

## EXPLOITATION CREEP AND THE UNMAKING OF HUMAN TRAFFICKING LAW

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Over the last fifteen years, the problem of human trafficking has become a focus of government and advocacy agendas worldwide. Increasingly referred to as “modern-day slavery,” the phenomenon has prompted rapid proliferation of international, regional, and national anti-trafficking laws, and inspired states to devote enormous financial and bureaucratic resources to its eradication. It has also spawned an industry of nonprofits that have elevated the “abolition” of trafficking into a pressing moral campaign, which anyone can join with the click of a mouse.<sup>1</sup> Scholars have also jumped into the fray, calling on states 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 law,<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 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 the concept’s legal parameters.<sup>9</sup> The first modern anti-trafficking treaty,

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<sup>1</sup> See, e.g., Walk Free, *A World Without Slavery: I Believe in a World Where Everyone Can Walk Free*, at <http://www.walkfree.org/en/actions/commit> (readers sign a pledge committing to the abolition of slavery); Not for Sale, *Donate: Give Freedom to Re-abolish Slavery*, at <http://www.notforsalecampaign.org/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*, 36 HUM. RTS. Q. 210 (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, *Remediating 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. PA. L. REV. 1849 (2010); Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76 (2012).

<sup>8</sup> See, e.g., Ethan B. Kapstein, *The New Global Slave Trade*, FOREIGN AFF., Nov.-Dec. 2006, at 103.

<sup>9</sup> Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons, Freedom Here & Now: Ending Modern Slavery, Remarks before the Women’s Foundation of Minnesota and the Center for Integrative Leadership (May 8, 2012), at <http://www.state.gov/j/tip/rls/rm/2012/189611.htm>.

the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) was adopted in 2000 to update earlier anti-trafficking laws—which had focused only on women and girls trafficked into the sex sector—to encompass men, women, and children trafficked into any sector of the economy. The protocol offers a definition of trafficking that, reduced to its core elements, entails: (1) an *act* of recruitment, movement, harboring, or receipt of a person, (2) by *means* of force, fraud, or coercion, (3) for the *purpose* of “exploitation.”<sup>10</sup> For the sake of achieving consensus, however, the protocol’s drafters left key aspects of the legal definition intentionally vague.<sup>11</sup> Ever since, diverse advocates have appropriated the “trafficking” label so that the activities covered by the term *trafficking* remain very much in the eye of the beholder. The definitional muddle has resulted in indiscriminate conflation of legal concepts, heated battles over how best to address the problem, and an expanding crowd of actors fervently seeking to abolish any conduct deemed “trafficking.”

From the Trafficking Protocol’s inception, the United States has dominated the international anti-trafficking law and policy arena. It led negotiations over the protocol, which adopted the Clinton administration’s “3 Ps” anti-trafficking policy framework—focusing on prosecution, (victim) protection, and prevention (with a heavy emphasis on prosecution). Shortly before the protocol’s adoption, the United States passed its own domestic anti-trafficking law, empowering the U.S. president to levy economic sanctions against states deemed noncompliant with U.S. anti-trafficking standards. Ever since, the United States has wielded enormous power to shape other states’ anti-trafficking laws and policy responses—in the course of which have surfaced the many conflicts among the approaches that different states have adopted (and advocates have proposed).

During the first decade of the modern anti-trafficking regime, the United States used its influence to pressure other states to establish aggressive, perpetrator-focused criminal justice responses to trafficking. The almost-exclusive focus of the George W. Bush administration (2001–09) on sex-sector trafficking and its concomitant goal of seeking to abolish prostitution worldwide provoked considerable conflict. Human rights activists defended the protocol’s explicit agnosticism on the prostitution issue,<sup>12</sup> and they fought to have anti-trafficking regimes applied to the arguably larger numbers of men, women, and children trafficked *outside* of the sex sector, and to afford all trafficked persons more substantive human rights protections.

Dramatic changes in the anti-trafficking field have led to a second generation of battles over definition and approach—prompted by efforts of the Obama administration (2009–present) to

<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, Art. 3, *opened for signature* Nov. 15, 2000, 2237 UNTS 319 [hereinafter UN Trafficking Protocol] (emphasis added).

<sup>11</sup> See *id.*; 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) (discussing the debates over vague elements of the definition, including, for example, “sexual exploitation”).

<sup>12</sup> The official interpretative notes to the UN Trafficking Protocol clarify that its use of the terms “exploitation of the prostitution of others and other forms of sexual exploitation” is “*without prejudice to how States Parties address prostitution in their respective domestic laws.*” Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Sessions, Addendum, Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, para. 64, UN Doc. A/55/383/Add.1 (Nov. 3, 2000) (emphasis added).

promote a broader legal definition and policy understanding of “trafficking.” Through doctrinal and discursive conflation, the aggregate effect of different and usually well-intentioned initiatives has been what I refer to here as “exploitation creep.” This sprawling phenomenon has many elements, but I focus here on two fundamental shifts. First, all forced labor is recast as trafficking, even if no one changes location at all. Second, all trafficking is labeled as slavery. Exploitation creep thus has been expressed through efforts to expand previously narrow legal categories—at least in terms of rhetoric and policy, but in some cases also in hard law—in a strategic bid to subject a broader range of practices to a greater amount of public opprobrium. This effort has involved, for example, breaking out of earlier legal limitations in which trafficking entailed some element of movement; situations in which people are maintained or born into forced labor are thereby included. Similarly, the legal (and moral) category of slavery—the prohibition of which is considered *jus cogens* under international law—had previously been reserved for the most extreme forms of exploitation (i.e., exercising the powers of ownership over another individual) but has now been extended to cover all trafficked persons.

This exploitation creep has the compelling goal of widening the anti-trafficking net to capture more forms of exploitation. But close analysis reveals that it is also a technique to protect the hegemony of a particular U.S. anti-trafficking approach—one having broad bipartisan support in U.S. politics—and to fend off competing approaches calling for labor rights and migration policy reforms that are particularly contentious in the U.S. context. Exploitation creep enables the United States to expand its “anti-trafficking” influence over areas once deemed non-trafficked forced labor and to generate, via “slavery” rebranding, heightened moral condemnation and commitment to its cause.

Exploitation creep has produced two possible trajectories for the anti-trafficking movement. First, it has had the intended effect of fueling an approach that I refer to here as *modern-day-slavery abolitionism* (MDS abolitionism). Locating the source of trafficking harm in the deviant behavior of individuals (and corporations), MDS abolitionism prioritizes the accountability of individual perpetrators and the rescue and protection of victims. Its preferred techniques are aggressive criminal justice responses and reputational harm. Joining the United States in promoting MDS abolitionism is an increasingly influential type of actor in the international realm—the well-resourced, funder-founded nongovernmental organization (NGO). With these powerful champions, MDS abolitionism has overtaken the trafficking field with high-profile media campaigns directed at rescuing a growing population of victims from “modern-day slavery.”

Second, exploitation creep has unintentionally infused a labor perspective into anti-trafficking law and policy regimes. That is, by expanding the reach of anti-trafficking regimes to include forced labor, exploitation creep has also made labor policy and the concept of labor itself explicitly relevant to a field that had long been narrowly focused on sexual exploitation. From this labor perspective, trafficking needs to be understood as a product of weak labor and migration frameworks. A rising chorus of labor institutions and advocates is consequently seeking strengthened labor protections as a means of reducing vulnerability to trafficking.

Exploitation creep has thus helped bring the anti-trafficking field to a crossroads: whether to stay the course of criminal justice–focused policy or to also pursue the structural changes that a labor approach prescribes. This article argues for embracing the latter option. Since the modern anti-trafficking regime’s inception, crime control–focused interventions have produced disappointing results even by the United States’ own (flawed) metrics—with a reported 44,000

survivors found worldwide last year, and over 20 million victims yet to be identified.<sup>13</sup> For most of the relatively small number of “rescued” survivors, life post-trafficking involves the same structural vulnerabilities that enabled them to be trafficked in the first place—for example, working in low-wage, precarious jobs for which forced labor is an inherent risk.<sup>14</sup> Crucially needed are alternatives that provide long-overdue substance to the third prong of the 3Ps approach to trafficking—prevention. With MDS abolitionism now in its stride, the 2014 edition of the United States’ annual *Trafficking in Persons Report* (TIP Report) tellingly omits the prevention prong from its opening analysis and recommendations. Pursuing the trajectory of integrating a labor-infused approach recovers this lost, but crucial, prong and imbues it with transformative potential.

To illustrate how, the article maps exploitation creep and assesses its implications for international anti-trafficking law and policy. Part I situates exploitation creep in its historical context, tracing the development of the modern international anti-trafficking legal regime and the United States’ rise to power as “global sheriff” on trafficking. The discussion demonstrates how exploitation creep has resulted from the Obama administration’s efforts both to reject certain aspects of Bush administration policies and to maintain U.S. anti-trafficking hegemony in the face of actors and perspectives belatedly laying claim to the anti-trafficking cause. It then explores how exploitation creep has changed the landscape of global anti-trafficking efforts, fueling a widespread “anti-slavery” movement and also inspiring a convergence of human rights and labor advocates around broader exploitation issues.

Part II assesses the actual and potential effects of exploitation creep. It examines the uncertain doctrinal grounds for conflating trafficking, slavery, and forced labor, and the possibility that this conflation may actually undermine “trafficking” as a freestanding legal concept. Setting aside these concerns, the discussion then explains how exploitation creep has produced, as mentioned briefly above, two trajectories for future anti-trafficking law and policymaking: MDS abolitionism and a labor-based approach. It demonstrates how MDS abolitionism, using an oversimplified slavery narrative, has created a simple moral imperative with tremendous popular appeal. It has galvanized support and resources for continued focus on perpetrator accountability and victim rescue, but deflected attention from the broader structural causes of exploitation. In contrast, the trajectory toward incorporating a labor perspective usefully complicates understandings of how exploitation occurs. It thus exposes, and targets for reform, weaknesses in current labor and migration frameworks that enable exploitation and impede redress.

Part III argues for pursuing the latter trajectory and incorporating a labor-based approach into anti-trafficking law and policy regimes. History has demonstrated the limited effectiveness—and ultimately, limited reach—of strategies that primarily, if not exclusively, target individual deviant actors and hapless victims for prosecution and rescue, respectively. A course correction is much needed and long overdue. Existing labor and migration frameworks have proven inadequate to the task of protecting those at the bottom of the global labor hierarchy.

<sup>13</sup> U.S. DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT 4* (2014) (letter from Secretary of State John Kerry, introducing the report). These reports all have the same title, distinguished by the change in the year of publication. For ease of citation, the short form for citing the reports will include the title prefaced by the year—for example, 2014 *TRAFFICKING IN PERSONS REPORT*.

<sup>14</sup> See generally DENISE BRENNAN, *LIFE INTERRUPTED: TRAFFICKING INTO FORCED LABOR IN THE UNITED STATES* (2013).

Also raised in this context are fundamental questions regarding what is acceptable exploitation in the global economy—questions that states are finding increasingly difficult to avoid, both within and outside of anti-trafficking law and policy regimes. Only by confronting them, however, can the anti-trafficking movement begin to deliver on its promise of eradicating human exploitation for profit.

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

Understanding the significance of exploitation creep requires that we first situate it in historical context. In the field of anti-trafficking—unlike in other fields, in which an advocacy movement spurs the creation of a new legal regime—the law preceded the social movement.<sup>15</sup> States decided to develop the Trafficking Protocol in a moment of “crisis governance,”<sup>16</sup> fueled by concerns over border security and transnational organized criminal syndicates’ role in facilitating clandestine migration. The hastily drafted protocol defined trafficking to include vague elements that are chronically undefined under international law and subject to vast differences in interpretation. The definition’s malleability has enabled anti-trafficking regimes worldwide to become powerful tools for addressing a wide range of problems—the specific target turning on the preferences of those with the power to dictate the scope and contents of “trafficking.”

Chief among those wielding such power has been the United States. Because the Trafficking Protocol lacks an enforcement mechanism, the United States has assumed the role of policing other states’ anti-trafficking responses—primarily by utilizing the powerful economic sanctions established in U.S. domestic anti-trafficking legislation, the Trafficking Victims Protection Act<sup>17</sup> (TVPA). Since the sanctions threat is triggered by states’ noncompliance with a set of “U.S. minimum standards,” the United States has been able to shape anti-trafficking law and policy responses worldwide.<sup>18</sup>

Each successive U.S. presidential administration has put its distinctive mark on global anti-trafficking priorities, massaging the legal parameters of the trafficking definition to match. In a bid to have prostitution abolished worldwide, the Bush administration interpreted the trafficking definition as encompassing all prostitution. The Obama administration then engaged in exploitation creep to broaden the spotlight to include non-sex-sector trafficking of men, women, and children (and also, arguably, to maintain U.S. dominance in global anti-trafficking policy).

<sup>15</sup> J. J. Gould, *Slavery’s Global Comeback*, ATLANTIC (Dec. 19, 2012), at <http://www.theatlantic.com/international/archive/2012/12/slaverys-global-comeback/266354/>.

<sup>16</sup> Diane Otto, *Remapping Crisis Through a Feminist Lens*, in *FEMINIST PERSPECTIVES ON CONTEMPORARY INTERNATIONAL LAW: BETWEEN RESISTANCE AND COMPLIANCE?* 75 (Sari Kouvo & Zoe Pearson eds., 2011).

<sup>17</sup> Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. §§7101–7110 (2000) [hereinafter TVPA], amended by Trafficking Victims Protection Reauthorization Act of 2003, 22 U.S.C. §§7101–7110 (Supp. III 2005), Trafficking Victims Protection Reauthorization Act of 2005, 22 U.S.C. §§7101–7110 (Supp. IV 2007), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 22 U.S.C. §§7101–7112 (Supp. III 2010), Trafficking Victims Protection Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 136.

<sup>18</sup> Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 449 (2006).

*Development of the Trafficking Protocol*

Although international, regional, and domestic anti-trafficking law and policy responses have proliferated over the last fifteen years, trafficking has been the subject of international law since the early 1900s. Concern over “white slavery”—the “export” or “‘trafficking’ of ‘white’ women from Europe and North America for the purposes of prostitution” by foreign or immigrant men in the colonial nether regions of Africa, Asia, and South America<sup>19</sup>—gave rise to a series of treaties beginning in 1904 and culminating in the 1949 Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention).<sup>20</sup> With no formal treaty-monitoring body, however, enforcement of that treaty became an orphan issue sporadically addressed within the margins of the UN human rights system.<sup>21</sup>

During the 1990s, in a wide range of economic sectors, including agriculture, construction, domestic work, and the sex industry, particular features of globalization gave rise to increased movement and recruitment of men, women, and children into exploitation.<sup>22</sup> Trade liberalization, structural-adjustment policies, and gender-, class-, and race-discriminatory practices resulted in limited job opportunities and social services, and created an emigration “push” from resource-poor countries. At the same time, unrelenting demand for cheap labor and greater (Internet-fueled) expectations of lucrative job opportunities abroad for low-skilled laborers strengthened the immigration “pull” of wealthier countries. Combined with increased border controls in the countries of destination, these factors created a desperate stream of migration from which traffickers could “fish.”<sup>23</sup>

In 1999, recognizing the 1949 Convention as inadequate to the task of addressing modern forms of trafficking, states began to negotiate the Trafficking Protocol.<sup>24</sup> The U.S.-led treaty negotiations produced two major conceptual shifts regarding the international legal treatment of trafficking. First, the Trafficking Protocol, developed as a protocol to the UN Convention on Transnational Organized Crime (Organized Crime Convention),<sup>25</sup> “unceremoniously plucked” the trafficking mandate out of the human rights realm and reframed it as a criminal justice issue.<sup>26</sup> Second, the protocol offered a legal definition of trafficking that broadened earlier conceptions to include men, women, and children trafficked outside the sex sector.

<sup>19</sup> Dianne Otto, *Lost in Translation: Re-scripting the Sex Subjects of International Human Rights Law*, in *INTERNATIONAL LAW AND ITS OTHERS* 318, 324 (Anne Orford ed., 2006).

<sup>20</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 UNTS 271.

<sup>21</sup> ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 62 n.48 (2012); 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).

<sup>22</sup> Saskia Sassen, *Women's Burden: Counter-geographies of Globalization and the Feminization of Survival*, 71 *NORDIC J. INT'L L.* 255 (2002).

<sup>23</sup> MIKE KAY, *THE MIGRATION-TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS' HUMAN RIGHTS* (2003).

<sup>24</sup> UN Trafficking Protocol, *supra* note 10.

<sup>25</sup> UN Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 UNTS 209 (entered into force Sept. 29, 2003).

<sup>26</sup> GALLAGHER, *supra* note 21, at 4.

