Centre on Migration, Policy and Society

Working Paper No. 66,
University of Oxford, 2009

Coercion/Consent in Labour

Robert Steinfeld

WP-09-66

Coercion/Consent in Labor

Abstract
This lecture was given at the annual conference of the Centre on Migration, Policy and Society on 'Theorising Key Migration Debates', 30th June-1st July, St Anne's College, Oxford University. It reviews selected court cases in the USA on the issue of 'involuntary servitude' and the attempts in law to distinguish between coercion and consent in labor. It concludes that, "rather than view compulsion in labor relations in terms of a binary opposition divided by type of pressure, it seems more plausible to think in terms of a combined scale of pressures, legal, physical, economic, social, psychological all running along a continuum from severe to mild, rather than falling into a binary opposition. This would not only help us to understand that the various types of pressure employed in eliciting labor are commensurable, operate in surprisingly similar ways at bottom, but also to see that the real focus of inquiry should be upon the choice sets with which individuals are confronted as they make their decisions about conducting their lives, and the ways in which these choice sets may be altered by changing legal arrangements." The framework for the argument in the lecture is set out in an appendix.

Key words: forced labour, trafficking, history, deportation, slavery.

Author: Professor Robert J. Steinfeld, University at Buffalo Law School, The State University of New York, 725 O'Brian Hall, North Campus, Buffalo, NY 14260-1100, USA
Email: steinfel@buffalo.edu

Coercion/Consent in Labor

The framework of my larger argument has been laid out in the summary already distributed to the conference, and I won't impose on you by repeating it here (se Appendix 1). Today, rather, I would like to try to fill in some of the details out of which this framework emerged, presenting a discussion of several 20th century American legal cases in which the judges attempted to develop a definitive test for distinguishing in law between voluntary labor and "involuntary servitude." As I go along I offer evaluations of the various tests they did develop, and an analysis of just why establishing a definitive test proved so difficult and controversial. But I'd like to begin by describing why courts in the United States have been put in the position of having to develop a jurisprudence to distinguish free from coerced labor in the first place, by way of introducing these 20th century cases.

The 13th amendment to the constitution of the United States, adopted following our Civil War, prohibited slavery throughout the United States along with something the amendment called "involuntary servitude". The "involuntary servitude" language of the amendment was drawn directly from an earlier prohibition on slavery and "involuntary servitude" that congress had imposed on the then lightly settled Ohio, Indiana, Michigan and Illinois territories in the 18th century following the American Revolution. Our war of independence had been built on the language of freedom and slavery. And so it is perhaps only slightly surprising that congress would have wanted to start afresh by prohibiting the extension of slavery into these new northern territories, at least. Why congress added "involuntary servitude" to slavery is not altogether clear, but at the time forms of labor existed that many people considered closely akin to slavery. Indentured servants, for example, were still being imported into the United States, and their contracts to labor for a term of years could still be enforced against the body of the worker through imprisonment and corporal punishment.

Indeed, no sooner had slavery been outlawed in the new territories of the upper Midwest than settlers from Southern states began to import slaves into these territories by having them sign long term labor contracts obligating them to serve their masters for 20 years or 40 years, etc. To the extent the labor obligation undertaken in these contracts could be enforced against the body of the worker, slave owners would have gone a long way toward successfully circumventing the prohibition on slavery. In a number of instances former slaves, now indentured servants, challenged their condition as a violation of the prohibition against "involuntary servitude". As a result the courts in the new territories were confronted with the problem of having to figure out precisely what "involuntary servitude" was, i.e. under what circumstances a labor contract could produce "involuntary servitude". But they faced a deep conceptual problem as they set about their task. All labor contracts were/are designed legally to bind a worker in one way or another to fulfill the labor obligations the worker has undertaken. That is one of the principal purposes of labor contracts.

