

EXPLOITATION CREEP AND THE UNMAKING OF HUMAN  
TRAFFICKING LAW

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INTRODUCTION

Within the space of only a dozen years, the problem of human trafficking has assumed a prominent place on government and advocacy agendas worldwide. Increasingly referred to as “modern slavery,” the phenomenon has prompted a rapid proliferation of international, regional, and national anti-trafficking laws, and inspired governments to devote enormous financial and bureaucratic resources to its eradication. It has also

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spawned an industry of non-profits that have elevated its “abolition” into a pressing moral crusade, which anyone can join with the click of a mouse.<sup>1</sup> And scholars have jumped into the fray, calling upon governments to marshal human rights law,<sup>2</sup> tax law,<sup>3</sup> trade law,<sup>4</sup> tort law,<sup>5</sup> public health approaches,<sup>6</sup> labor law,<sup>7</sup> and even military might<sup>8</sup> to combat this apparently growing international crime and human rights violation.

But *what* exactly is everyone trying to fight? Notwithstanding the seeming global consensus that trafficking is something to be rid of, the anti-trafficking field is a strikingly “rigor-free zone” when it comes to defining

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<sup>1</sup> See, e.g., *I believe in a World Where Everyone Can Walk Free*, WALK FREE, <http://www.walkfree.org/en/actions/commit> (readers enter their contact information and sign a pledge committing to the abolition of slavery); *Give to Not For Sale*, NOT FOR SALE, <https://nfs.webconnex.com/giving/donate> (readers can make a donation and “give freedom”).

<sup>2</sup> See, e.g., Lorna McGregor, *Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings*, HUM. RTS. Q. (forthcoming 2014).

<sup>3</sup> See, e.g., Diane L. Fahey, *Can Tax Policy Stop Human Trafficking?*, 40 GEO. J. INT’L L. 345 (2009).

<sup>4</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 (2009).

<sup>5</sup> See, e.g., Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574 (2006).

<sup>6</sup> See, e.g., Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447 (2011).

<sup>7</sup> See, e.g., James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PENN. L. REV. 1849 (2010); Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 2 (2012).

<sup>8</sup> See, e.g., Ethan B. Kapstein, *The New Global Slave Trade*, 85 FOREIGN AFFAIRS 103 (2006).

the concept's legal parameters.<sup>9</sup> When the international community developed the first modern anti-trafficking treaty in 2000 – the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (U.N. Protocol) – elements of the legal definition of trafficking were left intentionally vague for the sake of achieving agreement.<sup>10</sup> Reduced to its core elements, trafficking is defined as: (1) an *act* of recruitment, movement, harbouring, or receipt of a person, (2) by *means* of force, fraud, or coercion, (3) for the *purpose* of “exploitation.” The vagaries of this expansive definition have allowed diverse advocates to opportunistically appropriate the “trafficking” label, such that what trafficking is – is very much in the eye of the beholder. The definitional muddle has also inspired promiscuous conflation of legal concepts, heated battles over how best to address the problem, and an ever-changing landscape of actors sharing in the fervor to abolish that thing we call “trafficking.”

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<sup>9</sup> Luis CdeBaca, Ambassador-at-Large, U.S. State Dep't Office to Monitor and Combat Trafficking in Persons, *Freedom Here & Now: Ending Modern Slavery*, Remarks Before the Women's Found. of Minn. and the Ctr. for Integrative Leadership (May 8, 2012), <http://www.state.gov/j/tip/rls/rm/2012/189611.htm>.

<sup>10</sup> See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, 2237 U.N.T.S. 319 (Nov. 15, 2000) [hereinafter U.N. Trafficking Protocol]; Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 984-86 (2001) [hereinafter Gallagher, *UN Protocols*].

This Article examines the latest struggle over definition and approach: the U.S. government's controversial efforts to promote what I refer to here as "exploitation creep." Through doctrinal manipulation and discursive conflation, exploitation creep collapses trafficking with two phenomena separately prohibited under international treaty law and custom: forced labor and slavery. Recasting all forced labor as trafficking, and all trafficking as slavery, exploitation creep re-labels abuses as more extreme than is legally accurate, in what appears to be a strategic effort to garner increased commitment to their eradication. Exploitation creep is best understood, however, as an exercise of U.S. hegemony to maintain the dominance of a criminal justice approach to trafficking at a time when we are beginning to see the makings of a shift towards an alternative: a labor paradigm. This nascent battle over paradigms carries exciting, though fraught, potential to re-conceptualize both the nature of and approach to the problem of human trafficking. For the first time in the history of the modern anti-trafficking regime, there is the potential to focus on the underlying structures that create vulnerability to trafficking in the first instance – a marked shift from criminal justice approaches that prioritize punishment of individual perpetrators and, to a lesser extent, post-hoc protection of victims.

This Article explores how this is so and why it matters. It maps and

assesses exploitation creep, situating its component moves in historical context and considering their consequences for the global anti-trafficking movement. Part I provides a brief overview of the evolution of the modern anti-trafficking regime prior to exploitation creep. It traces how trafficking came to be framed in the U.N. Protocol as a problem requiring an aggressive criminal justice response. Underscored in this history is the central role the U.S. government – specifically, the U.S. State Department Office to Combat and Monitor Trafficking in Persons (U.S. TIP Office) – assumed in both establishing, and then subsequently maintaining criminal justice paradigm dominance in anti-trafficking law and policymaking worldwide. The account then turns to a description of two overlapping waves of efforts to introduce alternative paradigms for addressing trafficking. The first wave was launched by human rights advocates during the U.N. Protocol negotiations seeks a human rights approach that would protect against the human rights violations that are both cause and consequence of trafficking. Though thus far of limited success,<sup>11</sup> these efforts lay crucial groundwork for a second and current wave of efforts to shift away from criminal justice paradigm dominance – this time towards a

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<sup>11</sup> Gallagher, *UN Protocols*, *supra* note 10, at 984-86 (describing role of prostitution reform debates on negotiations over U.N. Trafficking Protocol); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PENN. L. REV. 1655 (2010) (describing impact of prostitution reform debate on the trafficking field) [hereinafter *Rescuing Trafficking*].

labor paradigm. Defining trafficking to be a subset of forced labor, the International Labor Organization (ILO) claimed both relevance and expertise as it belatedly entered the anti-trafficking field in 2005. An ever-growing chorus of unions, workers' rights advocates, labor bureaus, labor scholars, and human rights advocates are now advocating for a labor approach to anti-trafficking interventions.

Part II situates exploitation creep within this second wave of reform efforts, and details its two component moves. The first is an expansionist reading of the U.N. Protocol trafficking definition to encompass all forced labor ("forced labor creep"). The second is a largely discursive move to label all trafficking – hence, forced labor too – as "slavery" ("slavery creep"). Neither move derives much, if any, support from international treaty law or custom, and both, when taken to their logical conclusions, render the legal concept of trafficking redundant. Notwithstanding these troubling doctrinal implications, the U.S. TIP Office has used forced labor creep to justify expanding its bureaucratic turf to cover practices traditionally considered by the ILO and the U.S. Department of Labor's International Labor Affairs Bureau (ILAB) to be *non-trafficked* forced labor – i.e., forced labor not preceded by a process of movement or recruitment (e.g., inter-generational bonded labor). Simultaneously, via "slavery creep," the U.S. TIP Office has strategically used powerful slavery rhetoric and

imagery to galvanize support for its renewed mission to eradicate – through aggressive criminal justice responses – a now-expanded range of exploitative practices.

Part III assesses the actual and potential consequences of each exploitation creep move as to its respective ability to yield net gains for global anti-trafficking efforts. Regarding forced labor creep, the analysis concludes that, on balance, forced labor creep holds deep transformative potential that may actually be worth its doctrinal tradeoffs. Simply by introducing the concept of “labor” into anti-trafficking discourse, forced labor creep militates against a longstanding bias towards viewing “trafficking” as only or primarily involving sex trafficking. That bias has yielded a narrow understanding of trafficking as the product of individual deviant behavior (of the trafficker) and lack of agency (of the victim). Applying a labor lens exposes how coercion is not necessarily physical and is often situational, produced by a combination of factors (e.g., high debt, immigration status) that result from economic and social structures that feed vulnerability to exploitation. Forced labor creep has also inspired the recent convergence of the previously allergic anti-trafficking/human rights and labor advocacy communities, which are increasingly jointly advocating for anti-trafficking measures that target the structural causes of trafficking (e.g., exorbitant recruitment fees), and that provide much-needed substance to

previously hollow attempts at trafficking prevention.

Regarding slavery creep, however, the analysis concludes that there is high risk of producing counterproductive, if not harmful, results. Conflating trafficking and slavery risks diluting the *jus cogens* prohibition of slavery, while implicitly raising the threshold for trafficking, thus compromising the ability of victims of either practice to achieve accountability and redress for the abuses. But perhaps even more problematic is how slavery creep actively negates the more nuanced understanding of the trafficking phenomenon that forced labor creep encourages. Slavery creep operates like a rubber band to snap us back into adherence to a criminal justice paradigm. Distilling the complex phenomenon of trafficking into a narrative of evil wrongdoers to be punished and agency-less victims to be rescued, slavery creates a simple moral imperative with tremendous popular appeal. Such dynamics absolve States (and their corporate partners) of responsibility for promoting labor and migration structures that create and foster vulnerability to exploitation in the first instance. Moreover, slavery creep's savior narrative appeals in particular to a powerful new type of actor in the global anti-trafficking realm: venture philanthropist-founded NGOs. Their deep pockets enable them to wield tremendous influence vis-à-vis international organizations, NGOs and even the most powerful of States, yet also shield them from the

standard NGO accountability mechanisms. In the hands of such powerful (and largely unaccountable) actors, the slavery creep narrative could be highly distracting, if not disruptive to global anti-trafficking efforts.

Exploitation creep has thus helped bring the modern anti-trafficking movement to an important crossroads. The doctrinal manipulations entailed may ultimately render the concept of trafficking more a political tool than a freestanding legal concept. But to what end? – is the challenge that confronts us. We could continue along the trajectory set at the Protocol’s inception and maintained by slavery creep – targeting individual deviant actors and hapless victims for prosecution and rescue, respectively. History has demonstrated the limited effectiveness of this approach, however – with precious few trafficked persons identified, and those that are, ultimately finding themselves, once “freed,” back in low-wage jobs for which forced labor conditions remain an inherent risk.<sup>12</sup> Instead, we should pursue the course correction made possible by forced labor creep and cast long-overdue scrutiny upon poorly constructed labor and migration frameworks that have proven inadequate to the task of protecting those at the bottom of the global labor hierarchy. Only then would the anti-trafficking movement begin to deliver on its promise of reducing vulnerability to human exploitation for profit.

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<sup>12</sup> *See generally*, DENISE BRENNAN, LIFE INTERRUPTED: TRAFFICKING INTO FORCED LABOR IN THE UNITED STATES (2013).

## I. EVOLUTION OF THE MODERN ANTI-TRAFFICKING REGIME

Understanding the significance of exploitation creep requires first situating its component moves in historical context. Unlike in other fields – where an advocacy movement spurs creation of a new legal regime – in the anti-trafficking field, the law preceded the social movement.<sup>13</sup> Governments decided to develop the U.N. Protocol in a moment of “crisis governance,”<sup>14</sup> fueled by concerns over border security and transnational organized criminal syndicates’ role in facilitating clandestine migration. The hastily drafted treaty defined trafficking to include chronically vague elements that remain both undefined under international law and subject to vast differences in interpretation. The U.N. Protocol was clear, however, about prioritizing crime control concerns above its other stated goals: victim protection and trafficking prevention.

In response, there have been two waves of efforts to loosen the grip of criminal justice paradigm dominance to permit incorporation of

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<sup>13</sup> J.J. Gould, *Slavery’s Global Comeback*, THE ATLANTIC MONTHLY (Dec. 19, 2012, 7:44 AM), available at <http://www.theatlantic.com/international/archive/2012/12/slaverys-global-comeback/266354/> (citing argument made by Ambassador Luis CdeBaca to this effect).

<sup>14</sup> Diane Otto, *Remapping Crisis Through a Feminist Lens*, in FEMINIST PERSPECTIVES ON CONTEMPORARY INT’L LAW: BETWEEN RESISTANCE AND COMPLIANCE? 75 (Sari Kouvo & Zoe Pearson eds., 2011).

alternative perspectives, respectively: (1) a human rights paradigm, and (2) a labor paradigm.

#### A. *Criminal Justice Paradigm Dominance*

When the international community developed the U.N. Protocol in the late 1990s, it did so in the form of a protocol to the U.N. Convention on Transnational Organized Crime (Organized Crime Convention) then being drafted.<sup>15</sup> Until that point, trafficking had been an “obscure but jealously guarded” and relatively inactive mandate of the UN human rights system.<sup>16</sup> That it had been so “unceremoniously plucked” out of the human rights realm and placed under the purview of the U.N. Office of Drugs and Crime (UNODC) meant that the first effort to draft a modern international anti-trafficking treaty would be undertaken by law enforcement officials who were unversed in human rights standards and interested in them only insofar

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<sup>15</sup> UN Trafficking Protocol, *supra* note 10.

<sup>16</sup> Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 790-93 (2009) [hereinafter Gallagher, *Response to James Hathaway*]. The U.N. Working Group on Contemporary Forms of Slavery assumed *de facto* guardianship of the U.N. Trafficking Protocol’s predecessor, the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, the terms of that treaty having not established a formal treaty-monitoring body. ANNE GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 62 n.48 (2010).

as they served crime control goals.<sup>17</sup>

Crime control prerogatives thus have shaped and dominated the modern anti-trafficking movement since the UN Trafficking Protocol's inception. Governments framed trafficking as a crime perpetrated by criminal syndicates, unwittingly suffered primarily by innocent women and children, and best addressed by aggressive criminalization.<sup>18</sup> To that end, the Protocol and its parent Organized Crime Convention establish an elaborate framework to criminalize trafficking and to facilitate inter-state cooperation to intercept traffickers and control borders through information exchange, mutual legal assistance, repatriation procedures, among other measures.<sup>19</sup> Although the dominant rhetoric of the negotiations traded heavily in wrenching imagery of the iconic trafficking victim,<sup>20</sup> the Protocol drafters rejected a provision prohibiting governments from imposing criminal penalties on trafficked persons for crimes committed as a result of the trafficking (e.g., prostitution, undocumented migration).<sup>21</sup> In stark contrast to the language of hard obligation found in the criminalization provisions, States are only to "consider" and "endeavor to provide"

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<sup>17</sup> GALLAGHER, *supra* note 16, at 4.

<sup>18</sup> GALLAGHER, *supra* note 16, at 30-31.

<sup>19</sup> U.N. Trafficking Protocol, *supra* note 10.

<sup>20</sup> For an insightful discussion of iconic imagery of trafficked persons, see Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

<sup>21</sup> Gallagher, *U.N. Protocols*, *supra* note 10, at 990-91.

assistance for and protection of trafficked persons, and subject to the caveats of “in appropriate cases” and “to the extent possible under domestic law.”<sup>22</sup>

Much as the structure and content of international anti-trafficking norms prioritize crime control concerns, so do the international actors that have assumed leadership of global anti-trafficking efforts: the UN Office of Drugs and Crimes (UNODC) and the U.S. government. As the official guardian of the U.N. Trafficking Protocol,<sup>23</sup> the UNODC provides technical and legislative guidance to countries regarding Protocol implementation,<sup>24</sup> conducts research and analysis on trafficking,<sup>25</sup> and coordinates the annual Conference of States Parties where governments meet to discuss implementation issues.<sup>26</sup> Although other segments of the United Nations

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<sup>22</sup> See U.N. Trafficking Protocol, *supra* note 11, at arts. 6-7, 9.

<sup>23</sup> *Human Trafficking*, U.N. OFFICE ON DRUGS AND CRIME (UNODC), <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menu> (last visited Aug. 8, 2013).

<sup>24</sup> See, e.g., UNODC, MODEL LAW AGAINST TRAFFICKING IN PERSONS, U.N. Sales No. E.09.V.11 (2010), available at [http://www.unodc.org/documents/human-trafficking/Model\\_Law\\_against\\_TIP.pdf](http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf).

<sup>25</sup> See, e.g., UNODC, Issue Paper: Abuse of a Position of Vulnerability and other “Means” Within the Definition of Trafficking in Persons (2012), <http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menu> #Issue\_Papers.

<sup>26</sup> U.N. Convention against Transnational Organized Crime, at art. 32(1), Nov. 15, 2000, 2225 U.N.T.S. 209, (entered into force Sept. 29, 2003) [hereinafter U.N. Transnational Organized Crime Convention]; GALLAGHER, *supra* note 16, at 460-61 (discussing the decision of the Conference of Parties to extend its monitoring, information exchange,

also address trafficking issues,<sup>27</sup> the UNODC retains ultimate authority over the trafficking mandate, and explicitly exercises this power through the lens of being “the only [UN] entity focusing on the criminal justice element of [trafficking crimes].”<sup>28</sup> Partly because the U.N. Protocol frames combating human trafficking as a transnational endeavor requiring close collaboration between government law enforcement agencies, the UNODC has refrained from formal assessments of individual country compliance with the Protocol.<sup>29</sup>

By contrast, the U.S. government has assumed the role of “global sheriff” regarding the anti-trafficking efforts of other governments, wielding its hegemonic power to compel compliance with a set of U.S. anti-trafficking standards.<sup>30</sup> The U.S. government had played a prominent role

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cooperation, and other functions to the Trafficking Protocol.)

<sup>27</sup> See, e.g., *Introduction to the Special Rapporteur on Trafficking in Persons, Especially in Women and Children*, U.N. HUMAN RIGHTS, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx> (last visited Aug. 8, 2013).

<sup>28</sup> *On Human Trafficking and Migrant Smuggling*, UNODC, <http://www.unodc.org/unodc/en/human-trafficking/index.html?ref=menuse> (last visited Aug. 8, 2013).

<sup>29</sup> See generally Gallagher, *U.N. Protocols*, *supra* note 11. The UNODC has recently made a tepid attempt at assessment of government practices, however. The UNODC distinguishes its product from the U.S. TIP Report, noting that “observation of trafficking trends can be comprehensively conducted only from an international standpoint.” UNODC, GLOBAL REPORT ON TRAFFICKING IN PERSONS, at 51, U.N. Sales No. E.13.IV.1 (2012).

<sup>30</sup> See generally Janie Chuang, *The United States as Global Sheriff*:

in the U.N. Protocol's development, authoring the Protocol's underlying "3P's" (focused on prosecution, protection, and prevention) policy framework and leading negotiations over the treaty's substantive contents.<sup>31</sup> Two months prior to Protocol adoption, the U.S. Congress passed the U.S. domestic law on trafficking, the Trafficking Victims Protection Act of 2000,<sup>32</sup> which includes a unilateral economic sanctions regime targeted at the anti-trafficking efforts of other governments.<sup>33</sup> The sanctions regime was born of a realization that the success of U.S. domestic efforts to prevent trafficking into the United States turned on the anti-trafficking efforts of other governments.<sup>34</sup> Each year, therefore, the TVPA-created State Department Office to Monitor and Combat Trafficking in Persons (the TIP

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*Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2006) [hereinafter Chuang, *Global Sheriff*]; Anne T. Gallagher & Janie Chuang, *The Use of Indicators to Measure Government Responses to Human Trafficking*, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 317 (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry eds., 2012) [hereinafter Gallagher & Chuang, *The Use of Indicators*].

<sup>31</sup> Chuang, *Global Sheriff*, *supra* note 30, at 449.

<sup>32</sup> TVPA of 2000, 22 U.S.C. §§ 7101–10 (2000) [hereinafter TVPA], *amended by* the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, 22 U.S.C. §§ 7101-10 (Supp. III 2005) [hereinafter 2003 TVPRA], the TVPRA of 2005, 22 U.S.C. §§ 7101-10 (Supp. IV 2007) [hereinafter 2005 TVPRA], the William Wilberforce TVPRA of 2008, 22 U.S.C. §§ 7101-12 (Supp. III 2010) [hereinafter 2008 TVPRA], the TVPRA of 2013, Pub. L. No. 113-4, 127 Stat. 136 [hereinafter 2013 TVPRA].

<sup>33</sup> 22 U.S.C. §§ 7106-07.

<sup>34</sup> Chuang, *Global Sheriff*, *supra* note 30, at 454-56 (discussing the battles within the U.S. government over inclusion of a sanctions regime in the TVPA).

Office) issues an annual Trafficking in Persons Report (TIP Report) ranking countries' efforts to abide by a set of "U.S. minimum standards for combating trafficking," with those countries receiving the lowest ranking then potentially subject to U.S. economic sanctions.<sup>35</sup> Whether motivated by reputational or economic risk, governments have demonstrated a high level of sensitivity to the rankings, with many having taken actions in pursuit of a good report card.<sup>36</sup>

The U.S. TIP Office has used its role as "global sheriff" on trafficking to maintain dominance of the criminal justice approach to trafficking globally. Indeed, this is statutorily mandated: the first three of the four "U.S. minimum standards" target governments' efforts to punish traffickers, while the foremost indicia of the fourth standard focuses on governments' efforts to "vigorously investigate[] and prosecute[]...trafficking."<sup>37</sup> That the first eight years of the regime's

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<sup>35</sup> These sanctions are non-humanitarian-related and non-trade-related, and include withdrawal of both U.S. direct financial assistance and U.S. government support for multilateral aid packages (e.g., World Bank or IMF funds). 22 U.S.C. §§ 7106(a), 7107(d)(1). Countries receiving the lowest ranking (Tier 3) in the annual TIP Report have a 90-day grace period during which to improve their performance before the sanctions determination is made. Moreover, the U.S. President can waive sanctions in the U.S. national interest or in the interest of promoting the goals of the TVPA, or in order to avoid significant adverse effects on vulnerable populations. *Id.*, at § 7107(d).

<sup>36</sup> Chuang, *Global Sheriff*, *supra* note 30, at 464-65; Gallagher & Chuang, *The Use of Indicators*, *supra* note 30, at 327.