Because the Trafficking Protocol was negotiated under the purview of the UN Office on Drugs and Crime, the drafters were law enforcement officials unversed in human rights standards and interested in them only insofar as they served crime-control goals.<sup>27</sup> Trafficking was framed as a crime perpetrated by criminal syndicates, unwittingly suffered mainly by innocent women and children, and best addressed by aggressive criminalization.<sup>28</sup> Human rights advocates were caught flat-footed by the move toward a crime-control frame.<sup>29</sup> With concerns about border security and crime control driving the negotiations, human rights advocates were limited to arguing for human rights protections based on their instrumental value vis-à-vis criminal justice priorities. Recognition of trafficked persons as victims of crime and human rights abuse<sup>30</sup> ultimately yielded minimal entitlements, protections, or rights within the new protocol. For example, the drafters refused to prohibit states from imposing criminal penalties on trafficked persons for crimes committed as a result of the trafficking (for example, prostitution, undocumented migration).<sup>31</sup> Moreover, in stark contrast to the language of hard obligation found in the protocol's criminalization provisions, states were required only to "consider" and "endeavor to provide" assistance for, and protection of, trafficked persons—and even then, subject to the qualifications "in appropriate cases" and "to the extent possible under . . . domestic law."<sup>32</sup>

Further undercutting human rights advocacy efforts were the highly divisive debates over the legal definition of trafficking. While states readily agreed to expand earlier conceptions of trafficking to encompass non-sex-sector forms, whether "trafficking" ought to cover noncoerced adult prostitution prompted internecine battles within the human rights advocacy community.<sup>33</sup> The fractious prostitution-reform debates proved distracting and detrimental to efforts to prioritize human rights protections in the Trafficking Protocol. The "neo-abolitionist" feminist advocates<sup>34</sup>—viewing all prostitution as inherently coerced and thus sex trafficking—strongly supported aggressive criminal justice interventions: to stigmatize the buyers of

<sup>27</sup> *Id.*

<sup>28</sup> The first draft of the protocol (by Argentina) limited its coverage to women and children. The United States advocated, instead, coverage of all persons "while recognizing that women and children [were] particularly vulnerable to trafficking." The protocol thus references "especially women and children" in its title and throughout its provisions. Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, at 1 n.1, UN Doc. A/AC.254/4/Add.3/Rev.1 (Feb. 22, 1999).

<sup>29</sup> The work of the then UN Commission on Human Rights leading up to the Trafficking Protocol negotiations reveals no discussion of how human rights standards apply to human trafficking. The UN General Assembly resolution encouraging states and regional economic organizations to sign and ratify the Organized Crime Convention and its protocols was framed exclusively in terms of crime control, with no mention of human rights concerns. See GA Res. 55/25 (Jan. 8, 2001).

<sup>30</sup> UN Trafficking Protocol, *supra* note 10, pmb. (noting the need to protect the victims' "internationally recognized human rights").

<sup>31</sup> Gallagher, *supra* note 11, at 990–91.

<sup>32</sup> UN Trafficking Protocol, *supra* note 10, Arts. 6, 7; see also *id.*, Art. 9.

<sup>33</sup> See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010).

<sup>34</sup> See, e.g., Melissa Farley, *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRACTICE 33 (2003); KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY (1995); Dorchen Leidholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO WOMEN'S L.J. 133 (1993); Catherine MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 (1993). Sociologist Elizabeth Bernstein has labeled the feminist neo-abolitionist preference for punitive paradigms of justice as "carceral feminism." Elizabeth Bernstein, *The Sexual Politics of "New Abolitionism,"* 18 DIFFERENCES 128 (2007).

sex as socially or morally tainted; 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 or social deviance.<sup>35</sup> Hence, with both states and powerful neo-abolitionist feminists rallying behind criminal justice priorities, (other) human rights advocates were ill positioned to effectuate a shift toward a more robust human rights framework. That the International Labour Organization (ILO) maintained a decidedly low profile during the negotiations—in the wake of receiving wide criticism for allegedly offering “an economic anointment of the sex industry” in a then-recent report<sup>36</sup>—further deprived the negotiations of crucial expertise on forced- and child-labor issues.<sup>37</sup>

The ultimate result of these complex dynamics was an agreement that, together with its parent Transnational Organized Crime Convention, established an elaborate framework to criminalize trafficking and to facilitate interstate cooperation to intercept traffickers and control borders through information exchange, mutual legal assistance, and repatriation procedures, among other measures.<sup>38</sup> The Trafficking Protocol defines trafficking as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]<sup>39</sup>

Trafficking thus comprises three key elements: (1) an act (for example, recruitment, transportation), (2) means (for example, force, coercion), and (3) exploitative purpose (for example, forced labor, slavery). Vague and undefined terms within the definition—for example, sexual exploitation, abuse of a position of vulnerability—prompt and permit considerably divergent interpretations. Unlike human rights treaties, the Trafficking Protocol does not establish a treaty-monitoring body with powers to resolve the interpretative disputes or to assess individual state compliance with protocol obligations. Instead, the UN Office on Drugs and Crime is responsible for providing technical and legislative guidance to countries regarding protocol

<sup>35</sup> Chuang, *supra* note 33, at 1669. For incisive analyses of these feminist moves, see 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 (2010).

<sup>36</sup> See THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA (Lin Lean Lim ed., 1998); Janice G. Raymond, *Legitimizing Prostitution as Sex Work: UN Labour Organization (ILO) Calls for Recognition of the Sex Industry*, COALITION AGAINST TRAFFICKING IN WOMEN (July 12, 1999), at <http://www.catwinternational.org/Home/Article/61-legitimizing-prostitution-as-sex-work-un-labour-organization-ilo-calls-for-recognition-of-the-sex-industry>.

<sup>37</sup> The ILO submitted brief, narrowly focused written comments on the protocol but was absent from the coalition of other international organizations—including the Office of the High Commissioner for Human Rights, UN High Commissioner for Refugees, UNICEF, and the International Organization for Migration—that actively provided input during the protocol negotiations. See Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Note by the International Labour Organization on the Additional Legal Instrument Against Trafficking in Women and Children, UN Doc. A/AC.254/CRP.14 (June 16, 1999).

<sup>38</sup> UN Trafficking Protocol, *supra* note 10.

<sup>39</sup> *Id.*, Art. 3.



implementation,<sup>40</sup> for conducting research and analysis on trafficking,<sup>41</sup> and for coordinating the annual Conference of Parties, where states meet to discuss implementation issues.<sup>42</sup>

### *Bush Administration*

Simultaneous with Clinton administration efforts to lead the Trafficking Protocol negotiations abroad, the Republican-led U.S. Congress passed the U.S. Trafficking Victims Protection Act of 2000.<sup>43</sup> Although a domestic law, the TVPA has worldwide effect since its economic sanctions regime empowers the United States to effectively police the anti-trafficking efforts of other states.<sup>44</sup> Notwithstanding the Clinton administration's objection that sanctions conflicted with the protocol's international cooperation ethos, the TVPA's congressional sponsors included the sanctions regime because they believed that the success of U.S. domestic efforts to prevent trafficking into the United States turned on the anti-trafficking efforts of other states.<sup>45</sup>

Each year, therefore, the TVPA-created Department of State Office to Monitor and Combat Trafficking in Persons (TIP Office) issues the annual TIP Report ranking countries' efforts to abide by a set of four "U.S. minimum standards for combating trafficking." The first three standards target states' efforts to punish traffickers, whereas the fourth—aimed at efforts to "eliminate" trafficking—includes as its foremost indicator states' efforts to "vigorously investigate[] and prosecute[] . . . trafficking."<sup>46</sup> Those countries deemed noncompliant with the U.S. minimum standards receive the lowest ranking in the annual TIP Report

<sup>40</sup> See, e.g., UN OFFICE ON DRUGS AND CRIME, MODEL LAW AGAINST TRAFFICKING IN PERSONS, UN Sales No. E.09.V.11 (2009), 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>41</sup> See, e.g., UN Office on Drugs and Crime, Issue Paper: Abuse of a Position of Vulnerability and Other "Means" Within the Definition of Trafficking in Persons (2012).

<sup>42</sup> UN Convention Against Transnational Organized Crime, *supra* note 25, Art. 32(1); GALLAGHER, *supra* note 21, at 460–61 (discussing the Conference of Parties' decision to extend its monitoring, information exchange, cooperation, and other functions to the Trafficking Protocol).

<sup>43</sup> TVPA, *supra* note 17.

<sup>44</sup> 22 U.S.C. §§7106–7107, *supra* note 17.

<sup>45</sup> Chuang, *supra* note 18, at 454–56. These sanctions are neither humanitarian- nor trade-related, and include withdrawal of both U.S. direct financial assistance and U.S. support for multilateral aid packages. 22 U.S.C. §§7106(a), 7107(d)(1). Countries receiving the lowest ranking (Tier 3) in the annual TIP Report have a ninety-day grace period during which to improve their performance before the sanctions determination is made. The U.S. president can waive sanctions if necessary to protect U.S. national interests, promote the goals of the TVPA, or avoid significant adverse effects on vulnerable populations. *Id.*, §7107(d).

<sup>46</sup> 22 U.S.C. §7106(b)(1). The four minimum standards, in summary form, are as follows:

- (1) The government should prohibit and punish acts of severe forms of trafficking in persons.
- (2) For sex trafficking that involves force, fraud, or coercion, or in which the victim is a child, and for trafficking that 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). The long list of criteria for the fourth minimum standard has been expanded and refined with each reauthorization of the TVPA. See Trafficking Victims Protection Reauthorization Act of 2003, *supra* note

and risk being sanctioned. Whether motivated by reputational or economic risk, states have been highly sensitive to the rankings, with many taking actions in pursuit of a good report card.<sup>47</sup>

The Bush administration was the first to wield the sanctions regime to shape other states' anti-trafficking policies. With broad support from a motley alliance of neo-abolitionist feminists, neoconservatives, and evangelical Christian groups, the Bush administration pressured states worldwide to target prostitution as a key anti-trafficking measure.<sup>48</sup> It further used the power of the U.S. purse to compel civil society organizations and private sector actors worldwide to adopt an anti-prostitution stance—by requiring it as a specific condition for receipt of U.S. federal grants (for example, U.S. Agency for International Development (USAID) funds) and U.S. government contracts.<sup>49</sup> Despite inclusion of non-sex-sector trafficking in both the international and U.S. legal definitions of trafficking, the Bush administration maintained an almost-exclusive focus on the sex sector.

Non-sex-sector trafficking remained, however, a significant concern in other policy quarters. In 2005, the ILO (belatedly) staked a claim on the trafficking issue with the release of its quadrennial forced labor report. In that report, the ILO estimated that 2.4 million of the 12.3 million forced labor cases worldwide resulted from trafficking.<sup>50</sup> By framing trafficking as a subset of forced labor, the ILO claimed specific international authority and expertise based on its recognized guardianship of the 1930 ILO Forced Labour Convention.<sup>51</sup> This effort represented a jarring challenge to the United States' assumed authority in the field, as a number

17, §7106(b); Trafficking Victims Protection Reauthorization Act of 2005, *supra* note 17, §7106(b); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, *supra* note 17, §7106; Trafficking Victims Protection Reauthorization Act of 2013, *supra* note 17, §1204.

<sup>47</sup> Chuang, *supra* note 18, at 464–65; 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 327 (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry eds., 2012). Thailand paid a reported U.S.\$400,000 to a prominent lobbying firm to (unsuccessfully) persuade the United States not to downgrade Thailand to Tier 3 in the 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 13, at 58. Felicity Lawrence & Kate Hodal, *Thai Government Condemned in Annual U.S. Human Trafficking Report*, GUARDIAN (June 20, 2014), at <http://www.theguardian.com/global-development/2014/jun/20/thai-government-us-human-trafficking-report>.

<sup>48</sup> See National Security Presidential Directive/NSPD-22, at 2 (Dec. 16, 2002), at <http://www.combat-traffic.king.army.mil/documents/policy/NSPD-22.pdf> (noting that U.S. anti-trafficking policy “is based on an abolitionist approach to trafficking” and that the United States “opposes prostitution . . . as contributing to the [trafficking] phenomenon”). The “model law” distributed to states to help them comply with the “U.S. minimum standards” included a trafficking definition that explicitly encompassed noncoerced prostitution, inaccurately citing the UN Trafficking Protocol for authoritative support. U.S. DEPARTMENT OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, LEGAL BUILDING BLOCKS TO COMBAT TRAFFICKING IN PERSONS §§100, 206(a) (2004).

<sup>49</sup> For in-depth discussion of these measures, see Chuang, *supra* note 33, at 1680–94. The “anti-prostitution pledge” was struck down as unconstitutional in the HIV/AIDS funding context. *USAID v. Alliance for Open Soc’y Int’l*, 133 S.Ct. 2321 (2013).

<sup>50</sup> INTERNATIONAL LABOUR OFFICE, A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON THE FUNDAMENTAL PRINCIPLES AND RIGHTS OF WORK 14 (2005).

<sup>51</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 UNTS 161 (entered into force Nov. 19, 2000); Convention Concerning the Abolition of Forced Labour, *opened for signature* June 25, 1957, 320 UNTS 291 (entered into force Jan. 17, 1959); Convention Concerning Forced or Compulsory Labour, *opened for signature* June 28, 1930, 39 UNTS 55 (entered into force May 1, 1932).

of states balked at the U.S. anti-trafficking sanctions regime as an illegitimate exercise of hegemonic power that was fundamentally at odds with the protocol's ethos of international cooperation.<sup>52</sup> Notably, the 2006 TIP Report highlighted—for the first time—non-sex-sector trafficking as a major issue of concern.<sup>53</sup>

### *Obama Administration*

In contrast to the Bush administration, the Obama TIP Office made a concerted effort to spotlight the problem of non-sex-sector trafficking, making the link between trafficking and “labor” much more visible and explicit.<sup>54</sup> The TIP Reports signaled a policy change toward viewing (adult) sex trafficking as including only “forced prostitution” or prostitution involving force, fraud, or coercion<sup>55</sup>—thus undoing the prior conflation of prostitution and trafficking.<sup>56</sup> The policy change helped conceptually bridge the different forms of trafficking by emphasizing that the exploitation produced by trafficking resulted from a common element of *externally* imposed force, fraud, or coercion. In other words, whether a situation amounted to trafficking turns not on the type of the activities in a particular sector but on the conditions under which those activities take place.

Inasmuch as the Obama administration thus recovered the lost (non-sex-sector) scope of the trafficking definition, it also significantly expanded it by identifying the core harm of trafficking (into any sector) as “the many forms of enslavement, not the activities involved in international transportation.”<sup>57</sup> To justify this capacious view of trafficking, the Obama administration recast (1) all forced labor as trafficking and (2) all trafficking as slavery. As briefly mentioned earlier, and as discussed in greater detail below, this reconceptualization sought to address a wider range of exploitation, represented a strategic effort to prioritize a criminal justice framing and approach to the problem, and proved to have both intended and unintended consequences.

*Conflating forced labor and trafficking.* The ILO's approach to trafficking helped provoke the first move in exploitation creep: conflation of forced labor and trafficking. The 1930 ILO Forced Labor Convention defines forced labor 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>58</sup> The ILO's 2005 forced labor report depicted trafficking as accounting for only 20 percent of all forced labor worldwide—its distinguishing feature being that trafficking includes the additional element of *movement* by the action of a third party *into* the forced labor

<sup>52</sup> See Chuang, *supra* note 18, at 455.

<sup>53</sup> U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2006) (noting that the 2006 report focuses on “slave labor *and* sexual slavery”).

<sup>54</sup> See, e.g., U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 17 (2009) (debt bondage among migrant laborers), 18 (involuntary domestic servitude), 26 (strengthening prohibitions against forced labor and fraudulent recruitment of foreign workers).

<sup>55</sup> See, e.g., *id.* at 5, 13, 21, 22 (using the term “forced prostitution”); U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2010) (stating that “[p]rostitution by willing adults is not human trafficking regardless of whether it is legalized, decriminalized, or criminalized”).

<sup>56</sup> U.S. Department of State, Fact Sheet: The Link Between Prostitution and Sex Trafficking (Nov. 24, 2004), at <http://2001-2009.state.gov/tr/pa/ei/rls/38790.htm>.

<sup>57</sup> U.S. Department of State, *What Is Trafficking in Persons?* (June 2014), at <http://www.state.gov/documents/organization/233944.pdf>.

<sup>58</sup> See treaties cited *supra* note 51.

situation. Merely *maintaining* a person in forced labor (for example, intergenerational bonded laborers born into debt bondage),<sup>59</sup> by contrast, would be considered “non-trafficked forced labor.”<sup>60</sup> The Bush administration TIP Office rejected the distinction, stating in its 2006 TIP Report that trafficking does *not* require movement as a matter of law. Thereafter, the 2006 report referred only to the ILO’s larger “forced labor” statistic—not the smaller “trafficking” subset.<sup>61</sup> The Obama administration TIP Office, not content to accept disagreement, sought to promote worldwide its view of trafficking as encompassing forced labor. At stake was the TIP Office’s ability to justify expanded bureaucratic reach over forced labor matters, including those long considered within the purview of labor law and institutions rather than of anti-trafficking regimes.

