power with abject poverty. He writes: 'If all left-handed people in the world become destitute tomorrow, there would soon be slaveholders taking advantage of them. Modern slaveholders are predators keenly aware of weakness; they are rapidly adapting an ancient practice to the new global economy'.⁹⁵ Some support for Bales's position may be found in the fact that one recent conviction for forced labour did not involve migrants, but rather the exploitation of domestic homeless people.⁹⁶

And yet, race cannot be discarded as an explanation for the persistence of forced labour and slavery. In Asia, low caste status is 'unambiguously associated with a higher incidence of bondage'.⁹⁷ In Eastern Europe, forced labour is part of an 'ethnic business' structure.⁹⁸ In addition, the vulnerability of migrant workers, in developed and developing nations alike, is undoubtedly associated with their categorisation as 'others': unwanted, illegitimate and always temporary. In late October 2014, as the Modern Slavery Bill was passing through Parliament, the British Defence Minister has said that many towns in Britain feel 'under siege' from EU migrant workers, and that some communities risked 'being swamped'.⁹⁹ Such a pronouncement by a *Defence* Minister intimates a strong connection between national defence and identity. Similarly, an advisor to the Israeli Work and Welfare Minister stated that migrant workers are 'a foreign element that resides within me and hinders my development. It is an infection'.¹⁰⁰ Against this background, it is notable that while human trafficking is treated explicitly and extensively in the Modern Slavery Act, migrant workers are not identified as potentially vulnerable *qua* their status as migrant workers.¹⁰¹ Moreover, a parallel is found in Asia in general, and in India, in particular where, Lerche notes, 'the vast majority of bonded labourers continue to belong to the lowest, ex-

⁹⁵ *Ibid* 11.

⁹⁶ *Attorney General's Reference (Nos 2, 3, 4 and 5 of 2013), Re* [2013] EWCA Crim 324; [2013] 2 Cr App R (S) 71; [2013] Crim LR 611 (CA (Crim Div)).

⁹⁷ ILO, *Global Alliance*, n 26) 32-34.

⁹⁸ *Id.*, 58.

⁹⁹ BBC News, 'EU migrants could 'swamp' UK - defence minister Fallon warns' (26 October 2014) <http://www.bbc.co.uk/news/uk-29780384>

¹⁰⁰ Rutti Sinai, 'Foreign Work', *Ha'aretz* (19 August 1996)

¹⁰¹ *Onu v Akwivu and another; Taiwo v Olaiye and another* [2014] EWCA Civ 279; [2014] ICR 571. And see the discussion in text to note 154.

untouchable, caste groups and tribes'.¹⁰² And yet, his approach dovetails Bales's, as he notes that this oppression 'has become part and parcel of Indian capitalism'.¹⁰³ Indeed, instead of arguing for an artificial hierarchy between racism and poverty as leading to slavery and forced labour, it is more fruitful to acknowledge the strong linkages between the two,¹⁰⁴ as one leads to the other, and where the two meet, the conditions for slavery and forced labour are created.

In addition to race, sex provides an additional aspect of otherness.¹⁰⁵ The conflation of the two has led to the clear denunciation of sexual relations between black and white individuals.¹⁰⁶ At times, this revulsion was not only ancillary to slavery but also mobilised it. Thus, in 1717 the American state of Maryland legislated that if an interracial sexual relationship were to take place, the black party to the relationship would become a slave.¹⁰⁷

But it is more than that. Even independent of race, women are increasingly targeted as victims of modern slavery,¹⁰⁸ and suffer disproportionately to men when they are victims of bonded labour, as they are susceptible to physical and sexual abuse.¹⁰⁹ Girls and women are at a higher risk of occupying one of the most troubling 'sectors' in this context – that of domestic slavery.¹¹⁰ As the Council of Europe's Parliamentary Assembly noted in its Recommendation on Domestic Slavery: 'today's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers'¹¹¹. Women who are victims of human trafficking are often coerced into domestic servitude or into the sex industry. This coercion is often effected where initial consent for the travel and work may be ascertained, leading us to the next badge of modern slavery.

D. Lack of Consent, or Free Choice

¹⁰² J. Lerche, 'A Global Alliance Against Forced Labour? Unfree Labour, Neo-Liberal Globalization and the International Labour Organization' (2007) *Journal of Agrarian Change*, 425, 440.

¹⁰³ *Ibid.*

¹⁰⁴ ILO, *Global Alliance*, n 26 above, 31.

¹⁰⁵ Patterson, n 36 above, 179

¹⁰⁶ Patterson, n 36 above, 261.

¹⁰⁷ Cited in *Dred Scott*, n 91 above, 408

¹⁰⁸ ILO, *Combating Forced Labour: a handbook for employers and business* (International Labour Office, 2nd ed, 2015) 11.

¹⁰⁹ ILO, *Global Alliance*, n 26 above, 32.

¹¹⁰ ILO, *Global Alliance*, n 26 above, 43, 50.

¹¹¹ Parliament Assembly, Recommendation 1663: *Domestic Slavery: Servitude, au-pairs, and mail order brides* (2004); Also quoted in *Siliadin*, n 45 above, [88]

Some view lack of free will not only as a necessary condition for slavery, but as the defining factor distinguishing slavery from paid labour.¹¹² Consent to enter is regarded as crucial to legitimate employment relations,¹¹³ and thus ‘voluntary slavery’ is an oxymoron. The involuntariness of entering into work is one of two main elements constituting forced labour, the other being work ‘extracted ... under the menace of a penalty’.