There turned out to be no simple, natural answer to the question of when labor undertaken by contract amounted to "involuntary servitude". The courts in different states in the territories developed two quite distinct and inconsistent approaches to the problem. The first focused on the conditions of entry into the contract, the second focused on exit from the contract. Under the first test, if the contract was judged to have been entered into voluntarily then the contractual obligation to labor could be enforced against the body of the worker without infringing the prohibition against "involuntary servitude," the work having been undertaken "voluntarily". There could be no exit from such a labor contract, but the lack of a power to exit did not make the continued labor "involuntary", after all, what purpose did labor contracts serve in the first place if not to bind the worker to fulfill his "voluntary" undertakings. The courts in a second state disagreed violently holding that even work undertaken voluntarily would constitute involuntary servitude if a worker decided to leave in mid contract but was forced to continue work through the use of harsh legal remedies the master might invoke against the body of the worker. Continued work to avoid imprisonment or a beating could not be described as "voluntary," and fell under the prohibition against "involuntary servitude".

As the courts laid down these two tests, however, they left many questions unanswered. As for the first test, for example, what conditions would make entry into a labor contract "involuntary". If one were starving and signed up for 20 years in order to obtain 3 square meals a day, would the contract have been entered into "voluntarily or involuntarily"? In the case of the second test the courts had no doubt that legal remedies that were enforced against the body of the worker (imprisonment or corporal punishment) did not allow exit, but what of harsh pecuniary sanctions for contract violations, say forfeiting a year's wages if one left early. Did such a remedy leave a worker free to exit? If he stayed on to avoid forfeiting a year's wages would the continuing labor be "voluntary?"

This is neither the time nor place to tell this entire tale, but let me just say that both of these quite different approaches to the problem of distinguishing voluntary from coerced labor, each with its own weighty rationale, continued to be applied by American courts throughout the balance of the 19th century. What kept the courts involved in deciding these kinds of questions for so long was that following our Civil War and adoption of the 13th amendment, southern states began to do precisely what had been done in the upper Midwest at the beginning of the 19th century, attempt to circumvent the now nationwide prohibition on slavery by introducing a variety of contractual devices directed primarily at African American workers in an attempt partially to evade the prohibition on slavery. Eventually these contractual devices began to be tested in the federal courts under the "involuntary servitude" language of the 13th amendment. To make a very long story short, by the second decade of the 20th century, the United States Supreme Court had laid down a test that very much resembled the second test we have described above. This test focused on exit from labor contracts and struck down

as creating "involuntary servitude" "any state law that made the quitting of work any component of a crime, or made criminal sanctions available for holding unwilling persons to labor" (*Pollack v. Williams*).

Over the long course of dealing with the subject of voluntary and involuntary labor, Congress enacted a number of statutes to implement the 13th amendment. These made the holding of a worker in "involuntary servitude" a criminal offence for which an employer could be prosecuted and fined or imprisoned. The 20th century cases I am about to discuss arose as prosecutions of employers under these federal statutes and the 13th amendment, but they pose the issue of voluntariness and coercion in circumstances that are not so totally removed from the experience of ordinary labor contracting, and the courts recognized that they had to be cautious in developing a test for distinguishing coerced from voluntary labor lest they put at risk the entire system of "voluntary" employment.

I.

David Shackney owned and operated a commercial chicken farm in the American state of Connecticut during the early 1960s. Shackney had found it difficult to find American workers who would accept employment on his farm because the work was unpleasant and never ending. And so, like so many employers before and since, Shackney began to look abroad to Mexico for a solution to his labor problems, traveling there personally to recruit Mexican workers to take jobs on his chicken farm.

In 1963 criminal charges were brought against Shackney in federal court in Connecticut for holding the Oros family in "involuntary servitude". He had met the Oroses during his travels to Mexico, where he and they had signed a written contract in Spanish, committing Luis Oros, Oros' wife Maria Elena, and their eldest daughter to go to Connecticut to work on Shackney's farm for two years. The contract called for the Oroses to

> care for 20,000 laying hens…. The hours of work were to be from 6:30 in the morning until the work was completed, with three breaks during the day.

