

2016

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### Recommended Citation

Rana M. Jaleel, *The Wages of Human Trafficking*, 81 Brook. L. Rev. (2016).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol81/iss2/3>

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# The Wages of Human Trafficking

*Rana M. Jaleel*<sup>†</sup>

## INTRODUCTION

President Barack Obama has pledged a “zero tolerance” approach to human trafficking—a crime that, in his words, “ought to concern every person, because it is a debasement of our common humanity[,] . . . every community, because it tears at our social fabric[,] . . . every business, because it distorts markets[, and] . . . every nation, because it endangers public health and fuels violence and organized crime.”<sup>1</sup> This stance is hardly controversial. Pundits and practitioners alike continue to deplore the occurrence of human trafficking. Yet while President Obama’s remarks may well reflect a growing national and international consensus, recent and conflicting reinterpretations of the elements of human trafficking have destabilized the definition of the crime and thus its scope and meaning.

The legal definition of human trafficking—which is remarkably consistent across U.S. federal<sup>2</sup> and international

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<sup>1</sup> President Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), <http://www.whitehouse.gov/photos-and-video/video/2012/09/25/president-obama-speaks-clinton-global-initiative-annual-meeting#transcript> [<http://perma.cc/Q5HT-62W7>] (follow “Read the Transcript” hyperlink) [hereinafter Remarks by the President].

<sup>2</sup> Section 103 of the Trafficking Victims Protection Act (TVPA) defines “severe forms of trafficking in persons” as either “sex trafficking” (“the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act,” which was “induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age”) or labor trafficking (“the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery”). The TVPA understands the term “commercial sex act” to encompass “any sex act on account of which anything of value is given to or received by any person.” Trafficking Victims Protection Act of 2000, Pub.

law<sup>3</sup>—has been subject to wide-ranging interpretations.<sup>4</sup> Pared to its core elements, human trafficking requires (1) an act (the movement, recruitment, receipt, or harboring of men, women, or children); (2) a means (by force, fraud, or coercion); and (3) a purpose (at a minimum, involuntary servitude, slavery, or sexual or labor exploitation, which may include the removal of organs). While human trafficking was once viewed as functionally equivalent to criminalized sexual gender violence,<sup>5</sup> recent scholarly and legal efforts have targeted labor-sector human trafficking, specifically migrant labor exploitation.<sup>6</sup> This nascent focus on labor exploitation, while a step in the right direction, is nonetheless insufficient to address the global problem of human trafficking. Recent changes in how the U.S. State Department interprets the federal anti-trafficking statute, or the Trafficking Victims Protection Act (TVPA),<sup>7</sup> prove this point.

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L. No. 106-386, div. A, 114 Stat. 1466, 1469-70 (codified as amended in sections of 8, 18, and 22 U.S.C.), *amended by* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; (codified in sections of 8, 18, and 22 U.S.C.), Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); (codified in sections of 18, 22, and 42 U.S.C.), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified in sections of 6, 8, 18, 22, and 42 U.S.C.), Trafficking Victims Protection Act of 2013 Pub. L. No. 113-14, tit. XII, 127 Stat. 54, 136-60 (Title XII of the Violence Against Women Reauthorization Act of 2013) [hereinafter TVPA].

<sup>3</sup> Article 3, paragraph (a) of the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, 344 [hereinafter U.N. Trafficking Protocol], instead sets minimums on what will constitute exploitation. The U.N. Trafficking Protocol defines trafficking in persons as

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

U.N. Trafficking Protocol, *supra*, at 344.

<sup>4</sup> See Sally Engle Merry, *How Big is the Trafficking Problem? The Mysteries of Quantification*, OPENDEMOCRACY (Jan. 26, 2015), <https://www.opendemocracy.net/beyondslavery/sally-engle-merry/how-big-is-trafficking-problem-mysteries-of-quantification> [http://perma.cc/PS3K-N4JF] (discussing how definitions of human trafficking are not only “vague, overlapping, and even contradictory, but . . . [also] changing over time”).

<sup>5</sup> See, e.g., Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1657 (2010) (demonstrating that sex-sector trafficking and prostitution dominate human trafficking policies and debates) [hereinafter Chuang, *Rescuing Trafficking*].

<sup>6</sup> See, e.g., Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609, 609-11 (2014) (noting the emergence of a labor approach to human trafficking) [hereinafter Chuang, *Exploitation Creep*].

<sup>7</sup> Since 2004, the TIP Office has steadily adopted expansive interpretations of “harboring” and “receipt,” terms listed in the act element of international and

In 2012, the U.S. State Department's Trafficking in Persons Office (TIP Office) declared that "many forms of enslavement"<sup>8</sup> lie at the heart of the phenomenon of human trafficking—"[h]uman [t]rafficking can include but does not require movement."<sup>9</sup> This eschewal of any movement or recruitment requirement has resulted in the elimination of any distinction between human trafficking and forced labor.<sup>10</sup> This development, as well as the

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domestic anti-trafficking law. These acts alone are sufficient to support a charge of human trafficking—no movement or recruitment by a third party is required. During the George W. Bush administration, the distancing of human trafficking from any movement requirement facilitated President Bush's position that all prostitution (whether consensual or not) could constitute a violation of human trafficking law. Now that the Obama administration has broken with the Bush-era interpretation and set its sights on non-sex-sector labor trafficking, the absence of the movement requirement has assumed new significance. The lack of a movement requirement has allowed prior distinctions between trafficked and nontrafficked forced labor to conceptually crumble. In this way, the Obama administration may subsume all forced labor within the ambit of human trafficking. *See infra* Section III.A; *see also* Chuang, *Exploitation Creep*, *supra* note 6, at 609-11. Forced labor is defined under international law as "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 voluntarily." Convention Concerning Forced or Compulsory Labour, *opened for signature* June 28, 1930, 39 U.N.T.S. 55, 58 (entered into force May 1, 1932); *see also* Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *opened for signature* June 17, 1999, T.I.A.S. No. 13405, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000); Convention Concerning the Abolition of Forced Labour, *opened for signature* June 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959); Convention Concerning Forced or Compulsory Labour, *opened for signature* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932).

<sup>8</sup> Article 1 of the International Convention to Suppress the Slave Trade and Slavery establishes the benchmark definition of slavery: "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." International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263 [hereinafter 1926 Slavery Convention].

<sup>9</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 33 (2012). Until 2009, the TIP Office actively resisted substantive conflation of the concepts of human trafficking and slavery, naming force, fraud, and coercion—not slavery—as the root of the crime. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2009) ("The common denominator of trafficking scenarios is the use of force, fraud, or coercion to exploit a person for profit."). By 2014, however, the conflation of human trafficking with slavery was all but complete. *See, e.g.*, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 29 (2014) ("Human trafficking can include, but does not require, movement. People may be considered trafficking victims regardless of whether they were born into a state of servitude, were transported to the exploitative situation, previously consented to work for a trafficker, or participated in a crime as a direct result of being trafficked. At the heart of this phenomenon is the traffickers' goal of exploiting and enslaving their victims and the myriad coercive and deceptive practices they use to do so.").

<sup>10</sup> *See infra* Section III.A; *see supra* note 7 and accompanying text. The U.S. Department of State linked forced labor to human trafficking in the following manner:

Also known as involuntary servitude, forced labor may result when unscrupulous employers exploit workers made more vulnerable by high rates of unemployment, poverty, crime, discrimination, corruption, political conflict, or even cultural acceptance of the practice. Immigrants are particularly vulnerable, but individuals also may be forced into labor in their own countries. Female victims of forced or

simultaneous equation of human trafficking with slavery, has far-reaching implications for human trafficking's meaning. In essence, these interpretative shifts have pulled the legal conceptualization of human trafficking in two directions. In the first, human trafficking is a *labor problem*, as the elimination of distinctions between trafficked forced labor and nontrafficked forced labor suggests. In the second, it is an *ownership* problem of a different sort: human trafficking is *slavery*.

These developments raise extremely pressing questions. How does the United States enforce a "zero tolerance" approach to human trafficking if it has no clear, conceptual understanding of what the act of human trafficking entails? To put a finer point on it, what is human trafficking "more like": a labor problem or a slavery problem? The stakes of these questions become readily apparent when we recognize the revocation of the movement requirement and the equation of human trafficking with slavery as indicative of an early, emerging split between U.S. and international perspectives on human trafficking. While the United States has characterized human trafficking as a problem of slavery, the international community has largely sought to preserve distinctions between the variety of acts encompassed by anti-trafficking instruments, including distinctions between slavery, forced labor, and an array of lesser labor exploitations.<sup>11</sup>

The urgency of the problem of human trafficking, together with its doctrinal complexity, demands a principled exploration of its limits. This article takes up the challenge by asking a seemingly straightforward question: What is the wrong of human trafficking?

In the 14 years since the advent of contemporary human trafficking laws, this question has yet to be addressed by legal scholars. Now it is time to ask the question anew. For while we may intuitively believe that we will "know it when we see it," the continuously transfiguring terrain of human trafficking law has only offered disparate examples of *what* human trafficking might be with no underlying theoretical account of *why* all acts

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bonded labor, especially women and girls in domestic servitude, are often sexually exploited as well.

*What is Modern Slavery?*, U.S. DEP'T OF STATE, <http://www.state.gov/j/tip/what/index.htm> [<http://perma.cc/8QUC-FA68>] (last visited Mar. 4, 2016).

<sup>11</sup> See *infra* Part IV; see also Chuang, *Exploitation Creep*, *supra* note 6, at 619-20 (describing how the TIP Office has used forced-labor creep to justify expanding its "bureaucratic turf" to cover practices traditionally considered by the International Labor Organization (ILO) and the U.S. Department of Labor's International Labor Affairs Bureau to be nontrafficked forced labor (i.e., forced labor not preceded by a process of movement or recruitment) and also how "slavery creep" has been used to justify the international expansion of U.S. criminal authority).

prohibited by extant law are in fact actionable. While there are no fast and easy rules or tests to identify human trafficking, settling a conceptual approach helps ensure a more targeted, steady, and uniform forward course of action by establishing *what* we understand human trafficking to be, *why* we act against it, *how* we might prevent it, and in turn, what it means to be a free person. Accounting for the wrong of human trafficking is therefore no theoretical indulgence, but an operational imperative.

Accordingly, this article does not analyze human trafficking from within the familiar frames of transnational crime, sexualized gender violence, or human rights. Nor does it consider human trafficking to be best described as a problem of slavery or a problem faced largely by migrant workers. Each of these approaches fails to capture the core wrong of human trafficking. Instead, this article views human trafficking as a labor and employment problem that fits under what I call the new low-wage/vulnerable labor paradigm. In this account, human trafficking is wrong because it exploits worker vulnerability, regardless of migrant status, by forcing, coercing, or deceiving people into performing work (including commercial sex acts) under intolerable, illicit, or degrading conditions.<sup>12</sup> Therefore, human trafficking law should not be understood solely as a corrective to state failure to manage migrant workers, but rather as a lens through which to see the connections between human trafficking and domestic low-wage labor markets.

In advocating for a low-wage/vulnerable labor approach to human trafficking, this article argues that U.S. attempts to cast human trafficking as in essence a crime of enslavement are both descriptively and normatively incorrect. Casting all forms of human trafficking as slavery does not reflect the actual conditions and contexts from which prosecutable charges of human trafficking may arise. Further, the charged rhetoric of slavery can obscure how dire the conditions of erstwhile “freely chosen” work can be, thus reinforcing an inaccurate and perilous normative divide that casts all that falls beyond the rubric of slavery as “free.” The question that scholars and practitioners of human trafficking law should be asking at this time is not “what does it mean to be a slave in the twenty-first century?” but rather “what does it mean to be a *worker* in the twenty-first century global economy?”

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<sup>12</sup> The term “vulnerable labor” denotes a methodological commitment to Martha Albertson Fineman’s vulnerability theory, which emphasizes the structural and institutional arrangements that the state has or will create to manage human vulnerability. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

Additionally, this article contends that the emerging labor approach, which uses migrant labor as a template for understanding human trafficking, is also descriptively and normatively incorrect. Current human trafficking debates that offer the separate but overlapping paradigms of slavery and labor migration as palliatives to dominant criminal gender violence approaches are conceptually conflicted. They are caught between construing the wrong of human trafficking as a violation of equality (with a slavery paradigm positing a discriminatory dimension to a problem of individual ownership) or as a violation of labor rights (understood in the classic sense as collective rights that govern structural relationships between employers and employees and not solely as the provisioning of equal treatment for exploited migrant laborers).

Neither approach accounts for the full range of acts proscribed by the widely adopted U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (U.N. Trafficking Protocol)<sup>13</sup> and the TVPA.<sup>14</sup> Simply put, the legal definition of human trafficking encompasses more than acts of slavery, be it sexual or otherwise, and applies to both migrant and nonmigrant workers. Less severe exploitation, including the accumulation of poor labor conditions that individually would not constitute actionable exploitation, have also been interpreted as prohibited under the legal definition of human trafficking—and largely overlooked.<sup>15</sup> This discretionary oversight means that many migrant *and* nonmigrant low wage and vulnerable workers whose working conditions might warrant a charge of human trafficking fail to receive legal analysis or attention.

Theorizing and foregrounding the wrong of human trafficking through the new low-wage/vulnerable labor paradigm captures the full range of offenses proscribed by human trafficking law, from slavery to forced labor and other lesser

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<sup>13</sup> See *supra* note 3 and accompanying text.

<sup>14</sup> See *supra* note 2 and accompanying text.

<sup>15</sup> See INT'L LABOUR OFFICE, THE COST OF COERCION: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 5-9, 13 (2009) [hereinafter ILO GLOBAL REPORT 2009] (describing the Delphi indicators of human trafficking, which do not depend upon physical force or coercion); see also INT'L LABOUR OFFICE, OPERATIONAL INDICATORS OF TRAFFICKING IN HUMAN BEINGS: RESULTS FROM A DELPHI SURVEY IMPLEMENTED BY THE ILO AND THE EUROPEAN COMMISSION (2009) [hereinafter ILO OPERATIONAL INDICATORS REPORT] (listing operational indicators for human trafficking and detailing how they were established via the Delphi method); see *infra* Section IV.C.

exploitations.<sup>16</sup> All the while, the new paradigm understands the wrong that binds these offenses to be a collective wrong that inheres in the inner workings of global labor markets, manifests in specific employment conditions, and affects migrant and nonmigrant workers alike. Further, the new paradigm identifies how the existing labor paradigm—which focuses almost exclusively on the specific vulnerabilities of migrant labor—has limited analytically the would-be structural scope of a labor analysis by construing the wrong of human trafficking as functionally an equality or autonomy wrong. That view, what I call the labor migration paradigm, focuses on affording migrant workers the same protections as nonmigrant workers in order to end exploitative working conditions. Recent empirical research, however, has thrown the general conditions of the U.S. low-wage labor market—and the efficacy of existing labor and employment protections—into question.<sup>17</sup> Given this context, this article suggests that a low-wage/vulnerable labor paradigm best describes the wrong of human trafficking while avoiding the pitfalls of narrow analyses of equality.

While a labor migration paradigm helpfully emphasizes how *cumulative* labor conditions, characterized by subtly coercive and deceptive employment practices, can also cross the threshold into human trafficking,<sup>18</sup> it cabins the full import of that claim. It does so by limiting its analysis to migrant workers and specific types of work, often identifying “sectors prone to human trafficking”—from agriculture, home health care, service, begging, domestic work, and manufacturing, to name a few<sup>19</sup>—as the target of legal and social interventions.<sup>20</sup> In contrast, the new

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<sup>16</sup> See Jonathan Todres, *Human Rights, Labor, and the Prevention of Human Trafficking: A Response to A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. DISCOURSE 142, 145-46 (2013) (arguing that labor-based and human rights-based responses are not mutually exclusive). Crucially, understanding the wrong of human trafficking as a low wage/vulnerable labor wrong does not automatically put it at odds with human rights or even criminal law frameworks, although a classic understanding of labor rights can mitigate against the excessive individualism of these two approaches. *Id.* at 152-53. And in New York, for example, violations of state labor laws are increasingly met with criminal prosecution. See Juan Gonzalez, *State Attorney General Eric Schneiderman Says Those Who Knowingly Violate State Labor Laws Will Face Criminal Charges and Possible Jail Time*, N.Y. DAILY NEWS (July 13, 2012, 3:00 AM), <http://www.nydailynews.com/new-york/state-attorney-general-eric-schneiderman-knowingly-violate-state-labor-laws-face-criminal-charges-jail-time-article-1.1113537> [<http://perma.cc/XLT7-Y7A5>].

<sup>17</sup> See *infra* Section IV.D.

<sup>18</sup> See ILO GLOBAL REPORT 2009, *supra* note 15, at 13; ILO OPERATIONAL INDICATORS REPORT, *supra* note 15; see also Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 86-87 (2012).

<sup>19</sup> UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 73-74 (2009).

<sup>20</sup> *Id.*



paradigm's more general emphasis on the conditions of low-wage and vulnerable work prevents a too-narrow focus on job sectors or categories whose susceptibility to human trafficking may change over time.<sup>21</sup> Additionally, the new low-wage/vulnerable labor paradigm frames the problem of labor as one that explicitly traverses the categories of migrant and nonmigrant workers. In doing so, it eliminates the current framework's latent equality argument, which splinters the full potential of a labor analysis by viewing migrant labor as the template for understanding human trafficking.

In this way, the new low-wage/vulnerable labor paradigm prevents us from ignoring how contemporary conditions of low-wage work—including unenforced or underenforced employment law—not only *enable* human trafficking, but *continue to exploit* those who survive their trafficking only to enter what can be an equally exploitative low-wage labor market. Therefore, the new low-wage/vulnerable labor paradigm does not foreground movement/recruitment as the heart of the offense and cautions against axiomatic separations between, for example, trafficked and nontrafficked forced labor. That hard distinction rests on the fallacy that nontrafficked forced laborers inevitably have more control or agency than nontrafficked workers—an assumption that empirical research and on-the-ground observation have since undermined.<sup>22</sup> Anchoring the wrong of human trafficking in a low-wage/vulnerable labor paradigm thus mitigates the too-narrow focus on migrant labor while also correcting for the overwhelming emphasis on sex-sector human trafficking that still dominates legal efforts to quell the crime.<sup>23</sup>

The new low-wage/vulnerable labor paradigm would, however, not understand all instances of human trafficking as crimes of enslavement. The wrong of human trafficking exists less in its proximate relationship to slavery than it does in the systemic problems that inhere in low-wage labor. Perhaps most importantly, understanding the wrong of human trafficking as a low-

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<sup>21</sup> See *infra* Section IV.A; ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 56 (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf> [<http://perma.cc/XLT7-Y7A5>] (defining low-wage industries as those whose “median wage for front-line workers was less than 85 percent of the city’s median wage”).