<sup>37</sup> The four minimum standards are as follows:

application took place during the Bush Administration – which maintained an almost-exclusive focus on sex-sector trafficking – further entrenched dominance of the criminal justice paradigm.<sup>38</sup> As sociologist Elizabeth Bernstein has demonstrated, mainstream portrayals of the problem of sex-sector trafficking – i.e., young, innocent, impoverished, naive women debauched by evil traffickers – framed trafficking as a moral problem and crime of sexual violence against women and girls and, as such, best addressed through aggressive criminalization of the wrongdoers.<sup>39</sup>

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- (1) The government should prohibit and punish acts of severe forms of trafficking in persons.
  - (2) For sex trafficking involving force, fraud, coercion, or in which the victim is a child, or of trafficking which involves rape, kidnapping or death, the government should prescribe punishment commensurate with that for grave crimes.
  - (3) For the knowing commission of any act of severe form of trafficking, the government should prescribe punishment that is stringent enough to deter and that reflects the heinous nature of the offense.
  - (4) The government should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

See 22 U.S.C. § 7106(a). Note that there is a long list of criteria for the fourth minimum standard that has been expanded and refined with each Reauthorization of the TVPA. See 2003 TVPRA §7106(b); 2005 TVPRA §7106(b); 2008 TVPRA §7106; 2013 TVPRA §1204.

<sup>38</sup> Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *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, 359-60 (2010); Chuang, *Rescuing Trafficking*, *supra* note 11, at 1680-1705.

<sup>39</sup> Elizabeth Bernstein, *The Sexual Politics of “New Abolitionism,”* 18 DIFFERENCES 128 (2007) [hereinafter Bernstein, *New Abolitionism*]; Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral*

Over time, and particularly during the Obama Administration, the U.S. TIP Reports have evolved so as to more substantively address non-sex-sector trafficking and emphasize victim protections. But they continue to showcase and more closely assess governments' efforts to prosecute and punish trafficking.<sup>40</sup> With the UNODC as guardian of the UN Protocol and the U.S. government as enforcer of the criminal justice-dominated paradigm, international anti-trafficking laws and policies continue to prioritize crime control over all other goals.

### *B. Battles for Alternative Paradigms*

It is within this limited space that advocates have struggled to bring attention to the “lesser P’s” of victim protection and trafficking prevention. There have been two waves of efforts to shift anti-trafficking law and policy-making away from criminal justice dominance. The first began during the U.N. Protocol negotiations, with human rights advocates pressuring governments to recognize and address human rights violations as both cause and consequence of the trafficking phenomenon. This endeavor

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*Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Anti-Trafficking Campaigns*, 36 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOC’Y 45 (2010).

<sup>40</sup> See, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 57-62 (2013) [hereinafter 2013 TIP REPORT].

continues to present day, but intersects with a second, and more recent wave of advocacy brought by workers' rights organizations to frame trafficking as a problem rooted in inadequate labor and employment protections. Described in detail below, these two advocacy waves ultimately helped set stage for exploitation creep.

### 1. A Human Rights Perspective

Notwithstanding criminal justice paradigm dominance in the field, human rights advocates have succeeded in having at least some human rights protections infused into anti-trafficking laws and policies worldwide.<sup>41</sup> Human rights gains have largely been limited, however, to providing victims post-trafficking rights protections, leaving relatively undisturbed structural vulnerability to trafficking in the first instance.

It is important to note that such limited bandwidth reflects what

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<sup>41</sup> See, e.g., Council of Europe Convention on Action Against Trafficking in Human Beings, opened for signature May 16, 2005, C.E.T.S. No. 197 (entered into force Sept. 3., 1953; amended June 1, 2010). States are required, for example, to protect the private life and identity of victims, and to provide victims secure accommodation, psychological, legal, and material assistance, and a 30-day "recovery and reflection period," renewable temporary residence permit, and a bar against penalties on victims for any compelled involvement in unlawful activities. Compare *id.*, at arts. 11, 12, 13, and 26 (non-punishment of victims) with U.N. Trafficking Protocol, *supra* note 11, at art. 6 (obliging States "to consider" implementing measures to provide for the physical, psychological and social recovery of victims of trafficking).

human rights advocates have been able to achieve, and not the sum of what they have sought. Human rights advocates have also – unsuccessfully – targeted the underlying economic and social rights violations that create vulnerability to trafficking<sup>42</sup> – including, e.g., the unequal access of women to employment, social benefits, and educational opportunities; remittance and labor export policies that encourage women to work abroad and grant them few protections; and the failure to afford rights to those laboring in those (particularly informal) sectors that serve destination countries’ unrelenting demand for cheap, unprotected labor.<sup>43</sup> Moreover, mindful that

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<sup>42</sup> The right of opportunity to gain a living by work one freely chooses or accepts, the right to just and favorable conditions of work, the right to an adequate standard of living, and the right to education, for example, are all rights contained in the International Covenant on Economic, Social, and Cultural Rights. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 321<sup>st</sup> Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (Dec. 16, 1966), arts. 6, 7, 11, 13. The chronic challenge advocates face in advocating for realization of the economic, social, and cultural rights portion of the international human rights corpus, however, is the standard objection (by governments) that such rights are resource intensive and therefore only aspirational in nature. A growing body of jurisprudence and scholarship has helped unsettle these assumptions, demonstrating how, for example, there are non-resource-intensive steps towards economic and social rights realization – e.g., upholding race and gender-based non-discrimination norms with respect to *access to work and educational opportunities*. See generally ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Asbjorn Eide et al. eds., 2d. rev. ed. 2001).

<sup>43</sup> See, e.g., 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, 14-15 (1998) (describing human rights advocacy targets); BARBARA LIMANOWSKA, TRAFFICKING HUMAN BEINGS IN SOUTH EASTERN EUROPE (2005) [hereinafter SEE REPORT] (assessing prevention strategies in South Eastern Europe); COMM. ON

any line-drawing around a protected category can work to the detriment of those outside the category, human rights advocates have also demanded that anti-trafficking remedies be crafted “with a view towards also promoting the rights of persons found not to have been trafficked, yet still exploited.”<sup>44</sup>

Human rights advocates have not gained much traction with this broader rights agenda, for several reasons. First, during the U.N. Protocol negotiations, strong prioritization of criminal justice concerns created a dynamic where human rights advocates had to rely on strictly instrumentalist arguments for incorporating human rights standards into anti-trafficking regimes.<sup>45</sup> That the rights recognized in anti-trafficking regimes are largely limited to post-hoc victim protections is a consequence of this dynamic: the promise of post-hoc protections strategically designed to incentivize victim cooperation in efforts to investigate and prosecute

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FEMINISM AND INT’L LAW, INT’L LAW ASS’N, WOMEN AND MIGRATION: INTERIM REPORT ON TRAFFICKING IN WOMEN (2004).

<sup>44</sup> Miller & Stewart, *supra* note 43, at 12 (describing principle number 4 of the Roundtable on “The Meaning of ‘Trafficking in Persons’: A Human Rights Perspective”).

<sup>45</sup> See U.N. Special Rapporteur on Violence Against Women, *Position Paper on the Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Submitted to the Ad-Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime*, at 4-6, U.N. Doc. A/AC.254/CRP.13 (May 20, 1999) [hereinafter U.N. Special Rapporteur Position Paper]; U.N. High Comm’r for Human Rights, *Informal Note by the U.N. High Comm’r for Human Rights*, ¶ 16, Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, U.N. Doc. A/AC.254/16 (June 1, 1999) [hereinafter OHCHR Informal Note].

traffickers. Hence, for example, although some countries now afford immediate, temporary protections to trafficked persons once identified (e.g., “reflection period”),<sup>46</sup> longer-term protections (e.g., permanent residency status) typically remain contingent on victim cooperation in the pursuit of claims against their traffickers.<sup>47</sup> Second, since Protocol adoption, human rights advocates have had to focus on ensuring that the limited rights protections recognized under the law are actually applied to *all* trafficked persons, and meaningfully so. For example, notwithstanding the Protocol’s broad definition of trafficking as including men, women, and children trafficked outside the sex sector (e.g., into agriculture, construction, and domestic work), convincing governments to apply anti-trafficking instruments and programs to populations other than the iconic victims (e.g.,

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<sup>46</sup> Victims may be afforded, for example, a “reflection period” during which deportation is temporarily stayed and counseling services provided. *See, e.g.*, Directive 2011/36/, of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, 2011 O.J. (L 101) (mandating a reflection period).

<sup>47</sup> In the United States, trafficked persons must pursue civil actions or cooperate in criminal actions against their traffickers in order to qualify for residency status and social benefits—notwithstanding that such measures may very well place trafficked persons at risk of possible trafficker retaliation against themselves, their family members, or both. Victims of Trafficking and Violence Protection Act (TVPA) of 2000, 22 U.S.C. § 7105(b)(1)(E)(i) (2000). Italy, on the other hand, is one of the few countries that de-links victim assistance from victim cooperation, permitting victims to apply for residency status, for example, without having to first cooperate with the police. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 197 (2012) (describing victim assistance measures in Italy) [hereinafter 2012 TIP REPORT].

women and children in the sex sector) continues to be a struggle.<sup>48</sup>

The factors that have cabined both the breadth of human rights advocacy and its success are also internal to the movement. Internecine battles over prostitution reform<sup>49</sup> have caused deep rifts within the advocacy community, diverting willingness, time, and resources away from joint advocacy targeting a broader range of rights protections. Indeed, the “neo-abolitionist” feminist faction<sup>50</sup> – which dominated the debates through much of the first decade of the anti-trafficking movement, at least in North America and Europe – were and continue to be a powerful force in constructing and maintaining criminal justice paradigm dominance in the anti-trafficking field.<sup>51</sup> Viewing all prostitution as inherently coerced and

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<sup>48</sup> See, e.g., Testimony of Martina E. Vandenberg, *Legal Options to Stop Human Trafficking*, Senate Judiciary Subcommittee on Human Rights (Mar. 26, 2007) (describing gaps in legal protections for persons trafficked by U.S. government contractors for forced labor on U.S. military bases, and by diplomats for domestic work in private households); Martina E. Vandenberg & Alexandra F. Levy, *Justice at the Door: Ending Domestic Servitude*, 7 INTERCULTURAL HUM. RTS. L. REV. 77 (2012) (describing challenges posed by diplomatic immunity to efforts to achieve justice for women trafficked by diplomats into domestic servitude).

<sup>49</sup> For a more exhaustive account of this battle and its impact on the anti-trafficking movement, see Chuang, *Rescuing Trafficking*, *supra* note 11.

<sup>50</sup> See, e.g., Melissa Farley, *Preface to PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS* xi, xiv (Melissa Farley ed., 2003); KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* (1995); Dorchen Leidholdt, *Prostitution: A Violation of Women’s Human Rights*, in 1 CARDOZO WOMEN’S L.J. 133 (1993); Catherine MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 (1993).

<sup>51</sup> See references cited in *supra* note 39. According to sociologist

thus sex trafficking, neo-abolitionist feminists believe in the role of criminal law to stigmatize the buyers of sex as socially or morally tainted, and to aggressively prosecute the owners and managers, clients, and any third parties involved in prostitution; and to rescue and rehabilitate the women, as victims of patriarchy and/or social deviance.<sup>52</sup> With both government and powerful anti-prostitution advocates prioritizing an aggressive criminal justice paradigm, (other) human rights advocates were ill-positioned to effectuate a shift towards a more robust human rights frame.

Equally devastating to this project was the failure of core human rights governance institutions to provide conceptual and operational support for development and implementation of a more robust human rights frame. The international human rights treaty-monitoring bodies have – to this day – done precious little to clearly identify the “wrong” of human trafficking with regard to States’ specific responsibilities under international human rights treaties, typically choosing instead to refer States to the UN Protocol and the UNODC for guidance.<sup>53</sup> Human rights institutions’ deference to the

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Elizabeth Bernstein, feminist neo-abolitionists believe in “carceral feminism” that upholds punitive and criminal paradigms of justice as the preferred frame of anti-trafficking interventions.

<sup>52</sup> See Chuang, *Rescuing Trafficking*, *supra* note 11, at 1669.

<sup>53</sup> Particularly disappointing is the failure of the treaty-monitoring body of U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to link States’ Article 6 explicit obligation to “suppress trafficking” to any of many economic, social, and cultural rights protection required by the treaty. Convention on the

anti-trafficking regime also occurs at the domestic level. For example, within the U.S. government, the Bureau of Democracy, Rights, and Labor, used to include substantive human rights analysis of the trafficking phenomenon in each of the countries surveyed in its annual State Department Report on Country Human Rights Practices, but a few years ago dropped the analysis and began simply referring readers to the annual TIP Reports.<sup>54</sup>

That human rights advocates have achieved only such a narrow range of (post-hoc) human rights protections thus has engendered much criticism, and rising demands for a new alternative approach. Critics have lambasted human rights advocates, claiming that the protections achieved evince a savior complex that disempowers the very population it aims to

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Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979). The CEDAW Committee explicitly side-stepped an opportunity to do so in its General Recommendation 26 on migrant workers. For in-depth discussion of this and other issues regarding CEDAW's work on trafficking, see Janie Chuang, *Article 6*, in THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 169, 173-74 (Marsha A. Freeman, Christine Chinkin, & Beate Rudolf, eds., 2011).

<sup>54</sup> Prior to 2010, the DRL produced human rights-focused analysis of anti-trafficking efforts for each country covered in its annual U.S. Department of State Country Reports on Human Rights Practice (DOS Human Rights Reports) – analysis that tended to be more nuanced and targeted at structural factors than found in the annual TIP Reports. See Chuang, *Global Sheriff*, *supra* note 30, at 476, 481-483 (discussing as examples Cuba and Venezuela). Concerned over possible inconsistencies, however, the TIP Office had DRL excise and replace those analyses with a simple reference to the annual TIP Reports. See Human Rights Reports, *infra* note 107.

help by one-dimensional treatment of them as “victims” deprived of agency.<sup>55</sup> Critics have also accused human rights advocates working in the anti-trafficking field of engaging in exceptionalism that “normalizes the harsh realities of exploitation experienced by many migrant and nonmigrant workers in labor sectors prone to trafficking.”<sup>56</sup> These critiques have primed the pump for rising demands for a new alternative: a labor-based approach that, by focusing on worker empowerment, aims to restore agency to prospective and actual victims and substantively prevent trafficking in the first instance.

When considered in historical context, the hard-fought gains by human rights advocates laid crucial groundwork for the labor movement’s belated entry into the field. Human rights advocacy during the first decade of the modern anti-trafficking movement raised the public profile of trafficking as a problem around which concerned governments, organizations, and individuals increasingly rallied. As discussed below, labor institutions and advocates were then able to grab part of this spotlight

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<sup>55</sup> See, e.g., Shamir, *supra* note 7, at 107. This critique echoes the trenchant internal critiques of the human rights system made by Makau Mutua and David Kennedy. See, e.g., Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L. J. 201; David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 118 (2002).

<sup>56</sup> Shamir, *supra* note 7, at 103.

of condemnation and shine it on the broader spectrum of labor abuses,<sup>57</sup> and to access protections and remedies (e.g., residency status, compensatory and punitive damages) for abused workers that likely would not exist but for human rights advocacy.<sup>58</sup>

## 2. Belated Entry of a Labor Perspective

The link between the trafficking phenomenon and labor practices now seems fairly obvious, but the early years of the modern anti-trafficking movement were almost entirely devoid of a labor perspective. As the guardian of international labor norms since the time of the League of Nations, the International Labour Organization (ILO) ought to have been a key player during the U.N. Protocol negotiations. After all, many of the international treaties adopted and promulgated by the ILO codify rights that are violated in the course of a trafficking scheme – forced and child labor in particular.<sup>59</sup> Despite its broad and deep expertise in promoting respect for

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<sup>57</sup> See *infra* discussion accompanying notes 64-76.

<sup>58</sup> Confidential Source 1 Interview, *supra* note 197.

<sup>59</sup> See, e.g., Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *opened for signature* June 17, 1999, 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).

these rights, the ILO purposely deferred to other international institutions to lead the charge for including the coercive elements of forced labor, debt bondage, and slavery-like practices in the trafficking definition.<sup>60</sup>

The ILO's posture during the negotiations is at least partly attributable to the notoriously divisive politics surrounding the legal definition of trafficking in the treaty. Debates over whether all prostitution could be considered human trafficking consumed negotiations over the trafficking definition.<sup>61</sup> The ILO presaged this debate when shortly before the Protocol negotiations began, it released a highly controversial report, entitled *The Sex Sector*, recommending that governments recognize the sex sector as an economic sector and develop laws and policies to protect those working within the sector from abuse.<sup>62</sup> Though it explicitly refused to take

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<sup>60</sup> See The Director-General, ILO, Int'l Labour Conference, 89th Session, Geneva, Switz., *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/@dcomm/documents/meetingdocument/kd00014.pdf>. The ILO was noticeably absent from the coalition of other international organizations – including the Office of the High Commissioner for Human Rights, U.N. High Commissioner for Refugees, UNICEF, and the International Organization for Migration – that jointly provided input during the Protocol negotiations.

<sup>61</sup> Gallagher, *UN Protocols*, *supra* note 10, at 984-86; Gabrielle Simm, *Negotiating the United Nations Trafficking Protocol: Feminist Debates*, 23 AUSTL. Y.B. INT'L L. 135 (2004); Jo Doezema, *Now You See Her, How You Don't: Sex Workers at the UN Trafficking Protocol Negotiations*, 14 SOC. & LEGAL STUD. 61 (2005).

<sup>62</sup> ILO, *THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA* (Lin Lean Lim ed., 1998).

a stance on whether prostitution ought to be legalized, the ILO report drew a firestorm of criticisms from governments and anti-prostitution feminists for allegedly offering “an economic anointment of the sex industry.”<sup>63</sup>

Regardless, the ILO was well-aware of the opportunity that the strong international consensus around the Trafficking Protocol presented. The U.N. Protocol was developed on the heels of the ILO’s adoption of its 1998 Declaration on Fundamental Principles and Rights at Work (“Declaration”).<sup>64</sup> The Declaration was partly an attempt to revitalize the ILO – an international organization that had long been viewed as “ineffective and weak”<sup>65</sup> – by focusing on a core group of treaties with “the

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<sup>63</sup> See, e.g., Janice G. Raymond, *Legitimizing Prostitution as Sex Work: UN Labour Org. (ILO) Calls for Recognition of the Sex Industry*, COALITION AGAINST TRAFFICKING IN WOMEN, <http://action.web.ca/home/catw/readingroom.shtml?x=16741>.

<sup>64</sup> Int’l Labour Conference, 86th Session, Geneva, Switz., June 18, 1998, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> (Annex revised June 15, 2010). The decision to adopt the Declaration was highly controversial. Some critics characterize the Declaration as part of an effort to replace the labor rights agenda with a narrower focus on a much more limited corpus of four core labor standards, and to move from an approach grounded in legal obligations towards an approach that is fundamentally promotional. See Phillip Alston & James Heenan, *Shrinking the Int’l Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work*, 34 N.Y.U. J. INT’L L. & POL. 101 (2004).

<sup>65</sup> Laurence R. Helfer, *Understanding Change in Int’l Orgs.: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 704 (2006).

most compelling normative claim to adherence” among its membership.<sup>66</sup> The advent of the modern anti-trafficking regime enabled the ILO to pursue eradication of forced labor – one of the four core labor standards – with renewed vigor.<sup>67</sup> The ILO Governing Body thus created a Special Action Programme to Combat Forced Labor (SAP-FL) in 2001 to spearhead its work on forced labor and trafficking.<sup>68</sup>

The ILO SAP-FL did not, however, make its formal mark on the anti-trafficking movement until 2005, with the media-savvy release of its second quadrennial forced labor report.<sup>69</sup> The report drew a great deal of attention partly due to its release of “global estimates” of the numbers of victims of forced labor and, separately, trafficking as a subset thereof<sup>70</sup> – at

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<sup>66</sup> *Id.* at 709.

<sup>67</sup> *Id.* at 704.

<sup>68</sup> European Conference on Preventing and Combating Trafficking in Human Beings, Brussels, Belgium, Sept. 18-20, 2002, *Forced Labour, Child Labour and Human Trafficking in Europe: An ILO Perspective*, [http://www.gaatw.org/working%20paper/usefulresources\\_labour/Trafficking%20for%20Exploitation/ILO\\_2002\\_Forced%20Labour%20ChildL%20and%20HT%20in%20Europe.pdf](http://www.gaatw.org/working%20paper/usefulresources_labour/Trafficking%20for%20Exploitation/ILO_2002_Forced%20Labour%20ChildL%20and%20HT%20in%20Europe.pdf).

<sup>69</sup> The Director-General, ILO, Int’l Labour Conference, 93rd Session, Geneva, Switz., *A Global Alliance Against Forced Labour: Global Report Under the Follow-up to the ILO Declaration on the Fundamental Principles and Rights of Work*, (2005), <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

The launch of the report, which this author attended, was hosted by the BBC World Service Trust and the Massachusetts Institute of Technology, with panel discussions broadcasted on WBUR/NPR’s “On Point” radio program (hosted by Tom Ashbrook) and the BBC World’s “The World Debate” (hosted by Zeinab Badawi).