But when should we find that a person is *coerced* to work? A particular statute that sanctions the enslaving of individuals may be purged. But economic and background legal relations that lead an individual to ‘choose’ a life of work that is very far from his or her desires are far more difficult to critique. In 1958, C.S. Lewis wrote an essay entitled ‘Willing Slaves of the Welfare State’, in which he raged against the loss of liberty brought by the industrial revolution: ‘In the ancient world individuals have sold themselves as slaves in order to eat ... so in society’. Almost 50 years later, journalist Madeline Bunting borrowed the title for her book documenting the overwork culture, job intensification and management techniques that pervade British work life.¹¹⁴ And yet, do ‘hi-tech slaves’ or ‘slave doctors’ have much in common with past or current victims of slavery, in its core sense, apart from long hours of work, which members of both cohorts would rather avoid? With reference to the matter within this section, what are the parameters of choice and coercion that should be assessed?

First, when ascertaining that slavery has taken place, we need to ask what must be the role of the state (as opposed to the market) in coercing the individual. Is indirect, or passive, action sufficient?¹¹⁵ Second, what evidence is relevant to attribute consent, or lack thereof, to the victim? Finally, should we be focusing solely on coercion to *enter* the employment relationship, or would coercion to *continue* the employment relationship, i.e. denying the ability to end it, be sufficient? This latter question will be addressed below, in section 3.B.

The paradigm form of slavery manifests itself when the state, through its institutions, defines the category of people who are slaves, and decides what rights are denied, whether one may exit that status, and if so – how. However, the state may force

¹¹² Pope, n 85 above, 1482-1486.

¹¹³ Anderson, n 13 above, 148.

¹¹⁴ M. Bunting, *Willing Slaves: How the Overwork Culture is Ruling our Lives* (London: Harper, 2005).

¹¹⁵ Engerman, n 50 above, 28-34.

individuals to work, through explicit but indirect measures. Prohibition on vagrancy or begging in England and the United States did not only increase the prison population, but also forced many to accept any work, for fear of imprisonment. And today, as the *Rantsev* case revealed, some states are quite aware that sexual slavery and forced labour take place on their territory, but choose to turn a blind eye.¹¹⁶ Should workfare schemes that condition benefits on some form of ‘community work’ be considered sufficiently coercive for the purposes of this analysis?¹¹⁷ The former Director of the Anti-Slavery Society viewed the distinction between the state and individuals as the operating party as decisive in determining whether the practice should be categorised as forced labour or slavery. He stated that ‘Forced labour is exaction of involuntary labour by a government, whereas slavery is exaction of involuntary labour by an individual, springing from that individual’s right of property in the person compelled to work’.¹¹⁸ Apart from providing further evidence for the conceptual confusion between the two terms, no support was found for this particular approach.

So can the state be implicated for making migrants more vulnerable by strictly limiting their freedom to choose employers while at the same time deregulating labour markets and downsizing labour inspection services?¹¹⁹ The furthest attribution of state involvement in the creation of forced labour and thus – modern slavery, would identify government policies as facilitating the exploitation of migrant workers, the poor, and others. An ILO report documents numerous instances that link the absence of financial services to the prevalence of debt bondage, perhaps the most common proxy to slavery and forced labour today.¹²⁰ In other words, if the state were to take a proactive role, facilitating the creating of credit services, or even creating them itself, it would reduce the prevalence of debt bondage dramatically. Indeed, this has been the result when donors and NGOs have taken on this task.¹²¹ Similarly, it has been argued that the Indian ‘low route’ of development relies on extremely cheap labour which, in turn, is brought about by

¹¹⁶ *Rantsev v Cyprus and Russia*, App No 25965/04 (2010); J. Allain “*Rantsev v. Cypru and Russia: The European Court of Human Rights and Trafficking as Slavery*” (2010) 10 *Human Rights L. Rev.* 546.

¹¹⁷ *Reilly v DWP* [2013] UKSC 68; A. Paz-Fuchs and A. Eleveld (2015) ‘Workfare Revisited’ 46 *Industrial Law Journal* 60.

¹¹⁸ C.W.W. Greenidge, ‘Slavery at the United Nations’, cited in Lassen, n 29 above, 206.

¹¹⁹ Mantouvalou, n 15 above; Anderson, n 13 above; ILO, *Global Alliance*, n 26 above, 63.

¹²⁰ ILO, *Global Alliance*, n 26 above, 21, 39-41, noting a “weak state presence” and “absence of protective state institutions” in Latin America.

¹²¹ *Ibid*, 35-37.

regional governments colluding with large employers to exploit the desperate poverty of the population.¹²² Notwithstanding the evidence, this argument, as one would imagine, would have the least chances of implicating an actor (here - the state) in bringing about modern slavery. Indeed, the ILO takes the position that the ‘employer or state is not accountable for all constraints or indirect coercion existing in practice’.¹²³

As we saw above, with regards to *Kozminski* and *Siliadin*,¹²⁴ where the actions of a concrete individual are identified as creating conditions of slavery, courts are more willing to address them as such. In contrast, courts are far less inclined to identify background conditions (immigration laws, welfare policy, the criminal justice system) as ‘driving’ individuals to enter conditions of servitude, forced labour or slavery. The causal link would be far too fragile, and the factors to consider too varied, and thus risks eliding a useful distinction between paid work and slavery.¹²⁵ And yet, critical scholars argue that it is this inability to identify a concrete actor that makes these coercive elements so powerful, as ‘power over individuals is increasingly mediated through power over goods until the point is reached where the basic power relationship is largely, though never completely, obscured’.¹²⁶ A compromise approach may suggest that these background conditions are, and should be, assessed under the heading of vulnerability, and susceptibility to exploitation, noted above.