The contract further stipulated that because the work involved care of living things, it had to be performed every day, 7 days a week, 365 days a year with no exceptions. In return, the Oros family was to receive furnished living quarters, with heat, electricity, gas for cooking and sufficient food. They were also to receive a combined salary of $160 per month for the first year and $240 per month for the second year. But the contract stated that half of this salary was to be deposited and held in a joint bank account with Shackney as security to guarantee that the Oroses would stay for the entire two years. But there was more to the contractual arrangement. Shackney advanced money to obtain visas for the Oros family and bus tickets to Connecticut. As part of the agreement, the Oroses signed twelve $100 IOU notes to repay Shackney for these expenses, and Shackney insisted that the IOUs be co-signed by a friend of the Oroses who owned his own home in Mexico. Shortly after they arrived at the farm,

Shackney raised the family's combined salary to $200 per month, but at the end of each month did not actually pay them any money; instead, at the end of each month he tore up two $100 IOUs.

The government did not claim that the Oroses had entered the contract involuntarily. After all it had been agreed to and signed in Mexico, was written in Spanish and the Oroses, as we shall see, seem to have understood quite well the implications of signing the IOUs. To the extent they were not deceived, they may well have calculated, as so many migrants have, that at the end of the day even after paying off their debt, they might well be able to lay aside a considerable amount of money to take back to Mexico. Still, the terms of the agreement are appalling, and Shackney has certainly taken advantage of the limited universe of choices the Oroses faced to benefit himself.

The government's case against Shackney was not about entry into the contract. Rather, he was accused of holding the Oroses in "involuntary servitude" after they arrived at his Connecticut farm, by threatening them with harsh consequences if they did not continue to work. What threats did Shackney make to keep the Oroses at work "involuntarily"? He seems mainly to have made two kinds of threats; one was to foreclose on the house of the friend who had co-signed the IOUs. The other was to have the Oroses deported. At the trial the Oroses testified (and I quote from the report of the case) that

> they were always afraid. Of prime importance was the fear of deportation if they left… A further fear engendering factor was a threat in February, 1962, that unless Oros paid the notes [his friend] had co-signed, "somebody take my friend's house, and this thing I know when I sign the notes, and this is where I am scared to leave the farm." [1]

Shackney was found guilty at trial but appealed his conviction. Judge Friendly, writing for the three judge court of appeal, reversed the conviction. In his opinion, he surveyed earlier judicial decisions and found that the prohibition against "involuntary servitude" in the 13th amendment was meant to

> Abolish all practices whereby subjection having some of the incidents of slavery was *legally* [emphasis added] enforced, either directly by a state's using its power to return the servant to the master… or indirectly, by subjecting persons who left the employer's service to criminal penalties. Rather plainly, however [he went on], the term goes farther.[2]

It also extends, Friendly said, to cases in which a private individual holds a person to labor through physical force or the threat of physical force.[3] But it goes farther still. Another federal court had ruled that "involuntary servitude" resulted when a person continued to work out of fear of being sent to prison after her employer threatened to have her criminally prosecuted, despite the fact that the threat was totally empty, no grounds for prosecution existed.[4] Now, Friendly had to decide whether the term extended even farther, and in the process to develop criteria for establishing a line between

[1] *United States v. Shackney*, 333 F.2d 475 (1964), 479-80
[2] *Ibid.,* 485-86.
[3] *Ibid.,* 486.
[4] *United States v.Ingalls*, 73 F. Supp. 76 (S.D. Calif., 1947).

threats that produced "involuntary servitude" and threats that did not. Friendly dismissed the notion that continuing work out of fear that a friend's house might be foreclosed could possibly represent "involuntary servitude" "as it is [perfectly] within the rights of a mortgagee to threaten to enforce the security which the contract gives him for nonperformance."[5] But the threat of deportation, he thought, required more extended analysis.