<sup>22</sup> See BERNHARDT ET AL., *supra* note 21, at 5.

<sup>23</sup> Despite an increased interest in labor, prosecutions worldwide remain fixated on sex-sector human trafficking. The U.S. Department of State’s 2014 Trafficking in Persons Report estimates that in 2013, the 44,758 trafficked persons identified worldwide resulted in only 9,460 prosecutions and 5,776 convictions. Only 470 of these convictions were related to labor trafficking, while the rest were related to sex trafficking. 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 9, at 45.

wage/vulnerable labor one will ward off the conceptual collapse of human trafficking and slavery by fostering principled discussion of where we now want to draw the line between exploitation of all stripes and what constitutes the impermissible ownership of persons as a *jus cogen* norm and crime of universal jurisdiction.<sup>24</sup>

Finally, in advocating for a low-wage/vulnerable labor approach to human trafficking, this article does not mean to suggest that all low-wage labor abuses should be found to constitute human trafficking or that human trafficking law alone should be responsible for remedying widespread domestic workplace violations. Rather, this article seeks to establish a conceptual framework for human trafficking that identifies the problems of domestic low-wage labor that are at human trafficking's very core. Acknowledging the overlap between human trafficking and domestic low-wage labor violations is not only necessary for a clear conceptual understanding of the wrong of human trafficking, it is also doctrinally supported by the expansive definition and remedies offered by our anti-trafficking federal statute, the TVPA, and international law.

Since its 2003 reauthorization, the TVPA provides not only criminal avenues of redress, but also an underutilized private right of action for persons whose exploitation constitutes human trafficking.<sup>25</sup> This private right of action was intended to provide more comprehensive relief to trafficked persons than that offered by civil suits brought solely under the Fair Labor Standards Act,<sup>26</sup> analogous state employment laws, and state

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<sup>24</sup> See 1926 Slavery Convention, *supra* note 8. Often thought to involve the destruction of a person's juridical personality—the turning of a person with innate and assigned rights into a “thing”—slavery is an international crime and a peremptory or *jus cogen* norm. See Paul Finkleman, *Slavery in the United States: Persons or Property?*, in *THE LEGAL UNDERSTANDING OF SLAVERY* 105-34 (Jean Allain ed., 2012). *Jus cogen*, or “compelling law,” norms outrank all other norms and principles.

International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of “obedience to superior orders” . . . , the universal application of these obligations whether in time of peace or war, their non-derogation under “states of emergency,” and universal jurisdiction over the perpetrators of such crimes.

M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 63 (1996).

<sup>25</sup> Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4), 117 Stat. 2875, 2878.

<sup>26</sup> Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2012).

common law torts.<sup>27</sup> Encouraging TVPA-based civil litigation of the lesser labor exploitation claims of migrant and nonmigrant workers is one way to put the new low-wage/vulnerable labor paradigm into practice and enable courts to establish the proper boundary between labor exploitation that amounts to human trafficking and other civil or regulatory labor exploitation.

Accordingly, this article proceeds in five parts. Part I provides an overview of contemporary human trafficking law, including the civil and criminal rights of action offered by the TVPA. It then analyzes the dominant legal paradigms used to interpret human trafficking—the transnational criminal law, human rights, and gender justice paradigms. Each of the current paradigms fails in its own way to adequately explain or capture the full range of acts prohibited by human trafficking law. Crucially, each also diverts attention from the core problem of human trafficking—low-wage and vulnerable labor.

Part II examines the emerging labor paradigm, which assumes its primary target to be migrant labor. Part III considers how a conceptual fusion between criminal acts of forced movement and economically motivated migration has fueled the vision of migrants as the paradigmatic subjects of human trafficking law.

Part IV critiques the labor migration paradigm by assessing the strengths and limitations of the new low-wage/vulnerable labor

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<sup>27</sup> The U.N. Trafficking Protocol, the TVPA, and other anti-trafficking legal instruments provide remedies for trafficked persons beyond those offered by employment law. These include, for example, the TVPA's "T-visa," which enables some trafficked persons to remain in the country. See TVPA, Sec. 107(e), *supra* note 2. The TVPA also allows trafficked persons to recover payment of wages that exceed the federal minimum wage, an option that the FLSA does not provide. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A § 112(a)(2), 114 Stat. 1466, 1488 (codified at 18 U.S.C. § 1593 (2012)). Additionally, the FLSA does not apply to all workers. Most relevant to this discussion, perhaps, the FLSA also does not cover forced prostitution. For these reasons, a human trafficking legal framework can address exploitation without the categorical restrictions imposed by domestic labor law, bridge migrant and nonmigrant worker exploitation, and provoke a broader discussion about labor, immigration, and general low-wage and vulnerable labor exploitation in the United States and around the world. For a more detailed discussion of civil remedies and the TVPA, see Kathleen Kim & Kusia Hreshchysyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 24-25 (2004) (assessing the benefits of civil litigation for trafficked persons as an alternative and in addition to criminal prosecution), Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 431, 437-38 (2011) (explaining why civil remedies under the TVPA have largely been unexplored by persons who have endured sex-sector human trafficking), and Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking*, 107 COLUM. L. REV. 1655 (2007) (analyzing TVPA civil suits and reasons for their low numbers). Notably, these authors also retain a focus on migrant labor.

paradigm for human trafficking. To do so, this part juxtaposes the labor migration paradigm with recent sociological, empirical work on low-wage labor in the United States, which reveals widespread and systematic violations of the most basic workplace protections—the sort assumed to have been long addressed by domestic labor law. From this perspective, it becomes clear that the labor migration paradigm is conceptually tethered to specific ideas about who is most vulnerable to exploitation—ideas that are neither descriptively nor normatively correct.

Part V then returns to the issue of slavery. Here, the article analyzes how a new low-wage/vulnerable labor paradigm for human trafficking might interface with ongoing debates about which vision of slavery should be controlling: *de facto* or *de jure*. This discussion helps illuminate what is at stake, in part, in naming the wrong of human trafficking and crafting a legal distinction between exploitation and impermissible ownership: the conversion of people into property. Understanding the wrong of human trafficking as a low-wage/vulnerable labor one best fits anti-trafficking law's broad scope while still preserving the integrity of related legal concepts. In short, human trafficking law, in doctrine and practice, must be understood within the context of historical and contemporary conceptions of labor and situated within the annals of the laws of work.

## I. THE PARAMETERS OF HUMAN TRAFFICKING LAW

Contemporary human trafficking laws were adopted a scant 15 years ago but have since taken a firm hold of the legal imagination. While human trafficking has become a global subject *du jour*, fault lines have emerged in the primary anti-trafficking legal instruments, namely the U.N. Trafficking Protocol and the TVPA. Intentionally broad language and vaguely defined enumerated elements have opened the door to conflicting legal approaches to human trafficking.

Iterations of three conceptual approaches to interpreting human trafficking law currently dominate law and policy discussions. They are the transnational criminal law paradigm, the human rights paradigm, and the gender violence paradigm. Each has particular strengths and limitations in its characterization of the wrong of human trafficking. On balance, the shifting conceptualizations of human trafficking occur in response to the early dominance of a transnational criminal approach to human trafficking—one notable for an almost singular focus on the sexual

exploitation of women and children.<sup>28</sup> This approach, championed by the George W. Bush administration, conflated voluntary and involuntary prostitution and other commercial sex acts, leading to the neglect of actionable instances of other forms of labor exploitation while obscuring the exploitation of men and LGBTQ persons.<sup>29</sup>

A. *The Elements of Human Trafficking*

Contemporary human trafficking law began at the turn of the millennium with the passage of two legal instruments: the U.N. Trafficking Protocol<sup>30</sup> and the TVPA.<sup>31</sup> The U.N. Trafficking Protocol has with notable consistency served as the template for subsequent human trafficking law. Since its enactment, this law has mushroomed into an international legal system comprised of “regional treaties, abundant interpretive guidance, a range of policy instruments, and a canon of state practice.”<sup>32</sup> According to the United Nations Office on Drugs & Crime’s 2014 Global Report on Trafficking in Persons, the U.N. Human Trafficking Protocol has been ratified by 162 countries and is nothing short of a “success story.”<sup>33</sup>

The U.N. Trafficking Protocol and the TVPA introduced new definitions of human trafficking that, by virtue of their capaciousness and calculated association with transnational organized crime, ushered the issue to international prominence.<sup>34</sup> The TVPA and the U.N. Trafficking Protocol each provide a tripartite definition of human trafficking. The crime requires an act (the movement, recruitment, receipt, or harboring of men, women, or children) accomplished by a means (by force, fraud, or coercion) for a purpose (at a minimum, involuntary servitude,

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<sup>28</sup> Chuang, *Rescuing Trafficking*, *supra* note 5, at 1657.

<sup>29</sup> *See id.*

<sup>30</sup> *See* U.N. Trafficking Protocol, *supra* note 3.

<sup>31</sup> *See* TVPA, *supra* note 2. *See* U.N. Trafficking Protocol, *supra* note 3.

<sup>32</sup> *See* Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 791 (2009).

<sup>33</sup> UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 15 (2014).

<sup>34</sup> The 1998 and 1999 intergovernmental meetings that resulted in the U.N. Human Trafficking Protocol were by all accounts rushed; their primary purpose was to achieve an international cooperation agreement on its parent convention, the U.N. Convention Against Transnational Organized Crime. *See* Gallagher, *supra* note 32, at 789-93. That human trafficking was placed under the auspices of the U.N. Office on Drugs and Crime and not kept in its historical home within the U.N. human rights system was itself quite controversial. For a full description of the process, *see id.*

slavery, or sexual or labor exploitation, which may include the removal of organs).<sup>35</sup>

From the start, the definition of human trafficking has hardly been exact. For the sake of consensus among states, the elements of the emerging crime of human trafficking were left intentionally vague. The elements of the means component (force, fraud, and coercion) are also not explicitly defined in international law. Further, under the U.N. Trafficking Protocol and the TVPA, the question of what degree of coercion or abuse of power satisfies this definitional prong remains an open one.<sup>36</sup> These instruments also codify a distinction between sexual exploitation and labor exploitation—a framework that has contributed to the gendered, hypersexual focus of much human trafficking law, policy, and discourse.<sup>37</sup> Moreover, the U.N. Trafficking Protocol and the TVPA each neglect to define the new legal term “exploitation” in a targeted way, fostering uncertainty as to the conditions under which exploitation amounts to human trafficking.<sup>38</sup> It is also important to note that exploitation is enumerated not as a separate offense, but as an element of the crime of human trafficking.<sup>39</sup>

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<sup>35</sup> See TVPA, *supra* note 2, at § 103; U.N. Trafficking Protocol, art. 3, *supra* note 3.

<sup>36</sup> See Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 409, 414 (2011) (noting how “the laws addressing human trafficking continue to struggle with delineating the dimensions of coercion” and calling for a theory of “situational coercion,” . . . [which] recognizes that instead of experiencing coercion through direct threats of harm from their traffickers, many trafficked workers comply with abusive working conditions due to circumstances that render them vulnerable to the exploitation”).

<sup>37</sup> No reputable research has ever demonstrated that women are more vulnerable to human trafficking than men, yet women’s sexual exploitation is the most commonly identified form of human trafficking. As a result, it appears that “a disproportionate number of trafficking victims are women.” See Michael T. Tien, *Human Trafficking: The Missing Male Victim*, 18 PUB. INT. L. REP. 207, 208 (2013) (arguing that the 2013 reauthorization of the TVPA, which was added as an amendment to the Violence Against Women Act’s reauthorization, “ignores the prominence of male victims of human trafficking in the U.S. and abroad”); see also LAURA MARÍA AGUSTÍN, *SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS, AND THE RESCUE INDUSTRY* 39 (2007) (observing that in human trafficking discourse, “men are routinely expected to encounter and overcome trouble, but women may be irreparably damaged by it”); Mike Dottridge, *Introduction*, in *COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD* 17 (Global Alliance Against Traffic in Women ed., 2007) (arguing that human trafficking is perceived as a gendered issue and that “countries overlook the possibility that men can be trafficked”); Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 317, 320-21 (2007) (arguing that enforcement agencies’ focus on sex trafficking neglects the larger trafficking phenomenon).

<sup>38</sup> See ILO GLOBAL REPORT 2009, *supra* note 15, at 6 (noting that “for the legal concept of exploitation, which underpins the definition of trafficking in the Palermo Protocol, there is almost no precedent in international law, nor is there much national legislation”).

<sup>39</sup> See *infra* Section III.A.

As a result, both the U.N. Human Trafficking Protocol and the TVPA as written are amenable to vast interpretative shifts. Anne T. Gallagher, who participated in drafting the U.N. Trafficking Protocol, has lauded the broad definitional scope of human trafficking as the U.N. Trafficking Protocol's main achievement.<sup>40</sup> Gallagher has also praised the U.N. Trafficking Protocol's gender-neutral language and inclusion of not only sex-sector human trafficking, but also other kinds of labor-market exploitation.<sup>41</sup> The strength of such an expansive definition of exploitation, however, is also its downside, in that it requires a continual recalibration of its focus and scope. These adjustments, which implicate the legal recognition of human trafficking, also affect the implementation of human trafficking law. Given, for example, the specific enforcement mechanisms authorized by the TVPA, identifying what constitutes human trafficking and in turn what actions the TVPA requires in response to it have significant geopolitical implications.

While the TVPA and the U.N. Trafficking Protocol are compatible by letter of the law, the United States' influence and ability to set the legal and policy terms of the global anti-trafficking debate are difficult to overstate.<sup>42</sup> The TVPA is infamous for the reach of its unilateral global sanctions regime.<sup>43</sup> The TVPA's congressional sponsors believed that the eradication of human trafficking in the United States depended upon *other* countries' behavior—namely their explicit cooperation with U.S. anti-trafficking efforts. The resulting unilateral sanctions regime empowers the U.S. government to deny nonhumanitarian, nontrade-related foreign assistance to any government perceived as noncompliant with U.S.-defined anti-trafficking “minimum standards.”<sup>44</sup> In applying these minimum standards, the U.S. State Department considers and classifies countries as either origin, transit, or destination countries and issues an annual Trafficking in Persons Report (TIP Report) that details the state of human trafficking in countries across the world. Notably, the United States did not begin assessing its own human trafficking issues and including them in the TIP Report until 2012.<sup>45</sup>

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<sup>40</sup> Gallagher, *supra* note 32, at 791.

<sup>41</sup> *Id.*

<sup>42</sup> See Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 438-39 (2006).

<sup>43</sup> *Id.*

<sup>44</sup> See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, § 108, 114 Stat. 1466, 1480-81 (codified at 22 U.S.C. § 7106 (2012)).

<sup>45</sup> See Remarks by the President, *supra* note 1.

It is against this backdrop that efforts to move human trafficking beyond the criminal prostitution reform debates that characterized its infancy<sup>46</sup> occur—a backdrop where countries' prior classifications as origin, transit, or destination countries linger even as new, expansive, non-sex-sector labor-inclusive interpretations of human trafficking are deployed, and even as the operational parameters of what constitutes human trafficking shift. This conceptual, legal, and geopolitical landscape has complicated the recognition of lesser labor offenses that might constitute human trafficking while keeping legal efforts too tightly focused on migrant labor. These shortfalls have occurred due to shifting paradigms that have, in turn, contributed to a shifting conception of the wrong of human trafficking.

*B. The Dominant Paradigms of Human Trafficking*

Contemporary human trafficking law rests at the intersection of three dominant paradigms: transnational criminal law, gender violence, and human rights. In practice, this conflation is nearly impossible to pry apart, so steeped is the language of criminal justice in the wrenching image of the stereotypical trafficked person: a woman, stripped of all rights, spirited to a strange locale, and forced into “sexual slavery.” Subsequent sections of this article will further explain how, given the current doctrine, adopting a low-wage labor paradigm best addresses the challenges of human trafficking, including sex-sector human trafficking. First, however, close and comparative attention to how various legal paradigms conceive of the wrong of human trafficking—what they reveal and what they obscure—can help illuminate the underlying visions of human freedom that motivate and animate human trafficking law. These conceptions of freedom have produced inadequate legal outcomes by failing to address and describe the range of actions prohibited by anti-trafficking instruments. To ground the analysis of the wrong of human trafficking, this article asks: What kind of wrong is envisaged by the paradigms offered to explain it, who is at risk of suffering from it, and how does this notion of the wrong interact and intersect with other innovations in human trafficking law to construct the definition of freedom?

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<sup>46</sup> See *infra* Section I.B.2, Part II.



## 1. Human Trafficking as a Transnational Crime

A criminal and law enforcement approach dominates current human trafficking law and policy.<sup>47</sup> This criminal law paradigm deems the wrong of human trafficking a public one, wrought primarily by individual wrongdoers.<sup>48</sup> The U.N. Human Trafficking Protocol and the TVPA each conceive of human trafficking as a critical state security issue deeply tied to transnational organized crime syndicates that facilitate clandestine and often illicit migration that targets primarily women and children.<sup>49</sup> As such, efforts to stem or eliminate its occurrence exceed the sovereign prerogatives of immigration and border control that typically occupy a single state. Instead, as a transnational crime, human trafficking is construed as a global problem best approached by all states acting in concert. In other words, as a transnational crime, human trafficking is not merely an affront to sovereign state interests. It is an affront to justice and humanity that every state has a duty to criminalize.

The transnationality of the crime of human trafficking therefore dictates powerful and extensive state intervention. Because *networks* of bad individuals commit the crime, the state is empowered to flush them out from wherever they might be, including ostensibly private spheres. By this logic, almost all efforts to combat human trafficking in an individual

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<sup>47</sup> See ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 68 (2010) (arguing that “the 1990s marked an important shift in the international legal framework around trafficking” away from human rights approaches and toward a transnational organized crime model); Micah N. Bump, *Treat the Children Well: Shortcomings in the United States’ Effort to Protect Child Trafficking Victims*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 73, 73 (2009) (“[T]he U.S. Government is taking a law enforcement approach and not a victim-centered approach to combating trafficking.”); Jennifer M. Chacón, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1616 (2010); Dottridge, *supra* note 37, at 1 (“[T]he priority for governments around the world in their efforts to stop human trafficking has been to arrest, prosecute and punish traffickers, rather than to protect the human rights of people who have been trafficked.”); Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 345-52 (2007); Jayne Huckerby, *United States of America (USA)*, in *COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD* 230, 247 (Global Alliance Against Traffic in Women ed., 2007) (explaining how the U.S. government’s “prosecutorial focus often runs counter to the rights of trafficked persons”); Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 MICH. J. INT’L L. 53, 57-67 (2011).