<sup>70</sup> *Id.* at 10-15.

a time when policymakers and advocates were hungry for new trafficking statistics from a reputable international authority to replace existing statistics that had been roundly discredited.<sup>71</sup> In addition to reporting the incidence of trafficking and forced labor in subsequent quadrennial forced labor reports, the ILO has also produced a set of “operational indicators of trafficking in human beings” to be used by governments worldwide to collect data regarding human trafficking in their countries.<sup>72</sup>

Much as a labor perspective was only belatedly brought to bear on anti-trafficking work at the governmental/institutional level, grassroots advocacy was similarly missing a substantive labor perspective until very recently. The first decade of the anti-trafficking advocacy movement was dominated by organizations that promoted a human rights and/or gender

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<sup>71</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 06-825, HUMAN TRAFFICKING, BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 2-3 (2006) (concluding that the “accuracy of [trafficking] estimates is in doubt because of methodological weaknesses, gaps in data, and numerical discrepancies”); David A. Feingold, *Trafficking in Numbers: The Social Construction of Human Trafficking Data*, in SEX, DRUGS, AND BODY COUNTS: THE POLITICS OF NUMBERS IN GLOBAL CRIME AND CONFLICT 46 (Peter Andreas & Kelly Greenhill eds., 2010) (criticizing the methods by which trafficking data are calculated and presented); Dina 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, 342-44 (2006) (discussing the dramatic reduction in the U.S. government’s statistic of trafficking into the United States from a reported 50,000 in 2002, to 18,000-20,000 in 2003).

<sup>72</sup> ILO, *Operational Indicators of Trafficking in Human Beings* (2009), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_105023.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf).

approach to the problem of human trafficking.<sup>73</sup> While these organizations encouraged the incorporation of labor rights into anti-trafficking policy platforms, workers' rights organizations and labor unions were largely absent from anti-trafficking working groups and coalitions.<sup>74</sup> Labor organizations instead continued to work on workers' rights issues in parallel rather than in conjunction with the anti-trafficking movement.<sup>75</sup>

But within the last few years, labor institutions and labor advocates have dramatically ratcheted up their engagement in the anti-trafficking field. In an effort to establish more robust international standards to address non-sex-sector trafficking, for example, the ILO has decided to develop a protocol to its forced labor conventions, with negotiations set to begin in

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<sup>73</sup> These include, e.g., Human Rights Watch, International Human Rights Law Group (later renamed Global Rights), Global Alliance Against Trafficking in Women, and the Coalition Against Trafficking in Women.

<sup>74</sup> See generally INT'L TRADE UNION CONFEDERATION, NEVER WORK ALONE: TRADE UNIONS AND NGOS JOINING FORCES TO COMBAT FORCED LABOUR AND TRAFFICKING IN EUROPE (2011) (describing the lack of collaboration between unions and anti-trafficking organizations and the efforts of the ITUC and Anti-Slavery International to encourage collaboration between the two communities) [hereinafter ITUC, NEVER WORK ALONE]. At the invitation of human rights advocates, a few sex-worker groups participated in the U.N. Protocol negotiations, but they ultimately felt marginalized by both the process and the end product. See generally Doezema, *supra* note 49.

<sup>75</sup> Organizations such as the Solidarity Center and the National Guestworkers Alliance were the rare exceptions to this dynamic, explicitly linking their work to improve labor standards for migrant workers to an anti-trafficking agenda.

summer 2014.<sup>76</sup> At the grassroots level, anti-trafficking and workers' rights organizations now actively collaborate in joint advocacy targeting, for example, foreign labor recruitment practices that create and maintain conditions of servitude.<sup>77</sup> As discussed below, this heightened engagement

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<sup>76</sup> See generally Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation, Geneva, Switz., Feb. 11-15, 2013 *Report for Discussion at the Tripartite Meeting of Experts Concerning the Possible Adoption of an ILO Instrument to Supplement the Forced Labour Convention, 1930 (No. 29)* (2013), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/meetingdocument/wcms\\_203982.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_203982.pdf) [hereinafter ILO Forced Labour and Trafficking Discussion Paper]; Report and Conclusions of the Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation, The Int'l Labour Standards Dep't, 317th Session, Geneva, Switz., March 6-28, ILO Doc. GB.317/INS/INF/3, (2013) [hereinafter ILO Forced Labour and Trafficking Tripartite Meeting Report].

<sup>77</sup> Within the United States, for example, the Alliance to End Slavery and Trafficking (ATEST), a coalition of anti-trafficking organizations, together with the International Labor Recruitment Working Group (ILRWG), a coalition of human rights and labor advocates focused on addressing foreign labor recruitment abuses across labor sectors, have jointly and successfully lobbied to include provisions addressing abusive recruitment practices in the U.S. Senate's 2013 comprehensive immigration reform bill. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., 1st Sess. (2013) (introduced by Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet, and Flake) [hereinafter CIR Bill].

ATEST members include the Coalition of Immokalee Workers (CIW), Coalition to Abolish Slavery & Trafficking (CAST), End Child Prostitution and Trafficking-USA (ECPAT-USA), Free the Slaves, International Justice Mission (IJM), Not for Sale Campaign, Polaris Project, Safe Horizon, Solidarity Center, Verité, Vital Voices Global Partnership, and World Vision. See *About ATEST*, ATEST, <http://www.endslaveryandtrafficking.org/about-atest> (last visited Aug. 8, 2013). The International Labor Recruitment Working Group, of which the author is a member, comprises AFL-CIO, Solidarity Center, American Federation of Teachers, Centro de los Derechos del Migrante, Inc.,

has both prompted and resulted from exploitation creep, as discussed below.

## II. EXPLOITATION CREEP

The shift towards framing trafficking as a problem that a labor perspective can help solve has posed both threat and opportunity for U.S. TIP Office dominance in the global anti-trafficking realm. In one sense, the U.S. TIP Office appears to have welcomed the infusion of a labor perspective into global anti-trafficking efforts, incorporating more labor analyses into each successive TIP Report, for example.<sup>78</sup> But through the two “exploitation creep” moves detailed below, the TIP Office has managed both to claim oversight over forced labor issues as within its mandate and to uphold the criminal justice paradigm as paramount response to trafficking and forced labor.

The first of these moves is “forced labor creep,” and results from the TIP Office’s unprecedented turn to the U.N. Trafficking Protocol after a

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Economic Policy Institute, Farmworker Justice, Global Workers Justice Alliance, National Guestworker Alliance, Southern Poverty Law Center, among others. FAIR LABOR RECRUITMENT, <http://fairlaborrecruitment.wordpress.com> (last visited Aug. 8, 2013) (urging users to support the International Labor Recruitment Working Group (proprietor of the website) and comprehensive immigration reform) [hereinafter ILRWG website].

<sup>78</sup> Note that this is far more noticeable, however, in the Introductions to the TIP Reports than in the substantive country analyses.

decade of treating the treaty as largely ancillary to its work. The TIP Office has seized upon the Trafficking Protocol's chronically vague legal definition of trafficking to justify sweeping all forced labor practices under "trafficking." Though doctrinally problematic, as demonstrated below, forced labor creep strategically lays the foundation for expansion of the TIP Office's bureaucratic turf, creating conflicts with international and domestic labor institutions traditionally tasked with oversight over forced labor issues *writ large*. Yet, inasmuch as this move signifies a problematic intrusion on labor turf at the bureaucratic level, it has permitted application of a labor paradigm to anti-trafficking analysis. In so doing, it has added depth to otherwise shallow understandings of how coercion operates in practice, to underscore how coercion is produced by the structures governing labor relations and global labor markets. Moreover, even the superficial labeling of trafficking as related to "labor" (as opposed to, as previously, just sex) has opened the door to an array of workers' rights groups, unions, labor scholars to anti-trafficking field, enabling fruitful collaboration between labor and human rights advocates at the grassroots level. Through such collaboration and joint advocacy, human rights and labor advocates have brought long-overdue attention to the underlying structures (e.g. visa requirements) that leave workers vulnerable to extreme exploitation.

Contemporaneous with forced labor creep is the U.S. TIP Office's

efforts to encourage “slavery creep.” Unlike the forced labor creep, this move is primarily discursive: a rhetorical equating of trafficking (and by virtue of forced labor creep, all forced labor too) with “slavery.” One might be inclined to dismiss such discursive moves as political posturing with little actual consequence on the ground. But as championed by the U.S. TIP Office and highly influential venture philanthropists with enormous influence vis-à-vis governments, international institutions, and grassroots NGOs, slavery creep has had broad-reaching and significant impacts on both policymaking and grassroots advocacy landscapes. To be sure, linking trafficking and slavery could, in theory, surface important similarities between political economies of chattel slavery (largely) of the past, and modern-day trafficking. Drawing out such nuanced comparisons is not, however, the current trajectory of slavery creep. Instead, this version promotes an understanding of trafficking as a problem created and sustained by individual deviant actors, and thus best addressed through aggressive crime control measures. In so doing, slavery creep re-entrenches criminal justice paradigm dominance.

#### *A. Forced Labor Creep*

Understanding the mechanics of the first exploitation creep move

requires, first, a closer examination of the legal definition of trafficking established by the U.N. Protocol as a matter of international law. While the perennially “rigor-free” nature of the anti-trafficking field perhaps renders doctrinal accuracy less of a priority in practice, the proffered legal argument for forced labor creep has nonetheless helped legitimate a move that might otherwise be viewed as yet another bald exercise of U.S. hegemonic power to impose U.S. norms on other governments. However unsteady the doctrinal foothold, it has also enabled the U.S. TIP Office to gain entry to – and assert authority over – an arena once exclusively dominated by labor institutions and agencies.

## 1. Doctrinal Slippage

The U.N. Protocol defines “[t]rafficking 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, or 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....<sup>79</sup>

Recalling the three elements of the trafficking definition – act, means, and purpose<sup>80</sup> – forced labor thus is one form of exploitation to which trafficked persons may be subjected. Forced labour 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.”<sup>81</sup> The ILO, the keeper of the international forced labor treaties, interprets *trafficked* forced labor to include only forced labor involving recruitment or movement by a third party. Situations lacking this process element, such as intergenerational bonded labor (i.e., where individuals are born into bondage)<sup>82</sup> are thus considered *non-trafficked*

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<sup>79</sup> UN Trafficking Protocol, *supra* note 11, art. 3.

<sup>80</sup> Ongoing confusion over the scope of the trafficking definition has prompted the UNODC to commission expert studies into key definitional concepts (“abuse of a position of vulnerability,” “consent,” and “exploitation”) from an international legal perspective as well as with reference to the practice of states. *See, e.g.*, UNODC, Issue Paper: Abuse of a Position of Vulnerability and other “Means” Within the Definition of Trafficking in Persons (2012), [http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menu#Issue\\_Papers](http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menu#Issue_Papers) (2012).

<sup>81</sup> *See* treaties cited at *supra* note 59.

<sup>82</sup> In cases of intergenerational bondage, debts are passed down from parent to child – once a parent is no longer able to work, the child assumes the debt. This practice occurs in countries with longstanding feudal agricultural societies. *Forced and Bonded Child Labor*, U.S. DOL, BUREAU OF OF INT’L LABOR AFFAIRS,

forced labor. Until 2012, the ILO estimated trafficked forced labor to comprise only 20 percent of all forced labor globally.<sup>83</sup>

In contrast, in the first of the two exploitation creep moves, the U.S. TIP Office argues that *all* forced labor comprises trafficking. The TIP Office bases this trafficking/forced labor conflation on the UN Protocol definition's inclusion of "harbouring" (alongside "recruitment" and "transportation") in the action element.<sup>84</sup> Under this construction, the party to whom an intergenerational bonded laborer is indebted "harbours" the laborer, exerting control over the laborer through the debt.

The U.N. Protocol unfortunately does not offer a clear basis for resolving this definitional debate. Available information indicates, however, that the TIP Office's expansive interpretation is not what the Protocol drafters intended, as discussed below. The TIP Office's use of "harbouring" – a common criminal law term undefined in international law

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<http://www.dol.gov/ILAB/media/reports/iclp/sweat2/bonded.htm> (last visited Aug. 8, 2013).

<sup>83</sup> In its 2005 *Forced Labor Report*, the ILO reported that, of the estimated 12.3 million in forced labor globally, 2.45 million were trafficked. *Supra* note 69, at 12-13. The ILO stopped offering a separate trafficking statistic in its 2012 global estimate of forced labor. *See infra* notes 117-119 and accompanying text.

<sup>84</sup> This position has been personally conveyed to the author by TIP Office personnel, including Ambassador CdeBaca on multiple occasions, and confirmed by both TIP Office and Department of Labor personnel as the source of much debate within the U.S. government.

– is perhaps a plausible reading of the term’s ordinary meaning.<sup>85</sup> But as the Vienna Convention on the Law of Treaties instructs, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose.*”<sup>86</sup> Nothing in the treaty’s structure, the context in which it was developed, or its *travaux préparatoires* supports the TIP Office’s expansionist interpretation of the trafficking definition.<sup>87</sup>

As a structural matter, the TIP Office’s broad reading of “harbouring” collapses the drafters’ carefully crafted three-part (i.e., act, means, exploitation) definition of trafficking, rendering “trafficking” legally redundant with its “purpose of exploitation” element. Under the TIP Office’s construction, the trafficking threshold could be met simply by demonstrating the purpose element – the means element automatically satisfied by the inherently coercive nature of the end purposes (e.g., forced

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<sup>85</sup> The Oxford English Dictionary notes that the term “harbour,” defined as “to give shelter to” was formerly often used “in a good sense”: “to keep in safety or security, to protect”; the term is “now mostly dyslogistic, to give secret or clandestine entertainment to noxious persons or offenders against the laws.” OXFORD ENGLISH DICTIONARY (2000). Black’s Law Dictionary defines “harbor” as “to receive clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>86</sup> Vienna Convention on the Law of Treaties art. 31, *adopted* May 23, 1969, 1155 U.N.T.S. 331, (entered into force Jan. 27, 1980) [hereinafter VCLT] (emphasis added).

<sup>87</sup> GALLAGHER, *supra* note 16, at 30-31.

labor, slavery-like practices). Neither Protocol text nor its *travaux préparatoires* offers any suggestion that collapse of the three-part definition was even contemplated, much less intended, however.<sup>88</sup> Moreover, if trafficking could be so easily conflated with these or any other of the listed exploitative purposes, it is hard to see why States would have invested resources to create a new treaty regime when the target phenomena were already addressed by well-established treaty and customary international laws.<sup>89</sup> That the ILO, as guardian of the international forced labor treaties, was not more active during the Protocol negotiations also suggests lack of intent to update the forced labor regime.

If anything, the Protocol's context, treaty structure, and substantive provisions support the ILO's focus on movement/recruitment as a distinguishing feature of trafficking. It was States' concerns over clandestine migration (including its more abusive forms) and the particular role of organized crime syndicates in facilitating it that prompted

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<sup>88</sup> Indeed, guidance from the official Legislative Guide for the Protocol that "[t]he obligation is to criminalize trafficking as a *combination* of constituent elements and *not* the elements themselves" suggests a certain adherence to the three-part structure of the trafficking definition. UNODC, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOL THERETO, U.N. Sales No. E.0000000 (2004), *available at* <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html> (emphasis added).

<sup>89</sup> *Id.*; see treaties cited at *supra* note 59 (forced labor) and *infra* note 131 (slavery).

development of the Trafficking Protocol and its companion Migrant Smuggling Protocol.<sup>90</sup> The Trafficking Protocol’s preamble thus declares that effective action to prevent and combat trafficking “requires a comprehensive *international* approach in the countries of *origin, transit* and *destination*.”<sup>91</sup> The substantive provisions of the treaty assign states’ responsibilities according to these categorizations – e.g., with countries of destination to consider providing residency status to victims,<sup>92</sup> and countries of origin to accept their return.<sup>93</sup>

Moreover, the UN Protocol’s *travaux préparatoires*<sup>94</sup> includes several indications that the delegates were operating from the assumption that trafficking entails movement. Indeed, one of the two proposed options for a trafficking definition – retained in the draft Protocol until its near-final form – explicitly required “[t]ransporting a woman to or facilitating her

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<sup>90</sup> Protocol Against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/55/383 (Nov. 15, 2000). Indeed, States took great pains to distinguish smuggled from trafficked migrants – the former considered complicit in the crime of illegal border crossing and thus not worthy of victim protection, while the latter deemed worthy by virtue of the additional exploitation element. *See* ANNE GALLAGHER & FIONA DAVID, *THE INTERNATIONAL LAW OF MIGRANT SMUGGLING* (forthcoming 2013).

<sup>91</sup> UN Trafficking Protocol, *supra* note 11, at preamble (emphasis added).

<sup>92</sup> *Id.* at art. 7.

<sup>93</sup> *Id.* at art. 8.

<sup>94</sup> The VCLT permits review of a treaty’s *travaux préparatoires*, or the preparatory work of the treaty, as a supplementary means of interpretation. VCLT, *supra* note 86, at art. 32.

entry into another state.”<sup>95</sup> To the extent delegates raised questions or concerns about movement, it was not in the context of debating whether to require movement at all, but rather whether “trafficking” “would *also* include the transportation of a person within a State or whether it *necessitated* crossing an international border.”<sup>96</sup> Arguing for the former option, U.N. human rights agency representatives participating in the Protocol negotiations – including this author – operated from the assumption that some element of movement was required. The movement/recruitment element was considered a key factor rendering migrants particularly vulnerable to exploitation.<sup>97</sup> As the ILO later noted in explaining its position, *trafficked* forced laborers are “probably worse off”

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<sup>95</sup> Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Women and Children, art. 2, 2d Sess., March 8-12, 1999, U.N. Doc. A/AC.254/4/Add.3/Rev.1. [hereinafter U.S.-Argentina draft], at art. 2 (“option 2) (definition proposed by Argentina). This proposed definition was retained as an option until the April 2000 draft of the Protocol.

<sup>96</sup> Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Women and Children, art. 2 n.19, 7th Sess., Jan. 17-28, 2000, U.N. Doc. A/AC.254/4/Add.3/Rev.4.

<sup>97</sup> See U.N. Special Rapporteur Position Paper, *supra* note 45, at 3; OHCHR, *Informal Note*, *supra* note 45. Note that the author represented the U.N. Special Rapporteur on Violence against Women during the Protocol negotiations. That trafficking entailed a movement requirement was also working assumption of key U.S.-based non-governmental human rights organizations participating in the UN Protocol negotiations. See, e.g., Miller & Stewart, *supra* note 43, at 14-15 (discussing the understanding of U.S.-based human rights organizations that trafficking entailed physical movement or transport).

than *non-trafficked* ones, who exercise more agency in exiting forced labor.<sup>98</sup>

That the “act” element includes a range of actions beyond movement/recruitment – i.e., “transfer, harbouring or receipt of persons” – is thus not intended to bring all forced labor under the trafficking umbrella. The language “recruitment, transportation, transfer, harbouring or receipt of persons” was introduced in the first working draft of the Protocol – neither the act element as a whole nor any individual component was debated or discussed during the course of the negotiations.<sup>99</sup> Recollections of those present during the negotiations confirm that the structure of the act element was assumed to reflect the drafters’ vision of trafficking as a *process* carried out by multiple actors working in concert.<sup>100</sup> Pinpointing each act in the process was born of States’ desire to criminalize all actors involved in that process – the recruiters, transporters, owners and supervisors of any place of exploitation – not to equate individual parts of the process with their

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<sup>98</sup> Beate Andrees & Mariska N.J. van der Linden, *Designing Trafficking Research from a Labour Market Perspective: The ILO Experience*, in 43 INT’L MIGRATION 55, 64, (Jan. 2005) (explaining the ILO’s position during the UN Protocol negotiations).

<sup>99</sup> See U.S.-Argentina draft, *supra* note 95, at art. 2, option 1, at 2.

<sup>100</sup> Telephone Interview with Anne Gallagher, Legal Adviser to the U.N. and Association of South East Nations (July 31, 2013). Gallagher participated in the negotiations as the representative of the Office of the U.N. High Commissioner for Human Rights. The author’s personal recollection from participating in the negotiations is consistent with this understanding.

sum.

Yet, notwithstanding the shaky doctrinal ground for forced labor creep, the anti-trafficking field appears to be on a trajectory towards a view of trafficking that deemphasizes movement and emphasizes exploitation as the core of the harm. The TIP Office and TIP Reports have made abundantly clear that their assessment of State practices will encompass exploitation sans movement.<sup>101</sup> Moreover, supporting this shift, the Conference of Parties Working Group on Trafficking in Persons – empowered under the Organized Crime Convention to provide States Parties guidance concerning U.N. Protocol implementation – has recommended that States Parties recognize that the “presence of any of those acts [listed in the act element] could mean that [ ] trafficking had been committed, even in the absence of transit or transportation.”<sup>102</sup>

## 2. Bureaucratic Turf Wars

Forced labor creep has provided the U.S. TIP Office cover for its

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<sup>101</sup> See, e.g., 2013 TIP REPORT, *supra* note 60, at 29 (human trafficking can include but does not require movement...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>102</sup> Conf. of the Parties to the U.N. Convention against Transnational Organized Crime, para. 55, 5th Sess., Oct. 18-22, 2010, U.N. Doc. CTOC/COP/2010/6.

expansionist ambitions to police forced labor globally. Governmental and non-governmental institutions devoted to anti-trafficking issues have developed separately from and more recently than labor institutions long responsible for addressing forced labor issues. This compartmentalization tracks the separation of legal regimes – forced labor matters traditionally falling under labor (or industrial relations) law, with trafficking as a separate regime unto itself (and usually focused on criminal prosecution). The doctrinal conflation of forced labor and trafficking blurs these traditional boundaries, with unsettling implications for international and domestic institutions and their respective powers to frame the problem of trafficking and shape law and policy interventions thereto.

a. Brewing Conflict with the ILO

For the ILO to situate trafficking as a subset of forced labor in its 2005 quadrennial forced labor report was a jarring challenge to the U.S. government's presumed authority in the global anti-trafficking arena. Other governments already viewed the U.S. government's anti-trafficking sanctions regime as a bald, illegitimate exercise of U.S. hegemonic power, particularly on the heels of the internationally-backed UN Protocol. The ILO, on the other hand, enjoyed international recognition as the guardian of

international labor law. Moreover, by subsuming trafficking under its forced labor mandate, the ILO could claim specific international authority and expertise dating back to its 1930 adoption of the ILO Forced Labour Convention.<sup>103</sup>

But when first confronted with the ILO's contrary view of the relationship between trafficking and forced labor in 2005, the U.S. TIP Office did not directly object. The 2006 U.S. TIP Report simply notes that trafficking does not require movement as a matter of law,<sup>104</sup> and selectively reproduces the ILO statistics – carefully referring only to the ILO's global estimate for “forced labor” and not the smaller “trafficking” statistic.<sup>105</sup> The TIP Office's relatively muted response to this disagreement is likely attributable to at least two key factors. First is that this difference of opinion arose during the peak years of the Bush Administration, which adopted a policy perspective that equated prostitution (including

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<sup>103</sup> See international forced labor treaties cited in *supra* note 59.