As doctrinal justification for its view, TIP Office personnel cite the trafficking definition’s inclusion of “harbouring” in the *act* element<sup>62</sup> (that is, “the recruitment, transportation, transfer, harbouring or receipt of persons”) of the three-part definition (act, means, purpose). Recall that forced labor is specifically listed under the *purpose* element of the definition, as one form of exploitation to which trafficked persons may be subjected.<sup>63</sup> “Harbouring,” the TIP Office argues, operates to bring forced labor not involving movement within the scope of the trafficking definition; for example, the party to whom an intergenerational bonded laborer is indebted “harbours” the laborer, exerting control over the laborer through the debt.<sup>64</sup>

In seeking to export this interpretation abroad, however, the TIP Office first had to overcome deep resistance from U.S. agencies traditionally tasked with addressing forced labor issues worldwide—the State Department’s Bureau of Democracy, Human Rights and Labor (DRL) and Labor Department’s International Labor Affairs Bureau (ILAB). Both had distinguished between trafficking and forced labor in their operations, and they viewed the TIP Office’s criminal justice orientation as potentially disruptive to their programmatic efforts.<sup>65</sup> At stake was not only bureaucratic turf but the United States’ fundamental approach to encouraging other states to address their forced labor problems: introducing the specter of sanctions could undermine the DRL’s and ILAB’s diplomatic engagement with states and also redirect resources away from structural reforms and toward prosecutorial strategies. The TIP Office

<sup>59</sup> See INTERNATIONAL LABOUR ORGANIZATION, BURIED IN BRICKS: A RAPID ASSESSMENT OF BONDED LABOUR IN AFGHAN BRICK KILNS 6 (2011), at [http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/documents/publication/wcms\\_172672.pdf](http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/documents/publication/wcms_172672.pdf) (describing intergenerational transference of debt among bonded laborers in the Afghan brick-making industry).

<sup>60</sup> See Beate Andrees & Mariska N.J. van der Linden, *Designing Trafficking Research from a Labour Market Perspective: The ILO Experience*, INT’L MIGRATION, Jan. 2005, at 55, 64 (explaining that *non-trafficked* forced laborers exercise more agency in exiting forced labor than *trafficked* ones).

<sup>61</sup> 2006 TRAFFICKING IN PERSONS REPORT, *supra* note 53, at 6, 10; U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2007); U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2008); 2009 TRAFFICKING IN PERSONS REPORT, *supra* note 54, at 8; 2010 TRAFFICKING IN PERSONS REPORT, *supra* note 55, at 7.

<sup>62</sup> UN Trafficking Protocol, *supra* note 10, Art. 3(a).

<sup>63</sup> See *supra* text accompanying note 39.

<sup>64</sup> This position has been communicated 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.

<sup>65</sup> U.S. Department of State, *Human Rights Reports*, at <http://www.state.gov/j/drl/rls/hrrpt/>. For example, ILAB had viewed intergenerational bonded labor as within its portfolio and outside that of the TIP Office. Interview with International Labor Affairs Bureau, Department of Labor, in Washington, D.C. (Dec. 2012).

eventually had to enlist, in 2011, the support of the National Security Council to bring the DRL and ILAB in line with its position.<sup>66</sup> Thereafter, the DRL's annual *Country Reports on Human Rights Practices*, which had assessed state practices regarding trafficking and forced labor as separate analytic categories, were revised to explicitly reference the TIP Report's corresponding country narrative and to eliminate the DRL's substantive human rights-based analysis of states' anti-trafficking practices.<sup>67</sup> Although ILAB carried on with its labor-based annual assessments of other states' efforts to address child and forced labor, the TIP Reports' expanded coverage of forced labor issues introduced a competing metric.<sup>68</sup>

Having expanded bureaucratic control within the U.S. government, the TIP Office sought to sway the ILO to its position. Despite temporarily succumbing to U.S. pressure,<sup>69</sup> the ILO ultimately has chosen to studiously avoid the definitional debate altogether. In its 2012 "global estimate of forced labor" updating its 2005 statistics, the ILO estimated 20.9 million forced laborers worldwide, with no separate statistic for "trafficking."<sup>70</sup> Seizing upon the omission, the 2012 TIP Report stated that the new ILO estimate "recognizes that human trafficking is defined by exploitation, not by movement."<sup>71</sup> In preparatory meetings for the 2014 Protocol

<sup>66</sup> Close collaboration with states, NGOs, trade unions, companies, and international organizations is required to develop strategies to promote internationally recognized workers' rights and to address the loopholes in labor frameworks that facilitate forced labor. Interview with International Labor Affairs Bureau, *supra* note 65.

<sup>67</sup> DRL's analysis of states' anti-trafficking efforts tended to be more nuanced and targeted at structural factors. See *Human Rights Reports*, *supra* note 65; Chuang, *supra* note 18, at 476, 481–83 (discussing, as examples, Cuba and Venezuela).

<sup>68</sup> Bureau of International Labor Affairs, U.S. Department of Labor, *International Child Labor and Forced Labor Reports*, at <http://www.dol.gov/ilab/reports/child-labor/>. For example, ILAB found that Brazil had made "significant advancement" (the highest level) in 2012 in eliminating the worst forms of child labor, whereas the TIP Office found that Brazil had made only a middling effort (Tier 2) in combating trafficking (including child labor). U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 103 (2013).

<sup>69</sup> The ILO's 2011 *draft* survey guidelines for estimating forced labor, entitled *Hard to See, Harder to Count*, offered both "narrow" and "broad" definitions of trafficking. Whereas the "narrow" version retained the trafficked versus non-trafficked distinction, the "broad" definition noted that "[i]rrespective of movement . . . , any adult or child worker engaged in forced labour is classified also as a victim of human trafficking." INTERNATIONAL LABOUR OFFICE, *HARD TO SEE, HARDER TO COUNT: SURVEY GUIDELINES TO ESTIMATE FORCED LABOUR OF ADULTS AND CHILDREN 20* (2011), at [http://www.ilo.org/public/libdoc/ilo/2011/111B09\\_351\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2011/111B09_351_engl.pdf). The final (2012) version of the report deletes this language. INTERNATIONAL LABOUR OFFICE, *HARD TO SEE, HARDER TO COUNT: SURVEY GUIDELINES TO ESTIMATE FORCED LABOUR OF ADULTS AND CHILDREN 19* (2012).

<sup>70</sup> INTERNATIONAL LABOUR OFFICE, ILO GLOBAL ESTIMATE OF FORCED LABOUR 13 (2012). Tellingly, chapter 1 of a 2014 ILO report on the profits of forced labor is entitled "Measuring Forced Labour, Human Trafficking and Slavery: Why Definitions Matter." Rather than offering an interpretation of the trafficking definition, however, the discussion notes only that, except for trafficking for organ removal, "trafficking" is covered by the ILO Forced Labour Convention. INTERNATIONAL LABOUR ORGANIZATION, PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 3–4 (2014).

<sup>71</sup> U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 45 (2012). Closer review reveals the ILO's implicit adherence to the trafficked/non-trafficked distinction regarding forced labor, despite avoiding the term "trafficking." In *HARD TO SEE, HARDER TO COUNT*, *supra* note 69, at 19, the ILO states that while movement is not necessary 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 . . . to devise differentiated policy responses that are best adapted to the national context and specific target groups." Applying this distinction, the 2012 Global Estimate assesses "how many people end up being trapped in forced labour following migration" (9.1 million, or 44% of the total) versus those who are "subjected to forced labour in their place of origin or residence" (11.8 million, or 56% of the total). INTERNATIONAL LABOUR ORGANIZATION, ILO 2012 GLOBAL ESTIMATE OF FORCED LABOUR: EXECUTIVE SUMMARY (2012), at [3]. See also PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR, *supra* note 70, at 8 (offering same analysis).

to the Forced Labour Convention, 1930,<sup>72</sup> the ILO opted against adopting a determinate stance on the definitional debate<sup>73</sup> and chose, instead, to utilize a generalized forced labor frame in the convention and its accompanying recommendations.<sup>74</sup>

Inasmuch as the conflation of forced labor and trafficking provided the U.S. TIP Office a rationale for its expansionist ambitions to police forced labor globally, this U.S. effort and accompanying rationale fueled a contrary dynamic at the grassroots advocacy level: it created space for infusion of a labor perspective. The upshot is that the previously atomistic advocacy landscape has been transformed into a site of active and rich interdisciplinary collaboration. Human rights advocates, who have dominated the anti-trafficking advocacy space since the Trafficking Protocol negotiations, are now increasingly partnering with workers' rights groups and labor unions to jointly pursue anti-trafficking law and policy reforms. For a host of strategic and conceptual reasons, labor-based groups had previously distanced themselves from the anti-trafficking movement. The latter's earlier focus on sex trafficking and the attendant, highly charged prostitution-reform debates were strong disincentives. As a conceptual matter, labor advocates were also concerned that in singling out extreme exploitation, anti-trafficking regimes were "normaliz[ing] the harsh realities of exploitation experienced by many migrant and nonmigrant workers in labor sectors prone to trafficking."<sup>75</sup> Labor advocates were also troubled that anti-trafficking advocacy seemed to embody the worst aspects of human rights-based approaches to social change;<sup>76</sup> that is, the anti-trafficking movement was one championed by elites and that evidenced a savior complex that disempowers the very population it aims to help by treating them one-dimensionally as "victims" deprived of agency.<sup>77</sup>

Ultimately, however, the anti-trafficking field's turn toward labor concerns and its rise in prominence (and funding) have helped shift the above calculus.<sup>78</sup> Other contributing factors

<sup>72</sup> The protocol was adopted June 11, 2014.

<sup>73</sup> See Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation, *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)*, para. 144 (2013) (noting as discussion point number 1 whether and how to define the relationship between forced labor and trafficking); International Labour Standards Department and Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, *Report and Conclusions of the Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation*, app., para. 2, ILO Doc. GB.317/INS/INF/3 (2013) (implying a distinction between trafficking and forced labor, but leaving its precise contours unaddressed).

<sup>74</sup> See International Labour Conference, Protocol to Convention 29 (June 11, 2014); International Labour Conference, Text of the Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour (June 11, 2014).

<sup>75</sup> Shamir, *supra* note 7, at 103.

<sup>76</sup> See generally Kevin Kolben, *Labor Rights as Human Rights*, 50 VA. J. INT'L L. 449 (2010) (contrasting the approaches of labor rights and human rights to social change, and assessing the turn to human rights discourse by labor scholars and labor organizations).

<sup>77</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). For a response to Shamir's critique, 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>78</sup> Interview with Confidential Source no. 1 (labor advocate), in Washington, D.C. (May 28, 2013) (noting that framing projects as related to trafficking significantly increased their funding possibilities).

were labor institutions' general turn toward human rights discourse<sup>79</sup> and human rights institutions' increased focus on corporate social responsibility.<sup>80</sup> The "victim-savior" critique notwithstanding, the substantial progress that human rights advocates made in establishing trafficking as an issue of concerted human rights attention<sup>81</sup> created a useful entry point for labor advocacy—especially given that the human rights corpus has long included workers' rights within its scope.<sup>82</sup> As reflected in the products of joint human rights–labor advocacy,<sup>83</sup> anchoring labor-based initiatives in fundamental rights, under the rubric of trafficking, has enabled unions and workers' rights advocates to draw long-overdue attention to exploitative structures in global labor markets.<sup>84</sup>

*Conflating trafficking and slavery.* Curiously, simultaneously with its aggressive efforts to export its expansive definition of trafficking, the Obama administration's TIP Office has also been actively arguing that the term *trafficking* is obsolete. In the fall of 2012, President Barack Obama and former secretary of state Hillary Clinton explicitly advocated replacing the term *trafficking* with *slavery* because they considered the latter to be more accurate. Obama noted:

I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery.

<sup>79</sup> See Kolben, *supra* note 76. The ILO's adoption of its 1988 Declaration on Fundamental Principles and Rights at Work has been invoked (and criticized) as an example of this turn toward a human rights approach. International Labour Conference, ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up (June 18, 1998), at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> (the annex was revised June 15, 2010); see Phillip Alston & James Heenan, *Shrinking the International 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). The declaration was partly an attempt to revitalize an "ineffective and weak" ILO. Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 704 (2006). The advent of the modern anti-trafficking regime prompted the ILO to pursue eradication of forced labor—one of the four "core" labor standards under the declaration—with renewed vigor. The ILO Governing Body created a Special Action Programme to Combat Forced Labor (SAP-FL) in 2001 to spearhead its work on forced labor and trafficking.

<sup>80</sup> See, e.g., Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31 (Mar. 21, 2011) (adopting what has come to be known as the "Ruggie Principles").

<sup>81</sup> Examples include the development of the human rights–infused European regional treaty on trafficking, the mandate for a UN Special Rapporteur on Trafficking in Persons, and the development of soft law standards in the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking. Council of Europe Convention on Action Against Trafficking in Human Beings, *opened for signature* May 16, 2005, ETS No. 197 (entered into force Sept. 3, 1953; amended June 1, 2010); Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, UN Doc. E/2002/68/Add.1 (May 20, 2002).

<sup>82</sup> The International Covenant on Economic, Social and Cultural Rights, Arts. 6, 7, Dec. 16, 1966, 999 UNTS 3, includes, for example, the right of opportunity to gain a living by work one freely chooses or accepts and the right to just and favorable conditions of work. The UN Special Rapporteur on Trafficking in Persons has specifically called upon states to strengthen enforcement of labor laws and to take steps to regulate recruitment agencies. See Joy Ngozi Ezeilo (Special Rapporteur), Report on Trafficking in Persons, paras. 26–27, 56, 65, UN Doc. A/HRC/23/48 (Mar. 18, 2013).

<sup>83</sup> See section "Embracing the Labor Trajectory" in part III.

<sup>84</sup> See, e.g., INTERNATIONAL TRADE UNION CONFEDERATION, NEVER WORK ALONE: TRADE UNIONS AND NGOS JOINING FORCES TO COMBAT FORCED LABOUR AND TRAFFICKING IN EUROPE (2011) (describing a joint project with Anti-slavery International to encourage collaboration between human rights organizations and trade unions, resulting in innovative efforts to address forced labor in Azerbaijan, Belgium, Germany, Italy, and Poland).

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 150th anniversary of . . . the Emancipation Proclamation.<sup>85</sup>

Similarly, from Clinton:

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 . . . . I think labeling this for what it is, slavery, has brought it to another dimension.

. . . [W]hen I first used to talk about [trafficking] all those years ago, I think for a while people wondered whether I was talking 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.<sup>86</sup>

From the modern anti-trafficking movement’s inception, trafficking has been equated with “modern-day” slavery—for example, in preambular language to justify new legislation, and in grassroots campaign banners to inspire action.<sup>87</sup> But what is novel about the above statements is the shift from invoking slavery imagery for rhetorical flair to explicitly suggesting that *slavery* should replace *trafficking* because the latter term is a passé, if not inaccurate, descriptor. And *slavery*, rather than being strategically invoked to motivate advocacy efforts, is now coming to be used to actively reframe the problem—not only by the highest levels of the U.S. government but by powerful actors and mainstream media outlets.

This shift toward reframing slavery comes after nearly a decade of active resistance to the conflation of trafficking and slavery. Efforts to establish the modern anti-trafficking regime in the late 1990s coincided with a popular grassroots effort to abolish “modern-day slavery” led by bestselling author Kevin Bales, who claimed that twenty-seven million people were “enslaved” around the world.<sup>88</sup> But few, if any, legal advocates would have suggested that trafficking, but for the most extreme cases, met the legal threshold for slavery under international

<sup>85</sup> Press Release, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), at <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>.

<sup>86</sup> *Release of the 2012 Trafficking in Persons Report* (June 19, 2012), at <http://www.state.gov/secretary/20092013clinton/rm/2012/06/193368.htm>.

<sup>87</sup> The 2008 TVPA reauthorization was named the William Wilberforce Trafficking Victims Protection Reauthorization Act to coincide with the two hundredth anniversary of the British Parliament’s anti-slave trade legislation and named in honor of the famed British abolitionist. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, *supra* note 17. The quoted remarks by President Obama and then Secretary Clinton were intended to marshal support for the 2013 reauthorization of the TVPA, timed to coincide with the one hundred fiftieth anniversary of the Emancipation Proclamation. Trafficking Victims Protection Reauthorization Act of 2013, *supra* note 17.