<sup>48</sup> JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* (1823) (describing the theory of utilitarianism and the tension between criminal punishment and individual freedom).

<sup>49</sup> See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, § 102, 114 Stat. 1466, 1466; U.N. Trafficking Protocol, *supra* note 3, at 343.

state's domestic or civil sphere are justified, including the surveillance of private financial data by search engines alert to suspicious expenditures,<sup>50</sup> enhanced border control,<sup>51</sup> and armed raids of residences rumored to be housing commercial sexual activity.<sup>52</sup>

While the wisdom of encouraging states to engage in what Jonathan Simon calls "governing through crime"<sup>53</sup> is debatable, the stamp of transnational criminality and its expressive function is a weighty one that demands intensive mobilization of state resources, as well as moral condemnation.<sup>54</sup> From the sheer breadth of state participation, the enduring visibility of the issue, and its emphasis on the global nature of the problem, the transnational criminal law paradigm has

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<sup>50</sup> See John Reed, *Palantir Now Fighting Human Traffickers, Instead of the U.S. Army*, FOREIGN POLICY: THE COMPLEX (June 19, 2013, 10:24 PM), <http://foreignpolicy.com/2013/06/19/palantir-now-fighting-human-traffickers-instead-of-the-u-s-army/> [<http://perma.cc/2NPN-BSLE>].

<sup>51</sup> Article 11 of the U.N. Trafficking Protocol and the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, each require the strengthening of border controls and enhanced cooperation between border control agencies. See U.N. Trafficking Protocol, *supra* note 3, at 348; Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2241 U.N.T.S. 480, 512-13 [hereinafter Migrants Smuggling Protocol]. Additionally, Article 12 of those Protocols mandates that states ensure the integrity and security of their travel documents, while Article 13 of both Protocols requires state parties to verify at the request of another state party the legitimacy and validity of any travel documents purportedly released by them. See U.N. Trafficking Protocol, *supra* note 3, at 348; Migrants Smuggling Protocol, *supra*, at 513.

<sup>52</sup> See Melissa Ditmore & Juhu Thukral, *Accountability and the Use of Raids to Fight Trafficking*, ANTI-TRAFFICKING REV. 134, 134 (2012) (arguing that "[d]ata from the United States suggests that raids conducted by local law enforcement agencies are an ineffective means of locating and identifying trafficked persons").

<sup>53</sup> For Jonathan Simon, "governing through crime" describes a remarkable and pronounced shift in the organization of late twentieth-century civil society, which he distills to three key corollaries: (1) the rise of crime as a crucial strategic issue, (2) the ability of the "fight against crime" to legitimate actions that have other motivations, and (3) the seepage of crime and criminal justice metaphors into other social institutions, including schools. Simon uses this phrase to describe how, since the 1990s, the United States has "built a new civic and political order structured around the problem of violent crime." In Simon's account, these attempts to govern through crime have been profoundly undemocratic. Whether democracy is valued for its liberty or equality-enhancing features, he argues, governing through crime has exacerbated U.S. class and race-based social striations, as "the vast reorienting of fiscal and administrative resources toward the criminal justice system at both the federal and state level, has resulted in a shift aptly described as a transformation from a 'welfare state' to a 'penal state.'" The role of the state has shifted from providing for its populace to policing it. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 3-6 (2007).

<sup>54</sup> Criminal law's expressive function is significant. The transnational criminalization of human trafficking expresses an international consensus that such exploitation is beyond the pale. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 822 (1994) (describing how law affects social valuation).

certainly enjoyed some success, and it has undoubtedly safeguarded the rights and lives of many who would otherwise have suffered without recognition or redress.

The harms that the transnational criminal law paradigm obscures, however, are equally consequential.<sup>55</sup> First, by framing the wrong of human trafficking as a public offense committed by outlying wrongdoers, the criminal law paradigm ignores the structural conditions that facilitate human trafficking and diverts attention away from them. Such structural conditions include the inner workings of global markets,<sup>56</sup> the interplay between immigration law and securitized border control,<sup>57</sup> weak or underenforced labor laws,<sup>58</sup> the broader private law backdrops against which human trafficking and other relevant law operates,<sup>59</sup> and the state's role and interests in maintaining these orders.<sup>60</sup> The transnational criminal law paradigm's problems, then, lie in its focus on the individual wrongdoer and not the economic motivations of migration. In this way, the criminal law paradigm fails to appropriately consider the labor dimensions of human trafficking and casts trafficked persons as hapless victims forced into extreme, violent conditions, instead of agents who have made choices, however limited, that have led to exploitative outcomes.<sup>61</sup> A human rights approach has sought to address the shortcomings of the transnational criminal law paradigm with some success and some limitations. In the next section, I analyze this human rights perspective before returning to a particularly entrenched criminal perspective that demands more concerted attention: the equation of human trafficking with sex-sector human trafficking, which locates the wrong of human trafficking in gender violence.

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<sup>55</sup> See *supra* note 47 and accompanying text; see also Shamir, *supra* note 18, at 79 ("Yet despite this worldwide mobilization against human trafficking, the academic literature on anti-trafficking efforts has been largely critical of the emerging [criminal] legal paradigm.").

<sup>56</sup> See, e.g., Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 545, 550 (2009).

<sup>57</sup> See, e.g., James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking"*, 49 VA. J. INT'L L. 1, 5-6 (2008).

<sup>58</sup> See, e.g., Shamir, *supra* note 18, at 105-06.

<sup>59</sup> See, e.g., TSACHI KEREN-PAZ, *SEX TRAFFICKING: A PRIVATE LAW RESPONSE* 1 (2013) (discussing the rarity of private law claims against traffickers).

<sup>60</sup> See, e.g., Hathaway, *supra* note 57, at 5 (arguing that human trafficking laws, as presently configured, are "often convenient for (if not essential to) the project of globalized investment and trade"); Haynes, *supra* note 47, at 350 (arguing that practical, political, and theoretical concerns hinder U.S. efforts to protect trafficked persons).

<sup>61</sup> See Haynes, *supra* note 47, at 373.

## 2. Human Trafficking as a Human Rights Issue

In the wake of human trafficking's criminalization, human rights advocates have struggled to infuse a human rights perspective into the dominant transnational criminal law paradigm.<sup>62</sup> Instead of targeting perpetrators for punishment, human rights advocates seek a "victim friendly" global legal regime—one focused on and responsive to the needs and rights of trafficked persons themselves. In the words of legal scholar Allegra McLeod, "[a] human rights approach would emphasize prevention and care for those at risk of, or victim to, trafficking; it would not rely primarily on criminal law paradigms of innocent, 'iconic' victims, and individual, culpable trafficker defendants."<sup>63</sup> Human trafficking victims would, for instance, be understood to possess an untrammelled right to assistance—not one conditioned on their willingness or ability to cooperate with law enforcement in the prosecution of their traffickers.<sup>64</sup> Forced repatriation would also be prohibited. McLeod's argument illustrates the aspirational pull of human rights, where appeals in its name place the "human"—undifferentiated, equal to all others—at the analytic center of the legal problem.

If the aspirations of human rights law are laudable, critics argue that a human rights paradigm can nonetheless obscure the wrong of human trafficking.<sup>65</sup> Like the transnational criminal

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<sup>62</sup> The early and vast gulf between the criminalization of human rights perspectives is practically a truism. Human rights provisions in the U.N. Trafficking Protocol do not mirror the language of obligation found in the criminalization provisions. Instead, states are only required—in "appropriate cases" and "to the extent possible under its domestic law"—to "consider" and "endeavor to undertake" assistance and protection for trafficked persons. See U.N. Trafficking Protocol, *supra* note 3, at 345-47.

<sup>63</sup> Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83, 112 (2010). In fact, only one human rights obligation, the duty to furnish those subjected to human trafficking with access to a system to seek compensation, is mandatory. "Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damages suffered." U.N. Trafficking Protocol, *supra* note 3, at 345.

<sup>64</sup> See 22 U.S.C. § 7105(b)(1)(E)(i)(I) (2012) (requiring that prior to receiving assistance, the trafficked person "is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons or is unable to cooperate with such a request due to physical or psychological trauma"); see also Haynes, *supra* note 47, at 345 ("The United States approaches its efforts to combat trafficking in human beings from a law enforcement perspective, with the justification for victim assistance emerging from the willingness and ability of victims to cooperate with law enforcement."); Todres, *supra* note 16, at 150 ("In fact, the TVPA does not ensure victims' rights to assistance but rather conditions assistance to certain victims on their willingness to cooperate with law enforcement in the prosecution of their traffickers. That is hardly a rights-based approach." (citation omitted)).

<sup>65</sup> See Shamir, *supra* note 18, at 80 (contending that "[f]ar from being marginalized, a human rights approach to trafficking constitutes an important element of the current global anti-trafficking campaign and has actually become part of the

perspective that it seeks to correct, human rights approaches foreground individual harm and wrongdoing at the expense of broader analysis of the global market interactions that spawn human trafficking.<sup>66</sup> As a result, human rights paradigms tend to provide a way of understanding human trafficking that may check the power of individual states or groups of states (targeting, for instance, the poor treatment of commercial sex workers by their traffickers), but may fail to reign in other arrangements of multistate or corporate power (as when human rights violations are marshaled in the service of ulterior economic interests or used to mask or justify outright land grabs and predatory wars).<sup>67</sup>

What such criticism also illustrates is the potential for human rights and transnational criminal law/security approaches to converge—especially, as the next section details, in the name of gender justice.

### 3. Human Trafficking as Gender Violence

U.S. federal and state prosecutors have reported that definitional—and actively evolving—ambiguities in legal interpretations of human trafficking have fostered tremendous degrees of discretionary differentiation between acts that could, for example, easily be classified as either human trafficking or routine prostitution.<sup>68</sup> If sex-sector human trafficking has suffered

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problem”); Hathaway, *supra* note 57, at 26 (arguing that “the antitrafficking campaign has also resulted in significant collateral human rights damage by providing a context for developed states to pursue a border control agenda under the cover of promoting human rights”); Wendy Chapkis, *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*, 17 GENDER & SOC’Y 6, 923 (2003) (analyzing how the TVPA facilitates anti-immigration policies at the expense of aiding trafficked persons); Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS: J. WOMEN CULT. & SOC’Y 45 (2010) (arguing that anti-trafficking coalitions of Christian evangelical activists and some feminists prefer and have spurred a criminal justice approach to human trafficking that results in high rates of incarceration and enhanced border security).

<sup>66</sup> See Shamir, *supra* note 18, at 95 (noting that “while human rights are concerned with the power of the individual relative to the state, labor rights have tended to be more collective oriented, focusing on the power of groups of workers (‘labor’) in relation to employers (‘capital’)”).

<sup>67</sup> See Karen Engle, “*Calling in the Troops*”: *The Uneasy Relationship Among Women’s Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189, 189-90 (2007) (arguing that human rights and women’s rights are used to justify armed interventions *contra* traditional humanitarian goals); Vasuki Nesiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. J. 75, 76 (2004).

<sup>68</sup> See, e.g., Brooke Grona-Robb, *Prosecuting Human Traffickers*, PROSECUTOR, Sept.-Oct. 2010 (explaining in part how some officers and prosecutors might see prostitution instead of human trafficking, and vice versa); Katy Steinmetz, *Oakland Launches Pimp-Shaming Website*, TIME (July 2, 2014), <http://time.com/2946597/oakland-launches-pimp-shaming-website> [<http://perma.cc/6LD4-2K7K>] (describing an Oakland

from an overzealous inclusionary impulse, less severe forms of labor-sector human trafficking have been largely excluded from legal action or inquiry. The discretionary differentiation between human trafficking and non-sex-sector forms of labor exploitation has yet to be fully appreciated, analyzed, or theorized. This gap persists despite efforts to reorder the relationship between human trafficking and forced labor, complicating the definitional boundaries that delimit not only human trafficking and slavery, but also lesser exploitation and slavery. This gap persists in part due to the early and enduring framing of human trafficking as gender violence.<sup>69</sup>

A gender violence paradigm construes the wrong of human trafficking specifically as one of violence against women. Crucially, this conceptualization of human trafficking is amenable to criminal law and human rights approaches and remedies, which tend to focus on punishing individual wrongdoers or enhancing individual rights, respectively. Both criminal law and human rights paradigms demand an enhanced state presence, if not the express involvement of an international governing order or transnational alliance of states, in curbing the occurrence of gendered sexual violence. It is therefore important to note that while gender violence could be addressed outside of the criminal justice system, in practice, charges of gender violence—largely understood as *sexual* violence and as violations of women’s human rights—are often couched in the language of criminal justice and trigger a criminal justice response.<sup>70</sup>

A human rights approach therefore does not necessarily threaten, but rather can encourage, the recognition of sexual violence (if not all forms of human trafficking) as a crime that transverses domestic and international registers.<sup>71</sup> Under a human rights paradigm, “women’s human rights” are increasingly

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police campaign that all but equated human trafficking with prostitution, whether coerced or chosen).

<sup>69</sup> See, e.g., Chang & Kim, *supra* note 37, at 320-21 (arguing that enforcement agencies’ focus on sex trafficking neglects the larger trafficking phenomenon).

<sup>70</sup> See, e.g., KIRSTIN BUMILLER, IN AN ABUSIVE STATE 1-2 (2008) (analyzing how feminist efforts to end sexual violence have fostered a troubling alliance with the neoliberal state and criminal justice system); JEFFREY FAGAN, NAT’L INST. OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 25-27 (1996), <https://www.ncjrs.gov/pdffiles/crimdom.pdf> [<http://perma.cc/YD9R-RZNZ>] (detailing how the criminalization of domestic violence can fail to address its realities and arguing for the presence of informal or extralegal modes of redress).

<sup>71</sup> See, e.g., Mary Robinson, High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. Doc. E/2002/68/Add. 1, at 3-4 (2002), <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf> [<http://perma.cc/V6J4-JBU4>].

understood as gendered protections against violence, specifically sexual violence.<sup>72</sup> The criminal law paradigm shares this view of sexuality as a person's—especially a woman's—intimate, private, and personal province where she alone is sovereign.<sup>73</sup> This common take on sexuality's centrality to individual, private self-conceptualization underpins the moral ordering of the gender violence paradigm. This moral ordering then animates both a criminal law paradigm (wherein gendered human trafficking is an outrage to justice and an offense against the public) and a human rights paradigm (wherein gendered human trafficking is an affront to the rights of humanity, especially women).

Certainly, on questions of enforcement and remedy, human rights and criminal law paradigms diverge on the question of how to best nurture and protect the private sexual self. The criminal law paradigm would ex post recruit the state to punish sexual threats. Conversely, in some ways the human rights paradigm would ex ante seek to augment the conditions that would allow for the private sexual self's flourishing, urging an international order of states to adopt specific duties and obligations designed to foster those ends. But this divergence rests simply on the type of relationship between the law and the private sexual self. It does not deny the existence or primacy of a private sexual self, query the cultivation of a private sexual self as a key element of freedom, or question how or why “women's human rights” as an abstract category became largely synonymous with efforts to protect a private sexual self instead of, for example, a public, economic one.

What are the consequences that flow from understanding sex as wedded to a private, intimate self, and how do they affect how we theorize the wrong of human trafficking? Can one “own” one's sexual self—is one's sex market alienable—or is one

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<sup>72</sup> See, e.g., Rana Jaleel, *Weapons of Sex, Weapons of War: Feminisms, Ethnic Conflict and the Rise of Rape and Sexual Violence in Public International Law During the 1990s*, 27 CULTURAL STUD. 1 (2013).

<sup>73</sup> This autonomy/bodily integrity/equality fusion is supported throughout constitutional case law and ties in to how we understand slavery. See *infra* Part V; see also Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 349 (2006) (describing how abolitionists argued “that prostitution necessarily constitutes a form of trafficking because it necessarily reproduces and enforces subordination of women by men”); Melissa Farley, *Preface to PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS* xi, xiv (Melissa Farley ed., 2003); KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 1 (1995); Dorchen Leidholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO WOMEN'S L.J. 133, 133-37 (1993); Catharine MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 (1993).

indistinguishable from it? Does one's sexual self lie at the heart of one's humanness, indivisible from it?

These questions have persisted since the earliest human trafficking jurisprudence, which concerned the twentieth-century obsession with "white slavery," or the movement of women across borders for sexually exploitative purposes. In 1904, the International Agreement for the Suppression of White Slave Traffic was adopted.<sup>74</sup> Additional conventions were signed in 1910,<sup>75</sup> 1921,<sup>76</sup> 1933,<sup>77</sup> and 1950.<sup>78</sup> Each of these anti-trafficking/anti-slavery initiatives were passed at historical moments when labor—particularly women's labor and therefore also women's social roles—were in great upheaval.

At the beginning of the twentieth century, industrialization and the movement of unsupervised working class girls into city factory work prompted anxieties about sexual propriety. The 1920s, 1930s, and 1950s also saw shifting labor demographics following economic turmoil and world war.<sup>79</sup> The 1990s, which kicked off our current human trafficking legal regime, witnessed a new phase of global labor migration and economic interdependency at the end of the Cold War.<sup>80</sup>

This history suggests that human trafficking law has always attempted to mediate social concerns (particularly in the U.S. context) about what separates legitimate labor from acts of slavery—and has done so through the social category of gender. This millennium's early U.S. prostitution reform debates, which dominated early human trafficking legal efforts,<sup>81</sup> are no exception. At issue was the question of whether prostitution, including noncoerced or chosen prostitution, would be understood as sexual slavery and subsequently abolished, or as sex work subject to labor

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<sup>74</sup> International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

<sup>75</sup> International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 98 U.N.T.S. 101.

<sup>76</sup> International Convention for the Suppression of the Traffic in Women and Children, *opened for signature* Sept. 30, 1921, 53 U.N.T.S. 39 (entered into force Mar. 31, 1922).

<sup>77</sup> International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

<sup>78</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271 (entered into force July 25, 1951).

<sup>79</sup> See MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920* (Linda K. Kerber & Nell Irvin Painter eds., 1995); SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 65-66 (1991).

<sup>80</sup> See SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW* 186 (1990).

<sup>81</sup> See, e.g., Chuang, *Rescuing Trafficking*, *supra* note 5, at 1657-58.



regulations and protections. Beneath the prostitution reform controversy lurk legal and intra-feminist disagreements on the broader relationships between gender, sex, labor, race, and the meaning of freedom, not to mention the scope and aptness of theorizing gender justice through violence.