In the end, Friendly decided that because this threat offered a worker "a choice between continued service and [physical] freedom, even if the … choice [of freedom] entail[ed] consequences that were exceedingly bad", continued work to avoid the bad consequences of this kind of threat could not be deemed "involuntary servitude". Friendly was quite candid about what compelled him to draw the line in this way. "While a credible threat of deportation," he wrote, "may come close to the line, it still leaves the employee with a choice [between continued work and physical freedom], and we do not see how we could fairly bring this kind of threat within [the statute] without encompassing other types of threat, quite as devastating in the particular case as that of deportation may have been to the Oroses."[6] "The most ardent believer in civil rights," he went on to say, "might not think that cause would be advanced by permitting the awful machinery of the criminal law to be brought into play [against employers] whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful."[7] Friendly's analysis, of course, doesn't quite hold water, given that even workers faced with the threat of imprisonment or physical violence have a choice, however painful. It is not logic, I think, but political economy that provides the foundation for Friendly's test. He has self-consciously designed his rule so that economic threats, however fear engendering they may be, are excluded from the category of threat that can produce "involuntary" labor, which he limits to threats of physical force and imprisonment.

The arbitrariness of Friendly's line drawing by type of threat impelled one of the other judges who sat on the panel to propose his own test. It seems apparent from the disagreement between the two judges that no natural, obvious answer to the problem presented itself. Judge Dimock believed that courts should decide whether labor had been performed involuntarily or voluntarily based on the potency of the threat rather than on its formal type. "To a drug addict," he wrote, "the threat of deprivation of his supply is certainly more overbearing than the threat of almost any kind of force, yet it is a means falling outside of the majority's guilt criterion."[8] But how would the courts determine whether a threat was powerful enough to produce labor that was "involuntary?" Here Judge Dimock ran into trouble. He suggested that the courts should examine whether the will of the worker had been

[5] *United States v. Shackney*, n. 17.
[6] *Ibid.,* 486.
[7] *Ibid.,* 487.
[8] *Ibid.,* 487.

subjugated. But this test founders on the paradox of coercion and consent with which sophisticated judges had been familiar since the early years of the 20th century. As early as 1918, Justice Oliver Wendell Holmes, Jr. had written that "it always is in the interest of a party under duress [willingly] to choose the lesser of two evils. But the fact that a choice was made [willingly] according to interest does not exclude duress. It is the characteristic of duress properly so called."[9] This profound insight, however, did not really help very much, indeed complicated significantly the task of developing an objective test to separate voluntary from involuntary labor.

The opinions in the Shackney case, of course, did not lay the problem to rest. And in 1987, the United States Supreme Court took up the problem again as it went about resolving a case that had been brought against other employers. Ike and Margaret Kozminski had been convicted in a lower federal court of holding two mentally retarded men in "involuntary servitude" on their dairy farm in Michigan, and had appealed the conviction. [I quote from the report of the case]

> The Kozminskis subjected the two men to physical and verbal abuse for failing to do their work and instructed herdsmen employed at the farm to do the same. The Kozminskis directed [the men] not to leave the farm, and on several occasions when the men did leave, the Kozminskis or their employees brought the men back and discouraged them from leaving again. On one occasion, Kozminski threatened [one of the men] with institutionalization if he did not do as he was told. [10]

The Supreme Court reversed the conviction under a test that Justice O'Connor laid down. "Our precedents", she wrote, "clearly define a Thirteenth Amendment prohibition of involuntary servitude [as labor] enforced by the use or threatened use of physical or legal coercion."[11] By legal coercion she mainly meant here: a state using its power directly to return a worker to his employer or indirectly by making criminal penalties available to imprison workers who left their employers. But when she began to describe "physical and legal" coercion in greater detail she stretched the meaning of those terms to include forms of pressure that normally would not be considered "physical" or "legal".

In the 19th century, Italian children had been imported into the United States and made to work for those who had sponsored them. In reaction, Congress had passed legislation condemning this so-called Padrone system as a form of "involuntary servitude". O'Connor wrote

> [t]hese young children were literally stranded in large hostile cities in a foreign country. They were given no education or other assistance toward self-sufficiency. Without such assistance, without family, and without other sources of support, these children had no actual means of escaping the padrones' service; they had no choice but to work for their masters or risk physical harm. [12]

---

[9] *Union Pacific Ry. Co. v. Public Service Commission,* 248 U.S. 67 (1918), 70.
[10] *United States v. Kozminski,* 487 U.S. 931 (1987), 935.
[11] *Ibid*., 944.
[12] *Ibid.,* 947-48.