<sup>88</sup> KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 8–9 (1999). In 2006 and 2007, Bales repeatedly sought codification of his own made-up definition of “modern-day slavery”:

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.



law. Its prohibition considered a *jus cogens* norm, slavery is narrowly defined in 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>89</sup> The reported statistics for the far more broadly defined *trafficking* phenomenon—estimated at a “mere,” in comparison to the Bales statistic, one to two million people—were already drawing fire, including from the U.S. Government Accountability Office, as deeply flawed *overestimates*.<sup>90</sup>

Five years later, however, Bales’s once-rejected “27 million enslaved” statistic features prominently on the first page of the 2012 TIP Report.<sup>91</sup> Language throughout that report demonstrates the remarkable slippage in the United States’ treatment of the previously distinct legal concepts of forced labor, trafficking, and slavery:

[S]lavery 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>92</sup>

Likewise:

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>93</sup>

Congressional Commission on the Abolition of Modern-Day Slavery Act, H.R. 6328, 109th Cong. (2006); see S. 3787, 109th Cong. (2006); S. 3787, 109th Cong. (2006); H.R. 2522, 110th Cong. (2007); H.R. 2522, 110th Cong. (2007).

<sup>89</sup> Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 LNTS 253 (entered into force Mar. 9, 1927). Later, the United Nations elaborated a new legal instrument to address certain institutions and practices similar to slavery—in particular, 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, Sept. 7, 1956, 266 UNTS 40 (entered into force Apr. 30, 1957). That treaty 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).

<sup>90</sup> See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 06-825, HUMAN TRAFFICKING, BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 2–3 (2006), at <http://www.gao.gov/products/GAO-06-825> (concluding that the “accuracy of [trafficking] estimates is in doubt because of methodological weaknesses, gaps in data, and numerical discrepancies”); Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POL. & SOC’Y 447, 455–56 (2007); 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); 2006 TRAFFICKING IN PERSONS REPORT, *supra* note 53, at 6 (noting that “estimates range from 4 million to 27 million”); 2007 TRAFFICKING IN PERSONS REPORT, *supra* note 61, at 6 (same); 2008 TRAFFICKING IN PERSONS REPORT, *supra* note 61, at 7 (same); 2009 TRAFFICKING IN PERSONS REPORT, *supra* note 54, at 8 (reporting the ILO’s 12.3 million statistic); 2010 TRAFFICKING IN PERSONS REPORT, *supra* note 55, at 7 (same); U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 1–2 (2011) (reporting that the trafficked/enslaved population is in the “millions”).

<sup>91</sup> 2012 TRAFFICKING IN PERSONS REPORT, *supra* note 71, at 7; 2013 TRAFFICKING IN PERSONS REPORT, *supra* note 68, at 7 (same). The 2014 edition references the “more than 20 million” trafficking victims who have not been identified in the past year. 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 13, at 1.

<sup>92</sup> 2012 TRAFFICKING IN PERSONS REPORT, *supra* note 71, at 7 (emphasis added).

<sup>93</sup> *Id.* at 44 (emphasis added).

Since, on such an analysis, 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."<sup>94</sup>

With the conflation of forced labor, trafficking, and slavery fully realized in the U.S. anti-trafficking foreign policy agenda, the U.S. TIP Office sought to foster a modern-day-slavery abolitionist movement on the ground. Laying the groundwork for "individuals to understand their connection to modern-day slavery," the TIP Office commissioned the development of the website Slavery Footprint.org, inviting visitors to take an online survey to determine the number of "slaves" needed to maintain one's lifestyle.<sup>95</sup> USAID joined in the anti-slavery efforts, partnering with MTV Exit, Free the Slaves (an NGO founded by Bales), 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."<sup>96</sup> The TIP Office and USAID furthermore cosponsored the official launch of the exceedingly well-funded, international nonprofit Walk Free; the event, Myanmar's first open-air, mass concert, was broadcast worldwide by MTV Exit.<sup>97</sup>

The embrace of the anti-slavery movement by the "charitable industrial complex"—or, as defined by philanthropist Peter Buffett, "the world of philanthropy as practiced by the very wealthy"<sup>98</sup>—helped turned the fight against "slavery" into a cause célèbre.<sup>99</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>100</sup> But philanthropic involvement in addressing the world's problems has, in many cases, shifted toward a particular form of "venture philanthropy" in which funders are themselves founding NGOs and taking on operational roles to more directly effect change.<sup>101</sup> Unlike the venture philanthropist who considers funding proposals and weighs them against others—that is, responds to a story and weighs it in the context of the storyteller and other similar stories—the combined funder-founder *is* the storyteller and, more critically, has the

<sup>94</sup> As if preemptively defending the equivalence to transatlantic slavery, the 2012 TRAFFICKING IN PERSONS REPORT, *supra* note 71, at 19, features two sets of advertisements side by side in a graphic entitled "Then and Now: Fleeing Slavery": nineteenth-century ads offering rewards for runaway slaves and a contemporary ad offering a reward for information regarding the whereabouts of an escaped Indonesian fisherman.

<sup>95</sup> Slavery Footprint, <http://slaveryfootprint.org> (claiming that millions of people from two hundred countries have visited the website to discover their connection to modern-day slavery).

<sup>96</sup> The effort's website is Challenge Slavery, <http://www.challengeslavery.org>.

<sup>97</sup> See Jason Mraz in Myanmar, at <http://mtvexit.org/worldstage/>; Elisabeth Behrmann, *Gates Helps Australia's Richest Man in Bid to End Slavery*, BLOOMBERG (Apr. 14, 2013), at <http://www.bloomberg.com/news/2013-04-10/gates-helps-australia-s-richest-man-in-bid-to-end-slavery.html>.

<sup>98</sup> Peter Buffett, *The Charitable-Industrial Complex*, N.Y. TIMES, July 26, 2013, at A19. Buffett, the son of Warren Buffett, chairs the NoVo Foundation, which itself has been an active funder of anti-trafficking programs.

<sup>99</sup> See Dina Haynes, *The Celebrityization of Human Trafficking*, 25 ANNALS AM. ACAD. POL. & SOC. SCI. 653 (2013).

<sup>100</sup> Buffett, *supra* note 98. Buffett defines "conscience laundering" as feeling better about accumulating vast amounts of wealth by "sprinkling a little around as an act of charity."

<sup>101</sup> "Venture philanthropists" include grant makers who make fewer grants, take an active interest in the enterprises being funded, supply additional nonfinancial help (for example, consultants), and rely upon clear goals and metrics to define and gauge a grantee's progress. 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 & Leif Wenar eds., 2011).

resources to try to make his or her story come true. Having deep pockets affords funder-founded NGOs independence from the expectations of outside funders (including governments) and from the priorities of a fee-paying membership base. Having few, if any, built-in mechanisms to check the validity of their ideas creates a high risk of unreflective action and exacerbates concerns regarding NGO accountability.<sup>102</sup>

Funder-founded NGOs' embrace of the anti-slavery cause thus requires close scrutiny of the potential and actual impact of their advocacy. Walk Free is a prime example of a funder-founded NGO taking the anti-trafficking advocacy world by storm. Australian billionaire Andrew "Twiggy" Forrest—who, ironically, made his fortune from the mining industry—founded Walk Free in December 2012 "to end modern slavery in [Forrest's] lifetime." With vast resources apparently at its disposal, the organization has pressured "corporate giants" to pledge to rid the world of modern slavery, implored its purported 7.4 million "members" to write letters to companies reportedly using forced labor in their supply chains, and produced its analog to the TIP Report, the "Global Slavery Index."<sup>103</sup> Even in its infancy, Walk Free quickly garnered the support of some states and international institutions. It hired anti-slavery entrepreneur Kevin Bales to develop and produce the Global Slavery Index—numerically ranking countries according to risk and prevalence of slavery.<sup>104</sup> As a measure of the index's potential influence and also its ability to insulate itself from criticism, Walk Free solicited and received feedback on its first draft of the index from high-level governmental and intergovernmental officials and from prominent NGOs.<sup>105</sup> Walk Free has since branched out to establish the Global Freedom Fund, a private donor fund (with \$30 million in seed money) to "end slavery,"<sup>106</sup> and has also initiated the Global Freedom Network, a faith-based group led by Pope Francis, the Archbishop of Canterbury, the Grand Imam of al-Azhar (Mohamed Ahmed el-Tayeb), and Andrew Forrest that is even more ambitious in its stated goal of ending slavery by 2020.<sup>107</sup>

<sup>102</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>103</sup> See Walk Free, at <http://www.walkfree.org>. The website claims that "29.8 million people are forced to live in slavery around the world today." Website visitors can "act now" and become a "member" by signing a pledge committing to the belief that "our generation can build a world without slavery" and committing to "mobilize governments, businesses and communities to end modern slavery." At <http://www.walkfree.org/a-world-without-slavery/>.

<sup>104</sup> Walk Free, *Global Slavery Index* (2013), at <http://www.globalslaveryindex.org>. Notably, this role has positioned Bales to accomplish—but from an international perspective and with far greater influence and resources—the aims of Free the Slaves' failed proposal for a U.S. slavery commission. See *supra* note 88 and accompanying text.

<sup>105</sup> Walk Free received substantial criticism for the methodology employed but nevertheless released a final version with the problems largely unaddressed. See *infra* note 168 and accompanying text; Andrew Guth, Robyn Anderson, Kasey Kinnard & Hang Tran, *Proper Methodology and Methods of Collecting and Analyzing Slavery Data: An Examination of the Global Slavery Index*, 2 SOCIAL INCLUSION 14 (2014) (exposing the index's "significant and critical weaknesses" and raising questions concerning replicability and validity of data used). Cf. Monti Narayan Datta & Kevin Bales, *Slavery in Europe: Part 2, Testing a Predictive Model*, 36 HUM. RTS. Q. 277 (2014) (defending the methodology used).

<sup>106</sup> The Freedom Fund was started with \$30 million in seed money from three donors: Walk Free, Humanity United, and Legatum. The organization's goal is to raise and deploy \$100 million on anti-slavery projects. See Freedom Fund, at <http://www.freedomfund.org/what-we-do/#gallery>.

<sup>107</sup> See Global Freedom Network, at <http://www.gfn2020.org/about/> (stating that "[g]lobal faith leaders, by their words and deeds, may form the faith-inspired will and effort by men and women to overcome the manmade evil of modern slavery and free its victims from suffering, oppression and degradation").

Funder-founded NGOs have dramatically changed the landscape of the anti-trafficking field, not simply by virtue of their bold-faced prescriptions but through their considerable influence vis-à-vis other actors, particularly other NGOs in need of funding. In addition to providing coveted funding, their partnerships with major media outlets empower them to shape public discourse and raise the visibility of certain efforts to eradicate “slavery.”<sup>108</sup> For example, eBay founder Pierre Omidyar’s foundation, Humanity United, created the Alliance to End Slavery and Trafficking (ATEST) in 2007 to bring together, and provide financial and administrative support to, a small coalition of prominent anti-trafficking NGOs,<sup>109</sup> significantly elevating the individual organizations’ profiles and transforming them into a powerful lobbying coalition. Nevertheless, although funder-founded NGOs can facilitate the work of other NGOs, they can just as readily eclipse them and, moreover, chill critiques of funder-founded approaches. For example, Walk Free’s rapid rise to preeminent anti-slavery organization has diverted attention from more experienced entities, and the questionable methodology of its Global Slavery Index has engendered strong criticisms that both supporters and states have been reluctant to voice publicly.<sup>110</sup>

In the words of U.S. TIP Ambassador Luis 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>111</sup> What was once a peripheral tool to garner popular support for the anti-trafficking cause is now—by U.S. government design—the central framing device: recasting forced labor and trafficking as nothing short of slavery. As one journalist has described it, “[‘slavery’] is an emotive term whose time has come”;<sup>112</sup> the elastic and undefined term—*modern-day slavery*—is now part of the public imagination.

## II. ASSESSING EXPLOITATION CREEP

Branding certain practices as “slavery” has proved to be a powerful tool of condemnation. In particular, it has brought under scrutiny a broad range of practices that might otherwise be

<sup>108</sup> See, e.g., *Modern-Day Slavery*, GUARDIAN, at <http://www.guardian.co.uk/global-development/series/modern-day-slavery-in-focus> (with Humanity United); MTV EXIT: End Exploitation and Trafficking, at <http://mtve.xit.org> (including videos of music events organized by the organization); Trust Women: Putting the Rule of Law Behind Women’s Rights, at <http://www.trustwomenconf.com> (sponsored by International Herald Tribune/Thomson Reuters).

<sup>109</sup> See Humanity United, *Advancing Freedom*, at <http://www.humanityunited.org/advancing-freedom/>; ATEST: Alliance to End Slavery & Trafficking, at <http://www.endslaveryandtrafficking.org>.

<sup>110</sup> Interview with Confidential Source no. 1, *supra* note 78; Anne Gallagher, *The Global Slavery Index Is Based on Flawed Data—Why Does No One Say So?*, GUARDIAN (Nov.29, 2014), at <http://www.theguardian.com/global-development/poverty-matters/2014/nov/28/global-slavery-index-walk-free-human-trafficking-anne-gallagher>. Although Anti-slavery International has privately criticized the Global Slavery Index for its questionable methodology and potentially harmful consequences for anti-slavery efforts, the organization, whose work on slavery and exploitation dates back to 1839, has publicly supported the index. Compare *infra* notes 200–01 (sources cited), with Amar Toor, *Breadth of Modern Slavery Exposed by Sobering New Report*, VERGE (Oct. 17, 2013), at <http://www.theverge.com/2013/10/17/4847620/global-slavery-index-walk-free-foundation-shows-30-million-slaves-worldwide> (quoting Anti-slavery International executive director describing the Global Slavery Index as “a good starting point of conversation and engaging decision makers to tackle [slavery]”). Former TIP Office staff have indicated to the author concerns that the index, with its competing findings, potentially detracts from the TIP Reports.

<sup>111</sup> Gould, *supra* note 15.

<sup>112</sup> *Id.*

overlooked, if not indifferently tolerated. Proponents argue that characterizing the targeted practices as anything less emotive than “slavery” deploys euphemisms that justify lesser responses—especially in a world where exploitation, particularly of migrants, has become normalized.<sup>113</sup> The creep toward slavery is thus rationalized as the 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 states, NGOs, and the “charitable-industrial complex”<sup>114</sup> alike, rebranding forced labor and trafficking as slavery has indeed been extremely effective in motivating states to pass legislation, foundations to donate funds, and the broader populace to take up the “anti-slavery” cause.

Questions arise, however, as to whether the creep toward the legal and discursive extreme of “slavery” yields 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?

The doctrinal grounds for conflating forced labor, trafficking, and slavery are shaky at best and could prove to be quicksand for the very idea of trafficking as a freestanding legal concept. But exploitation creep’s more acute effects lie in the two different trajectories it produces as to how the problems of forced labor, trafficking, and slavery are framed and how best to address them. On the one hand, the move toward the slavery extreme fuels an understanding of the problems of trafficking and forced labor as rooted in the deviant behavior of individual actors. That approach suggests, in turn, that interventions should focus on ex post accountability and victim protection. On the other hand, exploitation creep’s conflation of trafficking and forced labor enables the problem of trafficking to be recast as a structural one. Proposed interventions thus aim to reduce the vulnerability that weak labor frameworks produce and that traffickers exploit. The necessary structural reforms include better regulation of foreign-labor recruitment and better oversight of guest-worker programs.

### *Doctrinal Implications*

Assessing the possible doctrinal justifications for conflating forced labor, trafficking, and slavery underscores the pitfalls of sacrificing precision for consensus in drafting treaties. The actual text of the Trafficking Protocol’s definition of trafficking arguably permits an expansive interpretation of that concept; that is, upon close inspection, the protocol’s text could permit the conflation of forced labor and trafficking. The *travaux préparatoires* reveal remarkably little, however, so the drafters’ intentions need to be inferred from the protocol’s overall structure and the broader context of the negotiations. As will be argued below, these factors suggest that interpreting “trafficking” to extend to situations *not* involving movement is likely contrary to what the drafters intended. Discerning any doctrinal basis for further equating forced labor and trafficking with slavery would be even more challenging, despite the notable efforts of some scholars to offer a sufficiently expansive interpretation of the *jus cogens* norm prohibiting slavery.<sup>115</sup>

<sup>113</sup> *Id.*

<sup>114</sup> Buffett, *supra* note 98 (critiquing “the world of philanthropy as practiced by the very wealthy”).

<sup>115</sup> See *infra* note 142 (sources cited).

Moreover, questions of interpretative accuracy aside, the creep toward slavery risks backfiring against the population that it aspires to protect: it potentially dilutes the *jus cogens* prohibition against slavery, raises the legal threshold for trafficking, and undermines victims' access to anti-trafficking remedies.