As for the relevant circumstances that should be taken into account when assessing the existence of consent, it is noted (by analogy) that the human trafficking clause in the MSA follows case law by clarifying that ‘it is irrelevant whether V consents to travel’.¹²⁷ In fact, prior to the MSA, in *Khan*,¹²⁸ the Court of Appeal minimised the relevance of consent even further: there, victims of trafficking were subject to threats, coercion, bullying, control, restriction of liberty, excessive working hours, and denial of medical treatment and suffered the theft of significant sums of money. And yet, when their work visa expired,

¹²² Lerche, n 102 above, 444-445.

¹²³ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A, International Labour Conference, 90th Sessions, Geneva, 2002)

¹²⁴ Text next to note 83.

¹²⁵ Kares, n 34 above. But *cf* the ECtHR’s more demanding approach in *Rantsev*, n 116 above, where human trafficking was concerned, at [284]

¹²⁶ Patterson, n 36 above, 18; and see, with particular emphasis on migrant labour, B. Anderson and R. Andrijasevic, ‘Sex, Slaves and Citizens: The Politics of Anti-Trafficking’ (2008) 40 *Soundings* 135, 144.

¹²⁷ Modern Slavery Act, section 2.

¹²⁸ *R v Khan* [2010] EWCA 2880

they travelled to Pakistan to renew their permits, and chose to return. Increasing the traffickers sentence from 3 to 4 years in prison, the Court explained that this was neither evidence of consent nor that their treatment was acceptable. Rather, it was ‘evidence of further exploitation by the offenders of personal circumstances [the economic circumstances of the families they left behind] of which they know they could take advantage’.¹²⁹ While this is an interesting, and laudable, position, it adds further complexity to the relevance of background economic circumstance to the identification of ‘true’ free will, which is assumed in mainstream labour relations.

Humiliation, ownership, exploitation and denial of free choice are concepts of general application that shed light on modern practices through their historical antecedents. The next section moves to focus on aspects of the contemporary employment relationship that, with the benefit of hindsight, may be recognised in troubling, and non-trivial instances, as ‘badges of slavery’.

3. Slavery and the Contemporary Employment Relationship

Several concrete legal themes link slavery to practices common within the contemporary employment relationship. These are terms and conditions of employment; the power to end the employment relationship; and the employer’s power to control the worker’s life outside the employment relationship.

A. Terms and Conditions of Employment

There is a strong link between harsh terms and conditions of employment, and the view that coercion lies at the heart of the institution of slavery. Extreme conditions which shatter an individual’s dignity may be evidence that the individual has not taken up such work of her own free will. The Supreme Court of India, for example, viewed even excessive deductions, which result in workers being paid less than the minimum wage, as a form of forced labour.¹³⁰ While this ruling was not widely embraced,¹³¹ and reportedly no longer followed even in India,¹³² exploitative terms and conditions operate as an important

¹²⁹ *Khan* [18].

¹³⁰ *People’s Union for Democratic Rights v Union of India* [1983] SCR(1) 456, 484-488.

¹³¹ ILO, *Global Alliance*, n 26 above, 5.

¹³² *Skrivankova*, n 44 above, 11.

indicator for modern slavery in general, and under the Modern Slavery Act in particular.¹³³ Further support for this approach is found in cases where courts refused to accept a claim that ‘forced labour’ was involved, where the terms of employment (as distinguished from the coercion) were not unpleasant. Somewhat embarrassingly for members of a particular profession, two such cases involved European lawyers who claimed that forcing them to represent disadvantaged groups as part of a legal aid initiative constitutes ‘forced labour’.¹³⁴ A similar argument was brought by two American high school students who objected to their school’s mandatory community volunteering programme.¹³⁵ The courts refused to entertain these arguments, stating that aside from the encroachment on free will, a claim for ‘forced labour’ or ‘slavery’ must show that the work is unjust and oppressive and that its performance must constitute ‘an avoidable hardship’, be ‘needlessly distressing’ or at least ‘somewhat harassing’.¹³⁶ The fact that this badge was not present, in other words, was crucially detrimental to the their case.

Contrast these cases with three others. In *Siliadin*,¹³⁷ the victim cared for three children seven days a week, without a day off; slept on the floor in the children’s bedroom; was subject to frequent insults and harassment; and was never paid. The Court integrated these findings into its analysis, leading it to the conclusion that the victim was held in servitude.¹³⁸ In *Kozminski*, Justice Brennan stressed that ‘oppressive working and living conditions, and lack of pay or personal freedom are the hallmarks of that slavlike condition of servitude’.¹³⁹ In *CN v UK*,¹⁴⁰ the applicant, a young woman who escaped a life of sexual and physical violence in Uganda, arrived in the UK to work as a live-in carer for an elderly couple. As the male employer was severely debilitated by Parkinson’s disease,

¹³³ V. Mantouvalou ‘Recent Legislation: Modern Slavery: The UK Response’ (2010) 39 *Industrial Law Journal* 425

¹³⁴ *Van der Mussele v. Belgium* Application No. 8919/80 (23 November 1983); *X v. Federal Republic of Germany* 17 Yearbook 148 (1974)

¹³⁵ *Steirer v. Bethlehem Area School District* 789 F. Supp. 1337, *aff’d*, 987 F.2d. 989 (3d. Cir. 1992), *cert. denied*, 114 S.Ct. 85 (1993)

¹³⁶ *Van der Mussele*, n 134), [37]

¹³⁷ *Siliadin*, n 45).