The "physical" harms which these children faced as alternatives to labor seem to have consisted of going hungry, going without shelter, in general, going without. Ordinarily, these kinds of disagreeable alternatives to labor would be placed under the category "economic" threat. What O'Connor has unintentionally laid bare in an effort to bring the Padrone precedent within the scope of the term "physical coercion" is that "economic" threats actually do involve, at times, the "risk of physical harm". Moreover, O'Connor also defined the threats that constituted "legal" coercion more broadly than had Judge Friendly. Depending upon their special vulnerabilities, she wrote, "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."[13]

Justice O'Connor appears to have been tugged in opposite directions. On the one hand, she, like Friendly, expressed deep concern that an overly broad definition of threats might compromise the entire system of voluntary employment. As a result she was determined to limit the kinds of threats that could produce "involuntary servitude" to two categories, "physical" and "legal." On the other hand, she appears not to have wanted unduly to restrict the kinds of circumstances that might be construed to give rise to "involuntary servitude." As a result, she offered a broad and flexible definition of what "physical" and "legal" threats might encompass.

But here again, as in Shackney, the judges could not agree on a test. Entering into a broad debate with O'Connor, Justice Brennan expressed deep dissatisfaction with her test. It was both too broad and too narrow. On the one hand, certain "physical or legal threats", Brennan thought, might not actually be potent enough to produce "involuntary servitude". On the other hand, certain "economic, social, or psychological" threats might be, but had been categorically excluded. Justice Brennan realized, however, that he faced a daunting task. How were courts to draw a line so that "economic" threats might give rise to "involuntary servitude" under certain circumstances, but exclude the kinds of "economic" threats that were made in the course of ordinary employment. And he invoked the paradox of coercion and consent to drive home just how difficult a problem it was. "It is of course not easy", Brennan wrote, "to articulate when a person's actions are 'involuntary'".

> In some… sense the laborer always has a choice no matter what the threat: the laborer can choose to work, or take a beating; work, or go to jail.

His solution was to acknowledge openly that any effort to distinguish voluntary from coerced labor must involve a normative judgment. "We can all agree," he wrote,

> that [the choices, work or take a beating, work or go to jail] are *so illegitimate* that any decision to work is 'involuntary'…. Happily our task is not to resolve the philosophical

[13] *Ibid.,* 948.

> meaning of free will, but to determine what coercion Congress would have regarded *as sufficient to deem* any resulting labor "involuntary servitude." [emphasis added] [14]

Brennan understood the potential risks presented by permitting "economic" threats to be evaluated in this way. Courts would be faced repeatedly with having to decide whether a particular threat was *so illegitimate* that labor performed in its shadow should be *deemed* "involuntary servitude." "One can… imagine". Brennan wrote, "troublesome applications of that test, such as the employer who coerces an employee to remain at her job by threatening her with bad recommendations if she leaves".[15]

To circumvent the deeply problematic task of distinguishing disagreeable choices offered to workers that were "illegitimate" from disagreeable choices that were not, Brennan proposed refocusing the entire test so that it would examine the results of threats rather than the threats themselves. "The solution", he wrote, "lies not in ignoring [economic threats] but in focusing on the 'slavelike' conditions of servitude Congress most clearly intended to eradicate".