*Forced labor = trafficking?* Regrettably, the Trafficking Protocol does not offer a clear basis for resolving the precise relationship between forced labor and trafficking. As noted earlier, the TIP Office has argued, with some *prima facie* plausibility, that the inclusion of "harbouring" in the *act* element of the protocol's definition (namely, the "recruitment, transportation, transfer, harbouring or receipt of persons") enables coverage of forced labor sans movement, even though the other listed types of trafficking involve elements of movement.<sup>116</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>117</sup> Nothing in the protocol's structure, the context in which it was developed, or its *travaux* supports the TIP Office's expansive interpretation of trafficking.<sup>118</sup>

If anything, the Trafficking Protocol's structure, context, and *travaux* all support the ILO's (previous) 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 development of the Trafficking Protocol and its companion Migrant Smuggling Protocol.<sup>119</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>120</sup> And the protocol's substantive provisions assign particular responsibilities to different states according to these categorizations—for example, for destination states to consider providing residency status to victims<sup>121</sup> and for countries of origin to accept their return.<sup>122</sup>

The *travaux* also include several indications that delegates assumed that trafficking entails movement. Although some questions about movement did arise during negotiations, those questions were raised in the context not of debating whether to require movement but of deciding whether trafficking "would *also* include the transportation of a person within a

<sup>116</sup> UN Trafficking Protocol, *supra* note 10, Art. 3(a) (emphasis added); see OXFORD ENGLISH DICTIONARY (2000) (noting that the term "harbouring" is "now mostly dyslogistic . . . to give secret or clandestine entertainment to noxious persons or offenders against the laws"); BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "harbor" as the "act of affording lodging, shelter, or refuge to a person, esp. a criminal or illegal alien").

<sup>117</sup> Vienna Convention on the Law of Treaties, Art. 31, *opened for signature* May 23, 1969, 1155 UNTS 331 (entered into force Jan. 27, 1980) (emphasis added).

<sup>118</sup> GALLAGHER, *supra* note 21, at 30–31.

<sup>119</sup> States took great pains to distinguish smuggled from trafficked migrants. Whereas the former are considered complicit in the crime of illegal border crossing and thus unworthy of victim protection, the latter are deemed worthy by virtue of the additional exploitation element. Compare UN Trafficking Protocol, *supra* note 10, and Protocol Against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, GA Res. 55/25 (Nov. 15, 2000). See also ANNE T. GALLAGHER & FIONA DAVID, THE INTERNATIONAL LAW OF MIGRANT SMUGGLING (2014).

<sup>120</sup> UN Trafficking Protocol, *supra* note 10, pmb. (emphasis added).

<sup>121</sup> *Id.*, Art. 7.

<sup>122</sup> *Id.*, Art. 8.

State or whether it *necessitated* crossing an international border.”<sup>123</sup> Indeed, the working assumption of UN human rights agency officials, the ILO, and NGO human rights advocates was that movement rendered individuals particularly vulnerable to exploitation.<sup>124</sup> The *travaux* further reveal that the language “recruitment, transportation, transfer, harbouring or receipt of persons” was introduced in the protocol’s first working draft; neither the act element as a whole nor any individual component was debated or discussed further.<sup>125</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* that multiple actors carried out in concert.<sup>126</sup> States separated out each act in the process in order to criminalize all the actors involved—the recruiters, transporters, owners, and supervisors of any place of exploitation—rather than to equate the individual components of that process with their sum.<sup>127</sup>

Yet, notwithstanding the tenuous doctrinal grounds, state practice appears to be on a trajectory toward a view of trafficking that deemphasizes movement and that emphasizes exploitation as the core of the harm.<sup>128</sup> The TIP Office and TIP Reports have made abundantly clear that their assessment of state practices will encompass exploitation sans movement.<sup>129</sup> Moreover, as an indication of this shift, the Conference of Parties Working Group on Trafficking in Persons—empowered under the Organized Crime Convention to provide guidance to states parties on implementing the Trafficking Protocol—has recommended that states parties recognize that the “presence of any of those acts [listed in the act element] could

<sup>123</sup> Ad Hoc Committee 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, UN Doc. A/AC.254/4/Add.3/Rev.5 (Jan. 1, 2000) (emphasis added).

<sup>124</sup> See Position Paper on the Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, at 4–6, UN Doc. A/AC.254/CRP.13 (May 20, 1999) (submitted to the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime); Informal Note by the UN High Commissioner for Human Rights, para. 16, UN Doc. A/AC.254/16 (June 1, 1999) (submitted to same); Note by the International Labour Organization on the Additional Legal Instrument Against Trafficking in Women and Children, *supra* note 37; 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).

<sup>125</sup> See Ad Hoc Committee 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, option 1, UN Doc. A/AC.254/4/Add.3/Rev.1 (Feb. 22, 1999).

<sup>126</sup> Telephone Interview with Anne Gallagher, Legal Adviser to the United Nations and Association of South East Asian Nations (July 31, 2013). Gallagher participated in the negotiations as the representative of the UN High Commissioner for Human Rights.

<sup>127</sup> This interpretation has been confirmed by subsequent interviews of delegates to the protocol negotiations; the interviews were conducted from 2012 to 2014 in the context of studies by the UN Office on Drugs and Crime concerning the definition of trafficking. See *id.* See also several issue papers by the UN Office on Drugs and Crime: Abuse of a Position of Vulnerability and Other “Means” Within the Definition of Trafficking in Persons, *supra* note 41; The Role of Consent Within the International Legal Definition of Trafficking in Persons (2014); and The Concept of Exploitation Within the Trafficking in Persons Protocol (draft; forthcoming 2015).

<sup>128</sup> The review of cases in the UN Office on Drugs and Crime’s trafficking case law database shows that states are prosecuting *as trafficking* many cases of exploitation that do not involve movement (yet overwhelmingly involve migrants as victims). See UN Office on Drugs and Crime, UNODC Human Trafficking Case Law Database, at <https://www.unodc.org/cld/index.aspx>.

<sup>129</sup> See, e.g., 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 13, at 9 (noting that a trafficking victim need not be physically transported from one location to another).

mean that . . . trafficking . . . had been committed, even in the absence of transit or transportation.”<sup>130</sup>

It is important to understand, however, that the TIP Office’s interpretation of “harbouring” does far more than simply subsume forced labor under trafficking—it deprives “trafficking” of its meaning as a freestanding legal concept. This expansive reading effectively collapses the drafters’ carefully crafted, three-part definition of trafficking (that is, act, means, exploitative purpose) and renders it equivalent to exploitation, the last of the three definitional elements.<sup>131</sup> Because both the act and means elements would typically be satisfied by the inherently coercive nature of the end result—for example, exploitation in the form of forced labor or slavery-like practices—demonstrating this exploitation would be sufficient to satisfy all three elements of the definition of trafficking. Moreover, given that the exploitative practices identified in the trafficking definition technically comprise a *non-exhaustive* list, the application of “trafficking” is indeterminate: how much and what it covers is impossible to predict.<sup>132</sup>

*Forced labor/trafficking = slavery?* Separate from the problems discussed above concerning efforts to subsume forced labor under trafficking, seeking a legal justification for equating trafficking with slavery is doomed from the outset. As a *jus cogens* norm, the prohibition against slavery cannot be derogated by treaty—contrary treaty or customary rules are null and void ab initio—and can be modified only by another *jus cogens* norm.<sup>133</sup> However one interprets it, the Trafficking Protocol definition of trafficking cannot change the content of the slavery norm. And even if one could equate trafficking and slavery as a matter of law, doing so risks both diluting the slavery norm and raising the trafficking threshold—with negative consequences for their target populations.

Notwithstanding that the earliest anti-trafficking treaties labeled trafficking as “white slave traffic” to invoke comparison to African enslavement,<sup>134</sup> international law has long treated slavery as a separate issue. The many treaties developed at the turn of the twentieth century to address the enslavement of Africans were never intended or considered to cover the practices now associated with trafficking, including sexual exploitation, forced labor, debt bondage, and

<sup>130</sup> Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Activities of the Working Group on Trafficking in Persons, para. 55, UN Doc. CTOC/COP/2010/6 (Aug. 10, 2010).

<sup>131</sup> That the official legislative guide for the protocol advises that the “obligation is to criminalize trafficking as a combination of constituent elements and *not* the elements themselves” arguably implies adherence to the trafficking definition’s three-part structure. UN OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOL THERETO, para. 33, UN Sales No. E.0000000 (2004) (emphasis added).

<sup>132</sup> Conference of the Parties to the United Nations Convention on Transnational Organized Crime, Working Group on Trafficking in Persons, Forms of Exploitation Not Specifically Mentioned in the Protocol, UN Doc. CTOC/COP/WG.4/2013/4 (Aug. 23, 2013) (showing the many ways in which the open-ended list is being expanded); *see also* The Concept of Exploitation Within the Trafficking in Persons Protocol, *supra* note 127.

<sup>133</sup> Vienna Convention on the Law of Treaties, *supra* note 117, Art. 53. A *jus cogens* norm is defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Id.*

<sup>134</sup> *See, e.g.*, International Agreement for the Suppression of the White Slave Traffic, May 4, 1904, 1 LNTS 83 (entered into force July 18, 1905); International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 3 LNTS 278 (entered into force Aug 8, 1912).



child labor.<sup>135</sup> Subsequent international legal developments maintained slavery as distinct from other exploitative practices. The 1956 treaty adopted to “supplement” the 1926 Slavery Convention created a separate concept of “a person of servile status” to cover victims of slave-like practices such as debt bondage and serfdom.<sup>136</sup> Such practices are, moreover, treated under subsequent international human rights treaties as broader and less severe than slavery; for example, in the International Covenant on Civil and Political Rights, the reference to the “slave-trade” was intended *not* to include traffic in women.<sup>137</sup>

Granted, the substantive content of the customary international law prohibition against slavery is now “in a state of flux,” with indications that legal conceptions of slavery have expanded to include practices beyond chattel slavery.<sup>138</sup> The recent establishment of the separate crimes of “enslavement” and “sexual slavery” in international criminal law<sup>139</sup> has prompted efforts to revisit the contours of the slavery definition—notwithstanding important contextual and legal differences between “slavery” under international human rights law and “enslavement” under international criminal law.<sup>140</sup> A Bales-led group of scholars has advocated a broad interpretation of the 1926 Slavery Convention definition<sup>141</sup> in order to “captur[e] the essence of contemporary slavery.”<sup>142</sup> Nevertheless, despite this renaissance of interest

<sup>135</sup> See Report Presented by the Advisory Committee of Experts on Slavery 24–25, League of Nations Doc. C.189(I).M.145 1936 VI (1936) (“[O]ne 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, *supra* note 21, at 799–810.

<sup>136</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 89, Arts. 1, 7 (obligating states to abolish these practices “where they still exist and *whether or not* they are covered by the [1926 Convention’s] definition of slavery” (emphasis added)).

<sup>137</sup> International Covenant on Civil and Political Rights, Art. 8, Dec. 16, 1966, 999 UNTS 171; M. J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 165, 167 (1987) (analyzing genesis of the Article 8 prohibition of slavery, slave trade, and servitude).

<sup>138</sup> GALLAGHER, *supra* note 21, at 189–91; *see, e.g.*, Siliadin v. France, 2005-VII Eur. Ct. H.R. 333 (2005) (limiting the concept of slavery to situations with a *de jure* right of ownership over a person); Rantsev v. Cyprus, 51 Eur. Ct. H.R. 1 (2010) (noting that trafficking, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership, but finding it unnecessary to identify whether the trafficking involved in the case would be considered slavery, servitude, or forced labor).

<sup>139</sup> Rome Statute of the International Criminal Court, Art. 7(1), (2), July 17, 1998, 2187 UNTS 3 (defining “enslavement” and “sexual slavery”).

<sup>140</sup> Violating the prohibition on slavery involves international legal responsibility of the state, whereas the crime of enslavement, developed in the war context, carries individual criminal responsibility. International human rights law has traditionally drawn distinctions between various types and degrees of exploitation, while also implying a hierarchy of severity: slavery, servitude, forced labor. International criminal law, by contrast, has sought to subsume all within the grander definition of “enslavement” and thus offers a stronger basis for expansive reading of “enslavement” than that which is available for an expansive reading of “slavery.” The availability of lesser alternatives to slavery in international human rights law suggests the possibility of a higher threshold for slavery as a human rights violation than for the international crime of enslavement. GALLAGHER, *supra* note 21, at 184 (citing Jean Allain, *Mobilization of International Law to Address Trafficking and Slavery*, paper presented at the eleventh Joint Stanford–University of California Symposium on Law and Colonialism in Africa, Stanford, CA (Mar. 19–21, 2009)).

<sup>141</sup> See Convention to Suppress the Slave Trade and Slavery, *supra* note 89.

<sup>142</sup> JEAN ALLAIN, THE LEGAL UNDERSTANDING OF SLAVERY, at v (2012). For example, this group of historians, sociologists, and property law scholars developed the 2012 Bellagio-Harvard Guidelines, 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.” *2012 Bellagio-Harvard Guidelines on the Legal*

in the slavery norm, current international law norms cannot sustain an unqualified claim that trafficking, in all its modern manifestations, is included in the customary or *jus cogens* norm prohibiting slavery. Only egregious cases of trafficking, such as those involving the “clear exercise of powers attached to the right of ownership,”<sup>143</sup> would likely qualify as slavery.<sup>144</sup>

To include trafficking within the prohibition on slavery would also have significant downsides from the perspective of prosecuting slavery. Diluting the slavery norm risks undermining its *jus cogens* status, which could compromise the international community’s ability to prosecute alleged perpetrators of chattel slavery—a practice, though rare, that still exists in parts of the world (for example, Mauritania).<sup>145</sup> A flexible or indeterminate definition of slavery would also risk violating the rights of those accused, for crimes and punishments need to be clearly defined in law (*nullum crimen sine lege, nulla poena sine lege*).<sup>146</sup> More broadly (and analogous to the genocide context), the gravity of slavery, which is one of the most extreme human rights abuses, demands judicious use of that descriptor lest the situation and experiences of those subjected to actual slavery be diminished.

Equating trafficking with slavery would also potentially complicate prosecutions for trafficking. In particular, the equation can implicitly *raise* the legal threshold for *trafficking* by creating expectations of more extreme harms than anti-trafficking norms require. Invoking slavery dredges up a tragic past and harsh imagery of people laboring in fields, sometimes in chains, and beaten into submission. But that imagined scenario represents only one extreme, and an exceptionally small fraction, of a wide range of trafficking practices involving varying types and levels of force or coercion, and not necessarily 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 substantial.<sup>147</sup> That space only widens the cracks in the system through which traffickers and trafficked persons already fall.

*Parameters of Slavery*, in THE LEGAL UNDERSTANDING OF SLAVERY, *supra*, at 375, 376 (“Guideline 2: The Exercise of the Powers Attaching to the Right of Ownership”); see also Kevin Bales, *Slavery in Its Contemporary Manifestations*, in THE LEGAL UNDERSTANDING OF SLAVERY, *supra*, at 281. 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”* (Cornell Legal Studies Research Paper No. 13-86, 2013), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2294656](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294656).

<sup>143</sup> As Gallagher explains, the interpretive guidance on this point is thin, although a 1953 UN Secretariat report identifies six characteristics of the various “powers attaching to the right of ownership” that give rise to 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 master’s property without any compensation commensurate with the value of the labor, (4) the ownership of the individual can be transferred to another person, (5) the status/condition of the individual cannot be terminated at the will of the individual, and (6) the status/condition is inherited/inheritable. GALLAGHER, *supra* note 21, at 184 (citing UN Secretary-General, *Slavery, the Slave Trade and Other Forms of Servitude*, at 40, UN Doc. E/2357 (Jan. 27, 1953)).

<sup>144</sup> GALLAGHER, *supra* note 21, at 190.

<sup>145</sup> 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 13, at 258 (describing continuing de facto chattel slavery practices).

<sup>146</sup> See The Concept of Exploitation Within the Trafficking in Persons Protocol, *supra* note 127.

<sup>147</sup> This dynamic risks renewing past media skepticism over the actual extent of the trafficking problem—which was perceived as overinflated when the United States placed cross-border trafficking estimates at 800,000 worldwide. See, e.g., Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASH. POST, Sept. 23, 2007, at A1; 2007 TRAFFICKING IN PERSONS REPORT, *supra* note 61, at 8 (reporting the U.S. government’s trafficking statistics). See also sources cited in Chuang, *supra* note 33, at 1708 n.221 (citing dispute among journalists over the accuracy of the claims made in a *New York Times Magazine* cover story).