¹³⁸ *Id* [126]-[129].

¹³⁹ *Kozminski*, n 83 above, 962-963. Another example of this link is found in *United States v. Ingalls* 73 F. Supp. 76 (S.D. Cal. 1947), where a 17 year old girl was held in conditions of servitude for 25 years. She was forbidden from meeting friends of family; was not given days off; was routinely beaten and probably raped by her employer, and forced to undergo an abortion. Her employers threatened her that if she leaves, they will see to it that she is imprisoned or institutionalized.

¹⁴⁰ *CN v UK* [2012] ECHR 1911.

she was permanently on-call day and night, changed his clothes, fed him and cleaned him. She was given a couple of hours leave one Sunday a month and was warned not to speak to anyone.

As *Siliadin* and *CN* suggest, domestic work is of particular interest for those seeking to identify the border between work and slavery. Historically, domestic slavery was, at times, the most common form of slavery. The intimate association with the master or mistress of the house had, and still has, important consequences, well beyond the economic relationship.¹⁴¹ Today, domestic work seems to be a necessary evil, especially within the care sector. Longer life expectancy has expanded the golden age of the elderly. Progressive changes to the perception of aging have led to a preference of life at home and in the community, over dedicated homes for the elderly.¹⁴² Enhanced globalisation has expanded the opportunities to employ women from developing nations in Africa and Asia to Western countries, for the purpose of caring for children, elderly and individuals with disabilities. Potentially, these developments could be a monumental drive for women's mobilisation, while simultaneously improving the welfare of individuals in need, in OECD countries.¹⁴³

But contemporary domestic work has proved problematic in practice, and has raised suggestions of parallels with slavery.¹⁴⁴ The gendered nature of employment, the unique structure of the intimate relationship, including residence in the employer's home, the round-the-clock treatment, have led the ILO to view domestic work as meriting special attention over 50 years ago.¹⁴⁵ In the early 2000s, the ILO published two reports on forced labour, with special attention to domestic work as a central locus of forced labour.¹⁴⁶ The Parliamentary Joint Committee on the Modern Slavery Bill noted that "The experiences of

¹⁴¹ D. McCann, "New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms" (2013) 34 *Comparative Labor Law and Policy Journal* 167; V. Mantouvalou, "Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor" (2013) 34 *Comparative Labor L. and Policy J.* 133; E. Albin, "From 'Domestic Servant' to 'Domestic Workers'" in J. Fudge, S. McCrystal and K. Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* 213 (Oxford: Hart, 2012).

¹⁴² A.M. Guillemard "Equity and Redistribution between Generations: A Challenge for the Future of Pensions and All Social Protection Schemes" (1999) 52(3) *International Soc. Sec. Rev.* 69.

¹⁴³ H. Lutz "Domestic Labour" (2007) 14 *European J. of Women's Studies* 187, 189.

¹⁴⁴ European Parliament, Recommendation 1523, *Domestic Slavery* (2001); V. Mantouvalou, 'The Many Faces of Slavery: The Example of Domestic Work' (2012) 14 *Global Dialogue* 73.

¹⁴⁵ ILO, *Resolution on the Condition of Domestic Workers* (1965); for a discussion see V. Mantouvalou, 'Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers' (2006) 35 *Industrial Law Journal* 395.

¹⁴⁶ ILO, *Stopping Forced Labour* (2001); ILO *A Global Alliance Against Forced Labour* (2005)

overseas domestic workers who are ill-treated by their employers are ‘often at the exploitative end of employment or at the cusp of domestic servitude’.¹⁴⁷ The European Parliament’s Recommendation on Domestic Slavery (2001) noted that an estimated 4 million women are sold worldwide for domestic work, and that the ‘physical and emotional isolation in which the victims find themselves, coupled with fear of the outside world, causes psychological problems which persist after their release and leave them completely disoriented’.¹⁴⁸ Recently, the ECtHR stated that

domestic servitude is a specific offence, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance.¹⁴⁹

And yet, it is the very uniqueness of this relationship, hovering between ‘the market’ and the non-market (family labour), which has led to the legal exclusion of domestic workers from the realm of certain employment rights.¹⁵⁰ In the UK, domestic workers are denied certain working time and health and safety protections,¹⁵¹ minimum wage rights¹⁵² and particular equality provisions. The Israeli Supreme Court rejected a claim for overtime benefits brought by domestic workers, asserting that their unique relationship is not covered by existing legislation.¹⁵³ This exclusion of workers from legal rights by the legislature and the courts is an important, and relatively exceptional, example of the state’s direct contribution to a ‘badge of slavery’.

In addition, and to reiterate the point of vulnerability noted above, mention should be made of two recent cases of domestic work that are not instances of slavery or servitude (or at least, were not claimed as such) – *Taiwo* and *Onu*.¹⁵⁴ In both cases, Nigerian women came to the UK on a migrant domestic worker visa, and were treated badly by their employers. The Court of Appeal accepted the EAT’s holdings, according to which

¹⁴⁷ HL Paper 166, HC 1019, *Draft Modern Slavery Bill Report* (2014) 100.

¹⁴⁸ European Parliament, n 144), [1], [7]; see Bales, n 4 above, 3, discussing the case of Sebba, a young woman who could not cope with concepts of time, space and choice even years after her release from domestic captivity.

¹⁴⁹ *CN v UK*, n 140 above.