> I thus conclude that whatever irresolvable ambiguity there may be in determining… the degree of coercion Congress would have regarded as sufficient to render any resulting labor "involuntary"… Congress clearly intended to encompass coercion *of any form* that actually succeeds in reducing the victim to a condition of servitude resembling that in which slaves were held before the Civil War. While no one factor is dispositive, complete domination over all aspects of the victim's life, oppressive working and living conditions, and lack of pay or personal freedom are the hallmarks of that slavelike condition of servitude.[16]

Justice O'Connor would have none of it, deeply concerned lest Brennan's test reach as "involuntary servitude" oppressive work conditions that were maintained through "economic" threats. "This formulation," she wrote of Brennan's test,

> would be useful if it were accompanied by a recognition that the use or threat of physical or legal coercion was a necessary incident of pre-Civil War slavery and thus of the slavelike conditions of servitude Congress most clearly intended to eradicate. Instead, finding no objective factor to be necessary to a "slavelike condition," Justice Brennan would delegate to prosecutors and juries the task of determining what working conditions are so oppressive as to amount to involuntary servitude…. The ambiguity in the phrase "slavelike conditions" is not merely a question of degree, but instead concerns the very nature of the conditions prohibited. Although we can be sure that Congress intended to prohibit "slavelike conditions of servitude," we have no indication that Congress thought that conditions maintained by means other than the use or threatened use of physical or legal coercion were "slavelike."[17]

---

[14] *Ibid.,* 959.
[15] *Ibid.,* 960.
[16] *Ibid.,* 962-63.
[17] *Ibid.,* 950-51.

II.

It should be apparent from these debates between the judges that no natural, objective line exists to neatly and definitively separate voluntary from coerced labor. The disagreement between Justices O'Connor and Brennan is at bottom a political disagreement about whether economic threats should be included among the kinds of threats that can, as a matter of law, produce involuntary labor. Her test is the one that prevails in the United States today. It constructs labor as a binary opposition, free vs. coerced, depending upon whether the labor results from threats of physical or legal compulsion on the one hand or from economic and other threats on the other. This test, and the others as well, turn out not to represent judgments about whether consent has actually been obtained in labor but rather political and moral judgments about something else, the legitimacy or illegitimacy of the various kinds of disagreeable alternatives to labor with which employers may confront workers to elicit their labor. When faced with an illegitimate set of choices, the labor is deemed involuntary. When faced with a legitimate set of choices, however disagreeable these alternative to labor may be, the labor is nevertheless deemed voluntary.

The prevailing legal test as laid down by Justice O'Connor is based upon two demonstrably false assumptions. The first is that the sources and characteristics of economic threats are qualitatively different than the sources and characteristics of physical and legal threats. The second is that economic threats operate much less harshly than physical or legal threats.

As to the first assumption, market power is supposed to be the source of economic threats, and to operate impersonally and indirectly. By contrast the state is the source of legal threats. State rules, normally, authorize or permit individuals or state officials to employ force or confine the body in order to extract labor. Market forces are supposed to be natural; law, state made and artificial. But the construction of this dichotomy does not quite stand up to scrutiny. Economic threats almost always have their source in a set of legal rights, privileges and powers that place one person in a position to force another person to choose between labor and some more disagreeable alternative to labor, just as legal threats do. The exercise of economic power is also often quite personal and direct. So-called economic pressures are nearly always a product in part of law. Organized markets and the economic threats made within markets have their ultimate origin in an act of the state to restrict the liberty to use and consume resources by laying down legal rules that define private property. Law pervasively conditions the universe of possibilities that determine the degree of economic pressure individuals will confront in markets. I've offered a few examples in my summary, but there are many, many others, think of progressive income tax law, for example, or inheritance law, and the consequences of more or less equal distribution for economic power and vulnerability, etc. In all market societies, an extensive set of

background legal rules shape to a significant degree the real alternatives working people have available, as they decide whether and on what terms to enter or remain at jobs. And these can differ significantly in detail from country to country, altering the magnitude of the pressures they face as they make their decisions about work. When we take a close look at economic and legal threats, the sharp distinction that is normally drawn between the two dissolves into a complex account of the different ways in which both are constituted by law.