A gender violence approach to human trafficking has been especially pernicious given contemporary human trafficking law's bifurcation of "sexual exploitation" from "labor exploitation."<sup>82</sup> Singling out the sexual as a distinct category of exploitation has furthered the conflation of human trafficking with the gendered and sexualized victimization of women and children.<sup>83</sup> This selective reading of human trafficking law downplays the prevalence of non-sex-sector trafficked workers while offering a vexed portrait of the relationship between women, sex, and violence that often silences the inquiry into whether "sex work" can be a consensual, chosen economic vocation—however limited the set of "choices" may be—instead of a criminal act.<sup>84</sup> Moreover, a gender violence approach risks rendering men who are trafficked for commercial sex purposes invisible.<sup>85</sup> It also creates a false divide between sex-sector trafficking and other forms of labor trafficking, all while erroneously masking the sizable sexual vulnerability of those who are trafficked into non-sex-sector forms of work.<sup>86</sup>

These heated and protracted debates are significant and ongoing. Critical to any effort to distinguish the wrong of human trafficking, they implicate far more than the criminal law paradigm per se. They bear on what the labor migration paradigm conceives of as "labor," the meaning of gender justice and human rights, as well as the legal meaning and social import of slavery.

Sex work advocates, whether they champion prostitution and other commercial sex practices as viable career paths or ultimately strive to reduce or eradicate their occurrence, contend

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<sup>82</sup> See *supra* notes 2-3 and accompanying text.

<sup>83</sup> See *supra* note 37 and accompanying text.

<sup>84</sup> See generally MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 276-85 (1999) (arguing that taking money in exchange for sexual services is analogous to other types of work).

<sup>85</sup> See Tien, *supra* note 37.

<sup>86</sup> See, e.g., GRACE MENG, HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 1 (2012), [http://www.hrw.org/sites/default/files/reports/us0512ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf) [<http://perma.cc/Q3EQ-3Z8L>]; Amanda M. Kjar, *U-Visa Certification Requirement is Blocking Congressional Intent Creating the Need for A Writ of Mandate and Training—Undocumented Immigrant Female Farmworkers Remain Hiding in the Fields of Sexual Violence and Sexual Harassment*, 22 SAN JOAQUIN AGRIC. L. REV. 141, 142 (2013).

that such activities are work.<sup>87</sup> In this view, those who perform such work deserve the full spectrum of labor protections that would accompany any other employment. A sex work approach to human trafficking understands its wrong in the language of labor—as unprotected, dangerous work often performed by women who may find themselves unable to find other gainful employment.<sup>88</sup> Crucially, understanding the core wrong of human trafficking’s sexual exploitation element as materially similar to its labor exploitation element helps right the imbalance that pulls the lion’s share of legal attention towards sex-sector trafficking, rendering human trafficking all but synonymous with sexual exploitation. It can also correct for the gendered imbalance and moral judgment that often attends discussions of prostitution and other commercial sex acts by shifting attention away from the sexual self (whose alleged private nature is imminently debatable)<sup>89</sup> and towards the structural economic realities faced by global low-wage workers.

The continuities between a sex work approach and a broader labor migration paradigm are worth emphasizing, particularly in our current historical moment when labor and slavery paradigms are each paradoxically on the ascent. What the early human trafficking paradigms show is the continuous give and take between punishing wrongdoers whose actions injure humanity (the transnational criminal law paradigm), the shaping of a clearer notion of what protections humanity by birthright deserves (the human rights and gender justice paradigms), and the acknowledgement of the material conditions and economic frailties of workers (via a sex work/labor paradigm). From each vantage, the meaningfulness and role of consent as a marker of

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<sup>87</sup> It is important to see how the goals of human rights (to “preserve the visibility of the person as an individual” and emphasize freedom of choice) can dovetail with labor perspectives. See Halley et al., *supra* note 73, at 350. After all, labor rights are human rights. See Gallagher, *supra* note 32, at 847 (“From its earliest days to the present, human rights law has loudly proclaimed the fundamental immorality and unlawfulness of one person appropriating the legal personality, labor, or humanity of another.”). But a traditional labor paradigm does not place individual rights holders at the center of the legal problem. See Shamir, *supra* note 18, at 80 (“Individual and collective labor and employment rights emerged in the attempt to bring about structural changes to labor markets that would strengthen workers’ bargaining positions and, eventually, lead to the redistribution of wealth between capital and labor. They are, therefore, better suited than the traditional human rights tools for addressing the institutional aspects of the labor market exploitation on which trafficking is structured.”).

<sup>88</sup> The ILO has taken tentative steps to recognize sex work as labor. See, e.g., ILO GLOBAL REPORT, *supra* note 15, at 196 (noting that forced labor occurs in private, where it is difficult to monitor and enforce labor law, and can involve commercial sex).

<sup>89</sup> See Katherine M. Franke, *Putting Sex To Work*, 75 DENV. U. L. REV. 1139, 1141 (1998) (arguing for an understanding of how the concept of sexuality functions socially that is not overly focused on private sexual identity or private sexual acts).

individual freedom assumes greater or lesser importance, depending on how each paradigm values individual choice versus structural or collective rights within its analysis of freedom. Unlike the transnational criminal law, human rights, and gender violence paradigms, the labor migration paradigm and the new low-wage/vulnerable labor paradigm each understand labor market structures and poor employment conditions as underlying the wrong of human trafficking, thus moving away from an emphasis on individual choice or wrongdoing.

## II. THE LABOR MIGRATION PARADIGM OF HUMAN TRAFFICKING

Individual harms of equality and autonomy figure prominently in each of the dominant approaches to understanding the wrong of human trafficking. While human trafficking does undoubtedly cause individual people individual damage, centering the individual at the heart of an analysis of human trafficking is a grave error. An overt focus on individual harm obscures the structural conditions that drive human trafficking—the inner workings of global labor markets and poor employment conditions that are not well regulated, if regulated at all.

In recognition of the shortcomings of the dominant paradigmatic approaches to human trafficking, a labor perspective has recently emerged. This labor approach frames human trafficking as an issue of power, focusing *ex ante* on the structural imbalances that characterize work relationships in “labor sectors susceptible to [human] trafficking.”<sup>90</sup> As labor law scholar Hila Shamir explains, to address the labor wrong of human trafficking, a labor paradigm “turns to strategies of collective action and bargaining, protective employment legislation, and contextual standard setting, in its attempt to remedy the unequal power relations in labor sectors susceptible to trafficking.”<sup>91</sup> Such an approach would empower states and relevant international agencies to assume a strong and active role in regulating the legal backdrop against which global markets function.<sup>92</sup> A labor approach also

calls attention to other elements of the legal order that shape power relations in labor markets, such as the background rules of private law (including, for example, property, contracts, and torts), immigration regimes, relevant trade policies, criminal law, border-crossing practices, and certain welfare policies, to the extent that these elements of the

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<sup>90</sup> Shamir, *supra* note 18, at 81-82.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

legal order affect the bargaining positions of the parties to a labor contract in various labor sectors.<sup>93</sup>

The emerging labor paradigm, however, has retained a focus on extreme migrant exploitation, splintering the full potential of human trafficking law.

#### A. *The Rise of a Labor Approach to Human Trafficking*

Suspending the question of whether prostitution should be abolished, decriminalized, or regulated like any other kind of work, a groundswell of noted legal scholars nonetheless agree: the early overemphasis on gendered sexual exploitation—be it through criminal law, human rights, gender violence, or gender equality paradigms—has overshadowed other forms of exploitation expressly targeted by human trafficking law, namely non-sex-sector labor exploitation.<sup>94</sup> Recent U.S. and international human trafficking law and policy have mirrored this scholarly consensus, quietly steering anti-trafficking efforts beyond prostitution reform debates. In 2010, the Obama administration effectively reversed the Bush administration’s equation of voluntary prostitution with human trafficking. As the State Department’s 2010 TIP Report states, “Prostitution by willing adults is not human trafficking regardless of whether it is legalized, decriminalized, or criminalized.”<sup>95</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> See Dina Francesca Haynes, *Exploitation Nation: The Thin Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 48 (2009) (criticizing the distinction between human trafficking and “ordinary” labor migration as a “false dichotomy”); Daryl Li, *Offshoring the Army: Migrant Workers and the U.S. Military*, 62 UCLA L. REV. 124 (2015) (noting the nascent prevalence of labor analyses of human trafficking while detailing the insufficiency of the TVPA to protect third-country national workers who are contracted by the U.S. military from extreme labor abuse); Chuang, *Exploitation Creep*, *supra* note 6, at 611 (noting how recent interpretations of human trafficking law have made “the concept of labor itself explicitly relevant to a field that had long been narrowly focused on sexual exploitation”); Note, *Counteracting the Bias: The Department of Labor’s Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV. 1012 (2013) [hereinafter, *Counteracting the Bias*] (arguing that human trafficking is increasingly understood as falling along a spectrum of abusive labor practices and detailing the Department of Labor’s mandate and renewed efforts to address human trafficking).

<sup>95</sup> U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 8 (2010). In contrast, see the 2004 U.S. Department of State Fact Sheet, which views prostitution, voluntary or otherwise, as a correlate if not a cause of human trafficking, stating that “where prostitution has been legalized or tolerated, there is an increase in the demand for sex slaves.” BUREAU OF PUB. AFFAIRS, U.S. DEP’T OF STATE, *FACT SHEET: THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING* (2004), <http://2001-2009.state.gov/r/pa/ei/rls/38790.htm> [<http://perma.cc/VX6B-8GRH>].

Meanwhile, the International Labor Organization (ILO) has attempted to exert new authority within human trafficking law through its close association with forced labor, a bailiwick of the ILO. In recognition of the prevalence of human trafficking and other “modern forms of slavery,” the ILO has recently adopted a new and legally binding Protocol to ILO Convention No. 29, the 1930 Forced Labour Convention.<sup>96</sup> Touted as “bring[ing] the existing ILO Convention [No.] 29 Concerning Forced Labour . . . into the modern era” to address practices such as human trafficking, the Protocol “establishes a common framework for the 177 ILO member states that have ratified Convention [No.] 29.”<sup>97</sup>

Specifically, the Protocol strengthens the international legal framework by creating new obligations to prevent forced labor, protect trafficked persons, and provide access to remedies—including compensation—regardless of trafficked persons’ legal status.<sup>98</sup> The Protocol encourages intergovernmental cooperation, including bilateral and multilateral agreements, to eradicate forced labor and human trafficking for the purposes of forced or compulsory labor.<sup>99</sup> Crucially, the Protocol requires governments to take measures to better protect workers, particularly low-skilled migrant workers, from fraudulent and abusive recruitment practices.<sup>100</sup>

The ILO’s interest in human trafficking as a form of forced labor serves as a corrective to the organization’s notable absence in the discussions that culminated in the drafting and adoption of the U.N. Trafficking Protocol.<sup>101</sup> The ILO’s involvement has

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<sup>96</sup> Int’l Labour Org., *Text of the Protocol to the Forced Labour Convention, 1930*, ILO Doc. 9A (June 11, 2014), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_246615.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_246615.pdf) [<http://perma.cc/HH6Q-BKCR>].

<sup>97</sup> Press Release, Int’l Labour Org., ILO Adopts New Protocol to Tackle Modern Forms of Forced Labour (June 11, 2014), [http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS\\_246549/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_246549/lang-en/index.htm) [<http://perma.cc/EN6R-JTAC>].

<sup>98</sup> See *Text of the Protocol to the Forced Labour Convention, 1930*, *supra* note 96, at 6-8.

<sup>99</sup> *Id.* at 8. The ILO does not assume that all forced labor is human trafficking, noting that “[f]orced labour, contemporary forms of slavery, debt bondage and human trafficking are closely related terms though not identical in a legal sense. Most situations of slavery or human trafficking are however covered by ILO’s definition of forced labour.” *The Meanings of Forced Labour*, INT’L LABOUR ORG. (Mar. 10, 2014), [http://www.ilo.org/global/topics/forced-labour/news/WCMS\\_237569/lang-en/index.htm](http://www.ilo.org/global/topics/forced-labour/news/WCMS_237569/lang-en/index.htm) [<http://perma.cc/C48D-MEQ7>].

<sup>100</sup> See *Text of the Protocol to the Forced Labour Convention, 1930*, *supra* note 96, at 6.

<sup>101</sup> See, e.g., Director-General of the Int’l Labour Org., *Stopping Forced Labour: Global Report Under the Follow-up to the ILO Declaration on the Fundamental Principles and Rights of Work*, 48, 100 (2001), <http://www.ilo.org/wcmsp5/groups/public/---dgreports/->

transformed the tenor of the legal debates over what human trafficking essentially *is* by portraying the wrong of human trafficking as a labor wrong and abandoning the Bush administration's interpretive lens of gendered morality. While this nascent labor paradigm is an improvement, it is not without limitations. The ILO has managed to shift the focus of human trafficking debates only by building on the legal architecture of extant human trafficking law. That law, grounded in the logic of transnational crime, understands human trafficking in ways that collapse distinctions between consensual economic migration and the act of movement thought necessary to support a charge of human trafficking. While the Obama administration and the ILO thus recognize a labor wrong (among a muddle of others) at the heart of human trafficking, they adopt a specific species of labor as the object of their best efforts: migrant labor.

### B. *Construing Labor as Migrant Labor*

The turn to migrant labor as the object of human trafficking law is also reflected in an emerging consensus among both labor and human trafficking legal scholars, who contend that a labor paradigm attuned to the vulnerabilities of migrant labor best recognizes and addresses the harms of human trafficking.<sup>102</sup> This paradigm casts human trafficking as largely the lot of the poor and the foreign who find themselves funneled into commercial sex work, construction, food service, home health care, agricultural work, or other forms of low-wage, poorly regulated labor with little recourse to the labor and employment protections enjoyed by native born or citizen workers.<sup>103</sup>

To stem the tide of human trafficking, some scholars, like Hila Shamir, advocate for a general strengthening of the complex of laws (labor, criminal, and private) that affect structural relationships between employers and employees.<sup>104</sup>

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<sup>102</sup> See, e.g., Bravo, *supra* note 56, at 547; Shamir, *supra* note 18, at 79-80; *Counteracting the Bias*, *supra* note 94, at 1013.

<sup>103</sup> The emphasis on migrant labor is due in part to a conflation of certain categories of work and the migrant status of the worker. For example, the National Labor Relations Act (NLRA) is often cited as a law that fails migrant workers because it defines the term "employee" to exclude in part "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home." National Labor Relations Act, 29 U.S.C. § 152(3) (2012). While agricultural and domestic workers do not categorically enjoy the protections of the NLRA, the Act makes no distinction between migrant and nonmigrant workers. *Id.*

<sup>104</sup> See, e.g., Shamir, *supra* note 18, at 81-82.

Others, like labor and constitutional law expert James Gray Pope, suggest that the prohibition against “new slavery”<sup>105</sup> should incorporate support for “selected labor rights,” including the right to change employers, the right to bargain collectively, and the right to freedom of association, among others.<sup>106</sup> Pope’s approach would help secure what legal scholar Karen Bravo calls “free labor” (or the ability of workers to freely alienate their labor across borders via a liberal trade and migration regime)<sup>107</sup> in part by affording migrant workers the same protections provided to citizens.<sup>108</sup>

Yet how recent interpretative changes in the conceptual meaning of human trafficking affect the operational parameters of human trafficking law is not assessed or explained in these works.<sup>109</sup> Where human trafficking begins and lesser exploitation ends “remains hotly contested”<sup>110</sup>—especially with the absence of any movement requirement and the simultaneous reordering of all human trafficking as slavery. Setting the wrong of human trafficking as a low-wage/vulnerable labor one helps shift the parameters of human trafficking debates towards the free approach advanced by these scholars while integrating the labor conditions of native/citizen workers more firmly into analyses of exploitation—what it is and how it operates.

As the prior analysis of the dominant paradigms shows, the act of movement or recruitment was at the outset considered uniquely critical in isolating and recognizing a specific population thought to be particularly vulnerable to exploitation, namely migrants or internally displaced persons. From the first, anti-trafficking law targeted the harms and vulnerabilities associated with migration, aiming to protect the least protected persons for whom migrants served as the model: those people without or unable to access home state protections—people in flux. Debates

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<sup>105</sup> James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849, 1851 (2010); see also Bravo, *supra* note 56 (advocating for a “free labor” approach to human trafficking that eliminates barriers to migration and secures work protections for migrant laborers).

<sup>106</sup> Pope, *supra* note 105, at 1853; see also Bravo, *supra* note 56, at 557.

<sup>107</sup> Bravo, *supra* note 56, at 547 (arguing that “through the liberalization of labor, economic and trade liberalization principles and theories can be used to harness the power of the market to combat human trafficking and to further human rights protection as a whole”).

<sup>108</sup> *Id.*; see also Pope, *supra* note 105, at 1870.

<sup>109</sup> See also Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607 (2012) (arguing that the resuscitation of the Peonage Abolition Act of 1867 might aid federal efforts to prosecute human trafficking).

<sup>110</sup> Chuang, *Rescuing Trafficking*, *supra* note 5, at 1656-57.

about the movement requirement remained debates about how to best protect, first and foremost—if not exclusively—this at-risk population. As the ILO explained its adherence to the movement requirement, trafficked forced laborers “are probably even worse off than non-trafficked victims” who were thought to exercise greater degrees of agency and control over work conditions.<sup>111</sup>

Recognizing that labor paradigm advocates have focused on migrant labor for legal, strategic, and ideological reasons illuminates how their position has not kept pace with transformations in how we interpret the elements necessary for a criminal or even civil charge of human trafficking. Other scholars have understood these developments as an “unmaking” of human trafficking law—as the destruction of the legal integrity of the crime of human trafficking.<sup>112</sup> Instead, I view these shifts as indicative of the tension at the heart of the definition of human trafficking, inscribed within the codified split between labor and sexual exploitation, between economic and equality (nondiscrimination) interests, whose meanings are themselves predicated on the paradigms adopted for their interpretation.

In this way, a labor migration paradigm—while undoubtedly promoting the collective rights of workers—nevertheless carries within it an embedded equality argument rooted in group identity. It understands the rights of migrant workers as uniquely diminished within the global market. Migrant workers are not treated as equals to citizen workers, who are understood as largely protected by domestic law and able to enjoy access to shared sociocultural resources. This dichotomized view of labor exploitation casts migrant worker treatment as an affront to a liberal notion of freedom premised on equality, while the low-wage/vulnerable work conditions that engender worker exploitation regardless of citizenship status remain outside legal attention.