¹⁵⁰ Anderson, n 13 above, 163ff.

¹⁵¹ Working Time Regulations 1998, reg 19; E. Albin and V. Mantouvalou ‘The ILO Convention on Domestic Workers: From the Shadow to the Light’ *Industrial L. J.* 67, 70 (2012); G. Mundlak, ‘Recommodifying Time: Working Hours of “Live-in Domestic Workers” in J. Conaghan and K. Rittich (eds) 125 (Oxford: OUP, 2005).

¹⁵² SI 1999 reg 2(iv); *Nambalat v Taher*; *Udin v Pasha* [2012] EWCA Civ 1249

¹⁵³ HCJ 1678/07 *Glutten v the National Labour Court and Yaacov* (29.11.2009)

¹⁵⁴ *Onu v Akwiwu and another*; *Taiwo v Olaijbe and another* [2014] EWCA Civ 279; [2014] ICR 571

immigration status did not constitute grounds for a discrimination claim. One may determine that if background conditions, such as migration status, cannot support a discrimination claim, it is even less likely that they may be used to support a more serious charge of servitude or slavery. And yet, as we see in the next section, there are strong reasons to challenge that position.

B. Limits on the Power to End the Employment Relationship

After Indiana became a state in 1816, its new constitution declared that ‘There should be neither slavery nor involuntary servitude in the state’. Only five years later, in the case of *Mary Clark*,¹⁵⁵ the court had the opportunity to decide a central issue, which bridges the predicament of slaves and that of servants and workers: would a contract entered voluntarily be transformed into involuntary servitude if the worker was coerced to remain in the employment relationship? And if so, what would constitute such coercion? In the case of *Mary Clark*, the Indiana Supreme Court was clear: an order of specific performance of an employment contract ‘would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery’.¹⁵⁶ Almost 300 years later, the ILO clarified that victims may be in a situation of forced labour even when they enter the situation freely, but ‘discover later that they are not free to withdraw their labour’.¹⁵⁷

But how are we to establish if a person is not free to withdraw her labour? In its seminal 2005 report, the ILO seems to limit such conclusions to situations in which a victim’s initial consent to enter the employment relationship was obtained through fraud and deception, or if they are unable to leave their work owing to legal, physical or psychological coercion.¹⁵⁸ And yet, some reference to *economic* coercion is found in the ILO Indicators for ‘menace of penalty’, which include debt bondage and withholding of wages.¹⁵⁹ A more recent ILO Report notes that ‘coercion’ that bars the worker from ending the relationship will include requiring deposits, withholding documentation, threats or use of violence, imposing financial penalties or requiring payment of recruitment fees.¹⁶⁰ It may

¹⁵⁵ *The Case of Mary Clark, a Woman of Color* 1 Blackf. 122 (1821)

¹⁵⁶ *Ibid.*, 123.

¹⁵⁷ ILO *The Costs of Coercion* 5 (ILO Labour Conference, 98th Session, 2009)

¹⁵⁸ ILO, *A Global Alliance*, n 26 above.

¹⁵⁹ ILO, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislatures and Law Enforcement* (2004); ILO, *Indicators of Forced Labour* (2012)

¹⁶⁰ ILO, *Combating Forced Labour*, n 108 above, ch 3, p 2.

be noted that some practices on this list are quite common in current day employment contracts.

For several centuries, slaves, serfs and servants who left their masters in England and the United States were subject to criminal charges, and to imprisonment. Indeed, this principle is still enshrined in the U.S. Constitution. Article 4(2), paragraph 3 (the Fugitive Slave Clause) states that ‘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’. And so, a Pennsylvania statute that made it illegal to return a slave to his master was struck down as unconstitutional.¹⁶¹ It is noted that, despite its title, and the fact that it was used to target slaves, the Clause’s formulation is far more general, and theoretically applicable to workers as well.

In England, the *Ordinance of Labourers* and the *Statute of Labourers* of 1351 prescribed imprisonment for a worker or apprentice ‘retained in service’ if they withdrew unilaterally from a contract, and was routinely enforced,¹⁶² making the labour contract ‘public, long term and unbreakable’.¹⁶³ Even after abolition, a servant who left his master prior to the end of the contractual term was subject to imprisonment as one who stole from his employer.¹⁶⁴ It is estimated that during the latter part of the nineteenth century, over 10,000 workers were prosecuted for this offence.¹⁶⁵ A keen awareness to the fine line that should separate labour and servitude, and the importance of the ability to end the relationship in preserving this line, articulated by a British Court in 1890:

I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I think the courts are bound to be jealous lest they should turn contracts of service into contracts of slavery.¹⁶⁶

¹⁶¹ *Prigg v. Pennsylvania* 41 U.S. 539 (1842); see Cover, n 42 above, 162-167.

¹⁶² Steinfeld, n 55 above, 28.

¹⁶³ J. Bennett, ‘Compulsory Service in Late Medieval England’ (2010) 209 *Past and Present* 7, 13.

¹⁶⁴ *Master and Servant Act* (1823)

¹⁶⁵ M. Curthoys, *Government, Labour and the Law in Mid-Victorian Britain* (Oxford: OUP, 2004)

¹⁶⁶ *De Francesco v Barnum* (1890) 45 Ch D 430, 438. This principle is now enshrined in the Trade Union and Labour Relations (Consolidation) Act 1992, sec 236.