<sup>104</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 10 (2006) (discussing “the myth of movement”) [hereinafter 2006 TIP REPORT].

<sup>105</sup> 2006 TIP REPORT, *supra* note 97, at 6; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2007) [hereinafter 2007 TIP REPORT]; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2008) [hereinafter 2008 TIP REPORT]; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2009) [hereinafter 2009 TIP REPORT]; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2010) [hereinafter 2010 TIP REPORT].

“voluntary” adult prostitution) with trafficking.<sup>106</sup> The refusal to equate prostitution with “labor” under any circumstances – and to view prostitution as intrinsically coercive, hence not “forced” – prevented trafficking from being connected to “forced labor” as a conceptual matter. This position, combined with the then-TIP Office’s relatively scant attention to non-sex-sector trafficking, together rendered concerns over the relationship between trafficking and forced labor largely irrelevant to its day-to-day functioning.

A second dynamic that likely tempered the TIP Office’s response was the rather inconvenient fact that those parts of the U.S. government specializing in forced labor – the U.S. State Department Bureau of Democracy, Rights, and Labor (DRL) and the U.S. Labor Department’s International Labor Affairs Bureau (ILAB) – actually sided with the ILO’s position. The DRL had long applied the trafficked versus non-trafficked distinction in its annual State Department Country Reports on Human Rights Practices, assessing government practices regarding trafficking and forced labor as separate analytic categories.<sup>107</sup> ILAB similarly adhered to the distinction in carrying out its mandate to address forced labor abroad, for example, viewing issues of intergenerational bonded labor as within its

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<sup>106</sup> Chuang, *Rescuing Trafficking*, *supra* note 11, at 1699-1702.

<sup>107</sup> U.S. DEP’T OF STATE, Human Rights Reports, *available at* <http://www.state.gov/j/drl/rls/hrrpt/>.

portfolio and outside the TIP Office's.<sup>108</sup>

The political landscape changed, however, with the entry of the Obama Administration. The Obama TIP Office made a concerted effort to shift the spotlight to non-sex sector trafficking, making the link between trafficking and “labor” much more visible and explicit.<sup>109</sup> It accomplished this in part through the bold and highly controversial move of defining (adult) sex trafficking as including “forced prostitution” or prostitution involving force, fraud, or coercion<sup>110</sup> – in effect, reversing the Bush Administration’s position equating voluntary prostitution with trafficking.<sup>111</sup> The move was partly a strategic effort to redirect attention

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<sup>108</sup> There, the TIP Office attempted to incorporate their own view of the trafficking definition into the treaty, but to no avail. Author Interview with International Labor Affairs Bureau, Dep’t of Labor, D.C. (Dec. 2012) [hereinafter ILAB Interview].

<sup>109</sup> See, e.g., 2009 TIP REPORT, *supra* note 105, at 17 (debt bondage among migrant laborers), 18 (involuntary domestic servitude), 26 (strengthening prohibitions against forced labor and fraudulent recruitment of foreign workers). Note that the 2006 TIP Report, issued towards the end of the Bush Administration, made a concerted effort to include substantive discussion of trafficking practices outside the sex sector. See 2006 TIP REPORT, *supra* note 104, at 6 (noting that the 2006 Report focuses on “slave labor *and* sexual slavery”) (emphasis in original).

<sup>110</sup> The 2009 TIP Report marks the shift in language towards use of “forced prostitution” to describe practices comprising sex trafficking. See, e.g., 2009 TIP REPORT, *supra* note 105, at 5, 13, 21, 22. The 2010 TIP Report includes the explicit statement that “[p]rostitution by willing adults is not human trafficking regardless of whether it is legalized, decriminalized, or criminalized.” 2010 TIP REPORT, *supra* note 105, at 8.

<sup>111</sup> BUREAU OF PUBLIC AFFAIRS, U.S. DEP’T OF STATE, FACT SHEET: THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004) (stating that “where prostitution has been legalized or tolerated, there is an increase

and resources away from the divisive and distracting prostitution reform debates. The move also enabled a pivot towards what the Obama TIP Office considered the core harm of trafficking (into any sector): “the many forms of enslavement, not the activities involved in international transportation.”<sup>112</sup> Increasingly, the TIP Office came to view the ILO’s trafficked versus non-trafficked forced labor distinction – and DRL and ILAB’s adherence to the ILO view – as stumbling blocks to the TIP Office’s efforts to pull focus to a broader range of abusive labor practices, including intergenerational debt bondage. The TIP Office thus began its campaign to bring DRL, ILAB, and ILO in line with its view, as described below.

#### b. Conquering DRL/ILAB

Beginning in 2009, the TIP Office sought a unified U.S. government position that the legal concept of trafficking encompasses all forced labor. At stake for DRL and ILAB was not only bureaucratic turf, but fundamental approach to encouraging other governments to address their forced labor

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in the demand for sex slaves”). Bush Administration’s anti-trafficking interventions targeted prostitution *writ large*, assuming away any distinction between voluntary and forced prostitution. See Chuang, *Rescuing Trafficking*, *supra* note 11, at 1680-1704.

<sup>112</sup> Gould, *supra* note 13.

problems. ILAB and DRL typically rely on a “carrot” approach of diplomatic engagement and technical cooperation to promote internationally-recognized workers’ rights, generally, and to eliminate forced labor, specifically. These efforts involve close collaboration with NGOs, trade unions, companies, and international organizations. Although both DRL and ILAB engage in naming and shaming of non-compliant governments through, for example, the annual State Department Country Human Rights Practices Report<sup>113</sup> and the Labor Department List of Goods Produced by Child Labor or Forced Labor,<sup>114</sup> respectively, the bulk of these offices’ programmatic activity lies in working closely with governments to identify structural factors that facilitate forced labor, and develop alternative solutions. This approach stands in stark contrast to TIP Office efforts in the trafficking arena, which involve diplomacy and technical cooperation, but are best known worldwide for using the “stick” of shaming via TIP Report rankings and sanctions to compel foreign government compliance with U.S. (criminal-justice-focused) anti-trafficking standards.

DRL was the first to succumb to TIP Office pressure, thus enabling the State Department to have a uniform position on the issue. ILAB, on the other hand, persisted in its refusal to adopt the TIP Office’s viewpoint. In

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<sup>113</sup> See Human Rights Reports, *supra* note 107.

<sup>114</sup> U.S. DEP’T OF LABOR, Bureau of Int’l Labor Affairs, Trafficking Victims Protection Reauthorization Act, List of Goods and Countries, available at <http://www.dol.gov/ILAB/programs/ocft/tvpra.htm>.

addition to viewing the TIP Office's interpretation of the Protocol trafficking definition as legally inaccurate, ILAB feared that introducing the TIP Office's "stick" of shaming and sanctions into ILAB's forced labor programming could disrupt diplomatic engagement. More significantly, it could redirect attention and resources to aggressive prosecutorial strategies, rather than strategies targeting root causes like weak labor frameworks. Moreover, TIP Office involvement could undercut ILAB's limited use of its own "stick" of shaming governments that use child or forced labor by introducing a competing metric for country assessments.

The TIP Office and ILAB at an impasse, the dispute was brought to the National Security Council (NSC) for resolution in 2010. The NSC ultimately decided in the TIP Office's favor – requiring all U.S. government agencies to hew to the definitional boundaries drawn by the TIP Office. Those boundaries have since enabled the TIP Office to stake its claim to a substantive role in developing international labor standards that bear upon the situation of trafficked persons. U.S. TIP Office representatives attended, for example, the 2010-2011 negotiations over the ILO Domestic Workers Convention, notwithstanding ILAB's role and presence there as lead U.S. government negotiator for international labor treaties.<sup>115</sup> With the ILO proposal to develop a new protocol to its forced labor treaties on the

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<sup>115</sup> ILAB interview, *supra* note 108.

horizon, as discussed below, one can expect continued jockeying for influence between the TIP Office and ILAB.

c. Swaying the ILO

In addition to pursuing uniformity of position across the U.S. government, the TIP Office has also maintained pressure on the ILO to conform to its expansive interpretation of the trafficking definition. The ILO appeared to succumb – temporarily – to TIP Office pressure, but has ultimately maintained its position. For example, in 2011, the ILO circulated a draft of its survey guidelines for estimating forced labour, entitled *Hard to see, harder to count*, which offered both a “narrow definition” and a “broad definition” of trafficking. While the “narrow” version retained the trafficked versus non-trafficked distinction, the “broad” definition reflected the U.S. TIP Office’s perspective that: “[i]rrespective of movement...any adult or child worker engaged in forced labour is classified also as a victim of human trafficking.”<sup>116</sup> The final (2012) version of the report deletes this language, however.<sup>117</sup> At the same time, the ILO studiously avoids the

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<sup>116</sup> INT’L LABOUR OFFICE, *HARD TO SEE, HARDER TO COUNT: SURVEY GUIDELINES TO ESTIMATE FORCED LABOUR OF ADULTS AND CHILDREN 20* (2011) (on file with author).

<sup>117</sup> The ILO notes, instead, the following:  
In the context of determining an operational definition of trafficking

trafficking issue altogether in its 2012 “global estimate of forced labor” (updating its 2005 statistic).<sup>118</sup> There the ILO reports a total of 20.9 million forced labourers, but unlike in 2005, does not include a separate “trafficking” statistic. Seizing upon the omission, the U.S. TIP Office notes in its 2012 TIP Report that “[the new ILO global estimate] recognizes that human trafficking is defined by exploitation, not by movement.”<sup>119</sup>

But what the TIP Office interprets as a concession is perhaps more aptly characterized as strategic avoidance – enabling the ILO to keep its

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for forced labour, for the purpose of data collection, it is necessary to raise two issues: first, whether movement of the victim either within or across national borders is a necessary condition for trafficking, and second, whether the involvement of an intermediary or other third party is required. While neither of these criteria has to be present in order to prosecute a case of human trafficking, national policy-makers may nonetheless decide to distinguish between “trafficked” and “non-trafficked” (or other forms of) forced labour. This may help them to devise differentiated policy responses that are best adapted to the national context and specific target groups. The present guidelines, which are designed for the purpose of statistical data collection, do not adopt a position on this issue.

INT’L LABOUR OFFICE, *HARD TO SEE, HARDER TO COUNT: SURVEY GUIDELINES TO ESTIMATE FORCED LABOUR OF ADULTS AND CHILDREN* 19 (2012).

<sup>118</sup> INT’L LABOUR OFFICE, *ILO 2012 GLOBAL ESTIMATE OF FORCED LABOUR* 1 (2012) [hereinafter *ILO 2012 GLOBAL ESTIMATE*]. The ILO reports that 90% of forced labourers are exploited in the private economy (i.e. by individuals or enterprises), and 10% in state-imposed forms of forced labour (e.g., prisons, state military, or rebel armed forces). 55% are women and girls, and 74% are adults. Of those exploited in the private economy, 22% are victims of forced sexual exploitation, and 68% are victims of forced labour exploitation in economic activities, such as agriculture, construction, domestic work or manufacturing. *Id.*

<sup>119</sup> 2012 TIP REPORT, *supra* note 47.

options open as it contemplates its future role in the anti-trafficking movement. For example, in response to the question “[i]s [forced labour] the same as trafficking and slavery?” posted on the ILO website releasing the new estimate, the ILO answers only that human trafficking “can also be regarded as forced labour.”<sup>120</sup> Tellingly, it avoids entirely the harder question of whether forced labour can be considered trafficking – or slavery, for that matter. Closer review of the global estimate reveals, however, the ILO’s implicit adherence to the trafficked/non-trafficked forced labor distinction, despite the ILO’s avoidance of the term “trafficking”:

The estimates also allow an assessment of how many people *end up being trapped in forced labour following migration*. There are 9.1 million victims (44% of the total) who have moved either internally or internationally, while the majority, 11.8 million (56%), are subjected to forced labour in their place of origin or residence.<sup>121</sup>

Whether and how the ILO ultimately chooses to address the relationship between trafficking and forced labour remains to be seen. That the ILO has decided to develop a trafficking-focused protocol to the ILO Forced Labour

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<sup>120</sup> International Labour Organization, Questions and answers on forced labour, Analysis, June 1, 2012, [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_181922/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_181922/lang--en/index.htm).

<sup>121</sup> ILO 2012 GLOBAL ESTIMATE, *supra* note 118, at 2 (emphasis added).

Convention promises sustained if not increased involvement in global anti-trafficking law and policy-making.<sup>122</sup>

### B. *Slavery Creep*

Curiously, simultaneous with its aggressive efforts to export its capacious interpretation of the trafficking definition, the Obama TIP Office has also been actively arguing for the “trafficking” term’s obsolescence. In fall 2012, President Obama and former Secretary of State Clinton explicitly advocated replacing the term “trafficking” with “slavery,” deeming the latter the more accurate label:

I’m talking about the injustice, the outrage, of human trafficking, which must be called by its true name – modern

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<sup>122</sup> First among the discussion points to be addressed by a February 2013 Tripartite Meeting of Experts on the proposed instrument was whether and how to define the relationship between forced labour and trafficking, and what regulatory gaps exist regarding trafficking and whether the ILO should address them through the proposed instrument. ILO FL/T Discussion Paper, *supra* note 76, at para 144 (Discussion point 1: Trafficking in persons). Ultimately, due to deeply divergent views expressed at the expert meeting, the conclusions adopted by the expert group only imply a distinction between trafficking and forced labor, leaving its precise contours unaddressed. ILO FL/T Tripartite Meeting Report, Appendix, *supra* note 76, at 39 para 2 (noting that “the ILO should pursue complementary approaches in accordance with its mandate and expertise with a view to ensuring effective eradication of forced labour, including forced labour exacted as a result of trafficking.”)

slavery.... Now, I do not use that word, “slavery” lightly. It evokes obviously one of the most painful chapters in our nation’s history. But around the world, there’s no denying that awful reality....Now, as a nation, we’ve long rejected such cruelty. Just a few days ago, we marked the 150<sup>th</sup> anniversary of ...the Emancipation Proclamation....

-- President Barack Obama<sup>123</sup>

Today, it is estimated as many as 27 million people around the world are victims of modern slavery, what we sometimes call trafficking in persons. As [TIP Ambassador Luis CdeBaca] said, I’ve worked on this issue now for more than a dozen years. And when we started, we called it trafficking. And we were particularly concerned about what we saw as an explosion of the exploitation of people, most especially women, who were being quote, “trafficked” into the sex trade and other forms of servitude. But I think labeling this for what it is, slavery, has brought it to another dimension.

I mean, trafficking, when I first used to talk about it all those years ago, I think for a while people wondered whether I was talking

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<sup>123</sup> The White House, Office of the Press Sec’y, Remarks by the President to the Clinton Global Initiative, N.Y.C, NY Sept. 25, 2012, *available at* <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>.

about road safety – (laughter) – what we needed to do to improve transportation systems. But slavery, there is no mistaking what it is, what it means, what it does....

– U.S. Secretary of State Hilary Rodham Clinton<sup>124</sup>

The references to slavery are neither new nor surprising, especially given that the year 2013 marks the 150<sup>th</sup> anniversary of the Emancipation Proclamation. The rhetorical marrying of trafficking practices with slavery has proven an enormously successful tool for galvanizing outrage and incentivizing anti-trafficking advocacy and support. The slavery analogy packs a particular punch in the U.S. context, given this country’s past as a major slaveholding country – its invocation by the United States’ first African-American President all the more powerful.

But what is novel about the Obama/Clinton statements is the shift from invoking slavery imagery for rhetorical flair to explicitly suggesting that “slavery” should replace “trafficking” because the latter is a passé, if not inaccurate, descriptor. This move is a far more intentioned use of the term “slavery” than has ever been used before. Rather than simply a tool to incentivize action, “slavery” is now being used to actively re-frame the

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<sup>124</sup> U.S. DEP’T OF STATE, Release of the 2012 Trafficking in Persons Report, Remarks by Sec’y of State Hillary Rodham Clinton, June 19, 2012, video and transcript available at <http://www.state.gov/secretary/rm/2012/06/193368.htm>.

problem – not only by the highest levels of the U.S. government, but by a wide swath of grassroots advocates and mainstream media outlets. Yet, as discussed below, use of the slavery analogy in the trafficking field comes with a long, fraught history, and efforts to officially equate trafficking with slavery as a matter of U.S. law failed as recently as five years ago. What accounts for the sudden embrace of “slavery” as conceptual frame? And, more significantly, at a time when we are also witnessing growing demands for a labor paradigm to be applied to the problem of human trafficking?

#### 1. From Analogy to Framing Device

Efforts to equate trafficking with slavery date back to the earliest anti-trafficking treaties, from the early 1900s, which targeted what was then referred to as “white slave traffic,” specifically the forcible or fraudulent recruitment into prostitution.<sup>125</sup> The use of “white slavery” was intended to both distinguish “female sexual slavery” from African enslavement and to draw a moral comparison between the two practices.<sup>126</sup> References to slavery were soon abandoned, however, for “not reflecting the nature and

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<sup>125</sup> International Agreement for the Suppression of the White Slave Traffic, May 4, 1904, 1 L.N.T.S. 83, (entered into force July 18, 1905); International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 3 L.N.T.S. 278, (entered into force Aug 8, 2012).

<sup>126</sup> GALLAGHER, *supra* note 16, at 55.

scope of the problem.”<sup>127</sup> Moreover, the many international agreements adopted in the late nineteenth and early twentieth centuries to address enslavement of Africans were never intended or considered to cover the practices now associated with trafficking, including sexual exploitation, forced labor, debt bondage, and child labor.<sup>128</sup>

Despite its contested use in the past, some activists resurrected the rhetoric of “sexual slavery”<sup>129</sup> during the U.N. Protocol negotiations to garner support for using the treaty to abolish prostitution writ large. But few, if any, legal advocates would have suggested that, but for the most extreme cases, trafficking met the legal threshold for slavery under

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<sup>127</sup> GALLAGHER, *supra* note 16, at 13-14. *See, e.g.*, International Convention for the Suppression of Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415, (entered into force June 15, 1922); International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431, (entered into force Aug. 24, 1934); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271, (entered into force July 25, 1951).

<sup>128</sup> *See Report Presented by the Advisory Comm. of Experts on Slavery*, League of Nations Doc. C.189(I).M.145 1936 VI, 24-25 (1936) (stating that “one should realize quite clearly that [debt slavery]...is not ‘slavery’ within the definition set forth in the 1926 Convention, unless any or all the powers attaching to the right of ownership are exercised by the master”). For a thorough examination of the international legal definition of slavery, *see* Gallagher, *Response to James Hathaway*, *supra* note 16, at 799-810.

<sup>129</sup> These same activists pushed for incorporation of this concept in the statutes establishing the international criminal tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court. *See generally*, Janet Halley, *Rape at Rome*, 30 MICH. J. INT’L L. 1 (2008) (examining feminist advocacy during the formation of new international criminal tribunals during the 1990s).

international law. Tellingly, the TIP Office has yet to offer a legal argument in support of conflating trafficking and slavery. The state of relevant international law norms would make finding a legal justification for equating trafficking with slavery a doomed endeavor, despite the energetic efforts of those who have single-mindedly pursued such a course.<sup>130</sup>

Its prohibition considered *jus cogens* under international law, slavery is defined under the 1926 Slavery Convention as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>131</sup> Nothing in the U.N. Protocol suggests that trafficking itself is a form of slavery. Like forced labor, the trafficking definition lists slavery as one possible purpose element, alongside

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<sup>130</sup> See, e.g., Kevin Bales, *Slavery in its Contemporary Manifestations*, and *2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, at Guideline 2–The Exercise of the Powers Attaching to the Right of Ownership) [hereinafter Bellagio-Harvard Guidelines], in *THE LEGAL UNDERSTANDING OF SLAVERY*, *supra* note 141, at 281-303, 375-80.

<sup>131</sup> Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 L.N.T.S. 253, (entered into force Mar. 9, 1927) [hereinafter Slavery Convention]. Later, the United Nations elaborated a new legal instrument to address certain institutions and practices similar to slavery, specifically debt bondage, serfdom, servile forms of marriage, and exploitation of children. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, Apr. 1, 1957, 226 U.N.T.S. 3, (entered into force Apr. 30, 1957) [hereinafter Supplementary Slavery Convention]. The Supplementary Slavery Convention retained the 1926 definition of slavery and created a new concept of “servile status” as attaching to a victim of slavery-like practices (as opposed to slavery).

“practices similar to slavery,” servitude, and sexual exploitation.<sup>132</sup> The notion that the treaty drafters intended to permit collapsing the three-part definition into a single purpose element is even less plausible in the slavery context than it is in the forced labor one. Nor can any legal support for slavery creep be found in customary international law. Granted, the substantive content of the customary international law prohibition against slavery is, “in a state of flux,” with indications that legal conceptions of slavery have expanded to include practices beyond chattel slavery.<sup>133</sup> Activist scholars have advocated for a broad interpretation of the 1926 Slavery Convention definition<sup>134</sup> in an effort “to captur[e] the essence of contemporary slavery.”<sup>135</sup> But, as Gallagher has demonstrated, an absolute claim that trafficking, in all its modern manifestations, is included in the customary and *jus cogens* norm prohibiting slavery remains difficult to

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<sup>132</sup> U.N. Trafficking Protocol, art. 3 (defining “trafficking in persons”).

<sup>133</sup> GALLAGHER, *supra* note 16, at 191.

<sup>134</sup> See Slavery Convention, *supra* note 131.