Understanding the wrong of human trafficking as a labor wrong that predominantly befalls migrant workers allows us to see several significant harms that criminal law, human rights, and assorted gender paradigms obscure. By framing human trafficking as a migrant labor issue, the labor migration paradigm

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<sup>111</sup> Beate Andrees & Mariska N.J. van der Linden, *Designing Trafficking Research from a Labour Market Perspective: The ILO Experience*, 43 INT'L MIGRATION 55, 64-65 (2005) (explaining the ILO's position during the U.N. Trafficking Protocol negotiations). The ILO's current position regarding the relationship between human trafficking and forced labor is currently much more nuanced. See *infra* Section IV.C.

<sup>112</sup> See Chuang, *Rescuing Trafficking*, *supra* note 5, at 1706-08; *Counteracting the Bias*, *supra* note 94, at 1015-16.



foregrounds the movement of workers of all genders and persuasions across borders or to otherwise nonnative locales. Doing so reveals the vulnerabilities and interdependencies that inhere in the human condition<sup>113</sup>—particularly human *working* conditions—while retaining a focus on the unique vulnerabilities of those who work beyond the borders of their homeland or place of origin. A labor migration paradigm thus offers a particular portrait of the inner workings of power—one where the struggle lies in perfecting the balance of power between citizen and noncitizen labor arrangements, specifically in sectors thought to be vulnerable to human trafficking.

Unqualified comparison between *all* migrant work and *all* work performed by a state's citizenry, however, may not be the best metric for producing sound law or policy. Differences across work sectors, industries, and job categories may complicate categorical claims that migrant workers are necessarily more exploited than other workers, particularly when the legal threshold for exploitation may be met by both forced and psychologically coerced labor, as well as deceptive or fraudulent recruitment practices that may cumulatively rise to the level of actionable exploitation. Is the wrong of human trafficking, then, best described through an unremitting, if not legally prescribed, focus on migrant labor? What harms would be made visible if states understood migrant labor in ways that also assessed the conditions of low-wage work more broadly, without recourse to worker citizenship status as an unacknowledged template for the violation? In other words, how would we understand the wrong of human trafficking if we reframed human trafficking debates as issues of domestic low-wage/vulnerable work and employment conditions?

Before turning to an exploration of the new low-wage/vulnerable labor paradigm, it is worth noting how the increasing willingness to recognize and address non-sex-sector labor exploitation as legally actionable human trafficking has been accompanied by a tendency to de-emphasize any movement requirement and instead spotlight exploitation as the core harm.<sup>114</sup> Theoretically, this should push against the notion that

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<sup>113</sup> Fineman, *supra* note 12, at 8-12.

<sup>114</sup>

The core of human trafficking is exploitation; trafficking does not necessarily involve movement of individuals across borders. Nevertheless, noncitizens working in the United States are especially vulnerable: Undocumented workers may labor under conditions in which “employers take advantage of their status and fail to pay adequate (or any) wages, discriminate openly in

anti-trafficking efforts should focus almost exclusively on migrant exploitation. Yet the assumption that trafficked labor is largely, if not exclusively, migrant labor lingers within legal descriptions of human trafficking, even though the scope of anti-trafficking law is less than ever limited to migrants. In other words, with the affirmative absence of any movement requirement, the abuse that constitutes actionable exploitation has been legally sundered from its foundational motivation: the vulnerability of migrant workers to various forms of organized exploitation perpetrated by international criminal syndicates.

What persists, however, are the old ties of movement, migrancy, and criminality. To illustrate this claim, the following sections describe the impact of eliminating the movement requirement on legal interpretations of human trafficking law. These sections also explore how the transnational criminal paradigm has conflated migrancy and movement with the harm of trafficking in ways that keep extant labor critiques from looking beyond severe (migrant) exploitation and towards lesser exploitations also prohibited by law that impact migrant and nonmigrant workers alike. Part of the exclusion of lesser labor exploitation from analyses of human trafficking turns on the equation of movement with migrancy and vulnerability, and simultaneously, citizenship with access.

### III. FUSING MOVEMENT AND MIGRATION

The focus on migrant labor has occurred even as the TIP Office has eliminated the movement requirement, demonstrating that the kind of isolation and lack of access to resources or remedies that characterizes human trafficking is not solely achieved by being physically moved, either across a border or within a state. A fusion of movement and migration as equivalent bad acts that befall human trafficking victims has resulted in case law that has been unable to capture the less severe forms of labor exploitation otherwise included in anti-trafficking law. Indeed, an understanding of movement as a prerequisite for a charge of human trafficking relies on an inaccurate perspective of the conditions of both migrancy *and* low-wage work.

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the workplace, and violate labor and safety laws with impunity because of weak laws and weak employer enforcement efforts.”

*Counteracting the Bias*, *supra* note 94, at 1014 (footnotes omitted) (quoting Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 893 (2008)); *see, e.g.*, 2012 TRAFFICKING IN PERSONS REPORT, *supra* note 9, at 13-14.

A. *The Elimination of the Movement Requirement and the Meaning of Exploitation*

The TIP Office's disavowal of any movement requirement is noteworthy as the United States broadens its focus on non-sex-sector labor exploitation. To satisfy the "act" element in the absence of a movement requirement, the TIP Office has adopted expansive interpretations of the enumerated act elements, including "harboring," "receipt," and "obtaining." The Obama administration understands these acts alone as sufficient to support a charge of human trafficking—no movement or recruitment by a third party is required. In this way, prior distinctions between trafficked and nontrafficked forced labor have conceptually crumbled, allowing the Obama administration to subsume all forced labor within the ambit of human trafficking.<sup>115</sup>

Moreover, in the absence of a movement requirement, the exploitation element takes on new significance in ways that transform the relationship between the three elements (act, means, and purpose) of the crime. With "exploitation" as an element, early interpretations of the TVPA and the U.N. Human Trafficking Protocol were not understood to contain an explicit mandate to end human sexual or labor exploitation—they were thought of instead as "process orient[ed]" proscriptions.<sup>116</sup> These instruments were construed as singling out only certain acts that engender exploitation for legal action. In other words, they only prohibit specific forms of dealing ("the recruitment, transportation, transfer, harbouring or receipt of persons" per the U.N. Trafficking Protocol,<sup>117</sup> and "the recruitment, harboring, transportation, provision, or obtaining of a person" per the TVPA) in which people are exploited through force, fraud, or coercion.<sup>118</sup>

Now that exploitation and not movement has become central to the TIP Office's interpretation of human trafficking,<sup>119</sup> the relationship between the act and purpose elements of human trafficking has changed. With the *act of movement* that once underpinned the meaning of "recruitment, harboring, transportation, provision, or obtaining of a person" removed, *exploitation itself* takes center stage. In New York City, for instance, where state trafficking laws are not interpreted to

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<sup>115</sup> See Chuang, *Exploitation Creep*, *supra* note 6, at 610-11.

<sup>116</sup> See Hathaway, *supra* note 57, at 9-11.

<sup>117</sup> U.N. Trafficking Protocol, *supra* note 3, at 344.

<sup>118</sup> See TVPA, *supra* note 2.

<sup>119</sup> See 2012 TRAFFICKING IN PERSONS REPORT, *supra* note 9, at 13-14.

require movement,<sup>120</sup> this has resulted in prosecutions of employers who exploit migrant workers who have already been in the country for some time—a fact pattern that was not always thought to constitute human trafficking.<sup>121</sup>

As a result of this interpretation, anti-trafficking instruments no longer function as strict process-oriented proscriptions. Instead, they now fall in line with anti-trafficking campaigns that aim to “end modern slavery.” This, then, is the point where the TIP Office’s move (1) to classify all forced labor as human trafficking and (2) to view all human trafficking as slavery, with all its populist abolitionary appeal, converge—in an effort to move from much-critiqued “process oriented proscriptions” to wholesale attempts to end exploitation.

A closer analysis of the relevance of movement to the recognition of human trafficking is illustrative in this regard. How human trafficking law has understood migration in relation to the movement requirement has led to problems in how the law identifies acts of human trafficking for both migrant and nonmigrant workers. This in turn affects how the meaning and significance of migration, and therefore movement, shifts with the paradigms applied to human trafficking law—even if these shifts in meaning have been largely unacknowledged.

## B. *A Critique of the Movement Requirement*

### 1. Mistaking Migration as the Harm

The wisdom of requiring movement—not to mention what sort of movement counts (transborder or intrastate) or when the movement had to occur in order to count—has long been a subject of debate. Paradigmatic shifts in interpreting, applying, and enforcing human trafficking law have driven, among other things, the debates over the significance of movement to human trafficking. The debates over movement are in essence debates about what causes the underlying conditions that create and foster exploitation and what those underlying conditions actually are. The early transnational criminal law understanding of human trafficking has led to the notion that migration in and of itself is a harmful act, which has inhibited

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<sup>120</sup> See *Human Trafficking*, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., <http://ocfs.ny.gov/main/humantrafficking/> [<http://perma.cc/Q8Z5-M8ED>] (last visited Mar. 4, 2016).

<sup>121</sup> Suzanne Tomatore & Laura Matthews-Jolly, *Spotlight on 150 Human Trafficking Cases*, CITY B. JUST. CTR. (2013), <http://www.nycbar.org/citybarjusticecenter/images/stories/pdfs/cbjc-iwc-human-trafficking.pdf> [<http://perma.cc/2M2G-95SH>].

the law's ability to recognize the full range of acts prohibited by our primary anti-trafficking instruments.

In the context of the transnational criminal law paradigm, migration and victimhood are closely entwined. The U.N. Human Trafficking Protocol and the TVPA conceive of human trafficking as a critical security issue deeply tied to transnational organized crime syndicates that facilitate clandestine, often illicit, migration and that primarily target women and children.<sup>122</sup> As a result, for U.S. courts, trafficked persons' vulnerability is often tied to their assumed status as unwitting victims far from home.<sup>123</sup>

Definitional ambiguities in the U.N. Trafficking Protocol fostered first-stage debates on whether the crime of human trafficking necessitated transborder movement, either across state borders or within a single state. Indeed, equivocation over the meaning of movement or recruitment is tied to the conceptualization of the wrong. While authors and advocates of the U.N. Trafficking Protocol initially understood the movement requirement as essential to any transnational legal definition of human trafficking,<sup>124</sup> others questioned the effectiveness of this approach. The issue of whether or not the U.N. Human Trafficking Protocol named the internal recruitment, transportation, transfer, harboring, or receipt of persons within a single state as actionable human trafficking fueled accusations that the human trafficking legal regime "while billed as key to the modern fight against slavery, has actually promoted a very partial perspective on the problem of modern slavery."<sup>125</sup>

Assurances and clarifications on the legal meaning of human trafficking soon followed. Subsequent regional and state laws that explicitly included intrastate movement within the auspices of human trafficking ultimately quelled debates about intrastate movement.<sup>126</sup> Yet the issue of the relationship

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<sup>122</sup> See *supra* Part I.

<sup>123</sup> See, e.g., *United States v. Chang Da Liu*, 538 F.3d 1078 (9th Cir. 2008) (involving the recruitment of Chinese women to work in a tea house and who were then forced into prostitution); *United States v. Naovasaaisri*, 150 Fed. Appx. 170 (3d Cir. 2005) (involving the trafficking of "impoverished Thai women" to the United States, where they were forced to pay off their smuggling debts through "prostitut[ion] at brothels, massage parlors, and tanning salons"); *United States v. Gasanova*, 332 F.3d 297 (5th Cir. 2003) (involving J-1 visa fraud in which migrant women did not conduct university research, but were compelled to become topless dancers); Superseding Indictment, *United States v. Soto-Huarta*, No. 7:03-CR-00341 (S.D. Tex. June 24, 2003), ECF No. 55 (involving sex slavery and involuntary servitude charges in a migrant labor smuggling ring turned human trafficking case).

<sup>124</sup> Chuang, *Exploitation Creep*, *supra* note 6, at 630-31.

<sup>125</sup> Hathaway, *supra* note 57, at 4.

<sup>126</sup> The European Convention against Trafficking in Persons prohibits internal trafficking and extends the rights and obligations therein to trafficking taking place

between movement and human trafficking is not put to rest even with the express inclusion of intrastate movement as an act that can trigger human trafficking liability. This enduring tension is arguably attributable to the worry that migration, often equated with forced movement—and not the labor structures and employment conditions into which migrants relocate—is itself the core harm. Early debates on the scope of human trafficking law and the meaning of human trafficking demonstrate the slippage between migration, movement, and this understanding of the wrong of human trafficking.

On January 29, 1998, a roundtable on “The Meaning of ‘Trafficking in Persons’: A Human Rights Perspective” was held in Washington, D.C., by the International Human Rights Law Group. Convened by the Women’s Rights Advocacy Program (WRAP) of the International Human Rights Law Group with the assistance of the Harvard Law School Human Rights Program, participants included human rights activists, scholars, and professionals, who sought to end the human rights abuses of human trafficking and hone a precise working definition of “human trafficking.”<sup>127</sup> All present roundly rejected any border-crossing requirement, be it international, national, state, or intrastate, noting that “the harm to victims can be the same whether they are moved two miles across a national border or 1,000 miles within national boundaries.”<sup>128</sup> For those present, certain “factors” associated with border crossing—not the physical act of crossing a border itself—lay at the heart of human trafficking. The factors generated and agreed upon by roundtable participants included “movement to a foreign or unfamiliar milieu; victims having illegal or non-national status; language, cultural or other barriers; and separation from family and community.”<sup>129</sup> Nonetheless, roundtable participants still deemed it “unfitting and inappropriate that a change in status or conditions without any physical transport, movement or travel should qualify as [human] trafficking.”<sup>130</sup>

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within as well as across national borders. Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report Ch. I, May 16, 2005, C.E.T.S. No. 197 [hereinafter European Trafficking Convention]. The official commentary to the European Trafficking Convention stressed that “trafficking in human beings does not necessarily involve a transnational element: it can exist at [the] national level.” *Id.* § I(a) at ¶ 7.

<sup>127</sup> Ali Miller & Alison N. Stewart, *Report from the Roundtable on the Meaning of “Trafficking in Persons”: A Human Rights Perspective*, 20 WOMEN’S RTS. L. REP. 11, 11 (1998).

<sup>128</sup> *Id.* at 14.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 15.

The rationales for this declaration are not elaborated in the record. What this assertion and omission indicate is the degree to which migration itself is viewed as a harmful act. Here, movement or migration becomes an act instigated (or enabled) by a wrongdoer that is both evidence of wrongdoing and is itself a kind of harm—a direct result of approaching human trafficking through a transnational criminal law framework.

This slippage between the movement requirement, migration, and the harm of human trafficking is on full display in early efforts to distinguish human trafficking from human smuggling.<sup>131</sup> While the definition of human trafficking turns on the existence of forceful, coercive, or fraudulent dealings that lead to sexual or labor exploitation, human smuggling has been historically understood as “a consensual and relatively benign market-based response to the existence of laws that seek artificially to constrain the marriage of surplus labor supply on one side of a border with unmet demand for certain forms of labor on the other side of that border.”<sup>132</sup> The transnational criminalization of human trafficking, however, revived and entrenched aggressive state border securitization and policing strategies, resulting in the attendant criminalization of human smuggling. The U.N. Trafficking Protocol and its parent Convention Against Transnational Organized Crime<sup>133</sup> sought to facilitate interstate cooperation to stamp out human trafficking, intercept traffickers, and control borders through standardized practices such as information exchange, mutual legal assistance, and repatriation procedures.<sup>134</sup>

By ignoring the market dynamics that put workers' bodies in migratory motion and framing efforts to work and survive as illicit criminal enterprises, the transnational criminalization of human smuggling is in essence the transnational criminalization of a market-responsive *labor practice*.<sup>135</sup> Economic migration and the act of movement necessary for a charge of human trafficking were thus conceptually fused and, as such, became the targets of anti-trafficking law. As a result, subsequent attempts to correct

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<sup>131</sup> Prohibited human smuggling entails “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” Migrants Smuggling Protocol, *supra* note 51, § I, art. 3(a).

<sup>132</sup> Hathaway, *supra* note 57, at 5.

<sup>133</sup> See U.N. Trafficking Protocol, *supra* note 3; United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

<sup>134</sup> U.N. Trafficking Protocol, *supra* note 3, at 343-47; Convention Against Transnational Organized Crime, *supra* note 133, at 293-95.

<sup>135</sup> See Hathaway, *supra* note 57, at 5.

for the excesses of the transnational criminal law paradigm retained a heavy, if not exclusive, focus on migrant labor.

This emphasis all but removed the nonmigrant workers whose conditions of work might trigger a charge of human trafficking from legal attention and analysis. The weighty charge of transnational criminality ensured a focus on more extreme forms of exploitation, keeping lesser exploitations prohibited by anti-trafficking law beyond legal purview. Perhaps most critically, the construal of migration as a harm in and of itself has helped preclude critical analyses of how duties and responsibilities are allocated between employers and employees. In other words, the broad nature of the work relationship has often been obscured by a too-narrow focus on the legal status of the worker and the attendant, misguided assumption that the harm, and in fact the wrong of human trafficking, lies in the act of movement/migration itself.

## 2. Rethinking the Relationship Between Movement, Migration, and Harm

When migration is recognized as value neutral, as potentially chosen and compelled by a desire to find work, even “bad” work, the legal significance of movement changes. Movement becomes a cipher for a social or structural lack of access to resources or options instead of something imposed or instigated by bad actors on unwitting victims. Movement becomes a proxy, in other words, for isolation, not simply forced migration. Indeed, when confronted with the choice to seek protection as victims of human trafficking or portray themselves as workers fighting for their rights, RESPECT, a network of European migrant domestic workers whose acronym stands for “Rights Equality Solidarity Power Europe Co-operation Today,”<sup>136</sup> rejected the human trafficking framework, which they felt compromised their efforts to overcome “the feeling of powerlessness among the migrants” and failed to promote “the regularization of undocumented migrants as workers.”<sup>137</sup> In understanding irregular or illegal labor migration as integral to

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<sup>136</sup> *Women Migrant Domestic Workers in Europe are Contributing to European Family Life, to European Economic Growth and to European Welfare Systems*, RESPECT, <http://www.respectnetwork.eu/> [<http://perma.cc/SM7J-AW8S>] (last visited Mar. 4, 2016).

<sup>137</sup> Helen Schwenken, “Domestic Slavery” Versus “Workers Rights”: *Political Mobilizations of Migrant Domestic Workers in the European Union* 11 (Ctr. for Comparative Immigration Studies, Univ. of Calif., San Diego, Working Paper No. 116, 2005), <http://www.antigone.gr/files/en/library/selected-publications-on-migration-and-asylum/eu/070506.pdf> [<http://perma.cc/85NE-CYC6>].



the global economy, they further alleged that the mainstream legal fight against human trafficking “delegitimize[s] and even destroy[s] safer mechanisms of irregular migration.”<sup>138</sup>

If the differing relationships between migration, movement, and vulnerability seem subtle, they are nonetheless significant in legal diagnoses of human trafficking. As the members of RESPECT attest, vulnerability does not stem from migration, even irregular migration. Rather, it emerges from within the larger labor and immigration structures in which it occurs, if not the strictures of human trafficking law itself, when it is interpreted as a process-oriented proscription that focuses legal attention on some kinds of exploitation but not others. In other words, it is the failure to enact and enforce basic labor protections and employment laws that creates vulnerability and isolation, not the act of migration or movement itself.