Coercion backed by imprisonment was incrementally replaced in some American states with a felony charge and a maximum fine. Only in the early 20th century did the US Supreme Court find that the peonage laws of Alabama were akin to indentured servitude, and thus unconstitutional.¹⁶⁷ During WWII, an imaginative sanction was put in place for workers who left their employer before the end of their contract – conscription.¹⁶⁸

Against this background, monetary incentives seem almost tame. American labour law in the nineteenth century routinely viewed the contract as a ‘whole’. The implication of this principle was that a worker hired for a prescribed period, and who left prior to the end of the period, was not entitled to *any* pay for the period.¹⁶⁹ ‘Direct coercion would not be permitted’, writes Steinfeld, ‘but legally sanctioned economic compulsion would’.¹⁷⁰ For over a century courts sided with employers in such cases, suggesting that an alternative would lead to a ‘monstrous absurdity, that a man may voluntarily and without cause violate his agreement’.¹⁷¹ It was only in 1944 that the United States Supreme Court confirmed a worker’s constitutional right to end her employment before the contract expired.¹⁷² Referring to the 13th Amendment, the Court linked the terms and conditions of employment, referred to above, with this constitutional right: ‘When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work’.¹⁷³

And yet, the reach of the 13th Amendment was not without limits. In 1897, the U.S. Supreme Court ruled that the amendment was never intended to apply to seamen’s contracts, and thus was not in conflict with a statutory provision that allowed federal marshals to detain deserting seamen and deliver them to the master of the vessel.¹⁷⁴ The

¹⁶⁷ *Bailey v. Alabama* 219 U.S. 219 (1911); Robert Stevens “Involuntary Servitude by Injunction” 6 *Cornell L. Q.* 235 (1921);

¹⁶⁸ Engerman, n 50) 32.

¹⁶⁹ Orren, n 64 above, 84-89; W. Holt, ‘Recovery by the Worker Who Quits: A Comparison of Mainstream, Legal Realist and CLS Approaches to the Problem of 19th Century Contract Law’ (1986) *Wisconsin Law Review*, 677–732

¹⁷⁰ Steinfeld, n 55 above, 150.

¹⁷¹ *Stark v. Parker* 2 Pick. (Mass.) 267 (1824) 271, 275; also *McMillan v. Vanderlip* 12 Johns (N.Y.) 165, 167

¹⁷² *Pollock v. Williams* 322 U.S. 4 (1944)

¹⁷³ *Ibid*, 18.

¹⁷⁴ *Robertson v. Baldwin* 165 U.S. 275 (1897)

court explained that the contract of the sailor has always been treated ‘as an exceptional one’ akin to that of a soldier, and perhaps some others.¹⁷⁵

Would those ‘others’ include, for example, those in the medical profession? While most would view the possibility of imprisoning workers for leaving their employers mid-contract as blatantly anachronistic, a peculiar development in Israel, in the summer of 2011, proved that not to be the case. The story began when 1000 medical trainees (in their final year, prior to becoming licensed doctors) expressed their frustration following a new collective agreement, signed by a doctors’ union with the Israeli government and the National Health Service, which they viewed as ignoring the interests of their sector. When they could not convince their union to renegotiate the agreement, they submitted uniform letters of resignation. Following the government’s request, the National Labour Tribunal (NLT) issued an injunction, demanding that they return to work, stating that the act was an illegal strike, since unauthorised abandonment of their post would lead to ‘serious consequences’.¹⁷⁶

The drama ended with the employers and the unions agreeing to reopen negotiations, to the satisfaction of the trainees. But the question remains: what are the ‘serious consequences’ that could have resulted had all parties stood fast? The refusal to come to work is an obvious repudiatory breach of contract, exposing the worker to summary dismissal. In this case, however, it would have been an empty sanction. Since they had resigned on their own initiative, dismissing them would not have achieved a thing. Thus one can only assume that the implicit threat underlying the court’s warning was none other than an injunction for contempt of court, for failing to obey the original instruction to return to work. Such an injunction carries with it the threat of a fine, or *imprisonment*, until the individual capitulates. Would it have come to that?

If some would view the proposition that medical doctors are serfs as preposterous, bonded labour, particularly in Asia, and the situation of migrant workers raise very serious concerns. The two, of course, are not mutually exclusive. Migrant workers may be more effectively exploited, particularly through ‘loans’ compelling them to stay in the

¹⁷⁵ *Ibid*, 281-283

¹⁷⁶ CA 722-09-11 *The State of Israel v The General Medical Union* (4.09.2011).

employment relationship, and through the manipulation of ‘repayment’ of the loan.¹⁷⁷ Here again, the historical analogy is instructive.

In 1834, the Tennessee Supreme Court ruled in the case of one Mr Fisher, who sought to set his slaves free.¹⁷⁸ The court ruled that the manumission of the slave must be conditioned upon sending them to Liberia. By explaining that ‘free negroes are a very dangerous and objectionable population’, the court provided an excellent example of positing the slave as the paradigmatic other, or stranger, and also of the antecedent to the contemporary threat that looms over migrant workers’ contracts: leaving their employer would result in losing their immigration status.

The current overseas domestic worker (ODW) visa regime in Britain, in place since 2012, generally does not allow domestic workers to change employers, leading Mantouvalou to characterise it as a ‘visa of enslavement’.¹⁷⁹ The Joint Committee on the Draft Modern Slavery Bill expressed its concern, stating that ‘[t]ying domestic workers to their employer institutionalizes their abuse; it is slavery’.¹⁸⁰ And yet, the Act was passed with no reform to this element of migration policy. Most recently, an independent review, commissioned by the British government, concluded that ‘it is widely, near unanimously, held view that where immigration laws tie a migrant domestic worker’s status to a specific employer, the vulnerability of that worker to abuse, including slavery and human trafficking, increases’.¹⁸¹ Such evidence led to the tempering of the ODW visa in September 2015. Section 53 of the MSA now provides that (only) victims of slavery and human trafficking may change employers and retain the right to remain in the UK for at least a further six months.