<sup>135</sup> For example, a group of historians, sociologists, and property law scholars developed the 2012 Bellagio-Harvard Guidelines, *supra* note 130, suggesting that ‘powers attaching to the right of ownership’ “should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person.” *Id.* For insightful critique of such strained efforts to expand yet also cabin the legal concept of slavery, see Chantal Thomas, *Immigration Controls and “Modern-Day Slavery”* (paper on file with author).

sustain.<sup>136</sup> Only the egregious cases involving the “clear exercise of powers attached to the right of ownership”<sup>137</sup> would likely qualify as slavery.

In the U.S. context, by contrast, the link between trafficking and slavery has clearer doctrinal underpinnings. As James Pope has powerfully argued, the Thirteenth Amendment aims not only at ending slavery, but also at ‘maintaining a system of completely free and voluntary labor throughout the United States.’”<sup>138</sup> Subsequent reauthorizations of the TVPA have reaffirmed and capitalized on trafficking’s connection to slavery in various rhetorical gestures.<sup>139</sup> Despite embracing a conceptual link between

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<sup>136</sup> GALLAGHER, *supra* note 16, at 190.

<sup>137</sup> As Gallagher explains, of the scarce interpretative guidance on this point, is one UN Secretariat report identifies six characteristics of the various “powers attaching to the right of ownership” that when exercised give rise to a situation of slavery, including: (1) the individual may be made an object of purchase; (2) the master may use the individual, in particular his or her capacity to work, in an absolute manner; (3) the products of the individual’s labor become the property of the master without any compensation commensurate to the value of the labor; (4) the ownership of the individual can be transferred to another person; (5) the status/condition of the individual is permanent in the sense that it cannot be terminated at the will of the individual; and (6) the status/condition is inherited/inheritable. GALLAGHER, *supra* note 16, at 184, citing UN Economic and Social Council, *Slavery, the Slave Trade and Other Forms of Servitude: Report of the Secretary-General*, UN Doc. E/2357, Jan. 27, 1953, at 40.

<sup>138</sup> See Pope, *supra* note 7, at 1850.

<sup>139</sup> The 2008 Reauthorization of the TVPA was named the William Wilberforce Trafficking Victims Protection Reauthorization Act to coincide with the 200<sup>th</sup> anniversary of the British Parliament’s anti-slave trade legislation and named in honor of the famed British abolitionist. President Obama’s and then-Secretary Clinton’s above-quoted remarks were made to marshal support for the 2013 reauthorization of the TVPA, which was timed to coincide with the 150<sup>th</sup> anniversary of the Emancipation Proclamation.

trafficking and slavery, until 2009, U.S. TIP Office actively resisted substantive conflation of the concepts, notwithstanding the potentially widespread support for doing so.

The evolution of the modern anti-trafficking regime happened to coincide with a popular grassroots effort to abolish “modern-day slavery” led by bestselling author Kevin Bales, who claimed that 27 million people were “enslaved” around the world.<sup>140</sup> That statistic was based, however, on Bales’ own made-up definition of slavery, which was far broader than any found in actual law:

the control of one person (the slave) by another (the slaveholder or slaveholders). This control transfers agency, freedom of movement, access to the body, and labor and its products and benefits, to the slaveholder. The control is supported and exercised through violence and its threat. The aim of this control is primarily economic exploitation, but may include sexual use or psychological benefit.<sup>141</sup>

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The Trafficking Victims Protection Reauthorization Act of 2013, Pub. L. No. 113-4, (Mar. 7, 2013).

<sup>140</sup> KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 8-9 (1999).

<sup>141</sup> Kevin Bales, *Professor Kevin Bales’s Response to Professor Orlando Patterson*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM HISTORICAL TO CONTEMPORARY* 360, 370 (Jean Allain, ed.) (2012) (explaining and defending his definition of slavery) [hereinafter *THE LEGAL UNDERSTANDING OF SLAVERY*].

The TIP Office did not rely on Bales' 27 million statistic in its annual TIP Reports<sup>142</sup> – not surprisingly, considering it had been taken to task by the U.S. Government Accountability Office for producing and recycling faulty statistics, including the then-presumed-inflated U.N. estimate of 2.5 million people trafficked worldwide.<sup>143</sup> The TIP Office also resisted Bales' efforts, beginning in 2006, through his non-profit Free the Slaves,<sup>144</sup> to seek codification of Bales's definition of "modern-day slavery" and to create a congressional Commission on Abolition of Modern-Day Slavery to track and address the problem within the United States and abroad.<sup>145</sup> These

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<sup>142</sup> In its 2006, 2007, and 2008 TIP Reports, the TIP Office simply noted that "estimates range from 4 to 27 million." See 2006 TIP REPORT, *supra* note 104, at 6; 2007 TIP REPORT, *supra* note 105, at 6; 2008 TIP REPORT, *supra* note 105, at 7. The 2009 and 2010 TIP Reports drop the reference to 27 million, reporting only the ILO's 12.3 million in forced labor statistic. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2009); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2010). The 2011 TIP Report drops statistics altogether, reporting that the trafficked/enslaved population figures in the "millions." U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1, 2 (2011).

<sup>143</sup> GAO REPORT, *supra* note 71, and accompanying discussion in text.

<sup>144</sup> Widespread attention to *Disposable People* inspired Bales to create the U.S.-based non-profit Free the Slaves in 2001, with the goal of "liberat[ing] slaves around the world & chang[ing] the systems that allow slavery to exist." FREE THE SLAVES, <https://www.freetheslaves.net/SSLPage.aspx> (last visited Aug. 1, 2013). Free the Slaves has consistently framed its advocacy efforts as targeting "modern-day slavery."

<sup>145</sup> Free the Slaves successfully lobbied to have legislation introduced to that effect. *Congressional Commission on the Abolition of Modern-Day Slavery Act*, 109<sup>th</sup> Cong., (2<sup>nd</sup> Sess.. 2006) S. 3787; 109 S. 3787 (sponsored by Santorum, Pryor, and Dole), January 3, 2006) and 2006

proposed measures would have created a separate government bureaucracy that replicated – under the rubric of “modern-day slavery” – much of what the U.S. TIP Office was already doing under its trafficking mandate.<sup>146</sup>

Five years later, however, Bales’ once-rejected “27 million enslaved” statistic features on the first page of the 2012 TIP Report.<sup>147</sup> Language throughout the 2012 TIP Report demonstrates the remarkable slippage in the U.S. government’s treatment of the previously distinct legal concepts of forced labor, trafficking, and slavery that exploitation creep has wrought:

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H.R. 6328; 109 H.R. 6328 (sponsored by Christopher Smith (R-NJ) and John H. Lewis (D-GA), Nov. 15, 2006); *Congressional Commission on the Abolition of Modern-Day Slavery Act*, 110<sup>th</sup> Cong., (1<sup>st</sup> Sess. 2007) H.R. 2522; 110 H.R. 2522 (sponsored by John H. Lewis (D-Ga), May 24, 2007).

Had the bills become enacted, the new law would have redefined as “modern-day slavery” practices encompassed by the trafficking definition under both U.S. law and the U.S. TIP Office’s interpretation of the U.N. Trafficking Protocol. For example, the proposed 2007 bill defined “modern-day slavery” as:

the status or condition of a person over whom any power attaching to the right of ownership or control is exercised by means of exploitation through involuntary servitude, forced labor, child labor, debt bondage or bonded labor, serfdom, peonage, trafficking in persons for forced labor or for sexual exploitation (including child sex tourism and child pornography), forced marriage, or other similar means.

*Id.*

<sup>146</sup> *Id.*

<sup>147</sup> 2012 TIP REPORT, *supra* note 47, at 7. The recently-issued 2013 TIP Report similarly includes the “27 million” statistic on the first page of the introduction. Curiously, however, the following sentence refers to a statistic of “more than 26 million” – implicitly suggesting a discrepancy of less than a million to be statistically insignificant. 2013 TIP REPORT, *supra* note 40, at 7.

...*slavery* persists in the United States and around the globe....It is estimated that as many as 27 million men, women, and children around the world are victims of what is now often described with the umbrella term “*human trafficking*.” The work that remains in combating this crime is the work of fulfilling the promise of freedom – freedom from *slavery* for those exploited and the freedom for survivors to carry on with their lives....<sup>148</sup>

On June 1, 2012, the International Labor Organization released its second global estimate of *forced labor*, which represents what the U.S. Government considers to be covered by the umbrella term “*trafficking in persons*.” Relying on an improved methodology and greater sources of data, this report estimates that *modern slavery* around the world claims 20.9 million victims at any time.<sup>149</sup>

Since all forced labor is trafficking, and all trafficking is slavery, in one fell swoop, the ILO’s 2012 statistic of 20.9 million in forced labor becomes 20.9 million “enslaved.” As if preemptively defending the equivalence to transatlantic slavery, the 2012 TIP Report features a graphic, entitled “Then

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<sup>148</sup> 2012 TIP REPORT, *supra* note 47, at 7 (emphasis added).

<sup>149</sup> *Id.* at 44 (emphasis added).

and Now: Fleeing Slavery” depicting 19<sup>th</sup> century ads offering rewards for runaway slaves alongside a recent ad offering a reward for information regarding the whereabouts of an escaped Indonesian fisherman.<sup>150</sup> Moreover, laying the groundwork for “individuals to understand their connection to modern-day slavery,” the TIP Office has commissioned the development of the Slavery Footprint website, on which one can take an online survey to determine the number of slaves needed to maintain one’s lifestyle.<sup>151</sup> Hence, what was once a peripheral tool to garner popular support for the anti-trafficking cause is now the central framing device: recasting trafficking as nothing short of slavery.

## 2. Modern Abolitionist Campaigners

Despite prior resistance to the slavery creep, its uptake is now widespread. Some attribute the governmental shift towards the slavery paradigm to leadership change in the U.S. TIP Office to an Ambassador-at-Large who actively embraces the slavery conflation. As a former federal trafficking prosecutor, Obama-appointed Ambassador-at-Large Luis

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<sup>150</sup> 2012 TIP REPORT, *supra* note 47, at 19.

<sup>151</sup> SLAVERY FOOTPRINT, <http://slaveryfootprint.org> (last visited Aug. 1, 2013). The website now features a video entitled “I’m With Lincoln,” “a dramatic commercial depicting modern slavery” as part of a new campaign by the same name, “asking Congress to make ending slavery a priority.”

CdeBaca had worked under a legal regime that situated trafficking within the scope of U.S. slavery and peonage laws.<sup>152</sup> One might assume that relevant *international* legal norms might more prominently factor into the work of a State Department agency. But the reality is that the U.S. TIP Office has always at its core functioned as more an exporter of “U.S. minimum standards” abroad than an arbiter of international standards.<sup>153</sup> Just as the U.S. TIP Office has aggressively sought international uptake of its view of trafficking as subsuming forced labor, reframing trafficking as slavery appears teed up for export as well.

The U.S. TIP Office is not alone in succumbing to the seductive power of the slavery paradigm. The TIP Office’s power to frame the trafficking issue for public consumption has affected civil society organizations at home and abroad – affirming the stance of those originally inclined towards slavery creep, and inspiring others to follow suit. Free the Slaves is now one among many organizations framing their work as modern abolitionism – indeed, it seems now the rule rather than the exception for an organization working on trafficking issues to frame its work as targeting “slavery.” This is likely partly due to the dynamics of what can only be

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<sup>152</sup> U.S. DEP’T OF STATE, Biography, Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons, *available at* <http://www.state.gov/r/pa/ei/biog/124083.htm>.

<sup>153</sup> *See supra* discussion accompanying notes 30-40.

characterized as the “trafficking industrial complex.”<sup>154</sup> In a world of funding scarcity for public interest organizations, abolishing “modern-day slavery” has become a cause célèbre and target of major donor foundations.<sup>155</sup>

Indeed, the anti-trafficking/slavery cause has attracted an immensely influential, new breed of actor of actor in the international realm: the venture philanthropist funder-founder.<sup>156</sup> Rather than providing philanthropic support to existing nonprofit organizations, venture philanthropist funder-founders create new nonprofit organizations in a more direct effort to effect change. Humanity United, for example, established in 2005 by eBay founder Pierre Omidyar and his wife, both funds and directly coordinates the anti-trafficking advocacy of grassroots organizations, playing a major and direct role in anti-trafficking U.S. legislative reform efforts.<sup>157</sup> Most recently taking the anti-trafficking advocacy world by storm

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<sup>154</sup> This phrase was coined by leading anti-trafficking litigator, Martina Vandenberg, formerly the trafficking researcher for Human Rights Watch, and now founder and director of The Human Trafficking Pro Bono Legal Center, <http://www.tahirih.org/htprobono/>.

<sup>155</sup> For an incisive discussion of the “celebritization of trafficking,” see Dina Haynes, *The Celebritization of Human Trafficking*, ANNALS AM, ACAD. POL. & SOC. SCI. (forthcoming 2013).

<sup>156</sup> James Shulman, *The Funder as Founder: Ethical Considerations of the Philanthropic Creation of Nonprofit Organizations*, in GIVING WELL: THE ETHICS OF PHILANTHROPY (Patricia Illingsworth, Thomas Pogge, and Leif Wenar, eds.) (2011).

<sup>157</sup> See Humanity United, <http://www.humanityunited.org>. For more in-depth discussion of Humanity United’s role in the U.S. anti-trafficking

with the promise of huge funding is the new international non-profit Walk Free – founded by Australian billionaire Andrew Forrest “to end modern slavery in [Forrest’s] lifetime.”<sup>158</sup> Notwithstanding the organization’s infancy, Walk Free has very quickly garnered the support of governments and international institutions<sup>159</sup> – officially launching only in December 2012, in Myanmar, with the country’s first open-air, mass concert co-sponsored by the United States and Australian governments, and ASEAN.<sup>160</sup>

In symbiotic relationship with these anti-slavery organizations and, indeed, the U.S. government, major media outlets have provided a significant platform for publicizing the problem of “modern-day” slavery and profiling the work of anti-slavery organizations. Examples include CNN’s Freedom Project: Ending Modern-Day Slavery,<sup>161</sup> the Guardian’s

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advocacy landscape, *see infra* discussion at notes 241-245.

<sup>158</sup> See Walk Free, <http://www.walkfree.org>. For more in-depth analysis of Walk Free’s operations and influence on the anti-trafficking field, *see infra* discussion at notes 242-253.

<sup>159</sup> For example, Walk Free’s Myanmar concert was co-sponsored by U.S. AID, Australian AID, and ASEAN. *See* MTV EXIT END EXPLOITATION AND TRAFFICKING, Jason Mraz in Myanmar, <http://mtvexit.org/worldstage/> (listing co-sponsors).

<sup>160</sup> Elisabeth Behrmann, *Gates Helps Australia’s Richest Man in Bid to End Slavery*, BLOOMBERG, (Apr. 14, 2013; 7:49PM), <http://www.bloomberg.com/news/2013-04-10/gates-helps-australia-s-richest-man-in-bid-to-end-slavery.html>.

<sup>161</sup> *The CNN Freedom Project: Ending Modern-Day Slavery*, CNN, <http://thecnnfreedomproject.blogs.cnn.com>.

“Modern-day slavery hub” (in partnership with Humanity United),<sup>162</sup> MTV Exit (which broadcast the Walk Free launch worldwide),<sup>163</sup> and the International Herald Tribune/Thomson Reuters Foundation’s “Trust Women” initiative.<sup>164</sup> The 150<sup>th</sup> anniversary of the Emancipation Proclamation has provided a particularly powerful hook for journalists, who have pronounced “slavery’s global comeback,” for example, in an article published in the Atlantic (and funded by MTV Exit).<sup>165</sup> USAID has partnered with MTV Exit, Free the Slaves, and Slavery Footprint.org to engage students worldwide to “challenge slavery” by developing “creative technology solutions to prevent human trafficking, rescue victims, and provide assistance to survivors” to combat traffickers’ use of technology to “ensnare their victims.”<sup>166</sup>

Even in academic articles, analyses of anti-trafficking laws and policies are now increasingly focused on “slavery” as legal category and

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<sup>162</sup> *Modern-day slavery*, THE GUARDIAN, <http://www.guardian.co.uk/global-development/series/modern-day-slavery-in-focus>.

<sup>163</sup> MTV EXIT: END EXPLOITATION AND TRAFFICKING, <http://mtvexit.org>. The website highlights the Walk Free launch concert – ‘MTV Worldstage: Live in Myanmar’ – “a one-of-kind [sic] concert that will go down in history where 70,000 people gathered in Yangon, Myanmar on December 17, 2012 to raise awareness to end human trafficking and exploitation.”

<sup>164</sup> TRUST WOMEN: PUTTING THE RULE OF LAW BEHIND WOMEN’S RIGHTS, <http://www.trustwomenconf.com>.

<sup>165</sup> See, e.g., Gould, *supra* note 13.

<sup>166</sup> Challenge Slavery, <https://www.challengeslavery.org>.

frame. Curiously, some legal scholars have even rested their analyses on Bales' broad definition of slavery in lieu of the legal definitions of slavery and slavery-like practices found in treaty and customary international law.<sup>167</sup> Indeed, implicitly acknowledging the difference between practices now referred to as "modern slavery" and practices traditionally considered "slavery" or "institutions and practices similar to slavery" under treaty law, a group of social science and legal academics, including Bales, have sought to expand legal understandings of slavery to help bridge the gap.<sup>168</sup>

Hence, as one journalist has described it, "[slavery] is an emotive term whose time has come,"<sup>169</sup> that elastic and undefined term: "modern-day slavery" now part of the public imagination. In the words of U.S. TIP Ambassador CdeBaca, "more than a decade of governmental and trans-governmental initiatives have seeded the social conversation," fostering "an emerging consensus around the language of slavery."<sup>170</sup> Through the two exploitation creep moves, the concept of "slavery" is now fully conflated

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<sup>167</sup> See, e.g., Pope, *supra* note 7, at 1853; James Hathaway, *The Human Rights Quagmire of "Human Trafficking,"* 49 VA. J. INT'L L. 1, 15-25 (2008) (describing a wide range of practices as "slavery" and uncritically quoting Bales' statement that modern slavery "is not about owning people in the traditional sense of old slavery, but about controlling them completely"). For a powerful critique of Hathaway's arguments, see Gallagher, *Response to James Hathaway,* *supra* note 16.

<sup>168</sup> See, e.g., THE LEGAL UNDERSTANDING OF SLAVERY, *supra* note 141 (compilation of articles from participants in the project).

<sup>169</sup> Gould, *supra* note 13.

<sup>170</sup> Gould, *supra* note 13.

and interchangeable with the concepts of forced labor and trafficking.

### III. ASSESSING EXPLOITATION CREEP

Undergirding both exploitation creep moves is a crucial acknowledgment of a link between trafficking and labor conditions. Previously obscured by distracting debates over prostitution reform and the tendency to focus on the border control aspects of the problem, this recognition is long overdue.

But serious questions remain as to whether exploitation creep's moves towards legal and discursive extremes yield desirable consequences on the ground. What are the implications of collapsing distinctions between legal categories? Although conflating forced labor, trafficking, and slavery has resulted in a powerful call to action, has it actually increased overall capacity to address the full continuum of forced labor and trafficking practices?

Close examination reveals that the two components of exploitation creep have different, and potentially conflicting, trajectories – only one of which offers a viable strategy for reducing extreme exploitation over the long-term. Although forced labor creep is doctrinally problematic, there are clear benefits to bringing a labor paradigm and labor institutions to bear on

anti-trafficking law and policy. At a conceptual level, a labor paradigm offers a more nuanced understanding of how coercion operates in the globalized workplace – for example, how employers and recruiters manipulate a worker’s immigration status or high debt-load to create and sustain servitude conditions. Bringing this perspective to the analysis of trafficking situations could have the practical effect of remedying the heavy prosecutorial bias against pursuing non-sex-sector trafficking cases. Better understanding of the structural contributors to extreme worker vulnerability could also inspire development of more targeted and substantive measures designed to prevent trafficking in the first instance. For example, it could encourage government authorities exert more substantive oversight over recruiters, requiring them to register and abide by transparency requirements, or prohibiting or limiting recruitment fees to workers seeking placements abroad.

By contrast, the second component of exploitation creep – slavery creep – turns us sharply away from pursuing such structural changes. Slavery creep marshals powerful rhetoric and imagery to cultivate a modern-day abolitionist movement to eradicate extreme exploitation. But by promoting an understanding of trafficking as a problem created and sustained by individual deviant actors, it ultimately reprises and entrenches the criminal justice paradigm that has dominated (and constrained) the

modern anti-trafficking field from inception.

#### A. *Assessing Forced Labor Creep*

The appeal of forced labor creep lies in the promise it holds for bringing a labor paradigm to bear on anti-trafficking law and policy, at a time when the field is desperately in want of a new approach. Notwithstanding over a decade's worth of targeted anti-trafficking interventions, the increase in the ILO's global statistic of forced labor from 12.3 million in 2005 to 20.9 million in 2012 suggests that, however one defines its relationship to forced labor, trafficking is on the rise. Moreover, according to the U.S. State Department, in 2012, the combined authorities of more than 180 countries officially identified only 46,570 victims out of the 20.9 million "enslaved" worldwide.<sup>171</sup> A grand total of 7,705 prosecutions were brought against the perpetrators, resulting in 4,746 convictions.<sup>172</sup> Of these, non-sexual labor trafficking cases accounted for only 1,153 of the cases prosecuted, and 518 of the convictions obtained<sup>173</sup> – despite ILO estimates that *non-sexual* forced laborers comprise 68 percent

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<sup>171</sup> 2013 TIP REPORT, *supra* note 40, at 46.

<sup>172</sup> *Id.*

<sup>173</sup> 2013 TIP REPORT, *supra* note 40, at 46.

of the 20.9 million forced laborers worldwide.<sup>174</sup>

Thus, even by the dominant criminal justice paradigm's own metric of prosecution and conviction rates as signifiers of success, the global anti-trafficking movement has been a dismal failure. Yet, the low numbers could not be less surprising to anyone who has worked directly with trafficked persons. As with any clandestine crime, victim identification typically requires victims to come forward and report the abuse, while successful prosecutions require victims to actively cooperate in the criminal proceedings. But there are strong disincentives against victims doing either, given the attendant risks of deportation, prosecution for crimes committed during the course of the trafficking, retaliation by the traffickers, and re-traumatization by the judicial process.<sup>175</sup>

Moreover, that the criminal justice system offers victims of *non-*

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<sup>174</sup> ILO 2012 GLOBAL ESTIMATE, *supra* note 118, at 13.