The second assumption underlying the modern construction of labor as a binary opposition is that economic threats do not operate nearly as harshly as physical and legal threats. Economic threats are assumed to be mild, while physical force and legal compulsion is assumed to be severe. Does this assumption withstand scrutiny? Depending on circumstances, it seems pretty clear that physical confinement may or may not be more disagreeable than so-called economic threats. The threat of starvation may certainly operate more powerfully than a short term of confinement. Some of you may not know that during the first 3/4s of the 19th century, most manual English wage workers could be imprisoned at hard labor for leaving their jobs. And thousands and thousands actually were. Until the very end, no one seems to have suggested that this system consigned English wage workers to involuntary servitude. In my research, though, I have found that some 19th century English workers were willing to serve short prison terms to discharge their contracts so that they could take work at higher wages with a different employer. A good way of thinking about the potential severity of economic threats is to consider what people have sometimes been willing to do to escape them. They have been willing to enslave themselves, indent themselves for long periods of service, risk their lives crossing borders, etc. These alternatives must have seemed less disagreeable than the economic threats themselves.

It should be pretty clear, I think, that there can be numerous degrees of economic pressure, ranging from mild to severe, just as there can be numerous degrees of legal and physical pressure. Rather than view compulsion in labor relations in terms of a binary opposition divided by type of pressure, it seems more plausible to think in terms of a combined scale of pressures, legal, physical, economic, social, psychological all running along a continuum from severe to mild, rather than falling into a binary opposition. This would not only help us to understand that the various types of pressure employed in eliciting labor are commensurable, operate in surprisingly similar ways at bottom, but also to see that the real focus of inquiry should be upon the choice sets with which individuals are confronted as they make their decisions about conducting their lives, and the ways in which these choice sets may be altered by changing legal arrangements.

Appendix 1: Synopsis of "Coercion/Consent in Labor"

Robert Steinfeld

I do not directly discuss the issue of illegal immigrants as victims or villains in this paper, but what I believe to be a related issue that may be of help in thinking through the first: the difficulties involved in distinguishing between work that is undertaken freely and voluntarily and work that is performed involuntarily under coercion, free and un-free labor if you will. On the surface distinguishing these two situations would appear to be unproblematic, but a closer examination reveals that no natural line between the two exists; the distinction itself serves as a proxy for something else, a moral/political judgment about the kinds of pressures to enter and remain at work that are considered legitimate and those that are not. Pressures to work moreover are themselves shaped directly and indirectly by legal rules that govern a variety of matters in society, and which of course may be changed.

The heart of the difficulty can be traced back to the nature of free markets themselves. In effect, free markets operate through a system of threats to inflict injury that market actors make against one another. One pays money to the grocer under the implicit threat that the grocer will invoke her property right to withhold food one needs. The money payment is a kind of bribe to the grocer not to carry through on her implicit threat. It is obvious that the grocer's power to make the threat in the first place grows out of legal rules that create and define property rights. But the grocer is not the only one making threats in this system. The grocer's customers also make implicit threats against the grocer; they threaten to take their money elsewhere, in effect threatening the grocer's livelihood. Depending upon circumstances, the grocer may be willing to bribe customers into not carrying through on their implicit threats by making price concessions. Again, the customers' power to make these threats grows out of their legally created and defined property rights in money, but also out of the legal fact that the British state no longer mandates public markets, bestowing on customers the legal liberty to shop where they wish.

It is apparent that this system of mutual threats operates in markets for labor as in other markets. Employers pay wages of a certain amount to workers under the implicit threat that workers will invoke their rights to withhold labor without which the owner cannot run a business to earn profits. Wages are a kind of bribe to employees not to carry through on this implicit threat. The power to make this threat grows out of the legal liberty workers possess to accept/decline job offers, to quit work, or to combine to withhold labor collectively. Of course, these legal liberties are by no means absolute; the law also

defines circumstances under which workers are not absolutely free to decline employment or to withdraw their labor collectively, in effect legally shaping the contours of this kind of threat.

But here is the main point of this exercise. Workers perform often disagreeable tasks for their employers over extended periods of time under the implicit threat that an employer will deny them their principal means of livelihood. The work is offered as a kind of bribe to the employer not to carry through on this implicit threat. The power to make this threat of course also grows out of legal rules defining property rights, among others.