¹⁷⁷ Lerche, n 102 above, 439.

¹⁷⁸ *Fisher’s Negroes v. Dabbs*, 14 Tenn. 119 (1834)

¹⁷⁹ Mantouvalou, n 15 above, 337-338.

¹⁸⁰ Joint Committee on the Draft Modern Slavery Bill, *Draft Modern Slavery Bill*, HL 166 (2013-14) HC 1019, 100. For a developed critique see: J. Fudge and K. Strauss, ‘Migrants, Unfree Labor and the Legal Construction of Domestic Servitude: Migrant Workers in the UK’ in C. Costello and M. Freedland, *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: OUP, 2014) 160, note 80.

¹⁸¹ J. Ewins, *Independent Review of the Overseas Domestic Worker Visa* (16 December 2015) [68]. Reports on the United States and Israel have similar stories to tell: Human Rights Watch, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States* (2001), available at <http://hrw.org/reports/2001/usadom/usadom0501.pdf>; M. Ellman and S. Laacher, *Migrant Workers in Israel – A Contemporary Form of Slavery* (International Federation of Human Rights, 2003), 19 <https://www.fidh.org/IMG/pdf/il1806a.pdf>

The ODW visa is but an extreme case of the overall policy, which Bridget Anderson aptly captures as a heavily regulated immigration regime coupled by a de-regulated employment sphere. In an effort to ‘control our borders’, countries have put in place a restrictive immigration regime that limits the freedom that migrant workers have vis-a-vis their employers. These include, in the main, revoking an individual’s leave to stay in the country once she leaves an employer. The analogy to ‘freeing’ serfs on condition that they return to their country of origin can hardly be clearer and, indeed, these restrictions suggest that migrant labour under these conditions is ‘unfree’, if not necessarily ‘forced’.¹⁸² Ironically, far from protecting the local workforce (e.g. ‘British Jobs for British Workers’), this policy ‘creates a set of employment relations that mean that migrant workers are preferable to British’.¹⁸³ The peril of deportation under this scheme makes them more ‘reliable’, more vulnerable and subject to exploitation by employers. The Israel Supreme Court thus minced no words in declaring its illegality:

It is impossible not to reach a painful and embarrassing conclusion that the migrant worker has become his employer’s serf ... that the bondage arrangement has created a version of modern quasi-slavery. In imposing the bondage arrangement, the state pierced the migrant workers’ ear to the door of their employers, chained their hands and legs to the employer who ‘imported’ them. The migrant worker has become ... a thing among things ... and has made them like the slaves of yesteryear, like those humans who built the pyramids or rowed the boats of war for the Roman Empire.¹⁸⁴

It is worth noting that the Israeli arrangement struck down by the Court is not dissimilar to the British overseas domestic worker visa, discussed above. Indeed, the 2014 Parliamentary Joint Committee on Modern Slavery criticised recent changes to immigration rules that included the removal of the non-EU workers’ right to change employers.¹⁸⁵ It stated: ‘tying migrant workers to the employers institutionalises their abuse. It is slavery

¹⁸² Costello, n 19 above; J. Fudge and D. Parrot, ‘Placing Filipino Caregivers in Canadian Homes: Regulating Transnational Employment Agencies in British Columbia’ in Fudge and Strauss, n 21 above, 70.

¹⁸³ Anderson, n 13) 90.

¹⁸⁴ HCJ 4542/02 *Workers’ Hotline v the State of Israel* (2008), per Justice Cheshin [4].

¹⁸⁵ HL Paper 166/HC 1019 (2014) 100.

and is therefore incongruous with our aim to act decisively to protect victims of modern slavery'.¹⁸⁶

C. *Rights and Status outside the Work Environment*

Although slavery was common throughout the ancient world, the Roman Empire's model of slavery is one of the most notable, insofar as modern practices are concerned. The master's complete control over the slave's life and, in particular, the power to change one's status from a free person to a slave, are important characteristics of Roman slavery. Slaves and servants were denied independent legal standing, and thus could not appear in court, own property, start a family or enjoy legal protection from violence, including sexual and fatal acts of violence perpetrated by the master.¹⁸⁷ The shift from status to contract was thus an indicator of 'progressive societies'¹⁸⁸ because, inter alia, of the legal system's willingness to protect an individual's rights regardless of class or status.¹⁸⁹ The contract would reflect the paradigm of freedom.

However, insofar as the employment relationship is concerned, matters become more complicated. The contract, in this case, could also serve as a mechanism to entrench status and social subordination. Referring to Weber's notion of 'status contracts', Steinfeld explains that the master's control over the slave, and in many ways – the employer's control over the worker, are more akin to *governance* than to a commercial relationship. For this reason, a slave's murder of his master was considered not only homicide, but treason.¹⁹⁰

Viewing complete control as a necessary element of the master-slave relationship may explain why problematic features of modern employment relations still fall short of slavery. The power to 'sell' a football player and limiting a doctor's right to resign may find their antecedents in practices that were common under slavery, but do not lead to the conclusion that they constitute the same institution. The football player and the doctor can go home at the end of a work day, raise a family and buy a house. The master's control

¹⁸⁶ Ibid.