<sup>175</sup> See e.g., Haynes, (*Not*) *Found Chained*, *supra* note 71 (detailing the many points at which trafficked persons are disserved by the U.S. anti-trafficking operatus); Dina Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 91-92 (2009) (same) [hereinafter Haynes, *Exploitation Nation*]. U.S. law, for example, affords trafficked persons an opportunity to apply for temporary – and potentially permanent – residency status, contingent on their cooperation in pursuit of criminal or civil cases against their traffickers. TVPA §107(b)(1). Tellingly, for example, of the estimated 14,500-17,500 people trafficked into the United States *each year*, during FY2002 through 2011, only a total of 4935 victims even applied for residency status and benefits (of which 2635 were successful). U.S. DEP'T OF JUSTICE, ATT'Y GEN.'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2011 56 (2011).

*sexual* labor trafficking vanishingly slim hope of accountability and restitution for their uncompensated labor is entirely predictable given dominant conceptions of what trafficking entails. A decade’s worth of inordinate focus on sex trafficking cases has fostered a thin understanding of how trafficking is perpetrated. The means element (e.g., force, fraud, or coercion) required under the trafficking definition is easier to discern (or assume exists) when sexual exploitation is involved. It comes as little surprise, therefore, that U.S. prosecutors, for example, typically refuse to take on labor trafficking cases unless they involve clear elements of actual or threatened physical violence<sup>176</sup> – notwithstanding U.S. laws explicitly

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<sup>176</sup> Telephone Interview with Martina Vandenberg, Founder and Executive Director, The Human Trafficking Pro Bono Legal Center (Aug. 3, 2013) [hereinafter Vandenberg Interview]; Confidential Source 1 Interview, *supra* note 197; Author Interview with Confidential Source #2 (former government official), in Washington, D.C., (Jan. 25, 2013) [hereinafter Confidential Source 2 Interview]; Telephone Interview with Confidential Source #3 (anti-trafficking researcher and advocate), (July 31, 2013) [hereinafter Confidential Source 3 Interview]. These cases typically remain in “monitoring” status, with no action taken for years while the statute of limitations runs out, or, are simply dropped. For example, federal prosecutors dropped its case against Global Horizons, Inc., a labor recruiting company accused of exploiting hundreds of farmworkers from Thailand by confiscating their passports, putting them into debt bondage, and threatening to deport them. Eight people were originally indicted, three of which had pled guilty to the charges. *Human Trafficking Against Executives Is Dismissed*, N.Y. TIMES, July 21, 2012. Some individuals familiar with the case believe the case was dropped for specious reasons, the Department of Justice having justified its dropping the case on a minor prosecutorial error that ultimately would not have compromised the prosecution. Sources also indicate that the case was severely understaffed, with the prosecutor single-handedly responsible for interviewing hundreds

covering situations involving *non-physical* coercion.<sup>177</sup> That advocates representing non-sexual forced laborers rely instead on other avenues for accountability and redress – e.g., civil anti-trafficking remedies, or relief under labor and employment law – is both cause and consequence of the low labor trafficking prosecution statistics.<sup>178</sup>

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of witnesses. Confidential Source 1 Interview; Confidential Source 2 Interview; Confidential Source 3 Interview.

<sup>177</sup> The TVPA criminalizes forced labor defined as:

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

18 U.S.C. §1589. As explained by the Seventh Circuit in *United States v. Calimlim*, 538 F.3d 706 (7<sup>th</sup> Cir. 2008), §1589 “is not written in terms limited to overt physical coercion, and we know that...[Congress] expanded the definition of involuntary servitude to include nonphysical forms of coercion.” It is sufficient that a defendant’s misconduct has created a situation where ceasing labor would cause a plaintiff serious harm. *Id.*, at 711-14.

<sup>178</sup> In the United States, for example, advocates handling labor trafficking cases the rely on civil remedies under the TVPA, and increasingly refer cases to the Equal Employment Opportunity Commission (EEOC). The EEOC has brought lawsuits against traffickers based on national origin harassment and race discrimination, seeking a wide array of remedies including, e.g., backpay, compensatory and punitive damages, injunctive relief, and including monetary and non-monetary relief such as reinstatement and injunctive relief. In *EEOC v. Trans By Steel*, for

Given these background dynamics, it is no wonder that grassroots advocates have embraced forced labor creep. However doctrinally problematic, bringing “forced labor” into the trafficking frame has helped bring trafficking out of the bedroom and shadowy alleys and into our everyday lives – making more visible for the mainstream public the possibility that the produce we eat, the clothes we wear, and the services that sustain our military abroad, may be tainted by trafficking. That these abuses are occurring in the context of official government-sponsored guestworker programs<sup>179</sup> and government contracting relationships<sup>180</sup> has also helped surface the role of governments and corporations in facilitating, if not actively perpetrating, trafficking and forced labor in our globalized economy.

In thus broadening and complicating our understanding of the

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example, the EEOC obtained a \$1 million settlement for a group of 48 trafficked Thai welders, along with a consent decree requiring the defendant to provide claimants future work, housing, and guaranteed minimum base pay, while paying for their housing stipend, local college tuition, and sponsorships to continue work in the United States. The EEOC is now pursuing a case against Global Horizons. *See* P. David Lopez & Stephanie Gouston-Madison, *Employment Discrimination Law: A Model for Enforcing the Civil Rights of Trafficking Victims*, in HUMAN TRAFFICKING RECONSIDERED: MIGRATION AND FORCED LABOR (Rhacel Parrenas & Kimberly Hoang, eds.) (forthcoming 2013).

<sup>179</sup> *See* references cited in *infra* note 271.

<sup>180</sup> *See* Sarah Stillman, *The Invisible Army*, NEW YORKER, June 6, 2011, at , (describing trafficking of foreign workers into U.S. military bases in Iraq and Afghanistan); Cam Simpson, *Pipeline to Peril*, CHI. TRIB., Oct 9, 2005, at , (describing the trafficking of Nepalese men to work for U.S. army contractors in Iraq).

trafficking phenomenon, forced labor creep has made possible the application of a labor paradigm to anti-trafficking interventions. Doing so carries the promise of many benefits, but also some tradeoffs and challenges, as assessed below.

## 1. Benefits of a Labor Paradigm

There are at least two sets of benefits that issue from application of a labor paradigm to trafficking, as described below. First, a labor paradigm helps complicate our understanding of how coercion operates in trafficking cases, enabling us to look beyond the stereotypes to better identify and respond to trafficked persons. Second, a labor paradigm strengthens the advocacy landscape by broadening the array of actors and expertise with which coalitions might be built. This produces a critical mass of advocates necessary to preserve space to develop alternatives to criminal justice-dominated interventions.

### a. Understanding and Addressing Vulnerability to Trafficking

As labor law scholars James Pope and Hila Shamir have powerfully demonstrated, a labor paradigm offers a salvo for one of the key problems

with the current anti-trafficking regime: the failure to address how labor relations and labor markets are structured in ways that render workers vulnerable to forced labor and trafficking.<sup>181</sup> A labor lens brings into sharper focus both the power disparities between individual victims and their traffickers, and also the broader economic and social structures that foster vulnerability to trafficking in the first place.<sup>182</sup>

A labor approach enables a more nuanced understanding of how coercion operates in the forced labor/trafficking context – one that better captures the sociological realities of the trafficking experience. It exposes, for example, the loopholes in migration and labor structures that are manipulated to create and sustain conditions of servitude – and by an increasingly complex array of actors. The global restructuring of work away from direct employment and toward subcontracting has made close scrutiny of labor market structures ever more important.

Coercion in the trafficking context is, after all, as Professor Kathleen Kim aptly demonstrates, “situational.” Coercion does not always take the form of direct threats of harm, and may take more subtle, non-violent forms, and may result from a combination of factors that create conditions under which workers cannot escape leave their jobs, regardless of how abusive the working conditions – e.g., through insurmountable recruitment fees and/or

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<sup>181</sup> Pope, *supra* note 7; Shamir, *supra* note 7.

<sup>182</sup> Shamir, *supra* note 7, at 81.

control over immigration status.<sup>183</sup> Identifying the structural market conditions and practices that shape workers' vulnerability and inferior bargaining power in the workplace"<sup>184</sup> rightly draws attention to factors currently overlooked – if not dismissed – by dominant anti-trafficking approaches.

Take, for example, a recent case involving the trafficking of Filipino teachers into the United States.<sup>185</sup> Approximately 300 Filipino teachers paid more than \$16,000 each (four times their annual salaries in the Philippines) to a recruiter for jobs teaching in Louisiana public schools under the H-1B visa program. The Louisiana school district had retained the recruiter notwithstanding her having previously pled guilty to money laundering and serving time for defrauding the California health care systems. After charging the teachers an initial \$5000 recruitment fee, the recruiter demanded an additional, previously undisclosed, fee of \$7500 immediately prior to departure (or forfeit the \$5000 initial fee). Upon arrival in the United States, the recruiter threatened to deport the teachers

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<sup>183</sup> See Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011).

<sup>184</sup> Shamir, *supra* note 7, at 99.

<sup>185</sup> *Mairi Nunag Tanedo vs. East Baton Rouge Parish School Board*, No. SA CV10-01172 JAK, (C.D. Cal. 2012) (class action lawsuit brought on behalf of Filipino teachers under the TVPA, RICO, and state laws regarding fraud and unfair business practices, among others); Farah Stockman, *Teacher Trafficking*, BOSTON GLOBE (June 12, 2013) (detailing the teachers' experiences); Testimony of Ingrid Cruz, ILRWG website, *supra* note 77.

unless they committed to work an additional year (for which they would pay the recruiter 10 percent of their salaries and additional recruitment fees), and to pay the recruiter hundreds of dollars above market rate for their substandard, group housing. The recruiter brooked no criticisms or complaints, going so far as to sue one of the teachers when a group of teachers criticized the trafficking scheme on an anonymous blog.<sup>186</sup> Under the weight of insurmountable debt and the recruiter's repeated threats of deportation and lawsuits, the teachers felt powerless to change their living and working conditions.<sup>187</sup>

In contrast to the violent and/or sex-sector trafficking cases that typically grab headlines and prosecutorial attention, this case involved documented migrant workers trafficked into formal, public sector jobs, trapped in those jobs by a third party to the employment relationship, and all within the context of a formal U.S. guestworker program. This is not the profile that most prosecutors, service providers, or even trafficked persons themselves typically associate with "trafficking."<sup>188</sup> The Filipino teacher trafficking case underscores how legal categories (e.g., documented migrant, guestworker) can disguise the empirical reality of extreme exploitation. The labor analysis that forced labor creep helps shoe-horn into

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<sup>186</sup> *Navarro v. Cruz*, 2009 WL 6058120 (Cal. Super. 2009).

<sup>187</sup> See references cited in *supra* notes 185.

<sup>188</sup> Rebecca Surtees, *Trafficked Men as Unwilling Victims*, ST. ANTHONY'S INTERNATIONAL REVIEW 16, 25 (2008).

anti-trafficking analysis helps probe beyond the surface to examine the underlying power disparities, and the sources of leverage used to create and sustain servitude.

Inasmuch as a labor frame helps better identify actual victims of trafficking, it also helps reshape the profile of the “victim subject.” The U.S. system, for example, requires the victim to “offer herself up as an easily identifiable ‘victim subject,’ without the clutter and complication of a story in which the ‘victim’ also had some agency in her decision.”<sup>189</sup> Past focus on sex trafficking cases helped elevate this profile, with victims of sex trafficking presumed (accurately or not) *not* to have chosen to engage in sexual commerce. Nuance and context get lost in a system narrowly focused on assigning victimhood and blame to individual actors. Hence, that trafficking abuses typically occur in the context of individuals seeking their livelihood – often as migrants, sometimes undocumented, sometimes utilizing state-created/sanctioned mechanisms and/or third party actors that offer opportunities laced with potentially exploitative constraints – fades into the background. Foregrounding these circumstances and demonstrating that coercion and agency are not mutually exclusive would enable us to better identify victims and help them achieve accountability and redress.

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<sup>189</sup> Haynes, *Exploitation Nation*, *supra* note 175, at 47.

Complicating our understanding of how trafficking occurs also provides a focal point for developing measures to prevent trafficking in the first instance. It invites scrutiny, for example, into how guestworker programs are structured and implemented and points of vulnerability – e.g., the ability to charge exorbitant recruitment fees, recruiter/employer control over immigration status, safeguards against retaliation for worker complaints, among others. A labor lens also points towards a host of different avenues and tools for improving baseline conditions – e.g., strengthening labor and employment law frameworks (particularly as applied to migrants) and regulatory mechanisms to enforce them, providing workers tools (e.g., collective action and bargaining) to reshape power relations and thus transform the economic conditions and legal rules that permit severe labor exploitation in the first place.<sup>190</sup> Such measures instantiate James Pope’s “free labor” theory that “when workers have rights, they can exert the ‘power below’ to give employers the ‘incentive above’ to avoid slavery and servitude.”<sup>191</sup>

b. Strengthening the Advocacy Landscape

By the simple act of introducing the concept of “labor” into anti-

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<sup>190</sup> Shamir, *supra* note 7, at 81.

<sup>191</sup> Pope, *supra* note 7, at 1862.

trafficking law and policy discussions, forced labor creep has helped push the distracting and counter-productive prostitution reform debates to their rightful place on the periphery. In its place, we have seen a previously atomistic grassroots advocacy landscape transform into one involving active and rich collaboration across disciplines and advocacy communities. The benefits of cross-fertilization are readily apparent, for example, in efforts to cast increased scrutiny on abusive recruitment practices for guestworker programs,<sup>192</sup> the vast supply chains that wrap around the world and back in the course of producing goods for daily consumption,<sup>193</sup> and the subcontracting chains that undergird government contracts for services, to name a few examples.<sup>194</sup>

A case in point is the current effort by a broad-based coalition of U.S. unions and human rights/labor rights/migrants' rights advocates to include an "anti-trafficking" provision in the comprehensive reform bill that targets the foreign labor recruitment industry for range of abuses –

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<sup>192</sup> See references cited at *infra* note 271.

<sup>193</sup> See, e.g., California Transparency in Supply Chains Act of 2010, S.B. 657, 2010 Reg. Sess., 2010 Cal. Legis. Serv. Ch 556 (West 2010) (codified at Cal. Civ. Code §1714.43). For an assessment of this law, Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CAL. L. REV. CIR. 80 (2012).

<sup>194</sup> See, e.g., The White House, President Barack Obama, Executive Order – Strengthening Protections Against Trafficking in Persons in Federal Contracts (Sept. 25, 2012) (ordering measures to implement the U.S. government's "zero-tolerance" policy on trafficking in persons by Federal contractors and subcontractors).

including situations that fall short of trafficking.<sup>195</sup> Parallel efforts to create international standards for foreign labor recruitment through codes of conduct, for example, reflect similarly collaborative engagement.<sup>196</sup> Labor advocates have helped anti-trafficking advocates better understand the mechanics of how foreign labor contractors create servitude conditions – e.g., exorbitant recruitment fees, non-disclosure of fees and working conditions, and retaliation against worker complaints and worker organizing. At the same time, labor advocates have been able to capitalize on the political will behind anti-trafficking interventions to shine a spotlight on a broader range of worker exploitation issues.<sup>197</sup> These efforts demonstrate how labor-based and human rights-based responses are overlapping and potentially mutually reinforcing,<sup>198</sup> and perhaps, even transformative.

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<sup>195</sup> See CIR Bill, *supra* note 77.

<sup>196</sup> See, e.g., VERITÉ, MANPOWER GROUP, AN ETHICAL FRAMEWORK CROSS-BORDER LABOR RECRUITMENT: AN INDUSTRY/STAKEHOLDER COLLABORATION TO REDUCE THE RISKS OF FORCED LABOR AND HUMAN TRAFFICKING, *available at* [http://www.verite.org/sites/default/files/ethical\\_framework\\_paper\\_20120209\\_PRINTED.pdf](http://www.verite.org/sites/default/files/ethical_framework_paper_20120209_PRINTED.pdf).

<sup>197</sup> Author Interview with Confidential Source # 1 (labor advocate), Washington D.C., May 28, 2013 (noting that framing projects as trafficking-related significantly increased their funding possibilities) [hereinafter Confidential Source 1 Interview].

<sup>198</sup> Todres, *infra* note 268, at 144.

## 2. Potential Tradeoffs and Challenges

Together, the above-described developments have created crucial space for a labor perspective to take hold in the anti-trafficking field. But maintaining and building upon the above-described gains requires carefully navigating doctrinal and institutional challenges that issue from conflating forced labor and trafficking – as discussed below.

While forced labor creep has helpfully complicated our understanding of the trafficking phenomenon, the consequences of doctrinal manipulation cannot be assumed away. Practically speaking, for example, the rights of criminal defendants to be fully informed of the nature of the charges against them are surely implicated when the legal definition of the alleged crime is a moving target. A more nuanced understanding of situational coercion inevitably leads to more fraught line-drawing questions. For example, at what point is a recruitment fee considered *too* exploitative, and how ought law and policy interventions balance this tipping point against migrants' willingness to pay these fees for job opportunities abroad? What is acceptable exploitation given the workings of the modern global economy, and what is not? And who should share in the responsibility? What level of responsibility for trafficking or forced labor should be attributed to countries of origin, like the Philippines, whose economies are

built on the remittances from laborers who routinely pay large recruitment fees for the privilege of working abroad – or, conversely, countries of destination like the United States, whose economies are built on the backs of cheap migrant labor?

In the same vein, labor and human rights advocates and institutions will also have to confront the vexing question of whether to incorporate sex worker interests and advocates in their activities. First marginalized during the U.N. Protocol negotiations due to the controversy around equating sex with labor, sex workers have been noticeably left out of forced labor creep’s turn to a labor framework – and anecdotal information suggests that they experience even greater marginalization than before by virtue of their exclusion from the emerging labor perspective.<sup>199</sup> Although the ILO has indirectly and cautiously recognized the possibility of sex work as labor,<sup>200</sup> current efforts to frame the proposed ILO protocol appear to exclude the sex sector from its scope.<sup>201</sup> While the prostitution reform debates no longer take center stage, they remain an active presence in the anti-trafficking

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<sup>199</sup> Confidential Source 2 Interview, *supra* note 176.

<sup>200</sup> *See, e.g.*, ILO, THE COST OF COERCION ¶ 196 (2009) (noting that forced labour occurs in private homes and commercial sex, where labour inspectors face great challenges in monitoring and enforcing labour law).

<sup>201</sup> *See* references cited in *supra* note 76 (noting how ILO Governing Body had limited the parameters of potential standard-setting to trafficking for forced labour (as opposed to trafficking for “sexual exploitation”).

field.<sup>202</sup> With the link to labor made explicit in the ILO protocol context, the stakes for prostitution reformers are even higher than they were during the U.N. Protocol negotiations, and compromise possibly more difficult to strike. This is not to say, however, that common ground is impossible to find. As James Pope insightfully points out, even if one accepts prostitution/sex work as inherently destructive, including sex workers/prostitutes within the embrace of labor protections “provide[s] the best practical opportunity for sex workers to carve out a space for collective deliberation and action.”<sup>203</sup> Within this space, a sex worker can better exercise agency to resist being forced into prostitution. Perhaps more importantly, improving the conditions of work in other sectors, especially those at the bottom of the global labor market, could provide more viable and appealing alternatives to sex work.<sup>204</sup>

Ultimately, forced labor creep has shone a spotlight on a broader range of abusive labor practices than the Protocol drafters likely intended. However doctrinally problematic, the challenge now is to maintain that

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<sup>202</sup> See, e.g., Holly Burkhalter, *Sex Trafficking, Law Enforcement, and Perpetrator Accountability*, Melissa Ditmore & Juhu Thukral, *Accountability and the Use of Raids to Fight Trafficking*, Aziza Ahmed & Meena Seshu, ‘We have the right not to be “rescued”...’: *When anti-trafficking programmes undermine the health and well-being of sex workers*, in 1 ANTI-TRAFFICKING REVIEW 122-49 (2012) (debating the merits of current anti-prostitution approaches to combating trafficking).

<sup>203</sup> Pope, *supra* note 7, at 1874.

<sup>204</sup> *Id.*

scrutiny and strategically marshal the political will behind anti-trafficking campaigns to address the underlying labor and migration structures that facilitate trafficking. The proposed ILO Protocol and U.S. domestic efforts to target abusive labor recruiters demonstrate that this is possible – but only with careful navigation to avoid the unintended consequences of forced labor creep. Governments having likely not anticipated what forced labor creep has wrought, one can be sure that governments will exercise far greater caution with regard to any new standard-setting.

The greatest barrier to realizing the benefits of forced labor creep, however, lies in the potential of slavery creep to reassert criminal justice paradigm dominance, narrowing responses to those that target individual deviant behavior and enable States to resist structural change, as explored below.

### *B. Assessing Slavery Creep*

A powerful tool of condemnation, labeling certain practices “slavery” has certainly brought under scrutiny a broad range of practices that might otherwise be overlooked, if not indifferently tolerated. Proponents of slavery creep argue that characterizing the targeted practices as anything less emotive than “slavery” may amount to deploying

euphemisms that justify lesser responses – particularly in a world where exploitation, particularly of migrants, has become normalized.<sup>205</sup> The creep towards slavery is thus rationalized as strategic deployment of crucial and rare political will in the service of trafficked and forced laborers who have long suffered from inadequate protections under the law. And as wielded by governments, NGOs, and the “charitable-industrial complex”<sup>206</sup> alike – slavery creep has indeed been extremely effective in incentivizing governments to pass legislation, foundations to donate funds, and the broader populace to take up the “anti-slavery” cause.