One critical question posed by this perspective on free markets is: can someone who performs labor as a result of threats be described as performing that labor voluntarily, or must we say that the labor is being performed under duress?

The issue is crucial because the premises of free societies require that only work undertaken and performed "voluntarily" can be considered legitimate. Coerced labor must not be permitted, indeed is illegal. In the United States the prohibition against "involuntary servitude" has been constitutionalized. The simultaneous embrace of free markets in labor that necessarily operate through a system of implicit threats, and the rejection of coerced labor, exist in some tension with one another. To ease the sense of inconsistency, the law has attempted to draw a line, or rather different lines at different times, to distinguish threats that produce "voluntary" labor from threats that produce "coerced" labor. American constitutional jurisprudence has been especially preoccupied with this issue for a very long time for a variety of reasons that I will examine in the full paper, but the upshot is that a number of different legal tests have emerged from this jurisprudence. They attempt to draw a sharp line between free/voluntary labor, on the one hand, and coerced/unfree labor on the other, constructing the two as opposites of one another-- in an effort simultaneously to condemn coerced labor, and to legitimate free labor. I describe and evaluate several of these legal tests more fully in the paper as I examine recent American judicial decisions which have ruled on the guilt or innocence of persons accused of holding other persons in constitutionally and statutorily prohibited "involuntary servitude" under a variety of circumstances.

But the truth of the matter is that all these attempts logically to distinguish labor performed voluntarily from labor performed involuntarily are bound to founder on the paradox of coercion and consent. No one has stated this paradox more clearly than the American Legal Realist John Dawson, writing during the middle of the 20th century. "[C]ourts ha[ve] been slow to realize," Dawson pointed out, "that the

instances of more extreme pressure were precisely those in which the consent expressed was *more real*; the more unpleasant the alternative, the more real the consent to a course which would avoid it."[1] Whether to characterize a decision to perform work as voluntary because it is the better choice under the set of alternatives the person confronts, or as coerced because the person has been forced to choose only among evils, turns out not to be a judgment about whether consent has actually been obtained, whether the labor "objectively" is voluntary or coerced, but a judgment about the legitimacy of the set of alternatives confronting the worker as s/he decides whether to undertake the work, a political/moral judgment.

My discussion of the operation of free markets omitted at least one important consideration; the threats market actors make against one another carry varying degrees of potency. How much pressure a threat produces depends upon the set of alternatives that both actors face. If unemployment is high, an employer's implicit threat to withhold a worker's principal means of support is generally more powerful than when unemployment is low, both because the employer's alternatives are better and because the worker's are worse. But notice that the alternatives a worker faces are determined in important part by a wide range of other legal rules. If the state has not established unemployment insurance and a welfare system or has set. payment standards very low, or made qualifying rules very restrictive, it very much affects the potency of an employer's threat, as does the opposite situation in which the state establishes a generous social insurance system, and separates health insurance from employment, etc. In the case of immigrants, the legal regulations a state puts into place necessarily shape the set of alternatives they face, hence the pressures under which their labor is offered.

Viewing matters this way should make at least two things clear. First, rather than understand labor in terms of a binary opposition, voluntary or coerced, it is necessary to see that almost all labor not performed for pure pleasure is offered as a result of implicit threats, and that drawing a line must involve drawing a line through a continuum of pressures, not, after all is said and done, on the basis of whether actual consent has been obtained, but on the basis of an evaluation of the legitimacy of the circumstances under which the decision to work has been made. The potency of a threat is only one consideration. In the United States today, I believe, hardly anyone would say that labor performed in order to avoid homelessness or to keep from going cold in the winter, as harsh as those alternatives to labor might be, is coerced labor. Second, to an important extent the alternatives to labor and how disagreeable they may be are shaped by a wide variety of legal rules practically all of which may be changed.

1 John Dawson, "Economic Duress—An Essay in Perspective," 45 *Michigan Law Review* 267 (Jan., 1947)