This dynamic can already be seen in the litigation strategies, if not the results, of cases brought by victims against their recruiter-traffickers in the United States.<sup>148</sup> For example, in the *Tanedo* case, which involved the alleged trafficking of Filipino teachers into the United States, approximately three hundred Filipino teachers paid (altogether) roughly \$17,000 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.<sup>149</sup> 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 initial \$5000 fee). Upon arrival in the United States, the recruiter threatened to deport the teachers 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 mandatory substandard group housing. The recruiter brooked no criticisms or complaints, and even sued one of the teachers for criticizing the scheme on an anonymous blog.<sup>150</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>151</sup>

Although the teachers had a strong trafficking claim, the facts of their case challenged common, but mistaken, assumptions about trafficking—in particular, as affecting only undocumented and unskilled workers subjected to violence or physical confinement. Feeding on that background disconnect, defense counsel used the slavery imagery to good effect in his closing statement: “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>152</sup> The jury rejected the trafficking claim, apparently unable to comprehend how the teachers, who had conceded their love of teaching and fondness for their students, could possibly be “trafficked.”<sup>153</sup> Slavery imagery helped implicitly raise the trafficking threshold by obscuring the core of what trafficking laws are intended to address—situations of exploitation from which individuals cannot escape. The case thus provides a cautionary tale of how pushing conceptions of trafficking into the slavery rubric risks undercutting social service providers' and law enforcement authorities' ability to identify victims, prosecutors' willingness to prosecute traffickers, and juries' willingness to find the trafficking threshold met and to award trafficked persons the relief sought.

<sup>148</sup> Telephone Interview with Martina Vandenberg, Founder and Executive Director, The Human Trafficking Pro Bono Legal Center (Aug. 3, 2013) (describing how defense counsel have been using the slavery analogy to avoid liability in civil cases brought under the TVPA).

<sup>149</sup> *Tanedo vs. East Baton Rouge Parish School Board*, No. SA CV10-01172 JAK, 2012 WL 5378742 (C.D. Cal. 2012) (class action lawsuit brought on behalf of Filipino teachers under the TVPA, Racketeer Influenced and Corrupt Organizations Act, and state laws regarding fraud and unfair business practices, among others); Farah Stockman, *Teacher Trafficking*, BOSTON GLOBE (June 12, 2013), at <http://c.o0bg.com/todayspaper/2013/06/12> (detailing the teachers' experiences); Fair Labor Recruitment, *Worker Testimonies* (testimony of Ingrid Cruz, on website of the International Labor Recruitment Working Group, a coalition of human rights and labor advocates, comprising the AFL-CIO, Solidarity Center, American Federation of Teachers, Centro de los Derechos del Migrante, Inc., Economic Policy Institute, Farmworker Justice, Global Workers Justice Alliance, National Guestworker Alliance, and Southern Poverty Law Center, among others), at <https://fairlaborrecruitment.wordpress.com/worker-stories/>; Stockman, *supra* note 149.

<sup>150</sup> *Navarro v. Cruz*, 2009 WL 6058120 (Cal. Super. 2009).

<sup>151</sup> See *supra* note 149 (references cited).

<sup>152</sup> Trial Transcript at 166, *Tanedo*, *supra* note 149 (Dec. 14, 2012) (No. SA CV10-01172 JAK).

<sup>153</sup> See Stockman, *supra* note 149; Cruz, *supra* note 149. The jury did award \$4.5 million, however, based on a finding of deceptive business practices. *Tanedo*, *supra* note 149.

*Modern-Day Slavery Abolitionism*

Both trafficking and slavery are more complex and varied phenomena than popularly depicted and understood. It took nearly a decade to break free of misconceptions of trafficking as primarily, if not exclusively, a sex-sector phenomenon. Likewise, the scholarly revival of interest in slavery is leading to a more nuanced comparison of past slavery and “modern-day slavery”; in addition to identifying important similarities in the political economy of past and present practices, this scholarly work is generating a richer understanding of the role of agency and coercion in the lives of the “enslaved.” Indeed, as discussed further below in “Challenges and Opportunities” (in part III), a handful of U.S. workers’ rights advocates have already begun to draw on such analysis in their work.<sup>154</sup>

Until that nuanced understanding of slavery is more widely understood and accepted, however, the slavery analogy pulls toward a reductive understanding of trafficking that fuels a continued emphasis on a criminal justice framing of, and approach to, the problem. Slavery imagery entrenches a long-standing impulse to distill the complex phenomenon of trafficking into a simple narrative of a crime perpetrated by evil, often foreign, criminal organizations and individuals, best solved through aggressive investigation and prosecution, coupled with policing of the border.<sup>155</sup> Labeling trafficked persons as “slaves” recasts them as perennial victims who, like trans-Atlantic slaves, must have been kidnapped or 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 or to search for a livelihood.<sup>156</sup> The slavery makeover thus depicts trafficked persons not as acting subjects but as passive victims. After all, if one sees slaves as “objects and eternal victims, one can pity [them] more unreservedly than . . . those whom we see as authoring and controlling their own destiny.”<sup>157</sup> Notwithstanding the TIP Office’s concerted efforts to convince other states that trafficked persons may have been willing migrants,<sup>158</sup> the slavery imagery rationalizes states’ tendency to weed out as “not trafficked” those who fail to fit the mold of the naive, innocent, unwilling migrant.<sup>159</sup>

This frame identifies trafficking as rooted in the deviant behavior of individual actors, rather than the product of global disparities in wealth and of social exclusion and discrimination in labor and migration frameworks. As sociologist Elizabeth Bernstein explains,

<sup>154</sup> See *infra* text accompanying notes 227–30.

<sup>155</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 how the imagery used in training U.S. officials to recognize trafficking situations fuels popular perceptions of noncitizens as criminal threats).

<sup>156</sup> See KAY, *supra* note 23 (describing push/pull factors driving international migration and human trafficking); see also BRENNAN, *supra* note 14 (explaining that glossing over the element of agency is fundamentally at odds with how trafficked persons view themselves); Rebecca Surtees, *Trafficked Men as Unwilling Victims*, ST. ANTHONY’S INT’L REV. 16 (2008) (discussing how male trafficking victims self-identify as unlucky migrants).

<sup>157</sup> Julia O’Connell Davidson, *New Slavery, Old Binaries: Human Trafficking and the Borders of ‘Freedom,’* 10 GLOBAL NETWORKS 244, 256 (2010).

<sup>158</sup> See, e.g., 2012 TRAFFICKING IN PERSONS REPORT, *supra* note 71, at 23 (describing common misperceptions of the role of consent in trafficking situations).

<sup>159</sup> Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2976, 3038 (2005); 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, 349–52 (2006).

the dichotomy between slavery and freedom poses a way of addressing the ravages of neo-liberalism that effectively locates all social harm *outside of* the institutions of corporate capitalism and the state apparatus . . . [B]ig business, the state, and the police are reconfigured as allies and saviors, rather than enemies, of unskilled migrant workers . . . ”<sup>160</sup>

This frame fuels a set of modern-day slavery abolitionist strategies, favored by the TIP Office, that prescribe interventions focusing on ex post accountability and victim protection. States are to improve law enforcement coordination and adopt more victim-centered techniques that better enable the identification of victims and their participation in prosecutions of traffickers.<sup>161</sup> And because human trafficking is “a humanitarian issue that global capitalists can help combat,”<sup>162</sup> MDS abolitionism also calls upon individuals and corporations to avoid using or producing, respectively, goods dependent upon the labor of trafficked persons— “a form of moral agency that can be encouraged by, and exercised in alliance with, capitalist enterprises.”<sup>163</sup>

Walk Free’s work is a prime example of MDS abolitionist strategies. Given its apparently vast resources and its catapulting stature in the anti-slavery movement, the organization is worth looking at more closely. At the core of Walk Free’s activities, for example, is the fundamental belief in business as the key driver of social change, along with a deep faith in states’ and corporations’ willingness to rid the world of worker exploitation. Walk Free thus has called upon states and major corporations to sign a “zero tolerance for slavery pledge” to eliminate forced labor from their supply chains. Corporations that allegedly tolerate forced labor become the target of letter-writing campaigns by Walk Free’s more than seven million “members.”<sup>164</sup> Even while targeting the “dark side of globalization,”<sup>165</sup> Walk Free believes in global economic growth as cure. Its founder has asserted his belief that exploitation can be eliminated in global supply chains without denting profits. He has implored Western business leaders to join him in investing in Myanmar because the lives of tens of millions of people may not improve otherwise<sup>166</sup>—notwithstanding human rights advocates’ caution against too-rapid Western

<sup>160</sup> Bernstein, *supra* note 34, at 144.

<sup>161</sup> See, e.g., 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 13, at 16–17 (discussing the use of “victim-witness coordinators” and, to provide restitution, the seizure of trafficker assets).

<sup>162</sup> Bernstein, *supra* note 34, at 141.

<sup>163</sup> Julia O’Connell Davidson, *Absolving the State: The Trafficking-Slavery Metaphor*, 14 GLOBAL DIALOGUE 38 (2012).

<sup>164</sup> As Nick Grono, when CEO of Walk Free, 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), at <http://www.prnewswire.com/news-releases/walk-free-calls-on-big-business-to-end-slavery-worldwide-183689831.html> (listing targeted companies, including Apple, Exxon Mobil, General Electric, Google, IBM, Microsoft, Shell, and Wal-Mart, among the “corporate giants” asked to sign the pledge by March 31, 2013). Perhaps tellingly, Walk Free’s otherwise frequently updated website does not mention the results of the corporate-pledge campaign. Author inquiries yielded no response. See Walk Free, *supra* note 103.

<sup>165</sup> Gould, *supra* note 15 (quoting Walk Free founder Andrew Forrest).

<sup>166</sup> *Myanmar President Emphasizes Benefits of Investment*, ASIALINK (Mar. 19, 2013), at [http://asialink.unimelb.edu.au/calendar/Recent\\_Events/Myanmar\\_President\\_emphasizes\\_benefits\\_of\\_investment](http://asialink.unimelb.edu.au/calendar/Recent_Events/Myanmar_President_emphasizes_benefits_of_investment) (describing speech given by Andrew Forrest). Myanmar was the first state to sign Walk Free’s anti-slavery pledge, though officials for the new government apparently were short on details as to plans for implementation. Sam Holmes & Shibani Mahtani, *Concert Against Slavery Draws Big Myanmar Crowd*, WALL ST. J. (Dec. 17, 2012), at <http://blogs.wsj.com/searealtime/2012/12/17/concert-against-slavery-draws-big-myanmar-crowd/>. Myanmar has a notorious history of forced labor practices, which inspired the ILO to exercise for the first time its power to levy trade

reengagement with Myanmar.<sup>167</sup> Moreover, Walk Free's Global Slavery Index appears to incorporate into its methodology an assumption that raising a country's level of economic development will reduce the prevalence and risk of slavery.<sup>168</sup>

As sociologists Julia O'Connell Davidson and Bridget Anderson explain, slavery rhetoric is a discourse of depoliticization.<sup>169</sup> MDS abolitionism 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>170</sup> MDS abolitionism enables states (and their corporate partners) to champion the anti-slavery cause through concerted efforts to root out the bad actors and save the victims, while deeming unnecessary any commitment to addressing the structural contributors to exploitation. For example, the 2012 TIP Report notes, in a section entitled “Making Migration Safe,” how trafficking results from weak labor migration frameworks that maximize access to cheap labor and remittances and that minimize opportunities for safe migration and labor protections for workers. Its prescriptions then call upon states to better educate emigrants of the dangers of migration and to train law enforcement to identify trafficking victims within the documented migrant worker population and to ensure safe repatriation. The report also notes the value of developing regional migration-management systems.<sup>171</sup>

Missing from the MDS abolitionism reform agenda are interventions that aim to address how countries of origin, such as the Philippines, pawn off their responsibility to protect their nationals, instead blaming recruitment agencies that routinely escape accountability for profiting from and facilitating forced labor abroad.<sup>172</sup> Also missing is any attention to destination countries such as the United States, in which the corporate control of workers and their recruitment, coupled with policy incoherence in guest-worker programs, makes conditions ripe for trafficking of migrants and renders accountability for abuses unattainable.<sup>173</sup> Such failures,

sanctions against member states. See Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, in *LABOUR RIGHTS AS HUMAN RIGHTS* (Philip Alston ed., 2005). The 2014 TIP Report ranked Burma Tier 3 from 2001 until 2012. See 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 13, at 115.

<sup>167</sup> Holmes & Mahtani, *supra* note 166 (describing violent state crackdown on protestors at a copper mine, with Myanmar apologizing 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).

<sup>168</sup> The index is derived from amalgamating an estimate of national slavery figures with an amalgamation of “risk factors” that include indicators with no apparent bearing on forced labor (for example, the HIV prevalence rate and availability of weapons). Only one of the thirty or so indicators deals with labor rights, and most deal with general country conditions that together contain an inherent bias in favor of wealthy countries (for example, indicators of development). See Walk Free, *Global Slavery Index*, *supra* note 104, at 110–15.

<sup>169</sup> Davidson, *supra* note 163, at 31; Davidson, *supra* note 157; Bridget Anderson & Rutvica Andrijasevic, *Sex, Slaves and Citizens: The Politics of Anti-trafficking*, 40 *SOUNDINGS* 135 (2008).

<sup>170</sup> Davidson, *supra* note 163, at 31.

<sup>171</sup> 2012 TRAFFICKING IN PERSONS REPORT, *supra* note 71, at 26–27.

<sup>172</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, 2011), at <http://dirp3.pids.gov.ph/ris/dps/pidsdps1112.pdf> (criticizing state efforts to regulate recruitment of Filipino transnational domestic workers).

<sup>173</sup> See generally ASHWINI SUKTHANKAR, VISAS, INC. CORPORATE CONTROL AND POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM (2012).

which provide the groundwork for rampant trafficking, are entirely disconnected from the trafficking-cum-slavery phenomenon that MDS abolitionists stand ready to fight. Conveniently obscured is the need to address the reality that trafficking is often labor migration gone horribly wrong and that it is at least partly due to the combination of tightened border controls, which have created a growing market for clandestine migration services, and lax labor laws, which permit employers and recruiters to coercively exploit their workers with impunity. MDS abolitionists, who feel good about feeling bad about the misfortune of trafficked persons, direct their considerable outrage at the individual perpetrators, calling for greater accountability and victim protection. Meanwhile, the broader structures that facilitate and maintain exploitation remain undisturbed.

### *A Labor Perspective*

The standard position of MDS abolitionism is well captured in the following remark of U.S. TIP Ambassador CdeBaca:

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.<sup>174</sup>

Notwithstanding the above, MDS abolitionism has had the unintended consequence of infusing a labor perspective into anti-trafficking law and policymaking. However doctrinally problematic, bringing "forced labor" into the trafficking frame has helped bring trafficking out of the shadows and into the everyday lives of citizens of well-to-do nations. In particular, this connection has brought into public awareness that the produce we eat, the clothes we wear, and the services that sustain our militaries abroad may be tainted by trafficking. That these abuses commonly occur in the context of official, state-sponsored guest-worker programs<sup>175</sup> and government contracting relationships<sup>176</sup> has also helped to reveal the role of states and corporations in facilitating, if not actively perpetrating, trafficking and forced labor.

As labor law scholars James Pope and Hila Shamir have powerfully demonstrated, a labor perspective serves to identify a key problem with mainstream anti-trafficking approaches: the failure to address how the structure of labor relations and labor markets renders workers vulnerable to forced labor and trafficking.<sup>177</sup> A labor lens brings into focus both the broader economic and social structures that foster vulnerability to trafficking in the first place and the power disparities between individual victims and their traffickers.<sup>178</sup> It exposes, for example,

<sup>174</sup> Gould, *supra* note 15.

<sup>175</sup> See, e.g., AMNESTY INTERNATIONAL, ABUSIVE LABOUR MIGRATION POLICIES (2014) (examining guest-worker programs in Hong Kong (domestic work), Italy (agriculture), Qatar (construction), and South Korea (all sectors)).

<sup>176</sup> See Sarah Stillman, *The Invisible Army*, NEW YORKER (June 6, 2011), at <http://www.newyorker.com/magazine/2011/06/06/the-invisible-army> (describing trafficking of foreign workers into U.S. military bases in Afghanistan and Iraq); Cam Simpson, *Pipeline to Peril*, CHI. TRIB. (Oct 9, 2005), at <http://www.chicagotribune.com/news/nationworld/chi-nepal-specialpackage-special.html> (describing the trafficking of Nepalese men to work for U.S. army contractors in Iraq).

<sup>177</sup> Pope, *supra* note 7; Shamir, *supra* note 7.

<sup>178</sup> Shamir, *supra* note 7, at 81.