But is creating a moral imperative and ready political consensus around governmental and grassroots action worth the sacrifice of legal accuracy? And even setting doctrinal concerns aside, how likely are the prescriptions that issue from slavery creep to cure the problem of extreme exploitation? The answer ultimately depends on how the linkage to slavery is made. If used in a nuanced way that foregrounds how societal structures facilitate slavery and servitude, rather than focusing on individual bad action, slavery creep could set us on a trajectory towards systemic, long-term solutions. But as currently constructed – and particularly as deployed by powerful philanthropists seeking quick change – slavery creep hews to

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<sup>205</sup> Gould, *supra* note 13.

<sup>206</sup> Peter Buffett, *The Charitable-Industrial Complex*, N.Y. TIMES, (July 26, 2013) (critiquing “the world of philanthropy as practiced by the very wealthy”).

a superficial (albeit compelling) narrative of good versus evil, reaffirming responses targeting individual bad actors. This narrative has unintended consequences that may harm the population it aims to save, as explored below.

## 1. Potential Drawbacks

As currently constructed, slavery creep aims its arrow at individual bad actors rather than the problematic structures within which they operate, reasserting dominance of the criminal justice paradigm in framing the problem and solutions thereto. Its highly charged imagery promotes doctrinal slippage in the wrong direction, raising the legal thresholds for trafficking/forced labor prosecutions, thus compromising victims' prospects for finding redress for the abuses suffered. More systemically, slavery creep pivots policy-making sharply away from long-term, structural solutions, leaving undisturbed the very labor and migration structures that foster vulnerability to extreme exploitation in the first place.

### a. Diluting the Slavery Norm, Raising the Trafficking Threshold

Even if one could equate trafficking and slavery as a matter of law,

it is far from clear that one should. Equating trafficking with slavery risks at least two negative outcomes: (1) diluting the slavery norm, and (2) raising the trafficking threshold.

As to the former, one need not be a legal purist to appreciate problems that come with diluting the *jus cogens* norm prohibiting slavery. As a *jus cogens* norm, the prohibition on slavery has a special status superior to those of all other rules of the international community.<sup>207</sup> The extraordinary status of *jus cogens* norms derives from recognition of these norms as “laying down international obligations so essential for the protection of fundamental interests of the international community that their breach is recognized as a crime by that community as a whole.”<sup>208</sup> This rarefied status means that the prohibition against slavery cannot be derogated from by treaty – contrary treaty or customary rules are null and void *ab initio* – and can be modified only by another *jus cogens* norm.<sup>209</sup>

It is understandable, of course, why activists might want trafficking to ride the coattails of the slavery prohibition into the international norm stratosphere. But there are significant downsides. Diluting the slavery norm risks compromising the ability of the international community to bring to justice alleged perpetrators of chattel slavery – a practice, though

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<sup>207</sup> ANTONIO CASSESE, INTERNATIONAL LAW 199 (2005).

<sup>208</sup> CASSESE, *supra* note 207, at 202, citing former Article 19 of the ILC Draft Articles on State Responsibility.

<sup>209</sup> Vienna Convention on the Law of Treaties, art. 53.

rare, that still exists in parts of the world (e.g., Mauritania).<sup>210</sup> Much like in the genocide context, the gravity of one of the most extreme human rights abuses thus demands judicious use of the “slavery” label,<sup>211</sup> or else risk minimizing the experiences of the men, women, and children subjected to actual slavery. Moreover, as with conflation of forced labor and trafficking, dilution undermines the right of those accused to be informed in detail of the nature of the charges against them.<sup>212</sup>

At the same time, equating trafficking with slavery can implicitly *raise* the legal threshold for *trafficking* by creating expectations of more extreme harms than is technically required under anti-trafficking law. Invoking slavery dredges up a tragic and shameful past and its attendant imagery of people laboring in fields, sometimes in chains and beaten into submission. But that imagined scenario comprises one extreme and an exceptionally small fraction of a wide range of trafficking practices involving varying types and levels of force or coercion, not necessarily

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<sup>210</sup> Despite passage of a law criminalizing slavery in 2007, government enforcement of the law is widely acknowledged to be inadequate, with reportedly up to 20 percent of the population still living in conditions of *de facto* chattel slavery. 2013 TIP REPORT, *supra* note 46, at 258.

<sup>211</sup> For a description of life as a slave in Mauritania, and the failures of the government to enforce anti-slavery laws, see John D. Sutter, *Slavery’s last stronghold, available at* <http://www.cnn.com/interactive/2012/03/world/mauritania.slaverys.last.stronghold/index.html>.

<sup>212</sup> Gallagher, *UN Protocols*, *supra* note 16, at 799.

physical violence. The distance between what is branded into the public imagination as “trafficking as slavery” and what technically counts as trafficking as matter of law is thus quite substantial.<sup>213</sup> That space only widens the cracks in the system through which trafficked persons already fall. Pushing conceptions of trafficking to the slavery extreme undercuts social service providers and law enforcement authorities’ ability to accurately identify victims, prosecutors’ willingness to prosecute their abuses, and juries’ willingness to find the trafficking threshold met and award trafficked persons the relief sought.

This dynamic has come into play in the litigation strategy, if not the results, of cases brought by victims against their recruiter-traffickers.<sup>214</sup> Defense counsel in the Filipino teacher trafficking case described above, for example, used the slavery imagery to good effect in his closing statement:

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<sup>213</sup> This dynamic risks renewing the skepticism expressed by mainstream media outlets in the past over the true extent of the trafficking problem in the United States – which they perceived as overinflated when the U.S. government placed the number of persons trafficked into the United States at 50,000 per year, and 800,000 worldwide. *See, e.g.*, Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASH. POST (September 23, 2007) (criticizing the disparity between the trafficking statistic and number of victims identified); *see also* sources cited in Chuang, *Rescuing Trafficking*, *supra* note 11, at 1708 n. 221 (citing dispute among journalists over the accuracy of the claims made in a New York Times Magazine cover story entitled *Sex Slaves of West 43<sup>rd</sup> Street*). That the U.S. government now estimates the problem at 27 million “enslaved” worldwide promises to exacerbate the public perception problem.

<sup>214</sup> Vandenberg Interview, *supra* note 176 (describing how defense counsel have been using the slavery analogy to their advantage in avoiding liability in civil cases brought under the TVPA).

Trafficking, in its form – in its real form exists when a worker...becomes a virtual slave to the employer. The more she works in the cotton fields, in the lettuce fields, in the strawberry fields...<sup>215</sup>

The jury awarded the teachers \$4.5 million based on a finding of deceptive business practices, not human trafficking – apparently unable to comprehend how the teachers, who had conceded their love of teaching and fondness for their students, could possibly be “trafficked.”<sup>216</sup> Not only does slavery creep undermine trafficked persons’ pursuit of civil remedies, but it helps maintain the apparent and troubling trajectory of trafficking prosecutions in the United States towards focusing on cases involving violence or confinement.<sup>217</sup> This obviates the TVPA’s intended goal of enabling prosecutors to prosecute cases involving a broader range of the types of coercion (e.g., psychological) used to traffic people.<sup>218</sup>

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<sup>215</sup> Trial Transcript, December 14, 2012, *Mairi Nunag Tanedo v. East Baton Rouge Parish School Board, et al*, *supra* note 185.

<sup>216</sup> See Stockman, *supra* note 185; Testimonial of Ingrid Cruz, at ILRWG website, *supra* note 77.

<sup>217</sup> Confidential Source 1 Interview, *supra* note 197; Vandenberg Interview, *supra* note 176.

<sup>218</sup> Prior to the TVPA, the definition of involuntary servitude, criminalized in 18 U.S.C. § 1584, had required that a victim be held against his/her will by actual force, threats of force, or threats of legal coercion. The TVPA’s criminalization of “forced labor” included coercion involving threats of “serious harm.” 18 U.S.C. §1589, quoted above at *supra* note 177.

b. Absolving the State, its Corporate Partners, and the “Charitable Industrial Complex”

“If we say the problem with domestic servants is that they’re not covered by the Fair Labor Standards Act, and so let’s just go out and make sure they get covered by labor laws around the world, we get to ignore, for example, the fact that domestic servants are being locked in and raped. It’s not a wage issue; it’s a crime issue....”

– *Slavery’s Global Comeback*, The Atlantic,  
quoting U.S. Ambassador-at-Large for  
Trafficking in Persons<sup>219</sup>

As reflected in the quote above, proponents of slavery creep worry that viewing trafficking through a labor lens risks failing to capture – and adequately penalize – the severity of the harms trafficked persons experience. But current dynamics in the field suggest the converse is true: locating the harm of trafficking in the actions of individual bad actors, slavery creep conveniently diverts attention from the broader economic, political, and social context within which trafficking is occurring.

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<sup>219</sup> Gould, *supra* note 13.

As sociologists Julia O’Connell Davidson and Bridget Anderson explain, slavery rhetoric is a discourse of depoliticization.<sup>220</sup> It creates a simple moral imperative with enormous popular appeal, while it depoliticizes and absolves – behind a humanitarian agenda – the State for its role in creating structures that permit, if not encourage coercive exploitation of workers, particularly migrants.<sup>221</sup>

The complex phenomenon of trafficking is distilled into a simple narrative of a crime perpetrated by evil, often foreign, criminal organizations and individuals, best solved through aggressive prosecution and policing of the border.<sup>222</sup> Assuming the “mantle of righteousness,”<sup>223</sup> States’ deployment of anti-slavery rhetoric distances them – and their corporate partners – from their own complicity in the trafficking phenomenon, and refashions them as allies and heroes in the anti-slavery

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<sup>220</sup> Julia O’Connell Davidson, *Absolving the State: The Trafficking-Slavery Metaphor*, 14 GLOBAL DIALOGUE 31 (2012) [hereinafter *Absolving the State*]; Julia O’Connell Davidson, *New slavery, old binaries: human trafficking and the borders of ‘freedom,’* 10 GLOBAL NETWORKS 244 (2010) [hereinafter *New slavery, old binaries*]; Bridget Anderson and Rutvica Andrijasevic, *Sex, slaves and citizens: the politics of anti-trafficking*, 40 SOUNDINGS 135 (2008) [hereinafter *Sex, slaves and citizens*].

<sup>221</sup> *Absolving the State*, *supra* note 220, at 31.

<sup>222</sup> See Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1630-31 (2010) (describing the imagery inscribed in the training of U.S. officials to recognize trafficking situations and its effect of fueling popular discourse that perceives the noncitizen as a criminal threat).

<sup>223</sup> Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 BOSTON U. INT’L L. J. 207, (2007).

crusade. Meanwhile, as “slaves,” trafficked persons are recast as perennial victims, who, like trans-Atlantic slaves, must have been kidnapped and otherwise brought to the destination countries against their will. This imagery conveniently elides the reality that the vast majority of trafficked persons’ narratives begin with an act with agency, a desire to move and/or search for a livelihood. Those who migrated invariably intended to do so, whether as survival migrants in response to acute insecurity at home, or as opportunity-seeking migrants.<sup>224</sup> The slavery makeover thus depicts trafficked persons not as political subjects, but as objects of intervention, and consequently, “obliterates any idea of struggle and works to stabilize the political and social transformations brought about by migration, as it confines migrants to victimhood.”<sup>225</sup>

The problem with this reductive narrative is that it risks rendering unnecessary deeper inquiry into how countries of origin and destination – and corporate interests – construct labor and migration frameworks that encourage maximum migration and minimum protection for the migrants in the course of the labor migration stream. This dynamic makes invisible how countries of origin like the Philippines pawn off their responsibility to

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<sup>224</sup> See generally ANTI-SLAVERY INTERNATIONAL, THE MIGRATION-TRAFFICKING NEXUS (2003) (providing an overview of the push and pull factors driving international migration and resulting impact on human trafficking) [hereinafter ASI MIGRATION-TRAFFICKING NEXUS].

<sup>225</sup> *Sex, slaves, and citizens*, *supra* note 220, at 143.

protect their nationals onto recruitment agencies that routinely escape accountability for profiting from and facilitating forced labor.<sup>226</sup> Also hidden from scrutiny is how, in destination countries like the United States, the combination of corporate control and policy incoherence in the U.S. guestworker programs makes conditions ripe for trafficking of migrants and accountability for the abuses unattainable.<sup>227</sup> The rampant exploitation suffered by the migrant workers who produce the remittances and the low-wage labor that sustain origin and destination country economies is rendered entirely disconnected from the trafficking-cum-slavery phenomenon that modern-day abolitionists stand ready to fight. Conveniently obscured is the central truth that trafficking is often labor migration gone horribly wrong – at least partly due to tightened border controls that have created a growing market for clandestine migration services and lax labor laws that permit employers and recruiters to coercively exploit their workers with impunity.

The reductive narrative embraced by slavery creep instead justifies anti-trafficking interventions that fail to respond to the lived realities of

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<sup>226</sup> See generally Graziano Battistella & Maruja M.B. Asis, *Protecting Filipino Transnational Domestic Workers: Government Regulations and Their Outcomes*, Philippine Institute for Development Studies, Discussion Paper Series No. 2011-12 (describing government efforts to regulate recruitment of Filipino transnational domestic workers).

<sup>227</sup> See generally, VISAS, INC., *supra* note 271.

trafficked persons,<sup>228</sup> and assume away the role of States and corporations in creating vulnerability to trafficking. As O’Connell Davidson points out, one can pity slaves – as objects and eternal victims – more unreservedly than we can those whom we see as authoring and controlling their own destiny.’<sup>229</sup> The slavery frame thus rationalizes States’ thirst for increased border controls that weed out as “not trafficked” those who fail to fit the mold of the naïve, innocent, unwilling migrant.<sup>230</sup> It also enables States to avoid responsibility for establishing restrictive migration frameworks that fail to absorb the number of migrants pushed and pulled into the migration stream by State interests’ in remittances and cheap labor.

c. Savivors

At the grassroots level, slavery creep has also bred a new generation of “anti-slavery” organizations – referred to here as the “new abolitionists.”<sup>231</sup> These organizations seek to mobilize and focus public

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<sup>228</sup> See generally BRENNAN, *supra* note 12 (explaining how glossing over the element of agency is fundamentally at odds with how trafficked persons view themselves).

<sup>229</sup> *New slavery, old binaries*, *supra* note 220, at 256.

<sup>230</sup> Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 2976, 3038 (2005); Haynes, *(Not) Found Chained*, *supra* note 71, at 349-52.

<sup>231</sup> The “new abolitionists” described here does not include, for example, U.K.-based Anti-Slavery International (ASI), established in 1839

outrage on the “dark side of globalization.”<sup>232</sup> These campaigns do nothing to challenge the idea that “inequality and poverty are providential,” however.<sup>233</sup> The new abolitionists are not, for example, demanding a transformation of attitudes adopted by the privileged towards the death or suffering of irregular migrants...[p]assivity in the face of their misery remains entirely conscionable.<sup>234</sup>

Instead, the new-abolitionist campaigns call upon individual and corporate consumers to consume more ethically – “an act of moral agency that can be encouraged by, and exercised in alliance with capitalist enterprises.”<sup>235</sup> As Bernstein explains,

the dichotomy between slavery and freedom poses a way of addressing the ravages of neoliberalism that effectively locates all social harm *outside* of the institutions of corporate capitalism and the state apparatus....big business, the state, and the police are reconfigured as allies and saviors, rather than enemies, of unskilled

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to address chattel slavery, and which has carefully broadened its mandate over the years to address forced labor and trafficking through careful reporting and analysis of the structural determinants of forced labor and trafficking. *See, e.g., ASI MIGRATION-TRAFFICKING NEXUS, supra* note 224; ITUC, NEVER WORK ALONE, *supra* note 74.

<sup>232</sup> Gould, *supra* note 13, quoting Walk Free founder Andrew Forrest.

<sup>233</sup> *Absolving the State, supra* note 220, at 38.

<sup>234</sup> *Id.* at 39.

<sup>235</sup> *Id.* at 38,

migrant workers...<sup>236</sup>

Trafficking is no longer the product of global disparities in wealth, and social exclusion and discrimination in labor and migration frameworks. Rather, human trafficking is “a humanitarian issue global capitalists can help combat.”<sup>237</sup>

It is therefore quite telling – and unsurprising – that abolishing modern-day slavery has become a favored cause of the “charitable industrial complex,” or as defined by philanthropist Peter Buffett, “the world of philanthropy as practiced by the very wealthy.”<sup>238</sup> As Buffett notes, against a backdrop of rising inequality and growth of the nonprofit sector, philanthropy has become “the ‘it’ vehicle for the very wealthy to level the playing field” and engage in ‘conscience laundering.’<sup>239</sup> But philanthropic involvement in solving the world’s problems has changed not only in volume, but also in nature. Shifts in the anti-trafficking advocacy landscape reflect a broader trend in philanthropy towards a particular breed of

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<sup>236</sup> Bernstein, *New Abolitionism*, *supra* note 39, at 144.

<sup>237</sup> *Id.* at 141.

<sup>238</sup> Buffett, *supra* note 206. Buffett, the son of Warren Buffett, chairs the NoVo Foundation, which has been an active funder of anti-trafficking programs.

<sup>239</sup> *Id.* Buffett defines “conscience laundering” as feeling better about accumulating vast amounts of wealth by “sprinkling a little around as an act of charity.” Buffett is critical of such “philanthropic colonialism” as “just keep[ing] the existing structure of inequality in place.”

“venture philanthropy”<sup>240</sup> where funders are becoming NGO founders and taking on operational roles.

Engagement in the anti-trafficking field by eBay-founder Pierre Omidyar and Australian mining-magnate Twiggy Forrest are two such examples. Omidyar’s organization, Humanity United, has had a dramatic impact on the anti-trafficking advocacy landscape within the United States.<sup>241</sup> Humanity United created the Alliance to End Slavery and Trafficking (ATEST) in 2007, to convene and provide financial and administrative support to a small coalition of extant anti-trafficking NGOs. In forming ATEST, Humanity United has created a prominent lobbying coalition vis-à-vis U.S. anti-trafficking legislative reforms and has elevated the profiles of its individual members. At the global level, Forrest’s organization, Walk Free, has claimed a prominent position in international anti-trafficking advocacy circles, garnering the visible support and substantive engagement of intergovernmental organizations and powerful

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<sup>240</sup> Drawing an explicit analogy to venture capital investing, this school of philanthropy includes grant makers who make fewer grants, take an active interest in the enterprises being funded, supply additional nonfinancial help (e.g., consultants), and rely upon clear goals and metrics to define and gauge a grantee’s progress. Shulman, *supra* note 156.

<sup>241</sup> See Humanity United, Modern-Day Slavery: Learn About Our Approach, <http://www.humanityunited.org/learn#>; Alliance to End Slavery & Trafficking: A Project of Humanity United, <http://www.endslaveryandtrafficking.org>.

governments in its bid to rid the world of modern slavery.<sup>242</sup>

To be sure, funder-as-founder venture philanthropy in the anti-trafficking field is not inherently a bad thing. As Shulman notes, one cannot dismiss the possibility that new ideas might rightfully emerge from those who amassed or steward great wealth and work assiduously to observe a sector closely.<sup>243</sup> Philanthropies are exposed to talented people with good ideas and gain a perspective that benefits from not being ‘too close to the ground.’<sup>244</sup> In creating ATEST, for example, Humanity United accomplished what many anti-trafficking advocates (including this author) would have considered a doomed endeavor – bringing together anti-trafficking NGOs with divergent ideologies (most notably regarding prostitution reform) to develop and jointly advocate for a shared legislative reform agenda. Using Shulman’s analogy, in so doing, Humanity United correctly identified a headache – paralyzing in-fighting among advocates –

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<sup>242</sup> The Walk Free website homepage explains that “Walk Free is a movement of people everywhere, fighting to end one of the world’s greatest evils: modern slavery.” Under the “learn” tab, the website reproduces the ILO’s 2012 forced labor statistics, but substitutes slavery terminology in place of “forced labor” – claiming that, e.g., “20.9 million people are forced to live in slavery around the world today” and “modern slavery generates profit of over US \$32 billion for slaveholders. Under the “take action” subheading, visitors to the website can sign a pledge committing to a belief that “our generation can build a world without slavery” and committing to “mobilize governments, businesses and communities to end modern slavery.” *Id.*

<sup>243</sup> Shulman, *supra* note 156, at 222.

<sup>244</sup> *Id.*

for which it could provide aspirin.<sup>245</sup>

The great danger, however, is that venture philanthropist funder-founders can wield tremendous influence – particularly in the international sphere – without the layers of checks that constrain other actors in the field. Concerns over NGO accountability in the international realm<sup>246</sup> are magnified exponentially in the case of funder-founded NGOs. Having deep pockets of their own affords them independence from the expectations of outside funders and/or the priorities of a fee-paying membership base. With few, if any, built-in mechanisms to check the validity of their ideas, the danger of unreflective action is very high. Unlike the venture philanthropist who views proposals and weighs them against others – i.e., responds to a story and weighs it in the context of the storyteller and other similar stories – the funder-founder *is* the storyteller, and moreover, has the resources to try to make their stories come true.<sup>247</sup>

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<sup>245</sup> Drawing an analogy to venture capitalist early-stage decisionmaking, Shulman notes that the first question a potential funder-founder ought to ask is “[w]hat is the headache for which your idea is the aspirin.” *Id.*, at 224.

<sup>246</sup> See generally Peter Spiro, *NGOs and Human Rights: Channels of Power*, in RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW (S. Joseph & A. McBeth eds., 2010); Peter Spiro, *Nongovernmental Organizations in International Relations (Theory)*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (Dunoff & Pollack eds., 2010); Kenneth Anderson, “Accountability” as “Legitimacy”: *Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT’L L. 841 (2011).

<sup>247</sup> Shulman, *supra* note 156, at 222-23.