Thinking through what differentiates trafficked forced labor from nontrafficked forced labor evinces this point. For example, to explain its early adherence to the movement requirement, the ILO relied on the notion that trafficked forced laborers are “probably even worse off than non-trafficked victims,” who were thought to exercise greater degrees of agency and control over work conditions.<sup>139</sup> This distinction, however, is not persuasive.

First, there is a temporal issue with the way that trafficked and nontrafficked forced labor has been differentiated. It is fairly noncontroversial that a migrant worker who is smuggled across a border and/or recruited by an agency or other intermediary into a textbook forced labor situation, where the worker’s wages are withheld and the worker is compelled to labor under threat of violence, would be considered a victim of human trafficking. Indeed, second only to sex-sector human trafficking, this is the classic human trafficking scenario.<sup>140</sup> If, however, a

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<sup>138</sup> *Id.*

<sup>139</sup> See Andrees & van der Linden, *supra* note 111, at 65.

<sup>140</sup> See, e.g., *United States v. Maka*, 2008 U.S. Dist. LEXIS 60823 (D. Haw. Aug. 8, 2008) (involving the smuggling and forced labor of migrant workers from Tonga to a Hawaiian pig farm); *United States v. Ramos*, 130 F. App’x 415, 417 (2005) (involving a labor contractor found guilty of involuntary servitude for smuggling undocumented migrant laborers to Florida citrus growers); *United States v. Bradley*, 390 F.3d 145, 148-49 (1st Cir. 2004) (involving the procurement and compulsion of migrant workers into agricultural work); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1064 (C.D. Cal. 2010) (containing class action claims by Malian child plaintiffs who were allegedly trafficked by cocoa growers into Cote D’Ivoire and forced to work in cocoa fields that supplied cocoa beans to defendants); *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1256, 1270 (N.D. Okla. 2006) (involving Title VII race and national

migrant worker is recruited by an agency, works for a period of months without incident, changes employers, and is then subject to the same sort of exploitation, should this count as human trafficking? Is the worker's migrant status the primary source of vulnerability? Or is it the working conditions that are at issue?

This scenario is far from a mere hypothetical. As mentioned previously, in New York City, where state laws expressly disavow movement as a requirement for human trafficking, the New York City Bar Justice Center's Immigrant Women and Children Project (IWC) reports that such is the case with many of their clients.<sup>141</sup> This example demonstrates how, with the abandonment of the movement requirement, legal interpretations of human trafficking law are coming closer to understanding the wrong of human trafficking as a labor and employment wrong that may befall migrant or nonmigrant workers—even if this is currently underacknowledged and underexplored. When nothing in either the U.N. Trafficking Protocol or the TVPA limits their application to migrant workers, what but an unexamined fusion between migrancy and vulnerability—one that crowds out a robust examination of nonmigrant worker vulnerability—can account for the current conceptual approach to human trafficking, which treats labor exploitation as almost exclusively a migrant labor problem?<sup>142</sup>

The new low-wage/vulnerable labor paradigm begins a conversation to remedy these issues. In recognizing human trafficking's wrong as a new low-wage/vulnerable labor one, the intuitive meaning of the movement requirement is preserved—namely, the vulnerability of living dislocated from institutional or social redress. Instead of rigorously inhering in the act of movement, however, isolation might also be achieved through the accumulation of poor working conditions and the lack of meaningful avenues of redress, which, as the U.S. context shows, affects migrant and nonmigrant workers alike, albeit to varying degrees.

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origin discrimination claims for the hiring of East Indian migrant workers for employment in a joint venture between John Pickle Co. and a Kuwaiti company).

<sup>141</sup> Tomatore & Matthews-Jolly, *supra* note 121 (noting that “[m]igration and trafficking need not be contemporaneous” and that “[m]any IWC clients were trafficked years after migrating”).

<sup>142</sup> See Andrees & van der Linden, *supra* note 111, at 64 (“[S]ince both those who are subject to coercion at the outset of the migration project as well as those subject to coercion at a later stage are victims of severe exploitation, the academically interesting distinction between trafficked versus non-traffick[ed] victims of forced labour becomes obsolete at a policy and legislation level. The conception of trafficking as a cross-border phenomenon, maintained by many actors in the field of trafficking, is not conducive to concerted action that encompasses all victims. Indeed, it should not matter when or where the coercion started, but that a person was subjected to it.”).

This is not to suggest that “forced labor [should] be equated simply with low wages or poor working conditions . . . [or] situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives.”<sup>143</sup> Rather, the new low-wage/vulnerable labor paradigm is a first step towards recognizing the unacknowledged breadth of our contemporary anti-trafficking instruments. Crucially, the new paradigm is no lofty theoretical imposition, but rather is an analytic synthesis of new legal interpretations of the elements of human trafficking and social scientific research. Both advocate for more frequent and sustained legal attention to labor exploitation and working conditions in the context of human trafficking. For these reasons, the new low-wage/vulnerable labor paradigm best describes the core wrong of human trafficking.

#### IV. A THIN LINE: HUMAN TRAFFICKING AND THE NEW LOW-WAGE/VULNERABLE LABOR PARADIGM

The preceding sections provide two new, fundamental insights about the current legal approach to human trafficking: (1) dominant paradigms fail to capture the full range of acts prohibited by human trafficking’s primary legal instruments; and (2) even the emerging labor approach, which does a better job of describing the wrong of human trafficking than the criminal law, gender violence, or human rights paradigms, hamstring the full potential of human trafficking law through the unacknowledged use of migrant labor as a template for understanding human trafficking. The new low-wage/vulnerable labor paradigm not only addresses the shortcomings of prior efforts to interpret human trafficking law but is also consistent with attempts to construe human trafficking law as mandating the end of exploitation.

##### A. *Human Trafficking as a Low-Wage/Vulnerable Labor Problem*

The new low-wage/vulnerable labor paradigm proposes that the wrong of human trafficking may lie in the nature of low-wage work itself, depending on how we as a society choose to configure the relationship between equality, labor, and freedom. In this spirit, I use the word “vulnerable” in an inclusionary way. “Vulnerable” can both describe precarious low-wage labor and

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<sup>143</sup> See ILO GLOBAL REPORT 2009, *supra* note 15, at 5.

encompass acts that are not paid a wage or recognized as work (including, in many cases, prostitution or other commercial sex acts). Recourse to vulnerability theory also emphasizes how a worker's susceptibility to exploitation is both context specific and inherent in the human condition. As new sociological scholarship reveals, "[w]orkplace violations are not limited to immigrant workers or other vulnerable groups in the labor force—everyone is at risk, although to different degrees."<sup>144</sup> With this understanding, I reference vulnerability, following Martha Albertson Fineman, as a methodological commitment to analyzing structural and institutional distributions of advantage and disadvantage that exceed a discrimination-based model's narrow focus on individual identity.<sup>145</sup> In the present case, vulnerability theory compels an analysis of human trafficking that looks beyond legal status designations (i.e., citizenship) to interrogate the broader institutional and social arrangements that put people at risk.

Vulnerability theory complements recent labor law scholarship that aims to make the law responsive and reflective of the changing nature of work in a globalized economy. This scholarship reconceptualizes the foundations of labor law by basing the extension of social protections on labor-force membership status—not the employment relationship. Alain Supiot takes this position, locating labor-force membership status in work, which differs from activity because work "results from an obligation, whether voluntarily undertaken or compulsorily imposed."<sup>146</sup> Foregrounding the wrong of human trafficking in this way captures the full range of offenses proscribed by human trafficking law, from labor performed pursuant to enslavement to deceptive or coercive exploitation. It does so by understanding that the wrong that binds this range of exploitative practices is a collective wrong that inheres in the inner workings of global labor markets and manifests in employment conditions.

To flesh out these potentials, the following section contrasts a recent report describing low-wage work conditions in the United States with a 2009 ILO Global Report authored in conjunction with the European Union. The ILO Global Report is an attempt to capture more legally actionable incidents of human trafficking—albeit with a specific focus on migrant labor. In the same spirit, 2009 also witnessed the release of a Delphi method

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<sup>144</sup> BERNHARDT ET AL., *supra* note 21, at 5.

<sup>145</sup> See *supra* note 12 and accompanying text.

<sup>146</sup> See ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 54 (2001).

survey, implemented by the ILO and the European Commission, identifying operational indicators used to diagnose the presence of human trafficking. The report departs from a definition of human trafficking as tantamount solely to slavery. Instead, it focuses on how to recognize less extreme versions of human trafficking, listing combinations of acts or violations that alone would not suggest its occurrence, but that together offer a vision of human trafficking as a cumulative accretion of workplace violations. Here, the trafficked person at issue belies the iconic image of the shackled sex slave or other worker trapped and forced to labor in slave-like conditions. Instead, the trafficked person more closely resembles someone trapped in the low-wage labor market.

Read in tandem, these two reports demonstrate the need for a thorough reconceptualization of the wrong of human trafficking as a baseline for developing targeted and effective action against it. This can be accomplished by recognizing how latent equality arguments are embedded within a labor migration paradigm in ways that draw a false distinction between trafficked migrant labor and other low-wage and vulnerable work. This division, while preserving the legal integrity of a vision of human trafficking defined by force, violence, and slavery, may in fact generate anti-trafficking efforts that fail to address “less extreme,” but equally proscribed forms of human trafficking—or worse, actively contribute to their flourishing.

*B. Cumulative Labor Violations as Human Trafficking*

In “A Labor Paradigm for Human Trafficking,” Hila Shamir states that the majority of scholars and activists agree that a “certain ‘seriousness’ threshold” must be reached before a detrimental employment practice may be deemed human trafficking.<sup>147</sup> And yet the threshold requirements are anything but clear: “uncertainty remains as to what exactly constitutes [human] trafficking.”<sup>148</sup> Anne T. Gallagher concurred, noting that beyond this seriousness threshold, “the lines [delineating human trafficking] remain blurred.”<sup>149</sup> The ambiguity surrounding what constitutes exploitation, as well as the porousness of the means element of the definition, have each contributed to the definitional imprecisions of human trafficking.

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<sup>147</sup> Shamir, *supra* note 18, at 86.

<sup>148</sup> *Id.*

<sup>149</sup> GALLAGHER, *supra* note 47, at 49.

Nevertheless, Shamir and others understand the means elements to have accrued certain content by experience and application in international and national contexts. In other words, the meaning of human trafficking has been determined by practice and experience—not necessarily through recourse to the plain language of the U.N. Trafficking Protocol or in accordance with its drafters’ intentions. Thus, as James Gray Pope notes, “physical coercion is decidedly *not* a threshold requirement for a practice to constitute human trafficking—other, less robust forms of intimidation have proven sufficient.”<sup>150</sup> Hila Shamir specifically observes that “[w]ithholding wages or identification papers, continually threatening to expose a worker’s undocumented status to authorities, and using indebted labor (bonded labor or indentured labor)<sup>151</sup> are all understood to satisfy the means element.”<sup>152</sup>

Relatedly and quite crucially, human trafficking may also arise in situations where workers have consented to travel for work—abduction and deception over the type and conditions of work are not the sole actions proscribed by human trafficking law.<sup>153</sup> Instead, human trafficking can occur not only when the type of work one is compelled to engage in differs from what was promised, but also when the worker has not consented to the working conditions themselves. Long working hours, illicit or excessive wage deductions, delayed payment, low wages, and restrictions on freedom of movement may all support a charge of human trafficking.<sup>154</sup> Deceptive recruitment is not, therefore, perceived as essential to the violative essence of human trafficking. Instead, human trafficking emerges as “a combination of labor rights violations, where each one alone might not amount to [human] trafficking.”<sup>155</sup> Under this configuration, a worker’s migrant status may contribute to vulnerability, but does it

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<sup>150</sup> Pope, *supra* note 105.

<sup>151</sup> Debt bondage is

the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1(a), 266 U.N.T.S. 3, 41 (Sept. 7, 1956).

<sup>152</sup> Shamir, *supra* note 18, at 86-87 (footnotes omitted).

<sup>153</sup> See, e.g., Kathy Richards, *The Trafficking of Migrant Workers: What Are the Links Between Labour Trafficking and Corruption?*, 42 INT’L MIGRATION 147, 154 (2004); Shamir, *supra* note 18, at 87; Gallagher, *supra* note 32, at 811-12.

<sup>154</sup> Shamir, *supra* note 18, at 87.

<sup>155</sup> *Id.*; ILO GLOBAL REPORT 2009, *supra* note 15, at 13.

describe the core wrong of human trafficking? Perhaps instead the wrong is rooted in the employment conditions themselves.

C. *The ILO's Operational Indicators of Trafficking in Human Beings*

The 2009 “Operational Indicators of Trafficking in Human Beings,” discussed fully in the ILO 2009 Global Report, originated in a joint ILO and European Commission project to “reach consensus among European experts on what indicators should be used to characterize the various elements of the definition of [human] trafficking for data collection purposes.”<sup>156</sup> The project employed the Delphi method. Developed in the 1950s and widely adopted throughout the social, medical, and political sciences, this methodology produces results based on the consensus of a wide-ranging group of experts.<sup>157</sup> In notable contrast to other methods of data gathering and analysis, the Delphi method operates through a feedback process conducted in a series of rounds. In each round, participants fill out questionnaires that the primary researcher then collects and edits. Prior to the next round, the researcher returns to each participant “a summation of comments [to make] each participant aware of the range of opinions and the reasons underlying those opinions.”<sup>158</sup> The returned comments are offered anonymously. As Chia Chien Hsu and Brian A. Sanford observe, “in a Delphi study, the results of previous iterations regarding specific statements and/or items can change or be modified by individual panel members in later iterations based on their ability to review and assess the comments and feedback provided by the other Delphi panelists.”<sup>159</sup> The Delphi method thus offers several unique advantages over conventional means of assessing group opinion, including the “ability to provide anonymity to respondents, a controlled feedback process,” and the minimization of the typical pitfalls of group dynamics, mainly group pressure to achieve conformity.<sup>160</sup>

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<sup>156</sup> ILO OPERATIONAL INDICATORS REPORT, *supra* note 15, at 2.

<sup>157</sup> Chia-Chien Hsu & Brian A. Sandford, *The Delphi Technique: Making Sense of Consensus*, 12 PRAC. ASSESSMENT OF RES. AND EVALUATION no. 10 (Aug. 2007).

<sup>158</sup> *Id.* at 1, 2.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* The Delphi method has, however, come under fire for enabling participant anonymity, which critics contend impedes accountability. For a review of the literature on the Delphi method, see Sinéad Hanafin, *Review of Literature on the Delphi Technique* (Mar. 2, 2004), [http://www.dcy.gov.ie/documents/publications/Delphi\\_Technique\\_A\\_Literature\\_Review.pdf](http://www.dcy.gov.ie/documents/publications/Delphi_Technique_A_Literature_Review.pdf) [<http://perma.cc/5HSL-ZUAT>].

In the ILO/European Commission human trafficking project, the surveyed experts hailed from 27 European Union states and included representatives of the judiciary, the police, the government, and academic and research institutes, as well as representatives from NGOs, international organizations, labor inspectorates, and trade unions. Each expert completed two successive surveys. The first identified indicators of human trafficking; the second rated the strength of those indicators.

This report was not only an attempt to standardize definitions of human trafficking and the meaning of relevant labor exploitation across Europe, but was also part of a broader effort to “strengthen[] freedom, security and justice in the EU” by

- (i) establishing cooperation between Member States and others in the implementation of the EU strategy to measure crime and criminal justice; (ii) identifying the policy needs for data on crime and criminal justice; and (iii) identifying the needs for—and/or developing—common indicators and tools designed to measure crime and criminal justice.<sup>161</sup>

In fact, the ILO/European Commission project was itself a subgroup housed within an expert group requested by the European Council’s Hague Program and convened by the European Commission to assess the European Union’s need for data on crime and criminal justice. In this way, the enduring transnational criminal law paradigm subtly structures what labor perspectives may most readily graft onto human trafficking law: a labor perspective focused on migrant labor. Such a perspective commandeers labor issues and wraps them in the veil of state security, perceiving migrant labor (abuse) as a threat to state sovereignty. And yet the operational indicators describing trafficked work that emerge from the joint report do not only characterize the kinds of work conditions suffered by migrant workers in Europe—they also describe large swaths of the U.S. landscape of low-wage work.<sup>162</sup>

The Delphi method yielded four sets of operational indicators: one each for adult labor and sexual exploitation, and one each for child labor and sexual exploitation. Each set is a structured list of indicators that together reveal six dimensions of human trafficking: (1) deceptive recruitment or deception during recruitment, transfer, and transportation (10 indicators);<sup>163</sup> (2)

<sup>161</sup> ILO OPERATIONAL INDICATORS REPORT, *supra* note 15, at 2.

<sup>162</sup> See *infra* Section IV.D; see also *supra* note 22 and accompanying text.

<sup>163</sup> The sole “[s]trong indicator” of deceptive recruitment for adult labor exploitation is being “[d]eceived about the nature of the job, location or employer.” “Medium indicators” include “[d]eceived about the conditions of work”; “[d]eceived about content or legality of work contract”; “[d]eceived about family reunification”; “[d]eceived



coercive recruitment or coercion during recruitment, transfer, and transportation (10 indicators);<sup>164</sup> (3) recruitment by abuse of vulnerability (16 indicators);<sup>165</sup> (4) exploitative work conditions (9 indicators);<sup>166</sup> (5) coercion at destination (15 indicators);<sup>167</sup> and (6) abuse of vulnerability at destination (7 indicators).<sup>168</sup>

For each of the six identified dimensions of human trafficking, a combination of strong, medium, or weak indicators can indicate a positive assessment, meaning that the dimension is present for the victim. A positive assessment can include two strong indicators, one strong indicator and one medium or weak indicator, three medium indicators, or two medium indicators and one weak indicator. The final analysis involves combining all six elements to identify victims of

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about housing and living conditions”; “[d]eceived about legal documentation or obtaining legal migration status”; “[d]eceived about travel and recruitment conditions”; “[d]eceived about wages/earnings”; and “[d]eceived through promises of marriage or adoption.” The lone “[w]eak indicator” of deceptive recruitment is being “[d]eceived about access to educational opportunities.” ILO OPERATIONAL INDICATORS REPORT, *supra* note 15, at 4.