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. As Jennifer Gordon has demonstrated, the global restructuring of work away from direct employment and toward subcontracting has made close scrutiny of labor market structures ever more important.<sup>179</sup>

A more nuanced understanding of how coercion operates within these structures discloses the sociological realities of the trafficking experience. Labor-infused approaches help spotlight how coercion in the trafficking context is, as Kathleen Kim aptly demonstrates, “situational.” Contrary to the typical headline-grabbing cases, coercion does not always take the form of threats of physical harm. Coercion may take more subtle, nonviolent forms and may result from factors that create conditions under which workers cannot leave their jobs, regardless of how abusive the working conditions—for example, through insurmountable recruitment fees or control over immigration status.<sup>180</sup>

This richer understanding of what trafficking entails helps expose how legal categories (for example, guest worker) and stereotypes disguise the empirical reality of who gets trafficked, how, and for what purposes. The *Tanedo* case (discussed above) illustrates how documented migrant workers can be fraudulently recruited and trapped in skilled, public sector jobs, by a third party to the employment relationship, and within the context of a formal U.S. guest-worker program. This profile is not what most prosecutors, service providers, or even trafficked persons themselves typically associate with “trafficking.” In a similar vein, victim identification also remains hampered by gendered assumptions of female vulnerability and “hegemonic masculinity” (that is, men are “strong, stoic, and self-sufficient”), which feed the common perception that women are trafficked, whereas men are unlucky migrants.<sup>181</sup> The labor perspective pushes past such stereotypes to expose how the underlying power disparities and sources of leverage used to create and sustain servitude can affect men, women, and children alike—whether documented or undocumented, skilled or unskilled.

A labor frame thus reshapes the profile of the “victim subject.” Nuance and context get lost in systems that are narrowly focused on assigning victimhood and blame to individual actors. Legal regimes for the prosecution of trafficking “force 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>182</sup> A labor perspective brings into focus that trafficking abuses typically occur in the context of individuals seeking a livelihood—often as migrants, sometimes undocumented, sometimes utilizing state-created or -sanctioned mechanisms or third-party actors that offer opportunities laced with potentially exploitative constraints. Underscoring how coercion and agency are not mutually exclusive thus facilitates identification of victims and access to accountability and redress.

This labor perspective on how trafficking occurs also provides a focal point for developing measures to prevent trafficking. Identifying the structural “market conditions and practices that shape workers’ vulnerability and inferior bargaining power in the workplace”<sup>183</sup> draws

<sup>179</sup> Jennifer Gordon, *Supply Chain Approaches to Regulating Recruitment* (draft) (International Labour Organization, forthcoming 2015).

<sup>180</sup> See Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011).

<sup>181</sup> See Surtees, *supra* note 156, at 25–26 (discussing impact of trafficking stereotypes on victim identification).

<sup>182</sup> 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, 47 (2009).

<sup>183</sup> Shamir, *supra* note 7, at 99.



attention to factors currently overlooked, if not dismissed, by dominant anti-trafficking approaches. This perspective invites scrutiny, for example, into how guest-worker programs can be manipulated to enable exploitation for private gain. Relevant in this context are recruiters' ability to charge exorbitant fees, recruiter/employer control over immigration status, and inadequate safeguards against retaliation for worker complaints and worker organizing, among others. A labor lens also points toward a host of different avenues and tools for improving baseline conditions. Relevant here are efforts to strengthen labor and employment law (particularly as applied to migrants) and the related enforcement mechanisms, and to provide workers with tools (for example, collective action and bargaining) to reshape power relations and ultimately to transform the economic conditions and legal rules that permit severe labor exploitation in the first place.<sup>184</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>185</sup>

### III. CAPTURING THE BENEFITS AND MANAGING THE RISKS OF EXPLOITATION CREEP

The destabilizing effect that exploitation creep has had on the ground cannot be overstated. Shifting the parameters of legal definitions has complicated the task of those at the front line of investigating and prosecuting trafficking, and also of grassroots advocates who must reframe their strategies and retarget their efforts in order to remain relevant (and fundable). Maintaining the core of what "trafficking" was intended to cover requires staving off the risk not only of the underinclusiveness that slavery imagery promotes but also of the overinclusiveness that increased attention to exploitation writ large might inspire.

But beyond the legal definitional battles, choices need to be made about the most effective overall approach to addressing the problem. The choice advocated here favors increased focus on labor-based approaches, though not to the exclusion of other approaches. Although criminal justice approaches have (rightly) received much criticism,<sup>186</sup> crime-control concerns have elevated the issue of trafficking to one of international and national concern; by contrast, the prior seven decades' worth of treaties on forced labor, slavery-like practices, migrant workers' rights, and sex trafficking had accomplished exceedingly little to address private exploitation. And when pursued in a victim-centered, rights-protective manner, criminal justice interventions unquestionably offer much-needed accountability and restitution for egregious wrongs.<sup>187</sup> Moreover, by

<sup>184</sup> *Id.* at 81.

<sup>185</sup> Pope, *supra* note 7, at 1862.

<sup>186</sup> See Joy Ngozi Ezeilo (Special Rapporteur), Trafficking in Persons, Especially Women and Children, Stock-taking Exercise on the Work of the Mandate on Its Tenth Anniversary, UN Doc. A/HRC/26/37/Add.2 (Mar. 27, 2014) (discussing the "collateral damage" of anti-trafficking interventions).

<sup>187</sup> In practice, criminal procedures may provide better options for restitution than the available civil options. In the United States, for example, criminal restitution offers potentially higher (and tax-free) financial compensation. See 18 U.S.C. §1593(b)(3) (2012) (defining the term "full amount of the 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"); Internal Revenue Service Notice 2012-12, at <http://www.irs.gov/pub/irs-drop/n-12-12.pdf> ("Restitution Payments Under the Trafficking Victims Protection Act of 2000"). Pursuing criminal restitution also saves victims the hassle of discovery and affords them better options for concealing their identities. Telephone Interview with Martina Vandenberg, *supra* note 148.

generating outrage and concern for trafficked persons, MDS abolitionism has likely contributed to long-overdue efforts to recognize and protect victims.<sup>188</sup>

Yet, even though the protection prong of the 3Ps anti-trafficking paradigm may now lag a bit less behind prosecution than it used to, the prevention prong continues to be neglected. To be sure, states' obligations under the Trafficking Protocol to *prevent* trafficking are only vaguely defined,<sup>189</sup> but those obligations cannot simply be ignored. Indeed, all indicators suggest the desperate need for substantive prevention strategies—which are not a salient element of MDS abolitionism, whose criminal justice interventions distract attention from the labor-based approaches slowly gaining traction in the field. Embracing these alternative approaches offers a necessary supplement and corrective to MDS abolitionist strategies.

### *Embracing the Labor Trajectory*

If one accepts, as the U.S. TIP Reports suggest, prosecution and conviction rates as the most important signifiers of success, then today's global anti-trafficking movement has been a failure. Even accounting for the flawed metrics of estimating numbers affected and assessing the impact of criminal justice interventions,<sup>190</sup> those interventions are affecting only a tiny percentage of trafficking cases. According to the 2014 TIP Report, in 2013, the combined authorities of more than 180 countries officially identified only 44,758 victims (.2 percent) out of the 20.9 million purportedly “enslaved” worldwide.<sup>191</sup> A total of 9460 prosecutions were brought against the perpetrators, resulting in 5776 convictions.<sup>192</sup> Of these, nonsexual cases of labor trafficking accounted for only 1199 (12.7%) of the cases prosecuted, and 470 (8%) of the convictions obtained,<sup>193</sup> despite ILO estimates that *nonsexual* forced laborers comprise 68 percent of forced laborers worldwide.<sup>194</sup>

MDS abolitionism risks diminishing even further the slim hope of nonsexual labor-trafficking victims to find accountability and restitution for their uncompensated labor. Looking at trafficking outside the sexual context brings into sharper focus the complexities of determining

<sup>188</sup> See, e.g., 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 13, at 1–66 (emphasizing victim empowerment measures).

<sup>189</sup> UN Trafficking Protocol, *supra* note 10, Art. 9 (obligating states to take or strengthen measures “to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”).

<sup>190</sup> For a discussion of these flaws, see *supra* note 90 (sources cited) and Anne T. Gallagher and Rebecca Surtees, *Measuring the Success of Counter-trafficking Interventions in the Criminal Justice Sector: Who Decides—and How?*, 1 ANTI-TRAFFICKING REV. 10 (2012).

<sup>191</sup> 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 13, at 45.

<sup>192</sup> The disparity between estimated and identified victims is partly due to the difficulty of detecting, investigating, and prosecuting trafficking without active victim cooperation. Yet, victims come forward at significant risk—for example, of deportation, prosecution for crimes committed during the course of the trafficking, retaliation by the traffickers, and retraumatization by the judicial process. See, e.g., Haynes, *supra* note 159; Haynes, *supra* note 182, at 91–92. In the United States, even the prospect of gaining residency status has provided little incentive for cooperation in trafficking prosecutions. Of the estimated 14,500–17,500 people trafficked into the United States each year, during FY2002 through FY2012 only 5820 victims applied for residency status and benefits (of which, 3309 were successful). U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2012, at 37–38 (2014).

<sup>193</sup> 2014 TRAFFICKING IN PERSONS REPORT, *supra* note 13, at 45.

<sup>194</sup> ILO 2012 GLOBAL ESTIMATE OF FORCED LABOUR, *supra* note 70, at 13.

precisely what constitutes coercion<sup>195</sup>—which is difficult enough for policymakers to articulate, and even more difficult for prosecutors to prove in court. In the U.S. context, for example, the simplified, agency-less victimhood of MDS abolitionism leads prosecutors to pursue only those labor trafficking cases that involve elements of actual or threatened physical violence.<sup>196</sup> The irony is that such cases could be brought under slavery-era statutes that predated the TVPA, which was specifically intended to expand upon those statutes by including *nonphysical* coercion within its coverage.<sup>197</sup> In this respect, MDS abolitionism has had the perverse effect of narrowing, rather than broadening, the TVPA's actual reach. That U.S. advocates representing nonsexual forced laborers rely on other avenues for accountability and redress—for example, civil anti-trafficking remedies, or relief under labor and employment law—is both a cause and consequence of this corrosive dynamic.<sup>198</sup>

MDS abolitionism's narrow focus on prosecution and protection diverts attention from and possibly undermines labor-based alternatives that seek to address states' and corporations' role in (and potential responsibility for) creating and maintaining structural vulnerabilities to trafficking. For example, the 2014 TIP Report's opening narrative, which includes its "shadow indicators" for state compliance with U.S. minimum standards,<sup>199</sup> focuses entirely on prosecution and protection measures of the 3Ps framework and curiously makes no mention of the much anticipated, historic adoption of the ILO Forced Labour Protocol. Similarly, Walk Free's Global Slavery Index<sup>200</sup> implicitly reinforces states' resistance to labor scrutiny; as

<sup>195</sup> The UNODC-commissioned study of consent under the Trafficking Protocol includes a discussion of coercion. *The Role of Consent Within the International Legal Definition of Trafficking in Persons*, *supra* note 127.

<sup>196</sup> Telephone Interview with Martina Vandenberg, *supra* note 148; Interview with Confidential Source no. 1, *supra* note 78; Interview with Confidential Source no. 2 (former state official), in Washington, D.C. (Jan. 25, 2013); Telephone Interview with Confidential Source no. 3 (anti-trafficking researcher and advocate) (July 31, 2013). These labor trafficking cases typically remain in "monitoring" status until the statute of limitations runs out or until they are dropped by prosecutors. For example, federal prosecutors dropped the case against Global Horizons—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—even though three of the eight people indicted had pleaded guilty to the charges. *Human Trafficking Case Against Executives Is Dismissed*, N.Y. Times, July 22, 2012, at A4. The U.S. Equal Employment Opportunity Commission subsequently filed a lawsuit on behalf of the workers, winning a partial summary judgment on their claims alleging hostile work environment, disparate treatment, and retaliation against the Thai workers. *EEOC v. Global Horizons, Inc.*, Case No. 1:11-cv-11-00257-LEK-RLP (D. Haw. Mar. 19, 2014).

<sup>197</sup> The TVPA creates the crime of "forced labor," defined as labor obtained or provided by means of force or physical restraint (or threats thereof), "serious harm or threats of serious harm," or "abuse or threatened abuse of law or legal process." 18 U.S.C. §1589(a)(2), (3) (2012). As explained by the Seventh Circuit Court of Appeals in *United States v. Calimlim*, 538 F.3d 706, 714 (7th Cir. 2008), "Section 1589 is not written in terms limited to overt physical coercion, and . . . [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 in which the plaintiff's ceasing to work would lead to serious harm. *Id.* at 711–14.

<sup>198</sup> In the United States, for example, advocates handling labor trafficking cases rely on civil remedies under the TVPA and the Fair Labor Standards Act, and increasingly refer cases to the Equal Employment Opportunity Commission. See Interview with Confidential Source no. 1, *supra* note 78; Telephone Interview with Martina Vandenberg, *supra* note 148; Interview with Confidential Source no. 2, *supra* note 196; Telephone Interview with Confidential Source no. 3, *supra* note 196.

<sup>199</sup> Gallagher & Chuang, *supra* note 47, at 332–33.

<sup>200</sup> For example, commentators have criticized the high ranking of the United Kingdom; its recent visa reforms effectively prevent migrant domestic workers from switching employers, which could result in a loss of residency. Alan Travis, *New Visa Rules for Domestic Workers 'Will Turn the Clock Back 15 Years'*, GUARDIAN (Feb. 29, 2012), at <http://www.theguardian.com/uk/2012/feb/29/new-visa-rules-domestic-workers>; Aidan McQuade, *Slavery Is Real—We Must Protect Its Victims*, GUARDIAN (Feb. 29, 2012), at <http://www.theguardian.com/commentisfree/2012/feb/02/rethink-attitudes-to-slavery-trafficking>.

pointed out by one critic, for example, the wealthy states that ranked at the top of that index are the same states that opposed development of the Forced Labour Protocol.<sup>201</sup> Walk Free's other campaigns—for example, garnering support for laws that require businesses to disclose forced labor in their supply chains,<sup>202</sup> thereby enabling consumers to consume more ethically—stop short of mandating reform of the structures that enable forced labor to occur.<sup>203</sup> Having corporations shamed into promising to do better is a poor substitute for obligating them to do so through strengthened labor law protections and enforcement mechanisms. With their implicit assurance of a bark without bite, MDS abolitionism's promise of freedom rings a bit hollow.

By contrast, labor-based approaches offer greater hope of long-term prevention and change. Away from the spotlight of MDS abolitionism, and outside the traditional anti-trafficking power structures, labor-infused anti-trafficking approaches are beginning to take hold. Labor and employment institutions are already filling in the gaps left by anti-trafficking strategies that focus on criminal justice. Those underserved by criminal justice approaches are gaining access to remedies and accountability, and prospective measures are being developed to prevent future exploitation.<sup>204</sup> Recognizing that criminal justice-focused approaches have led to significant underdetection of non-sex-sector labor trafficking, the recommendations accompanying the ILO Forced Labour Protocol offer specific guidance regarding the necessary reforms to labor markets and legal frameworks to prevent forced labor (for example, labor-recruitment regulations).<sup>205</sup> These recommendations resonate with growing efforts to develop legal frameworks to regulate labor supply chains,<sup>206</sup> target fraudulent foreign-labor recruitment,<sup>207</sup> and

<sup>201</sup> Letter from Aidan McQuade, Director, Anti-slavery International, to Nick Grono and Fiona David, Walk Free, June 6, 2013 (offering a scathing critique of the draft Global Slavery Index) (on file with author).

<sup>202</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, see Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CAL. L. REV. CIR. 80 (2012).

<sup>203</sup> Walk Free, *Tell Congress to Help End Modern Slavery in Corporate Supply Chains*, at <http://campaigns.walkfree.org/petitions/tell-congress-to-help-end-modern-slavery-in-corporate-supply-chains>.

<sup>204</sup> Within the U.S. context, for example, the Department of Labor has played a less visible, yet crucial role in anti-trafficking efforts. See *Counteracting the Bias: the Department of Labor's Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV 2012 (2013). Moreover, the Equal Employment Opportunity Commission has brought lawsuits against traffickers for racial discrimination and harassment (based on national origin) and has sought a wide array of remedies, including back pay, compensatory and punitive damages, injunctive relief, monetary damages, and equitable relief such as reinstatement. 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 (Rachel Parrenas & Kimberly Hoang eds., 2013). In *EEOC v. Trans Bay Steel*, the EEOC obtained a \$1 million settlement for forty-eight trafficked Thai welders, plus a consent decree requiring the defendant to provide claimants future work, housing, and guaranteed minimum base pay, to pay for their housing stipend and local college tuition, and to ensure the availability of sponsorships to continue working in the United States. Consent Decree, *EEOC v. Trans Bay Steel Corp.*, No. 2:06cv-07766-CAS-JTL (C.D. Cal. 2008).

<sup>205</sup> Protocol to Convention 29, *supra* note 74.

<sup>206</sup> For example, the International Organization for Migration is currently developing the International Recruitment Integrity System. See IRIS: International Recruitment Integrity System, at <http://iris.iom.int>. Note, however, that an independent monitoring requirement is apparently lacking and that the organization's own pilot efforts to manage labor recruitment directly are of concern to labor advocates.