Thus, in the hands of such powerful storytellers – who may have the power to make them come true – the narrative of trafficking cum slavery as a problem individual bad action that global capitalists can fix can very quickly take on a life of its own. The work of Walk Free is a prime example of this dynamic, and given its apparently vast resources and its skyrocketed stature in the anti-slavery movement, is worth looking at more closely. Among its impressive flurry of activities during its short lifespan, Walk Free has called upon governments and major corporations to sign a “zero tolerance for slavery pledge” to eliminate forced labor from their supply chains.<sup>248</sup> It has hired anti-slavery entrepreneur Kevin Bales to develop and produce its “Global Index on Modern Slavery” – numerically ranking countries according to risk and prevalence of slavery.<sup>249</sup> Both a

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<sup>248</sup> As Walk Free CEO Nick Grono explained, “If Corporate Giants – 25 of the world’s top businesses whose net worth make up US\$5 trillion – prioritize the abolition of modern slavery as their next major innovation, we could quickly deal a major blow to the slavery industry in this generation.” *Walk Free Calls on Big Business to End Slavery Worldwide*, PR NEWSWIRE (DEC 16, 2012) (listing targeted companies, including Apple, Exxon Mobil, Microsoft, Wal-Mart, Shell, General Electric, Google, IBM, among “corporate giants” implored to sign the pledge by March 31, 2013). Perhaps tellingly, Walk Free’s otherwise frequently-updated website makes no mention of the results of the corporate pledge campaign. See Walk Free (website), available at <http://www.walkfree.org>. Current campaigns appear focused on encouraging the public to pressure corporations to rid themselves of forced labor in their supply chains – e.g., Target to eliminate Uzbek cotton in its products, Nintendo to eliminate “slave-mined minerals” from its gaming consoles. *Id.*

<sup>249</sup> WALK FREE, GLOBAL SLAVERY INDEX (2013), available at <http://www.globalslaveryindex.org>. Notably, this positions Bales to

measure of Walk Free's influence – and also its ability to insulate itself from their negative feedback – it circulated a draft Index to high-level governmental and intergovernmental officials, and prominent NGOs for feedback, received apparently substantial criticism for the methodology employed, and then finally released with the problems largely unaddressed.<sup>250</sup>

At the core of its activities is the fundamental belief in business as the key driver of social change, and a deep faith in states' and corporations' willingness to rid the world of worker exploitation. These assumptions undergird Walk Free founder Andrew Forrest's plea to Western business leaders to invest in Myanmar because the lives of tens of millions of people may not improve otherwise<sup>251</sup> – notwithstanding human rights advocates'

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accomplish the aims of Free the Slaves' failed proposal for a U.S. slavery commission from an international perch with far greater influence and resources at his disposal. *See* discussion accompanying *supra* note 145.

<sup>250</sup> Letter from Aidan McQuade, Anti-Slavery International to Nick Grono & Fiona David, Walk Free, June 6, 2013 (offering a scathing critique of the draft Global Slavery Index) [hereinafter Anti-Slavery International letter].

<sup>251</sup> *Myanmar President emphasizes benefits of investment*, ASIALINK (March 19, 2013), available at [http://asialink.unimelb.edu.au/calendar/Recent\\_Events/Myanmar\\_President\\_emphasises\\_benefits\\_of\\_investment](http://asialink.unimelb.edu.au/calendar/Recent_Events/Myanmar_President_emphasises_benefits_of_investment) (describing speech given by Andrew Forrest at Asialink dinner). The Myanmar government was the first to sign Walk Free's anti-slavery pledge, though officials for its still-military and undemocratic new government apparently were short on details as to plans for implementation. Sam Holmes & Shibani Mahtani, *Concert Against Slavery Draws Big Myanmar Crowd*, WALL STREET JOURNAL (December 17, 2012), available at <http://blogs.wsj.com/searealtime/2012/12/17/concert->

caution against too-rapid Western re-engagement with Myanmar.<sup>252</sup> In similar vein, Walk Free's much-touted Global Slavery Index appears to incorporate in its methodology a bias in favor of wealthy countries and an assumption that raising a country's level of economic development will reduce prevalence and risk of slavery.<sup>253</sup>

Such activities beg the question of whether one can really solve a problem with the same mind-set that created it.<sup>254</sup> But the problem with

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[against-slavery-draws-big-myanmar-crowd/](#). Myanmar has a notorious history of trafficking and forced labor practices. Myanmar's persistent refusal to address its forced labor problem inspired the ILO to exercise – for the first time – its power to levy trade sanctions against a Member State. See Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, in *LABOUR RIGHTS AS HUMAN RIGHTS* (2005). The TIP Report ranked Burma Tier 3 from 2001 until 2012. See 2013 TIP REPORT, *supra* note 40, at 112.

<sup>252</sup> Holmes & Mahtani, *supra* note 251 (describing violent government crackdown on protestors at a copper mine, for which the Myanmar government apologized for the injuries inflicted, but not for the crackdown). For an insightful critique of “constructive engagement” with Burma, see generally JOHN G. DALE, *FREE BURMA: TRANSNATIONAL LEGAL ACTION AND CORPORATE ACCOUNTABILITY* (2011) (assessing governments' past use of a combination of (economic) carrots and sticks in their dealings with the Myanmar government).

<sup>253</sup> The Index is derived from amalgamating an estimate of national slavery figures with an amalgamation of “risk factors.” The risk factors, however, comprise a broad and random assortment of measures, some of which have no apparent bearing on forced labor (e.g., HIV prevalence rate, availability of weapons, political instability). Only one of the twenty or so indicators deals with labor rights, and the vast majority of them deal with general country conditions that together contain an inherent bias in favor of wealthy countries (e.g., development indicators). GLOBAL SLAVERY INDEX, *supra* note 249.

<sup>254</sup> Buffet, *supra* note 206. There is, of course, also the irony of Walk Free's founder having made his billions from the (notoriously worker-

such “anti-slavery” measures is not simply that they are predicated on neoliberal assumptions that undergird the very structures that create vulnerability to trafficking and forced labor in the first place. The greater harm is that these prescriptions necessarily *overshadow* – simply because of identity of the funder-founder prescriber – anti-trafficking measures that are increasingly targeting those same structures and attempting to hold states and corporate actors accountable. As pointed out by one critic, unsurprisingly, the same wealthy governments that rank at the top of the Global Slavery Index<sup>255</sup> also happen to be the same wealthy governments that have argued against the need for the proposed ILO forced labor protocol on grounds on that their national measures are sufficient.<sup>256</sup> The Global Slavery Index thus plays into wealthy governments’ continued

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exploitative) extractive industry.

<sup>255</sup> These include Canada, Austria, Norway, Japan, Denmark, Iceland, Australia, United Kingdom, France, and Luxembourg. GLOBAL SLAVERY INDEX, *supra* note 249. Critics have been quick to criticize the high placement of, for example, the United Kingdom, given current efforts to engage in retrogressive measures that affirmative increase the prevalence of “slave-like” conditions. In 2012, the U.K. government’s concerns over the possibility of migrant domestic workers remaining permanently (via visa renewals) led to new visa rules preventing migrant domestic workers from switching employers—a move that rights advocates criticize as “turn[ing] back the clock 15 years” and creating a system that would now mirror the “kafala” system across the Middle East where a change of employer amounts to a loss of residency. Alan Travis, *New visa rules for domestic workers ‘will turn the clock back 15 years,’* GUARDIAN, Feb. 29, 2012; Aidan McQuade, *Slavery is real—we must protect its victims,* GUARDIAN, Feb. 29, 2012.

<sup>256</sup> See Anti-Slavery International Letter, *supra* note 250.

resistance to labor scrutiny, and based on deeply flawed assumptions. One can reasonably confidently predict that the Global Slavery Index will likely be used to defend against assessments made in the TIP Report. In similar vein, Walk Free's campaigns also let their corporate targets off the hook, even as they exhort them to rid their supply chains of forced labor. There is, of course, merit to encouraging companies to adopt voluntary codes of conduct, and relying on transparency measures and possible public shaming as vehicles for compliance. But having governments and corporations *promise* to do better is a poor substitute for pursuing structural safeguards – as lower-profile anti-trafficking advocates do – that would *obligate* them to do so, however.

In addressing foreign labor recruitment, for example, anti-trafficking advocates are targeting issues that directly implicate deeply-entwined state and corporate interests in maintaining the availability of cheap and exploitable labor. Battles in the United States over a draft anti-trafficking law prohibiting recruitment fees for those participating in U.S. guestworker programs provide a case in point. The proposed legislative reforms prompted aggressive efforts by the recruitment industry and the businesses they service to exclude what is *de facto* the largest U.S. guestworker program from its scope – the J-1 Visitor Exchange Program.<sup>257</sup> Technically

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<sup>257</sup> Fredreka Schouten, *Au pair groups, others fight Senate*

a “cultural exchange” program administered by the State Department, the J-1 Program brings young foreigners (typically students) to the United States to work and/or experience American life.<sup>258</sup> But government oversight offices have repeatedly concluded, several of these programs function as guestworker programs on the cheap and lowdown – providing student labor at rates below what official U.S. guestworkers are required to earn, and moreover, all the while shielded from labor scrutiny by their “cultural exchange” classification.<sup>259</sup> Student participants have thus found themselves, for example, working over-full-time at Hershey packing plants for less than a dollar-an-hour, and caring for children for well over 45-hour au pair workweek limit– yet compelled to remain in these jobs due to exorbitant (and entirely unregulated) recruitment fees they unwittingly paid for the privilege of obtaining these jobs.<sup>260</sup> Stoking fears of small business

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*immigration rules*, USA TODAY (June 19, 2013); Kristina Peterson, *Worker Bill Roils the Au Pair World*, WALL STREET JOURNAL (May 24, 2013); Annys Shin, *Au pair agencies win fight to keep recruitment fees*, WASH. POST (June 25, 2013); ILRWG website, *supra* note 77.

<sup>258</sup> U.S. Department of State, J-1 Visitor Exchange Program (website), *available at* <http://www.google.com/search?client=safari&rls=en&q=j-1+visa+program&ie=UTF-8&oe=UTF-8>.

<sup>259</sup> *See, e.g.*, U.S. DEP’T OF STATE & BROADCASTING BD. OF GOVERNORS OFFICE OF INSPECTOR GEN., INSPECTION OF THE BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS (2012) (questioning “the appropriateness of using J visas in work programs,” particularly the Summer Work Travel, au pair, and intern programs).

<sup>260</sup> REPORT OF THE AUGUST 2011 HUMAN RIGHTS DELEGATION TO HERSHEY, PENNSYLVANIA (2011), <http://www.guestworkeralliance.org/wp->

owners and American families of increased financial burdens, the J-1 industry lobby successfully organized a massive letter-writing and calling campaign to Congress to protect their ability to charge students recruitment fees.<sup>261</sup>

Trafficked as these students may have been, slavery creep – at least in its dominant construction – maintains them on the periphery of mainstream concern. Migrating for labor (even if mixed with “cultural exchange”) in our global economy is an endeavor laden with risk. New abolitionists’ bold-faced prescriptions do precious little to help level the playing field between the recruiters and businesses that rely on cheap, exploitable labor, and the individuals who provide it. Particularly when juxtaposed against the potential benefits that come with applying a labor paradigm to the field, the promise of freedom offered by the new abolitionists is ultimately a hollow one.

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content/uploads/2011/09/Human-Rights-Delegation-Report-on-Hersheys-J-1-Workers.pdf (criticizing violations of workers’ rights); Julia Preston, *Foreign Students in Work Visa Program Stage Walkout at Plant*, N.Y. TIMES, Aug. 17, 2011, at A11; Editorial, *Not the America They Expected*, N.Y. TIMES, Aug. 18, 2011, at A22, available at <http://www.nytimes.com/2011/08/19/opinion/not-the-america-they-expected.html>.

<sup>261</sup> See references cited in *supra* note 257. The final legislation imposed regulatory limits upon – rather than prohibiting – fees paid by J-1 visa-holders on the justification – voiced by the State Department and recruitment agencies – that students, unlike other guestworkers, were rightly paying for the privilege of “cultural exchange.” *Id.*; CIR Bill, *supra* note 77.

## 2. Potential Benefits

Not all invocations of “slavery” are wrong or necessarily problematic. There may be situations that arise to the level of slavery under evolving international law norms. Even holding to a narrow doctrinal construction of slavery, there are ways to play out the slavery analogy to frame prescriptions that extend beyond sanctioning individual bad behavior and rescuing victims. Foregrounding the similarities in the political economies of slavery of the past with modern exploitation of the present could be useful in incentivizing policymakers to address the structural contributors to modern-day exploitation.

In the U.S. context, for example, careful use of the slavery frame has proven instrumental in bringing African-American and migrant low-wage workers together in a common struggle against systemic workers’ rights abuses.<sup>262</sup> Advocates including, for example, the National Guestworkers Alliance, have made use of the U.S. Supreme Court’s decision in *Pollock v. Williams*, to argue for rights to organize, and change employers, among other rights.<sup>263</sup> Scholarship looking at the shifting historical meanings of

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<sup>262</sup> Telephone Interview with Jennifer Rosenbaum, Legal Director, National Guestworkers Alliance (July 26, 2013).

<sup>263</sup> See, e.g., First Amended Complaint and Expert Affidavit of

the Thirteenth Amendment point to its exciting potential as a tool for protecting immigrant workers from servitude.<sup>264</sup> A scholarly revival in the study of the international law of slavery has provided scholars, such as Chantal Thomas, a springboard to explore how the slavery frame might be used to argue for immigration reforms to prevent the conditions of immiseration that have come to be associated with “modern-day slavery.”<sup>265</sup>

Given that the slavery creep in policy discourse is likely here to stay, these are the narratives that those committed to the eradicating forced labor/trafficking/slavery – be they ambitious philanthropists, U.S. TIP Office, UNODC, or grassroots NGOs – could and should more productively promote.

## CONCLUSION

If anything, the evolution of the anti-trafficking field provides a jarring lesson in how international legal norms and institutions can be

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James Gray Pope, in *Jimenez v. Vanderbilt Landscaping LLC*, Civ. Action No. 3:11-0276, filed Apr. 6, 2011, U.S. District Court, Middle District of Tennessee Nashville Division.

<sup>264</sup> See, e.g., Risa L. Goluboff, *The Thirteenth Amendment in Historical Perspective*, 11 J. CONST. L. 1451 (2009).

<sup>265</sup> Thomas, *supra* note 135 (assessing the work of international law scholars Jean Allain, Robin Hickey, and other scholars involved in developing the Bellagio-Harvard Guidelines on the legal parameters of slavery).

massaged and manipulated into the service of powerful interests and agendas. The U.S government has always loomed large in global governance in this field, as key promoter and enforcer of the criminal justice-dominant anti-trafficking framework. Exploitation creep is the latest of maneuvers to assert criminal justice paradigm dominance – this time in the face of a growing chorus of actors demanding labor-based solutions to the problem of human trafficking. Yet the results produced by exploitation creep demonstrate that U.S. hegemony in this field is neither monolithic nor inevitable. The responses exploitation creep has engendered – from the internal divisions within the U.S. government, the rise of joint human rights/labor grassroots advocacy, the active engagement by charitable industrial complex, to the ILO’s bid to engage in new international standard-setting – all present opportunities to reallocate the power to frame the problem of trafficking and responses thereto.

This is not to suggest, however, that the choice of frame be a singular one. If anything, experience tells us that a multi-pronged approach to trafficking is necessary. Although many have pointed to the failure of the dominant criminal justice paradigm to make much of a dent in the trafficking problem, it cannot be denied that criminal justice concerns have played a crucial role in elevating the issue of trafficking to one of international and national concern. Prior to the U.N. Protocol, seven

decades' worth of treaties addressing forced labor, slavery-like practices, migrant workers' rights, and sex trafficking accomplished exceedingly little to address private exploitation. And when developed and implemented in a genuinely victim-centered manner, criminal justice interventions unquestionably can provide much-needed accountability and restitution for egregious wrongs.<sup>266</sup>

Criminal justice approaches thus ought to be pursued alongside others. There is much to be gained, for example, from combining human rights advocates' traditional focus on limiting the power of the state with labor advocates' focus on limiting the power of private actors in the market.<sup>267</sup> As Jonathan Todres has aptly demonstrated, human rights strategies can “strengthen labor-based initiatives by anchoring them in

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<sup>266</sup> In practice, criminal procedures may even provide better and greater options for restitution than available civil options. In the United States, pursuing criminal restitution offers a potentially higher sum of money than available civil remedies. 18 U.S.C. § 1593(b)(3) (defining the term “full amount of victim’s losses” to include “the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act.”). Moreover, the restitution obtained under § 1593 is tax-free, unlike that obtained through civil actions under the TVPA or labor law. *See* IRS notice 2012-12, *Restitution Payments under the Trafficking Victims Protection Act of 2000*. Moreover, pursuing criminal restitution saves victims the hassle of discovery and affords them better options for concealing their identities in the process. Vandenberg Interview, *supra* note 176.

<sup>267</sup> *See generally* Kevin Kolben, *Labor Rights as Human Rights*, 50 VA. J. INT’L L. 449 (2010) (contrasting labor rights and human rights’ approaches to social change, and assessing the turn to human rights discourse by labor scholars and labor organizations).

fundamental rights,”<sup>268</sup> enabling workers to articulate political claims and hold truth to power. The benefits of this synergy are already apparent in the U.S. context, for example – for example, in joint advocacy efforts to gain worker protections from employer/recruiter retaliation against those engaged in worker organizing or speaking out about their exploitative workplace conditions.<sup>269</sup> A joint project by the International Trade Union Confederation and Anti-Slavery International to encourage collaboration between human rights organizations and trade unions has resulted in innovative efforts to address forced labour in Azerbaijan, Belgium, Italy, Poland, and Germany.<sup>270</sup> Other promising new initiatives lie in the direction of, for example, seeking better regulation of the foreign labor recruitment industry,<sup>271</sup> finding alternatives to reliance on third party labor

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<sup>268</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, 158 (2013).

<sup>269</sup> See THE POWER CAMPAIGN, <http://thepoweract.com> (website to support passage of the Power Act, federal legislation to provide whistleblower protections for immigrant workers). The recently passed Senate comprehensive immigration reform bill incorporated Power Act worker protections against retaliatory termination and deportation. See CIR Bill, *supra* note 77.

<sup>270</sup> See, e.g., ITUC, NEVER WORK ALONE, *supra* note 74 (describing results of project to create a European coalition of anti-trafficking NGOs and trade unions to address forced labor and trafficking).

<sup>271</sup> See VISAS, INC.: CORPORATE CONTROL AND POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM (2012) [hereinafter VISAS, INC.]; THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE (2013); Janie A.

recruiters – through, for example, creating and expanding government-mediated direct hire systems that cut out the middleman,<sup>272</sup> and exploring the possibility of transnational worker organizations empowered to manage cross-border recruitment of their members.<sup>273</sup>

Providing crucial conceptual and institutional support for these labor-based approaches are the efforts of key labor institutions like the ILO and ILAB to stake a claim to independent anti-trafficking expertise and authority – notwithstanding heavy pressure to defer to dominant anti-trafficking institutions. The ILO’s upcoming efforts to develop a protocol to the ILO forced labor treaties will be a significant testing ground for that commitment. Attributing the significant under-detection of non-sex-sector

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Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269 (2013); ILRWG website, *supra* note 77.

<sup>272</sup> Advocates working on behalf of Filipino and Indonesian migrant domestic workers in Hong Kong, for example, have called for the Hong Kong government to work with the Indonesian and Philippines governments to implement a direct hire system. Author Interview with representatives from the International Domestic Workers Network, the Hong Kong Confederation of Trade Unions, and Mission for Migrant Workers, April 24-25, 2013. Taiwan has a direct hire system, but the complicated and time-consuming application process has made it an unpopular option for prospective employers. Author Interview with Peter O’Neill, Hope Workers Center, in Chungli, Taiwan (Apr. 30, 2013); Author Interview with Yuling Ku, Taiwan International Workers Association, in Taipei, Taiwan (Apr. 30, 2013).

<sup>273</sup> See Jennifer Gordon, *Towards Transnational Labor Citizenship: Restructuring Labor Migration to Reinforce Workers’ Rights* (January 2009) (describing emerging models of “mobile labor citizenship” including those foster union-union job referrals).

trafficking to criminal justice approaches pursued to the exclusion of other relevant areas of law, the ILO has expressed explicit intent to establish a “labour approach that takes into account the role of labour administration and labour inspection in preventing and combating forced labour.”<sup>274</sup> Even accepting the many weaknesses of the ILO as an institution and governments’ underwhelming adoption of ILO treaties, the proposed protocol offers a prime opportunity to conceptualize trafficking as a labor issue.<sup>275</sup> In addition to hardening States’ obligations (particularly vis-à-vis their corporate partners) to protect victims of forced labor, the proposed ILO protocol could reaffirm and elevate the (thus far overlooked) role of domestic labor institutions in strengthening and ensuring implementation of protections against forced labor and trafficking.<sup>276</sup>

Such initiatives contribute significantly to deepening our understanding of how power is wielded among employees, employers,

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<sup>274</sup> ILO Forced Labour and Trafficking Discussion Paper, *supra* note 76, at ¶ 15; ILO Forced Labor and Trafficking Tripartite Meeting Report, *supra* note 76.

<sup>275</sup> Some human rights advocates are now looking to the prospect of an ILO trafficking protocol as a second bite at the apple – an opportunity to harden the rights protections States accepted as merely aspirational under the U.N. Protocol. Dep’t of Labor, Int’l Labor Affairs Bureau, Feb. 5, 2013 (meeting with labor and human rights advocates regarding the proposed ILO protocol to the forced labor treaties).

<sup>276</sup> For a comprehensive discussion of the U.S. Department of Labor’s role in anti-trafficking efforts, for example, see *Counteracting the Bias: the Department of Labor’s Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV 2012 (2013) [hereinafter *Counteracting the Bias*].

contractors, recruiters and other actors operating in a globalized economy. Formulating interventions based on that empirical reality is the most effective way at targeting the structures that create and feed vulnerability to trafficking and forced labor. Only then can we have any hope of producing a world where identifying a practice as “forced labor” is a powerful call to action.

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