<sup>164</sup> The sole “[s]trong indicator” of coercive recruitment for adult labor exploitation is “[v]iolence on victims.” “Medium indicators” include “[a]bduction, forced marriage; forced adoption or selling of victim”; “[c]onfiscation of documents”; “[d]ebt bondage”; “[i]solation, confinement, or surveillance”; “[t]hreat of denunciation to the authorities”; “[t]hreats of violence against victim”; “[t]hreats to inform family, community, or public”; “[v]iolence on family (threats or effective)”; and the “[w]ithholding of money.” *Id.*

<sup>165</sup> There are no strong indicators of recruitment by abuse of vulnerability for adult labor exploitation. “Medium indicators” include “[a]buse of difficult family situation”; “[a]buse of illegal status”; “[a]buse of lack of education (language)”; “[a]buse of lack of information”; “[c]ontrol of exploiters”; “[e]conomic reasons”; “[f]alse information about law, attitudes of authorities”; “[f]alse information about successful migration”; “[f]amily situation”; “[p]ersonal situation”; “[p]sychological and emotional dependency”; and “[r]elationships with authorities/legal status.” “Weak indicators” number the “[a]buse of cultural/religious beliefs” and “[g]eneral context” among their ranks. *Id.*

<sup>166</sup> For adult labor exploitation, the “[s]trong indicator” of exploitative conditions of work is “excessive working days or hours.” “Medium indicators” include “[b]ad living conditions”; “[h]azardous work”; “[l]ow or no salary”; “[n]o respect of labour laws or contract signed”; “[n]o social protection (contract, social insurance, etc.)”; “[v]ery bad working conditions”; “[w]age manipulation.” “No access to education” is considered a “[w]eak indicator.” *Id.*

<sup>167</sup> For adult labor exploitation, “[s]trong indicators” of coercion at the destination include “[c]onfiscation of documents”; “[d]ebt bondage”; “[i]solation, confinement, or surveillance”; and “[v]iolence on the victims.” “Medium indicators” include “[b]eing forced into illicit/criminal activities”; being “[f]orced [to perform] tasks [or take] clients”; being “[f]orced to act against peers”; being “[f]orced to lie to authorities, family, etc.”; the “[t]hreat of denunciation to authorities”; the “[t]hreat to impose even worse working conditions”; “[t]hreats of violence against victim”; being “[u]nder strong influence”; “[v]iolence on [the] family (threats or effective)”; and the “[w]ithholding of wages.” “Threats to inform family, community, or public” are considered “[w]eak indicators.” *Id.*

<sup>168</sup> For adult labor exploitation, “[m]edium indicators” of the abuse of vulnerability at the destination include “[d]ependency on exploiters”; “[d]ifficulty to live in an unknown area”; “[e]conomic reasons”; “[f]amily situation”; and “[r]elationship with authorities/legal status.” “Weak indicators” are “[d]ifficulties in the past” and “[p]ersonal characteristics.” *Id.*

human trafficking. Based on the results, migrants are classified as successful migrants (no deception, no coercion, no exploitation), exploited migrants (exploitation without deception or coercion), victims of exploitation and deception (without coercion), and victims of trafficking for forced labor (deception, exploitation, and coercion).

The information gleaned from the ILO/European Commission report is quite striking. First, work conditions that alone would not merit a charge of human trafficking can in combination pass the crime's threshold requirements. For example, one could be deceived about the nature of the job and about wages or earnings (indicators of deceptive recruitment), subjected to excessive working hours and wage manipulation (indicators of exploitation), isolated or surveilled, subjected to the withholding of money and threats of violence (indicators of coercive recruitment), given false information about the law, or manipulated due to a difficult family situation or cultural/religious beliefs (indicators of recruitment by abuse of vulnerability). Additionally, one could have documents confiscated, be threatened with worse working conditions, or have wages withheld (indicators of coercion at destination). This could occur all while having difficulties in the past, a dependency on the exploiters, and a poor economic outlook (indicators of abuse of vulnerability at destination). This scenario would, according to the report, merit a charge of human trafficking for forced labor. Various other combinations of labor violations could also produce charges of human trafficking for lesser labor exploitation.

The 2009 ILO/European Commission report is therefore significant for two reasons. First, it offers a reputable model for how experts across a region can develop a working consensus on the parameters of human trafficking—a model that could prove useful as the scope of human trafficking law continues to be debated. Second, the report is valuable for the experts' specific consensus that the accrual of labor violations can produce the type of exploitation prohibited by anti-trafficking instruments. Interestingly, although the report understands migrant workers to be the paradigmatic face of human trafficking, the acts and harms that give rise to the charge of human trafficking need not result from a worker's migrant status. In the above example, the abuse the worker suffers—the conditions of work that merit a charge of trafficked work—could be inflicted on many low-wage workers. This suggests that the wrong of human trafficking has less to do with the legal status of the workers than it does with the conditions of

the work endured by workers and by the broader assignation of duties and responsibilities that workers and employers are thought to owe one another.

*D. State of the Low-Wage Nation—Surveying U.S. Low-Wage Work Conditions and the New Low-Wage/Vulnerable Labor Paradigm*

In the landmark 2009 report, “Broken Laws, Unprotected Workers: Violations of Employment and Labor Law in America’s Cities,” a team of expert policy analysts, researchers, and professors surveyed 4,387 low-wage workers in Chicago, Los Angeles, and New York City—the three largest cities in the United States.<sup>169</sup> This report departed from the majority of prior studies in significant ways.<sup>170</sup> It targeted a broader range of workers than those typically surveyed and took pains to include workers who often fall through the cracks, including unauthorized immigrant workers and workers paid in cash.<sup>171</sup>

The report found widespread and systematic violations of the most basic workplace protections—the sort assumed to have been long addressed by U.S. labor law. Among the core labor protections routinely denied to U.S. low-wage workers are the right to be paid at least the minimum wage, the right to be paid for overtime hours, the right to take meal breaks, access to workers’ compensation when injured on the job, and the right to advocate for better working conditions.<sup>172</sup> Wage violations were exceedingly common. Of those surveyed, 26% had been paid below minimum wage the week before; 60% of these were underpaid by more than \$1 an hour.<sup>173</sup> One-quarter worked more than 40 hours per week in “off the clock” unpaid labor; 76% were not paid the legally required overtime rate.<sup>174</sup> Workers with violations had put in an average of 11 hours of underpaid or unpaid overtime.<sup>175</sup> Moreover, the survey found that 30% of the tipped workers surveyed were not paid the tipped worker minimum wage, which by state law is lower in New York and Illinois than the standard state minimum wage.<sup>176</sup>

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<sup>169</sup> BERNHARDT ET AL., *supra* note 21, at 2.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 2-4.

<sup>173</sup> *Id.* at 21.

<sup>174</sup> *Id.* at 21-22.

<sup>175</sup> *Id.* at 22.

<sup>176</sup> *Id.*

Workers were also subjected to long working hours, at times without pay.<sup>177</sup> One quarter of surveyed workers exceeded their work shift.<sup>178</sup> Of those workers, 70% received no pay for extra work.<sup>179</sup> Regardless of the form of payment (cash or check), in California, Illinois, and New York, employers are legally mandated to furnish workers with documentation of their earnings and deductions.<sup>180</sup> Of those surveyed, 57% did not receive the required documentation, and 41% reported illegal employer deductions for damage or loss of work-related tools, materials, or transportation.<sup>181</sup>

Additionally, when low-wage workers attempted to assert their labor rights, legal processes failed them. One in five workers surveyed reported either filing a complaint or attempting to form a union in the last year.<sup>182</sup> Of those, 43% experienced some form of retaliation, including termination or suspension, threats to cut hours or pay, and threats to call immigration authorities.<sup>183</sup> Another 20% did not make a complaint even after suffering a serious workplace problem, such as the failure to be paid a minimum wage, discrimination, and dangerous working conditions,<sup>184</sup> and 50% refrained from reporting violations due to fear of termination.<sup>185</sup> Furthermore, 10% failed to report due to fear of hour and wage cuts, while 36% believed that reporting would not change the harmful practice or otherwise provide them with redress or relief.<sup>186</sup>

This brief account of U.S. low-wage work conditions evinces the continuities between erstwhile legal low-wage work and the kind of exploitative work that meets the legal definition of trafficked work. In this way, the new low-wage /vulnerable labor paradigm demonstrates how, depending on the context, human trafficking law may cast a wide enough net to include a significant portion of workers within the U.S. low-wage labor market. This is significant because it taps into the crisis inherent to human trafficking law itself: that of envisioning the act of human trafficking as befalling certain individuals or

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<sup>177</sup> *Id.* at 2-3.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 3.

<sup>181</sup> *Id.* at 2-3.

<sup>182</sup> *Id.* at 24.

<sup>183</sup> *Id.* at 25.

<sup>184</sup> *Id.* at 24.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

understanding human trafficking as rooted in collective labor exploitation that does not discriminate by citizenship status.

Further, comparing conditions of low-wage work with conditions that meet the legal definition of trafficked work shows that attempts to rescue or rehabilitate trafficked workers will not end their exploitation—not when an exploitative low-wage labor market is the liberation that awaits them. A low-wage/vulnerable labor paradigm reveals how, from chronic wage theft to increased vulnerability to on the job sexual violence, otherwise legal low-wage work can look the same as the kind of exploitative work that meets the legal definition of trafficked work—even if other elements of a human trafficking charge are not present and human trafficking itself is not a supportable charge. As such, understanding human trafficking as having more in common with low-wage and vulnerable labor abuse than slavery or criminal gender violence is both normatively and descriptively more useful than interpreting human trafficking through those current dominant paradigms, which also tend to view all human trafficking as rooted in migration problems.

#### V.     RETHINKING SLAVERY, FORCED LABOR, AND          EXPLOITATION

The conflation of human trafficking with slavery risks upending distinctions between owning and exploiting human beings. While such distinctions are never clean or easy to discern, casting all human trafficking as slavery nevertheless muddies the waters in ways that might well hinder efforts to eradicate less severe forms of exploitation proscribed by anti-trafficking instruments in one of two ways. On the one hand, the charge of slavery can tilt the focus of anti-trafficking efforts towards the most extreme, “slave-like” abuses—the kidnapped woman chained to a bed in a brothel, the migrant worker beaten and forced to farm acres of arid land. Naming slavery as the core wrong of human trafficking thus cuts against expert consensus that the accretion of labor violations—at times in otherwise legal labor situations—can create exploitative conditions sufficient to merit a charge of human trafficking.

On the other hand, calling all forms of human trafficking slavery runs counter to the careful debates within the international law of slavery that have taken place since the turn of the millennium. These judgments, which concern the relationships between slavery, forced labor, and sexual exploitation, recognize that the legal parameters of slavery are of enduring consequence. Deliberations about what constitutes

slavery are ultimately deliberations about what protections the international order of states are willing to enforce as *jus cogen* norms.<sup>187</sup> Once again, less extreme exploitation proscribed by human trafficking law may slip through the cracks.

Yet while the slavery paradigm is less than ideal, the desire to label all human trafficking as slavery is itself an impassioned response to the global expansion of capitalism in the 1990s. While a full assessment of slavery law is beyond the focus of this article, the following sections track flashpoints in the legal trajectory of enslavement in the twenty-first century. In an age with little *de facto* slavery, contemporary international slavery judgments have reconfigured the meaning of “ownership” by incorporating acts under the rubric of slavery acts that more closely resemble force or coercion—the hallmarks of forced labor.<sup>188</sup> This reformulation suggests that the new low-wage/vulnerable labor paradigm is conceptually consistent with ongoing debates in slavery law proper. In other words, the new paradigm’s placement of working conditions—rather than movement/recruitment or slavery—at the heart of the offense does not introduce new difficulties in debates about how to distinguish severe instances of forced labor from slavery. Instead, by distancing human trafficking from a slavery paradigm, the new low-wage/vulnerable labor paradigm preserves the legal integrity of slavery by expressly locating the wrong of human trafficking in the exploitation of worker vulnerability through the imposition of poor labor and employment conditions. In this way, the new paradigm more clearly differentiates lesser exploitation from slavery proper.

#### A. *The Relationship Between Slavery and Human Trafficking*

Human trafficking’s definitional problems first necessitate the establishment of its wrong and then require an analysis of how the proffered wrong impacts debates within slavery law that concern the boundaries between slavery and forced labor. Control and ownership are at the heart of internationally accepted definitions of slavery.<sup>189</sup> Article 1(1) of the 1926 Slavery

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<sup>187</sup> Bassiouni, *supra* note 24, at 67-68.

<sup>188</sup> See Holly Cullen, *Contemporary International Legal Norms on Slavery*, in THE LEGAL UNDERSTANDING OF SLAVERY 304, 304-05 (Jean Allain ed., 2012) (arguing that contemporary slavery is largely *de facto* slavery and that control that amounts to ownership—not coercion—should be the criteria by which slavery is determined).

<sup>189</sup> The classic understanding of ownership holds that it is not a single, unified thing, but rather a collection of severable incidents (or powers) that can be divided between and amongst multiple owners. See A.M. Honoré, *Ownership*, in OXFORD

Convention establishes the benchmark definition of slavery: “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.”<sup>190</sup>

Generally speaking, the wrong of slavery lies in treating a person as one would treat property and exerting ownership when no legal right to ownership exists.<sup>191</sup> This understanding of slavery, coupled with the Thirteenth Amendment’s prohibitions against slavery and involuntary servitude,<sup>192</sup> established the initial operational and conceptual parameters of the TVPA.<sup>193</sup> How practitioners and policymakers define the wrong of human trafficking, however, contributes to the question of what acts constitute slavery. When, for example, the Obama administration characterized all human trafficking as at its core a problem of enslavement, it theoretically expanded the practical meaning of what it means to exercise “any or all of the powers attaching to ownership.”

Initially, human trafficking was construed through a criminal gender violence paradigm—one that emphasized sex-sector human trafficking. Under this framework, even consensual commercial sex acts could be deemed “sexual slavery” because the

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ESSAYS IN JURISPRUDENCE 107, 112-28 (A.G. Guest ed., 1961) (describing 11 incidents of ownership: the right to possess, the right to use, the right to manage, the right to income, the right to capital, the right to security, transmissibility, absence of term, prohibition of harmful use, liability to execution, and residuary character).

<sup>190</sup> 1926 Slavery Convention art. 1(1), *supra* note 8, 60 L.N.T.S. at 263; *see also* Rome Statute of the International Criminal Court art. 7(2)(c), July 17, 1998, 2187 U.N.T.S. 3 (defining enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”).

<sup>191</sup> *See* R. M. Hare, *What is Wrong with Slavery?*, 8 PHIL. & PUB. AFF. 103, 104 (1979) (arguing that even if slavery can be justified through a utilitarian calculus in an imaginary case, it is still wrong because it almost always causes misery in the actual world).

<sup>192</sup> “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

<sup>193</sup> Additionally, if the 1926 Slavery Convention rendered the suppression of slavery a standard of civilization that no state may abrogate, the presence of forced labor has historically had less bearing on the international assessment of a state’s civility. As Viscount Cecil of Chelwood, the British Delegate to the League of Nations and the primary drafter of the 1926 Slavery Convention noted, “I do not think that there is any nation, civilized or uncivilized, which does not possess powers enabling the Government, for certain purposes and under certain restrictions, to require forced or compulsory labor on the part of its citizens.” While the instant examples of mandatory military service and prison labor come to mind, the 1926 Slavery Convention’s demarcation between the absolute proscription of slavery and the more flexible approach to forced labor has resonated far beyond these practices, shaping our understanding and approach to human exploitation to this day. League of Nations, *Question of Slavery: Report of the Sixth Committee: Resolution*, *League of Nations Official Journal*, (Special Supplement 33) Records of the Sixth Assembly: Text of Debates, Nineteenth Plenary Meeting, Sept. 26, 1925, 156-57.

sexual self, in this view, could neither be owned nor alienated.<sup>194</sup> In contrast, the Obama administration explicitly understands human trafficking as embedded in the historical trajectory of U.S. slavery as a social institution. Louis CdeBaca, the current U.S. Ambassador-at-Large to Monitor and Combat Human Trafficking in Persons, explains the trajectory of slavery and human trafficking as follows:

In the wake of the Civil Rights Movement, there was a perception that the problem of slavery, of sharecropping, was a thing of the past . . . . And, quietly, the abusers were bringing in immigrants to replace the African American community . . . . The involuntary servitude and slavery program had been a little bit on the back burner during the '70s and '80s because of the gains of the Civil Rights Movement . . . . And, then, by the '80s and '90s, we were starting to see—whether it was Guatemalans, or Mexicans or others—suffering often in the same farms in the American South picking tomatoes, cucumbers, onions.<sup>195</sup>

The Obama administration's embrace of the term "modern slavery" is thus presented as a corrective to the prior administration's overwhelming emphasis on sex-sector human trafficking. Proponents of this line of thinking applaud not only its renewed attention to non-sex-sector exploitation, but also the subject of that exploitation: migrant workers. Even those who are skeptical of the turn towards the explanatory power of slavery embrace efforts to assuage and address the plight of migrant workers, albeit through a labor paradigm.<sup>196</sup>

While a slavery paradigm is not the best or most accurate approach to establishing the wrong of human trafficking, it would be a mistake to see "new abolitionism" arising in necessary opposition to a broader low-wage/vulnerable labor approach. The impulse to establish slavery—and in particular, the U.S. historical and legal experience of slavery—as a leitmotif for human trafficking is a real, if at times inchoate, attempt to grapple with the new realities of global labor exploitation. The resurrection of the U.S. experience of slavery through human trafficking law can be understood as an attempt to push back against one of the central tensions of slavery law: the tendency to "equate collective forms of oppression (political repression, racial discrimination and exclusion, etc.) with an individual relationship

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<sup>194</sup> See *supra* note 65 and accompanying text.

<sup>195</sup> Phillip Martin, *Underground Trade Part Seven: Why Human Trafficking is Called Modern Day Slavery*, HUFFINGTON POST (Jan. 23, 2014, 6:58 PM), [http://www.huffingtonpost.com/phillip-martin/underground-trade-part-se\\_b\\_2929373.html](http://www.huffingtonpost.com/phillip-martin/underground-trade-part-se_b_2929373.html) [http://perma.cc/Z3GT-H3GS].

<sup>196</sup> See, e.g., Chuang, *Rescuing Trafficking*, *supra* note 5, at 1656-57.



between a master and a slave.”<sup>197</sup> “Modern slavery” may well be moving towards recognition of the routinized, systemic face of modern labor exploitation.

