

Undocumented Status and Slavery: Examining the Parallels

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Chantal Thomas, *Immigration Controls and "Modern-Day Slavery"* (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 13-86, 2013), available at [SSRN](#).

In the heat of the debate over comprehensive immigration reform last spring, Marco Rubio's press secretary likened undocumented migrants to slaves, noting that Americans have not "[had a cohort of people living permanently in US without full rights of citizenship since slavery](#)." The parallel between slavery and undocumented status is drawn often, but rarely with precision or analytical rigor.

[Chantal Thomas's](#) new paper, *Immigration Controls and "Modern-Day Slavery"*, takes on the challenge of bringing hard-nosed logic to bear on the concept of "modern-day slavery" and its interface with immigration law. In my view one of the most interesting authors out there on questions of international law, immigration, and labor, Thomas's analysis of the slavery debate does not disappoint.

She begins by noting the potential breadth of the term "modern-day slavery," and presenting the debates around whether forced labor should be included within the definition. Thomas focuses on the coercion aspect of slavery, arguing that today the lack of lawful immigration status is "the single most formal and legally permitted basis" for this type of coercion. (P. 11). This leads to the article's central contribution: Pointing out that advocates and scholars who seek to dismantle modern-day slavery are engaged with the wrong problem, as their proposed solutions focus on criminal law or human rights protections but fail to discuss the impact of immigration laws. Because United Nations human rights bodies and even anti-slavery advocates never seriously question state sovereignty and border control prerogatives, they are ineffective in preventing severe exploitation of undocumented migrants.

Thomas engages with two literatures in the course of her article. She begins with the contemporary debate around the legal definition of slavery, labeling the different camps with the monikers of "maximalist" and "minimalist." (Pp. 15-22). These groups sit at either end of a spectrum in defining slavery, from narrow *de jure* ownership to a broad sociological approach that includes conditions of control. Thomas gets deep into the weeds of the debate around the [1926 Slavery Convention](#) and its definition of slavery, tangling with questions of factual and legal equivalence. For those familiar with the literature, this is the least interesting portion of the paper, as Thomas engages in critique of the analytically impossible task of defining slavery in a world in which ownership of humans is legally prohibited. Though she does an admirable job of parsing the debate and highlighting its glaring deficiencies, I think Thomas is at her best when she spins out her own far more original and thoughtful theories. In my view, it would have sufficed to make the point that current-day abolitionists are seeking to "eradicate a practice that has no explicit legal component" and therefore abolitionists are barking up the wrong tree. (P. 15). Given the questions raised in the rest of the paper, this section might have focused instead on whether the academic focus on slavery and definitions of possession and control serves to obscure the role of the state in enabling coercion.

Thomas gets to that point next, in a lively and engaging section that draws on legal realist scholars Wesley Hohfeld and Robert Hale. Hohfeld and Hale wrote about labor law in the early 20th century, highlighting the "internal analytical incoherence and external negative impact" of conservative legal interpretations of labor law. (P. 12). Following Hohfeld, Thomas unearths the hidden role of private law in enforcing the state's coercive power. In her words, "Hohfeld encourages us to identify the precise contours of legal rules that shape entitlements as enforced by the state.

If we try to unpack what legal rules contribute to modern-day slavery, we are confronted with the fact that border controls do a lot of this work.” (P. 36). From Hale, Thomas extracts an explanation of the ways in which property laws, by requiring us to enter into the market, construct the imbalanced bargaining power faced by undocumented migrants. Hohfeld and Hale’s theories are powerful, and Thomas deftly adapts them to the contemporary situation of the undocumented.

Thomas struggles with the analogy between undocumented status and slavery, appearing (understandably) conflicted about whether or not it should be drawn. The term “slavery” brings with it formidable rhetorical power, but, as she notes, there are important differences between undocumented migrants and slaves. In the beginning of the article, Thomas explicitly disavows the equivalence of undocumented migrants and slaves, noting that the former have *some* rights and are therefore in quite a different position from the latter. Yet she is drawn to the parallel, returning to it at the end of the article. Thomas first argues that the thread that ties undocumented status and slavery is the deprivation of the right to freedom of movement. She recognizes that the analogy is imperfect: In her view because the former group is forcibly returned to the country of origin while the latter is forcibly returned to forced labor. I agree with Thomas that undocumented migrants face problematic restrictions on their freedom of movement. But I would distinguish that right from the right to territorial security. In other words, the inability to travel within a country is conceptually distinct from the inability to regularize and remain lawfully in that country. I therefore find more convincing Thomas’s second argument: that the main parallel between slaves and the undocumented is their susceptibility to exploitation, and that the threat of expulsion imposed by immigration law is a central factor in that vulnerability.

The article is a refreshing and provocative foray into the contemporary slavery debate and is at its strongest when showcasing the author’s original ideas. Its theoretical power is matched by its practical value, and I, for one, look forward to the day when anti-slavery advocates and scholars heed Thomas’s advice and focus on the role of immigration law in perpetuating the exploitation of undocumented migrants.

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