<sup>207</sup> See, e.g., Fraudulent Overseas Recruitment and Trafficking Elimination Act of 2013, H.R. 3344, 113th Cong. (2013).

prevent forced labor by government contractors and subcontractors.<sup>208</sup> For example, U.S. advocates have successfully incorporated various reforms into draft legislation, including the following: prohibitions against charging workers recruitment fees to participate in guest-worker programs; protections against retaliatory termination or deportation of workers who engage in worker organizing or who complain about exploitative workplace conditions; imposition of licensing and transparency requirements on foreign labor recruiters; and safe harbor provisions for employers who utilize licensed recruiters.<sup>209</sup> In other parts of the world, concerns over the risk of trafficking caused by unregulated or poorly regulated international labor-recruitment schemes have prompted efforts to explore alternatives to reliance on third-party labor recruiters. These efforts include creating and expanding state-mediated direct-hire systems that eliminate middlemen,<sup>210</sup> exploring the possibility of transnational worker organizations empowered to manage cross-border recruitment of their members,<sup>211</sup> and reshaping the labor recruitment market by holding employers jointly liable for recruitment abuses.<sup>212</sup>

Regulating labor markets and labor relations as a core component of anti-trafficking strategies accomplishes several goals. Most immediately, the expanding efforts of labor and employment institutions to combat trafficking address the violations left unsanctioned by the criminal justice system and resurrect victims' prospects for remedies and accountability. Alternative avenues of relief are becoming available, and these institutions are also bringing their expertise more directly to bear on prosecutors' and juries' understanding of how coercion operates—by training the prosecutors and by helping courts to craft better jury instructions. Perhaps more importantly, labor-based approaches can help lessen the reliance on *ex post* strategies by reducing the risk of extreme exploitation in the first place. By targeting those dimensions of labor frameworks that place workers at risk of exploitation (particularly the dimensions that apply to migrants, such as foreign-labor recruitment schemes and guest-worker programs), labor-based approaches can help level the playing field between individual workers and the recruiters and businesses that rely on them as cheap, exploitable labor. Both everyday exploitation and the more acute harms resulting from unchecked abuses can be reduced by providing tools to workers, including to trafficked persons who have been “rescued,” for reporting abuse or for organizing to demand better working conditions—presumably free of the risk of retaliatory termination or deportation.

<sup>208</sup> See, e.g., Exec. Order No. 13627, 77 Fed. Reg. 60029 (Sept. 25, 2012) (ordering measures to implement a zero-tolerance policy on trafficking in persons by federal contractors and subcontractors).

<sup>209</sup> See Fraudulent Overseas Recruitment and Trafficking Elimination Act of 2013, *supra* note 207. Note that these provisions had been successfully introduced in subpart F of the U.S. Senate's 2013 comprehensive immigration reform bill, Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

<sup>210</sup> For example, advocates working on behalf of Filipino and Indonesian migrant domestic workers in Hong Kong have called for a state-mediated, direct-hire system. Interview with representatives from the International Domestic Workers Network, the Hong Kong Confederation of Trade Unions, and Mission for Migrant Workers, in Hong Kong (Apr. 24–25, 2012).

<sup>211</sup> See Jennifer Gordon, *Towards Transnational Labor Citizenship: Restructuring Labor Migration to Reinforce Workers' Rights: A Preliminary Report on Emerging Experiments* (Fordham Law School, Jan. 2009), at [https://www.law.berkeley.edu/files/Gordon\\_Transnatl\\_Labor\\_Final.pdf](https://www.law.berkeley.edu/files/Gordon_Transnatl_Labor_Final.pdf) (describing emerging models of “mobile labor citizenship,” including those fostering union-union job referrals).

<sup>212</sup> See Gordon, *supra* note 179 (exploring successful and potential efforts to adopt this approach in Canada and the Netherlands, Philippines, United Kingdom, and United States).

### *Challenges and Opportunities*

The attempt to prevent trafficking through labor-based approaches remains controversial. When trafficking was just about sex and about protecting women from sexual servitude, prevention was easily articulated as being about reducing (male) demand for commercial sex. Against that background, when *non-sex-sector* trafficking first became a policy focus, an aspirational nod to prevention and to labor concerns seemed enough. Now, however, that “labor” has become part of the reform agenda on the ground and in other parts of global governance, a mere nod is not enough—and the stakes are much higher. The reforms sought under the rubric of “labor” challenge the very structures that have fueled global economic growth and upon which prosperous societies are built.

Labor-based approaches to trafficking present a serious threat to the status quo, as can be seen in the response to the United States’ current effort to prohibit recruitment fees for those participating in U.S. guest-worker programs. The recruitment industry and the businesses they service have aggressively sought to exclude from the scope of the legislation what is *de facto* the largest U.S. guest-worker program, the J-1 Visa Exchange Visitor Program.<sup>213</sup> Technically a “cultural exchange” program administered by the State Department, the J-1 program brings young foreigners (typically students) to the United States to work or experience American life.<sup>214</sup> But as government oversight offices have repeatedly concluded, several of these programs function as guest-worker programs on the cheap; they provide student labor at rates below what official U.S. guest-workers are required to earn, and are shielded, moreover, from labor scrutiny by their “cultural exchange” classification.<sup>215</sup> Student participants have thus found themselves, for example, working more than full time at Hershey packing plants for less than a dollar an hour or caring for children for well over the 45-hour au pair workweek limit and for substantially less than the minimum wage. The students are nevertheless compelled to remain in these jobs due to the exorbitant, unregulated recruitment fees that they paid for the privilege of obtaining these jobs.<sup>216</sup> Preying upon the fears of small business owners and U.S. families that the prospective legislation would increase their financial burdens, the J-1 industry lobby organized a massive letter-writing and call-in campaign demanding—with suc-

<sup>213</sup> Fredreka Schouten, *Au Pair Groups, Others Fight Senate Immigration Rules*, USA TODAY (June 19, 2013), at <http://www.usatoday.com/story/news/politics/2013/06/19/lobbying-cultural-exchange-visas-au-pairs/2437589/>; Kristina Peterson, *Worker Bill Roils the au Pair World*, WALL ST. J., May 24, 2013, at A5; Annys Shin, *Au Pair Agencies Win Fight to Keep Recruitment Fees*, WASH. POST, at A7 (June 25, 2013); Fair Labor Recruitment, *supra* note 149; Janie A. Chuang, *The U.S. au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269 (2013).

<sup>214</sup> U.S. Department of State, Bureau of Educational and Cultural Affairs, J-1 Visitor Exchange Program, at <http://j1visa.state.gov>.

<sup>215</sup> See, e.g., U.S. DEPARTMENT OF STATE AND THE BROADCASTING BOARD OF GOVERNORS OFFICE OF INSPECTOR GENERAL, INSPECTION OF THE BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS 24 (2012) (questioning “the appropriateness of using J visas in work programs,” particularly the Summer Work Travel, au pair, and intern programs).

<sup>216</sup> *Report of the August 2011 Human Rights Delegation to Hershey, Pennsylvania* (2011), at <http://www.guestworkeralliance.org/wp-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.

cess—that Congress continue to protect their ability to charge students recruitment fees.<sup>217</sup> Along the same line, U.S. senators from Alaska have introduced special legislation seeking to override a specific J-1 program bar—which shortly before had been won by anti-trafficking and labor advocates—against students being hired for seafood-processing (and other dangerous) jobs.<sup>218</sup>

In addition to the political challenges to enacting legislation incorporating a labor approach to trafficking, difficult conceptual questions remain concerning the distinction between acceptable labor practices and unacceptable exploitation. As Julia O’Connell Davidson notes, the realities of modern-day, debt-financed labor migration “disturb[] the trafficking/smuggling, illegal/legal, and forced/voluntary dyads that are widely used to make sense of migration and troubles the liberal construction of ‘freedom’ and ‘slavery’ as oppositional categories.”<sup>219</sup> While debt—particularly in the context of restrictive immigration policies—can lock a migrant into highly asymmetrical, ongoing, and potentially exploitative relations of power and dependency, it can also be “a means by which many seek to extend and secure their future freedoms.”<sup>220</sup> Not all migrants who pay what might be considered excessive recruitment fees are harmed or cheated during the indenture. And for those who are not so lucky, some may have knowingly and willingly accepted the risks of harm as a “temporal strategy”—accepting conditions of “unfreedom” and “self-exploitation” as presenting the opportunity to acquire and achieve a better future.<sup>221</sup> While a “situational coercion” analysis gives us greater insight into how coercion operates, it does not answer the question of what is acceptable “self-exploitation.” In this context, and given that coercion can result from many factors acting in concert, including systemic ones, a reassessment of the highly charged prostitution-reform debates would appear to be in order.<sup>222</sup>

States are already starting to confront these questions, including in the process of drafting domestic legislation. Exploitative labor-recruitment practices have prompted Australia, for example, to expand the legal definition of “debt bondage”<sup>223</sup> to include, as a matter of domestic

<sup>217</sup> The final bill imposed regulatory limits upon—rather than prohibiting—fees paid by J-1 visa-holders, reasoning that students, unlike other guest workers, were rightly paying for the privilege of “cultural exchange.” Border Security, Economic Opportunity, and Immigration Modernization Act, *supra* note 209.

<sup>218</sup> Department of State, Foreign Operations, and Related Programs Appropriations Act of 2015, S. 2499, 160th Cong. (2014).

<sup>219</sup> Julia O’Connell Davidson, *Troubling Freedom: Migration, Debt, and Modern Slavery*, MIGRATION STUD. 176, 176 (2013).

<sup>220</sup> *Id.*

<sup>221</sup> See, e.g., Antonella Ceccagno, Renzo Rastrelli & Alessandra Salvati, *Exploitation of Chinese Immigrants in Italy*, in CONCEALED CHAINS: LABOUR EXPLOITATION AND CHINESE MIGRANTS IN EUROPE 89, 135 (Gao Yun ed., 2010) (describing heavily indebted Chinese workers who, in migrating to Italy to work in the garment industry, had knowingly engaged in “self-exploitation” as a temporary means to an end).

<sup>222</sup> The ILO has only indirectly and cautiously recognized the possibility of sex work as labor and has refrained from explicitly including sex workers within the embrace of the labor protections sought. See, e.g., INTERNATIONAL LABOUR ORGANIZATION, THE COST OF COERCION, para. 196 (2009) (noting the difficulty of labor inspection of the commercial sex sector); Protocol to Convention 29, *supra* note 74, pmb. (noting that forced labor “may involve sexual exploitation”).

<sup>223</sup> The 1956 Supplementary Slavery Convention, *supra* note 89, Art. 1(a), defines debt bondage as

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

law, “manifestly excessive” debts.<sup>224</sup> In a similar vein, in considering its Modern Slavery Bill in 2014, the United Kingdom has considered the possibility of criminalizing “exploitation” and “slavery,” broadly defined.<sup>225</sup> In an international context, states parties to the Trafficking Protocol have specifically requested the UN Office on Drugs and Crime to undertake studies into the meaning and application of “abuse of a position of vulnerability,” “consent,” and “exploitation” within the Trafficking Protocol’s definition of trafficking;<sup>226</sup> clarity on these matters is essential for the investigation and prosecution of trafficking.

That states such as the United Kingdom are considering redefining “slavery” in domestic legislation underscores the need to think strategically about how the slavery analogy could be better used to promote a more nuanced, complex analysis of modern exploitation. Beyond the din of MDS abolitionist campaigns, some U.S. labor advocates, for example, have usefully drawn upon important structural similarities between the chattel slavery (largely) of the past and the trafficking/slavery of today. As James Pope has powerfully argued in the U.S. context, for example, the Thirteenth Amendment aims not only at ending slavery but also at “maintain[ing] a system of completely free and voluntary labor throughout the United States.”<sup>227</sup> Building on this analysis, the National Guestworkers Alliance relied on the U.S. Supreme Court’s decision in *Pollock v. Williams* to argue for the rights to organize and to change employers, among other rights.<sup>228</sup> From a worker-organizing perspective, the slavery frame has proven useful in bringing African American and migrant low-wage workers together in a common struggle against systemic abuses of workers’ rights.<sup>229</sup> Recent examinations of the international law of slavery and historical analyses of the Thirteenth Amendment have provided springboards for exploring how the slavery frame might be used for protecting immigrant workers from servitude.<sup>230</sup>

These strategies and narratives are ones that those committed to the modern abolitionist cause—be they ambitious philanthropists, the U.S. TIP Office, or grassroots NGOs—can and should use more productively. Funder-founded organizations can play a powerful role in

Involvement of third-party recruiters as creditors challenges traditional conceptions of debt bondage, which presume the employer is also the creditor.

<sup>224</sup> Criminal Code Act, 1995, sec. 271.8 (Austl.) (criminalizing debt bondage); *id.*, Dictionary (defining “debt bondage”).

<sup>225</sup> The recommendation defined “exploitation” to include “where one person obtains a benefit through the use of a second person for the purpose of exploitation” by using the means listed in the Trafficking Protocol definition of trafficking. The Committee Bill, pt. 1, para. 3(2), *in* House of Lords/House of Commons, Joint Committee on the Draft Modern Slavery Bill, Report, Sess. 2013–14 (Apr. 3, 2014). “Slavery” was defined as “the control by a person of a second person in such a way as— a. significantly to deprive that second person of their individual liberty, and b. by which any person obtains a benefit through the use, management, profit, transfer or disposal of that second person. *Id.*, para. 1(2)(a), (b).

<sup>226</sup> See Abuse of a Position of Vulnerability and Other “Means” Within the Definition of Trafficking in Persons, *supra* note 41; The Concept of Exploitation Within the Trafficking in Persons Protocol, *supra* note 132; The Role of Consent Within the International Legal Definition of Trafficking in Persons, *supra* note 127.

<sup>227</sup> Pope, *supra* note 7, at 1850 (quoting Justice Robert Jackson).

<sup>228</sup> See, e.g., First Amended Complaint and Expert Affidavit of James Gray Pope, *Jimenez v. Vanderbilt Landscaping LLC*, Civ. Action No. 3:11-0276 (M.D. Tenn. Apr. 6, 2011) (citing *Pollock v. Williams*, 322 U.S. 4 (1944)).

<sup>229</sup> Telephone Interview with Jennifer Rosenbaum, Legal Director, National Guestworkers Alliance (July 26, 2013).

<sup>230</sup> See, e.g., Thomas, *supra* note 142 (assessing scholarly efforts to promote expansive understanding of the slavery concept); Pope, *supra* note 7; Risa L. Goluboff, *The Thirteenth Amendment in Historical Perspective*, 11 J. CONST. L. 1451 (2009).



bringing these ideas to fruition. Philanthropies can bring a perspective that benefits from not being “too close to the ground.”<sup>231</sup> Moreover, unburdened by the uncertainties brought about by changes in government leadership and funding priorities, funder-founders are uniquely positioned to establish and promote long-range goals and solutions. Doing so, however, requires rising to Warren Buffett’s challenge to his fellow philanthropists: to resist the tendency to engage in “philanthropic colonialism” that “just keeps the existing structure of inequality in place.”<sup>232</sup> Reforming the labor frameworks that render individuals vulnerable to trafficking—and that keep even those “rescued” on the precipice of re-trafficking—would be a good place to start.

#### IV. CONCLUSION

Ultimately, exploitation creep has helped shine a spotlight on a broader range of abusive labor practices than the drafters of the Trafficking Protocol ever intended. Exploitation creep is the latest of the United States’ maneuvers to elevate a criminal justice approach to trafficking—this time in the face of a growing chorus of actors demanding labor-based solutions to the problem of human trafficking. The responses to exploitation creep demonstrate that U.S. hegemony in this field is neither monolithic nor inevitable. The rise of joint grassroots activity by human rights and labor advocates, the active engagement by the charitable-industrial complex, and the ILO’s adoption of additional international standards on forced labor all present opportunities to reframe the interconnected problems of forced labor, trafficking, and slavery, along with the responses thereto.

However doctrinally problematic, the current challenge is to marshal the political will behind modern “anti-slavery” campaigns and to bring it to bear on the structural contributors to forced labor in the global economy. The move toward a labor perspective has contributed significantly to deepening our understanding of how power is wielded among employees, employers, contractors, recruiters, and other actors operating in a globalized economy. Formulating interventions based on that empirical reality is the most effective way to target the structures that create and maintain vulnerability to modern human exploitation for profit. Only then can we hope to have a world in which identifying a practice as “slavery” yields not only a powerful call to action, but a productive one.

<sup>231</sup> Shulman, *supra* note 101, at 222. In creating ATEST, for example, Humanity United successfully (and surprisingly) moved U.S. anti-trafficking NGOs beyond counterproductive infighting over prostitution reform issues to find common ground in, and to jointly advocate for, a shared legislative reform agenda.

<sup>232</sup> Buffett, *supra* note 98.