While the sentiment driving the rhetoric of modern slavery is laudable, it is, this article argues, nevertheless inadvisable to interpret the range of acts proscribed by human trafficking law as slavery. For legal scholars, the persistence of the term “modern slavery” in the context of human trafficking should urge a revisiting of what acts convey ownership that is tantamount to slavery.<sup>198</sup> That said, the notion of “modern slavery” should also prompt a reappraisal of other, lesser forms of labor exploitation proscribed by human trafficking law, lest they fall through the cracks.

For example, recent Equal Employment Opportunity Commission (EEOC) cases in which labor-sector human trafficking was prosecuted as Title VII race and national-origin discrimination are indicative of this point.<sup>199</sup> In four cases, two of which have been successful, the EEOC has adopted the language of human trafficking as slavery and used it to construe human trafficking as Title VII race, national origin, and sex employment discrimination in a series of class action suits geared towards

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<sup>197</sup> United Nations Economic and Social Council, *Questions of Slavery and the Slave Trade in All Their Practices and Manifestations, Including the Slavery-Like Practices of Apartheid and Colonialism: Apartheid as a Collective Form of Slavery* 1 (July 2, 1981).

<sup>198</sup> In another project currently in progress, I explore this complex of issues. See *Reimagining Ownership: The Impact of Sexual Violence on the Law of Forced Labor and Slavery*, draft project on file with author.

<sup>199</sup> These EEOC human trafficking cases, some of which were initially filed during the Bush administration, have gained traction as a crucial component of the EEOC’s Strategic Enforcement Plan (SEP) for 2013-2016. The SEP sets the direction of the EEOC, establishing EEOC priorities and identifying where it will invest the bulk of its resources and efforts to combat workplace discrimination, inequality, and injustice, of which human trafficking is but one component of a range of abuses that trouble low-wage workers. The 2013-2016 SEP in part “target[s] disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers,” demonstrating that large class discrimination suits that include workers who have been trafficked may be no flash in the pan, but rather a sign of litigation to come. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN, FY 2013-16, at 1 (2012), <http://www.eeoc.gov/eeoc/plan/sep.cfm> [<http://perma.cc/67CY-YAQQ>]; see also *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1247 (N.D. Okla. 2006) (involving Title VII race and national origin discrimination claims for the hiring of East Indian migrant workers for employment in a joint venture between John Pickle Co. and a Kuwaiti company); *Consent Decree, EEOC v. Trans Bay Steel Corp.*, No. 2:06-cv-07766 (C.D. Cal. Dec. 8, 2008) (involving Title VII race and national origin discrimination claims for 48 Thai welders on H-2B visas); *EEOC v. Global Horizons, Inc.*, 860 F. Supp. 2d 1172, 1177 (D. Haw. 2012) (involving Title VII race and national origin discrimination claims for hundreds of Thai workers on H2-A visas); *David v. Signal International, LLC*, No. 08-1220, 2012 WL 4344540, at \*1 (E.D. La. Sept. 21, 2012) (involving Title VII race and national origin discrimination claims for 500 Indian nationals on HB-2 visas).

addressing the systemic abuse of vulnerable workers' civil rights at U.S. worksites. This emerging case law illustrates some of the conceptual risks of understanding human trafficking within the U.S. model of slavery. In these cases, the severe racial and discriminatory core of slavery as a crime and experience pulls attention, again, towards migrant workers, who are racialized as the "new slaves." This contributes, again, to a hyperfocus on the most extreme forms of migrant exploitation and fails to capture the more mundane, yet equally prohibited exploitation that affects migrant and nonmigrant workers.

The new low-wage/vulnerable labor approach can be understood as a correction to the excesses of the TIP Office's approach—as a necessary recalibration of legal norms in the wake of the globalization and technological changes of the 1990s. Much as the concept of labor law itself emerged from the failure of traditional contracts principles to produce a desirable balance between individual autonomy and the distribution of wealth in the aftermath of the Industrial Revolution, the new low-wage/vulnerable labor paradigm may be viewed as another turn of the wheel.

Recent slavery case law bears out this claim, illuminating how ambiguities that now inhere within slavery law itself complicate its meaning and scope in ways that precede, presage, and implicate the legal discourse on human trafficking. Recent international judgments have undermined the boundary between slavery and forced labor.<sup>200</sup> Further, as human rights courts have begun to hear slavery disputes, the framing of the issue has shifted from the traditional calculus of whether an individual engaged in the proscribed act of owning or controlling another person to an approach that evaluates whether the individual right to be free from slavery has been abrogated due to failures of the state.<sup>201</sup> In other words, while human rights approaches to slavery still focus on the individual harm, they have also enhanced the political profile of slavery by holding states accountable for its occurrence in highly public ways—and they have done so at a time when the line demarcating slavery from forced labor has weakened.

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<sup>200</sup> See *infra* Section V.B.

<sup>201</sup> See *Siliadin v. France*, 2005-VII Eur. Ct. H.R. 333, 363 (2005); *Rantsev v. Cyprus and Russia*, 2010-I Eur. Ct. H.R. 65, 90 (2010); *Ituango Massacres v. Columbia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 141 (July 15, 2005); *Montero-Araguren v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 28 (July 5, 2006).

A new low-wage/vulnerable labor paradigm will help make sense of these shifts. What the new low-wage/vulnerable labor paradigm offers is another angle on the slavery debates—one where the notion of control or ownership moves beyond individual bad actors, individual freedoms, and identity-based equality frames. The sum of anti-trafficking efforts amounts to an unacknowledged and undertheorized account of human trafficking's wrong as rooted in the vagaries of low-wage and vulnerable labor. Recognizing human trafficking's wrong as a low-wage/vulnerable labor wrong answers the call from labor law scholars to broaden the scope of the discipline beyond employee/employer relationships, the work enterprise, and even individual states, to global labor markets more generally.<sup>202</sup> This approach shows promise for moving human trafficking debates beyond the individualistic lens of human rights and discrimination frameworks that can characterize slavery.

*B. International Law and Judgments: De Facto Slavery and Its Proximity to Forced Labor*

If one were of the opinion that slavery was largely a relic of the past, a survey of twentieth-century international judgments on slavery would do little to dispel that notion. The twentieth century witnessed only one international judgment that touched on slavery—the 1905 *Muscat Dhows* case.<sup>203</sup> Renewed popular and legal interest in the subject only converged in the first decade of the twenty-first century, when “sex slavery” in the former Yugoslavia and the wave of global labor migrations spurred by the ascent of global capitalism in the aftermath of the Cold War led to the passage of the first anti-trafficking instruments in roughly 60 years.<sup>204</sup> Subsequently, a spurt of slavery cases appeared on the international scene, resulting in judgments by

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<sup>202</sup> New conceptualizations of labor law integrate its historical mission to protect and regulate economies with the contemporary realities of global markets and workplaces. See, e.g., Judy Fudge, *Labour as a “Fictive Commodity”: Radically Reconceptualizing Labour Law*, in *THE IDEA OF LABOUR LAW* 120, 128-29 (Guy Davidov & Brian Langille eds., 2011); Richard Mitchell & Christopher Arup, *Labour Law and Labour Market Regulation*, in *LABOUR LAW AND LABOUR MARKET REGULATION* 3 (Christopher Arup et al. eds., 2006).

<sup>203</sup> *Muscat Dhows* (Fr. v. Gr. Brit.), XI RIAA 83 (Perm. Ct. Arb. 1905).

<sup>204</sup> See Siddharth Kara, *SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY* (2009); *Interviews with Siddharth Kara*, COLUM. U. PRESS (Jan. 6, 2009, 10:53 AM), <http://www.cupblog.org/?p=488> [<http://perma.cc/6G6Q-LTWH>] (“Abolitionists must also not forget that powerful macroeconomic forces unleashed during the process of economic globalization in the post-Cold War era have been more responsible than any other force for the unforgivable rise in contemporary slavery.”).

the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>205</sup> the European Court of Human Rights,<sup>206</sup> the Economic Community of West African States Community Court of Justice,<sup>207</sup> and the Special Court for Sierra Leone.<sup>208</sup>

The creation of our contemporary anti-trafficking legal regime accompanied and abetted this surge in international legal attention to slavery. Anti-trafficking provisions not only kept international interest in slavery alive but also allowed the public to interrogate the meaning and scope of slavery and other types of exploitation that occur both internationally and domestically. Jean Allain has called these developments the “renaissance of the legal definition of slavery.”<sup>209</sup>

This renaissance, however, has not simply propelled the issue of slavery to legal prominence. It has also put pressure on the definitional parameters of the act, blurring distinctions between slavery and forced labor and forcing the question of what constitutes *de facto* slavery in an age where *de jure* slavery has been largely abolished.<sup>210</sup> The first successful attempt to prosecute the crime of enslavement under international law is evocative of these tensions. The case also illustrates a kind of feedback loop between human trafficking and the high-profile “sexual slavery” prosecutions of the late 1990s and early 2000s.

The 2002 ICTY case, *Prosecutor v. Kunarac et al.*, was the first contemporary international decision on slavery.<sup>211</sup> At this time, the early dominance of “sex trafficking” as the primary descriptor of human trafficking aided in ushering slavery back into the juridical spotlight. Simultaneously, the

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<sup>205</sup> See, e.g., *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 5 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

<sup>206</sup> See, e.g., *Siliadin*, 2005-VII Eur. Ct. H.R. 333; *Rantsev*, 2010-I Eur. Ct. H.R. 65.

<sup>207</sup> *Koraou v. Republic of Niger*, App. No. ECW/CCJ/APP/08/08, Judgment, ¶ 72, The Court of Justice for the Economic Community of West African States (Oct. 27, 2008), [https://www.unodc.org/res/cld/case-law-doc/traffickingpersons/crimetype/ner/2008/h\\_m\\_v\\_republic\\_of\\_niger\\_html/Hadijatou\\_Mani\\_v.\\_Republic\\_of\\_Niger\\_Community\\_Court\\_of\\_Justice\\_Unofficial\\_English\\_translation.pdf](https://www.unodc.org/res/cld/case-law-doc/traffickingpersons/crimetype/ner/2008/h_m_v_republic_of_niger_html/Hadijatou_Mani_v._Republic_of_Niger_Community_Court_of_Justice_Unofficial_English_translation.pdf) [<http://perma.cc/NV5D-GTEB>].

<sup>208</sup> *Prosecutor v. Brima*, Case No. SCSL-2004-16-A, Judgment, ¶ 195, Special Court for Sierra Leone (Feb. 22, 2008), <http://www.rscsl.org/Documents/Decisions/AFRC/Appeal/675/SCSL-04-16-A-675.pdf> [<http://perma.cc/2QAX-JYDL>].

<sup>209</sup> Jean Allain, *The Legal Definition of Slavery in the Twenty-First Century*, in *THE LEGAL UNDERSTANDING OF SLAVERY* 199, 214-15 (Jean Allain ed., 2012).

<sup>210</sup> Some cases arising before African regional courts, however, have involved situations that more closely resemble *de jure* slavery. See *Malawi African Association et al. v. Mauritania*, Comm., Nos. 54/91, 61/91, 98/93, 164/97 a 196/97 and 210/98, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶¶ 132-35 (May 11, 2000), <http://www.refworld.org/docid/52ea5b794.html> [<http://perma.cc/XES3-DZSK>].

<sup>211</sup> *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

equation of sex-sector human trafficking with slavery was fed by the new international judgments on slavery.<sup>212</sup>

In *Kunarac*, Serbian militia members, pursuant to their involvement in the infamous “rape camps” of Foca, were charged with enslavement as a crime against humanity under Article 5(c) of the ICTY statute.<sup>213</sup> *Kunarac* set the standard for subsequent tribunal and international legal treatments of slavery in ways that muddled the boundaries between slavery and forced labor. With no definition of slavery provided by the ICTY charter, the Trial Chamber II’s judgment lists acts that might constitute enslavement. The list of acts, however, contained language reflecting both ownership (slavery) and coercion (forced labor).<sup>214</sup> The *Kunarac* decision’s list of indications of enslavement included “elements of control and ownership.”<sup>215</sup>

This ambiguity is mirrored in the more recent International Criminal Court (ICC) case regarding sexual slavery,

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<sup>212</sup> U.N. Special Rapporteur Gay McDougall, for instance, minced no words regarding the relationship of “sexual slavery” to slavery proper. “The term ‘sexual’ is . . . an adjective to describe a form of slavery, not to denote a separate crime.” Gay McDougall, Special Rapporteur, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-like Practices During Armed Conflict*, ¶ 30, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998).

<sup>213</sup> Statute of the International Tribunal art. 5(c), *annexed to* U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (May 3, 1993) (*adopted by* S.C. Res. 827, ¶¶ 1-2 (May 25, 1993)).

<sup>214</sup>

Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labor or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. . . . The “acquisition” or “disposal” of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of the case, usually not constitute enslavement.

Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment of the Trial Chamber, ¶ 542 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001). For an illuminating discussion of these issues, see Cullen, *supra* note 188.

<sup>215</sup> *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T ¶ 542.

*Prosecutor v. Katanga*.<sup>216</sup> In this case, the ICC Pre-Trial Chamber declared that sexual slavery, consistent with the Rome Statute's and U.N. Rapporteur McDougall's characterizations,<sup>217</sup> could be regarded as a particular form of enslavement, yet the Pre-Trial Chamber still referenced forced labor and servile status.<sup>218</sup> Although the Pre-Trial Chamber's judgment contained language concerning rights of ownership, its primary focus was on deprivation of liberty, sexual and otherwise.<sup>219</sup>

This brief survey of slavery law demonstrates how the slipperiness between slavery and forced labor does not occur solely because of difficulties within human trafficking legal discourse, but rather also results from shifting perspectives of the wrong of slavery and who or what should be held responsible for providing redress.

C. *Differentiating Slavery, Forced Labor, and Other Exploitation: The New Low-Wage/Vulnerable Labor Paradigm's Potential*

Viewing the wrong of human trafficking as a low-wage/vulnerable labor wrong may help clarify the relationship between lesser forms of exploitation and slavery. If there are qualms about weakening the distinction between forced labor and slavery, then setting human trafficking's wrong as a low-wage/vulnerable labor one can help move past the Obama administration's current attempts to cast *all* forced labor (through the elimination of the movement/recruitment requirement) as human trafficking and *all* human trafficking (including the lesser exploitations that also comprise it) as slavery. In other words, the new low-wage/vulnerable labor paradigm can not only more accurately reflect the range of harms prohibited by human trafficking law, it can also help keep legal debates about slavery focused on the very real issue of what separates it from forced labor. Clarifying the wrong of human trafficking will thus have the benefit of refining the law of slavery in that important way.

Perhaps most significantly, the new low-wage/vulnerable labor paradigm has the potential to spur conversation not only about what it means to be a slave in the twenty-first century, but

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<sup>216</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008).

<sup>217</sup> See McDougall, *supra* note 212, ¶ 30.

<sup>218</sup> *Katanga*, ICC-01/04-01/07 ¶¶ 430-31.

<sup>219</sup> For a more in-depth discussion, see Cullen, *supra* note 188, at 306-07.

what it means to be a *worker* in the twenty-first-century global economy. Understanding the wrong of human trafficking through the new low-wage/vulnerable labor paradigm could compel careful debate over the desired normative nature of the relationship between workers and the conditions of their work. Here, the work relationship is not reducible to an isolated connection between individual employees (migrant or otherwise) and employers. Nor is freedom in work understood simply as the ability to enter into an individual employment contract that one has the “choice” to embrace or decline. Rather, the new low-wage/vulnerable labor paradigm is the chance for a global reckoning of what social protections should be extended to workers based not on their status as citizens or migrants but rather on their labor-force membership status—on their identity as workers. Locating the wrong of human trafficking through the new low-wage/vulnerable labor paradigm offers both a coherent theory of why all acts proscribed by human trafficking law are wrong and an analytic blueprint for addressing the complex harms and root causes of human trafficking.

#### CONCLUSION

Contrary to the standards adopted by international agencies and other federal departments, the U.S. TIP Office has attempted to absorb forced labor beneath the banner of human trafficking via an abandonment of any movement/recruitment requirement for a charge of human trafficking and simultaneously reconceptualize *all* human trafficking as slavery. These transformations in the law have occurred as an international push to incorporate a labor perspective in human trafficking law has taken root. This emergent labor perspective, which uses migrant labor as a template, understands that the accumulation of poor labor conditions, which individually might simply constitute discrete labor violations, can cross the threshold into human trafficking.

The naming of human trafficking as modern slavery, while signaling the gravity of the act, fails to provide a full account of why all acts proscribed by human trafficking law, at the center and at the margins, are wrong. Moreover, the emerging labor migration paradigm, while usefully identifying human trafficking as a labor issue, analytically limits the would-be structural scope of a labor analysis of human trafficking by tacitly construing its wrong as an equality or autonomy wrong suffered by migrant workers. This labor migration perspective focuses on affording

migrant workers the same protections as nonmigrant workers in order to end exploitation.

Yet neither the slavery nor the labor migration approach describe the full range of exploitative acts prohibited by primary anti-trafficking instruments. Less severe exploitation, including the accumulation of poor labor conditions that individually would not constitute actionable exploitation, are also proscribed—and largely neglected. This discretionary oversight has left many migrant and nonmigrant low-wage and vulnerable workers whose conditions of work might meet the requirements for a charge of human trafficking outside of legal analysis or attention.

As a corrective, this article argues that the core wrong of human trafficking is a low-wage/vulnerable labor wrong, where the conditions of work (which includes commercial sexual acts) are controlling, independent of the migratory status of the workers themselves. Theorizing the wrong of human trafficking in this way, through what this article calls a new low-wage/vulnerable labor paradigm, captures the full range of offenses proscribed by human trafficking law, from labor performed pursuant to enslavement to lesser exploitation. A low-wage/vulnerable labor perspective also allows for a structural perspective on the wrong of human trafficking, understanding it as engendered by global labor markets and not individual wrongdoers alone.

Approaching human trafficking law through the new low-wage/vulnerable labor paradigm not only provides a comprehensive account of *why* all acts able to be prosecuted as human trafficking are wrong, it also helps preserve the legal integrity of one of the most serious violations recognized by law: slavery. The new low-wage/vulnerable labor paradigm ensures that the seriousness of slavery is maintained, while also assuring that deeply concerning acts of human trafficking are not overlooked simply because they do not resemble the extreme conditions of traditional slavery. For these reasons, a theoretical exploration of the wrong of human trafficking is necessary to halt the continuously shifting interpretations of its legal definition. Settling the wrong of human trafficking will help establish a more cohesive understanding of the problem. Doing so will establish firm ground to locate and oppose exploitation and the misery that it brings to workers at home and around the world.