¹⁸⁷ Patterson, n 36 above, 87-89, 175, 182, 190; M.L. Bush 'Introduction' in *Slavery and Serfdom*, n 50 above, 1, 2-3; Engerman, n 50 above, 20.

¹⁸⁸ Henry Maine, *Ancient Law*, (10th ed., London, John Murray, 1884) 172-174

¹⁸⁹ Otto Kahn-Freund "A Note on Status and Contract in British Labour Law" (1967) 30 *Modern Law Review* 635; F. Raday 'Status and Contract in the Employment Relationship' (1989) 23 *Israel Law Review* 77.

¹⁹⁰ Steinfeld, n 55 above, 56-58, referring to Max Weber, *Economy and Society* (vol 2, Berkeley: University of California Press, 1978) 674.

may be significant, and yet is limited to the relevant areas of the employment relationship. As such, it is different from the power of the master over his slaves.¹⁹¹

However, the case of migrant workers, again, suggests a modern analogy that may exist. One of the most severe restrictions on the lives of slaves concerned their ability to raise a family. In part, this was achieved through an effort to physically separate men and women.¹⁹² Since this measure could not guarantee success in limiting procreation, the law was employed to deny slaves legal family rights.¹⁹³ Parents had no rights over their children (including a right to custody), and children were denied the right to inherit from their parents.¹⁹⁴

To what extent do contemporary immigration policies follow the historical lead? Policies that deprive a female migrant worker of her right to work if she becomes pregnant arguably constitute an extreme form of control over a worker's intimate choices. In 2011, a 'Grand Chamber' of 15 judges of the Israeli Supreme Court ruled that the policy is illegal, as it violates the rights of migrant workers in a manner that is disproportionate and unreasonable.¹⁹⁵ The court was not persuaded by the government's argument that the worker's right to raise a family was unaffected by the policy, since she could always terminate her employment, leave the country, and raise a family in her native country. Two judges found it appropriate to quote the Swiss playwright and novelist Max Frisch, who quipped: 'we asked for workers. We got people instead'.¹⁹⁶

4. Conclusion

Constraints of space barred us from discussing numerous cases, not all of which reached the courts, which manifest the badges of slavery highlighted here. So one Israeli case may be representative.¹⁹⁷ A woman was smuggled to Israel illegally, 'bought' by one trafficker, 'rented out' to another trafficker, forced to give sexual services seven days a week, to 10-12 customers a day, was locked up in an apartment for six months, and her

¹⁹¹ Patterson, n 36 above, 27.

¹⁹² Temperley, n 50 above, 167; Patterson, n 36 above, 6.

¹⁹³ Engerman, n 50 above, 24.

¹⁹⁴ Patterson, n 36 above, 189.

¹⁹⁵ HCJ 11437/05 *Workers' Hotline v the Home Office* (2011). For a discussion of further cases, which also manifest the badges noted here, see e.g. Skrivankova, n 44 above, 22-28.

¹⁹⁶ *Ibid*, Justice Jubran [9], Justice Levi, [32].

¹⁹⁷ Labour Appeals 247/07 *Anon v Sofia Cochick* (24.09.2009).

passport was taken from her. Even this extremely brief overview reveals ownership, sexual and national ‘otherness’, intolerable conditions and control of life outside work. The National Labour Tribunal noted that ‘this disgusting phenomenon’ of human trafficking is essentially ‘modern slavery’ and has become commonplace.¹⁹⁸ The NLT stated that ‘the criminals-traffickers gain profit from their employment through abuse and treachery, depriving them of humanity and offending their dignity and their basic rights in the gravest way’.¹⁹⁹ The NLT also refused to view the victim of trafficking as ‘consenting’ to prostitution, despite the fact that initial consent was proven.²⁰⁰

The advancement of the Modern Slavery Act is a good opportunity to reflect on the most precarious aspects of contemporary labour markets and to ask whether their association with labels such as slavery or forced labour is justified. This was done here by disassembling the concepts by reference to their historical, cultural, social and legal aspects, assessing the importance that each attribute held in the original institution, and its importance in contemporary labour relations.

Identifying the constituent parts of modern slavery may provide an analytical guide, or map, to the analysis of future cases that may come before the courts under the MSA. The latter three badges – terms and conditions of employment; power to end the relationship; and control of rights outside work – are strongly linked to the first four badges, logically, philosophically and politically, and may be seen as deriving from them. Together, the badges may explain why professional athletes and medical professionals are not slaves and, truth be told, neither are workfare participants, objectionable as the practice may be. As the Australian High Court noted, in upholding the first slavery conviction since the introduction of anti-slavery laws in Australia in 1999: ‘It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention’.²⁰¹

It is difficult to disagree with the Australian Court on this matter. And yet, the rhetorical use of the term ‘slavery’ by academics and activists may be justified as part of the

¹⁹⁸ *Ibid* [9]

¹⁹⁹ *Ibid*; also in a similar case: Labour Appeals 611/05 *Ben-Ami v Anon* (8.7.2008).

²⁰⁰ *Ibid* [10].

²⁰¹ *The Queen v Tang* [2008] HCA 28, [32]

ongoing effort to expand and enhance the rights of migrant workers in general, and domestic workers in particular; to raise awareness to employers' increased control over the lives of workers outside the workday; and to provide a platform for a campaign against demeaning and degrading terms and conditions of employment.

Awareness of the badges of slavery that, more often than not, are attached to their predicament, should galvanise courts to develop employment law instruments, such as broadening the ambit of protection from discrimination, as part of the effort to truly make those badges a thing of the past.