



EXPLOITATION CREEP AND THE UNMAKING OF HUMAN TRAFFICKING LAW

Janie A. Chuang

Associate Professor of Law, American University Washington College of Law; Fellow (2012)

Author note to readers

First, thanks for taking the time to look over this very rough first draft – any and all comments are most welcome.

Second, by way of explanation:

- language in brackets just indicates I'm trying to figure out better wording
- you'll see red text, mostly in the footnotes, indicating sources to be cited/found.
- there are some comment boxes indicating what I plan to do, or questions I have (including a few directed a specific individuals).

Future plans:

- I plan to reorganize the draft and flesh out the arguments for why these two “creep” moves are problematic.
- There are arguments I still need to raise/address – they're listed at the end of the draft

Thanks – looking forward to hearing your feedback! cheers, janie

EXPLOITATION CREEP AND THE UNMAKING OF HUMAN TRAFFICKING LAW

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INTRODUCTION

Within the space of only a dozen years, the problem of human trafficking has assumed a prominent place on government and advocacy agendas worldwide. Increasingly referred to as “modern slavery,” the phenomenon has spawned rapid proliferation of international, regional, and national laws, and a veritable industry of non-profits that have elevated its “abolition” into a pressing moral crusade. The U.S. government alone has spent nearly \$1 billion funding anti-trafficking interventions worldwide,¹ while at the grassroots level, any individual can become a “modern-day abolitionist” with the click of a mouse.² Scholars have offered a broad range of solutions to the problem, calling upon governments to marshal human rights law, tax law,³ trade law,⁴ [tort law],⁵ public health approaches,⁶ labor law,⁷ and even military might⁸ in the service of combating trafficking.

* Associate Professor of Law, American University Washington College of Law; Fellow (2012), Open Society Foundations. Thanks to the Open Society Foundations Fellowship Program for funding the research for this article. **Add others, including workshops at HLS, WCL, UCC, USC.**

¹ Insert statistic

² See e.g., website for non-governmental organizations Walk Free, available at <http://www.walkfree.org/en/actions/commit> (readers enter their contact information and sign a pledge committing to the abolition of slavery); website for Not for Sale, available at <https://nfs.webconnex.com/giving/donate> (readers can make a donation and “give freedom”).

³ Diane L. Fahey, *Can Tax Policy Stop Human Trafficking?*, 40 GEO. J. INT’L L. 345 (2009).

⁴ Karen E. Bravo, *Free Labor: A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 TRANSNAT’L L. & CONTEMP. PROBS. 545 (2009).

⁵ *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574 (2006).

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

⁷ Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 2 (2012).

⁸ Ethan B. Kapstein, *The New Global Slave Trade*, 85 FOREIGN AFFAIRS 103 (2006).

But exactly *what* is everyone trying to fight? Notwithstanding the apparent global moral consensus that trafficking is something to be rid of, the concept of “human trafficking” is a strikingly rigor-free zone⁹ when it comes to defining its legal parameters. When, in 2000, the international community developed the first modern anti-trafficking treaty, elements of the legal definition of trafficking were left intentionally vague for the sake of achieving global consensus on an international anti-trafficking treaty.¹⁰ Reduced to its core elements, trafficking is roughly comprised of: (1) an *act* of recruitment, movement, harbouring, or receipt of a person, (2) by *means* of force, fraud, or coercion, (3) for the *purpose* of placing that person in “exploitation.” This expansive formulation has placed the meaning of “trafficking” [in?] the eye of the beholder, providing a banner under which advocates have sought to eradicate diverse (and sometimes deeply contested) phenomena.

For much of the first decade of the modern anti-trafficking regime, for example, the trafficking field was consumed by the highly charged debates over whether anti-trafficking laws and policies should seek to eradicate all non-coerced adult prostitution[, even pornography].¹¹ Recently, however, a new set of debates over the scope of the trafficking definition has emerged, and with the potential to fundamentally reconceptualize both the nature of and approach to the problem. After much concerted effort by grassroots advocates, mainstream media reporting and government attention are finally being brought to bear on trafficking outside the sex sector -- e.g., trafficking into domestic work, agriculture, and construction, among other sectors. Consequently, trafficking is increasingly recognized as a phenomenon linked to labor migration – a link previously obscured by intractable prostitution reform debates over whether prostitution could even be considered a form of labor (as opposed to inherently an act of violence). The increased focus on non-sex sector trafficking has put front and center deeply fraught questions over the scope of the trafficking definition. Trafficking has now come to be understood as falling somewhere along a spectrum of abusive labor practices, but where exactly lesser exploitation ends and trafficking begins remains unclear. Is – or should – the Chinese migrant who pays a recruiter \$25,000 to come to the United States who then finds himself working 18-hour-days for virtually

⁹ Insert citation to lou’s speech

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

¹¹ Insert citations to UPennLR pieces by MacKinnon, Dempsey and me.

no pay for three years to pay off the debt be considered trafficked, or is this a case of acceptable “self-exploitation”? What about the Chinese migrant’s undocumented co-worker, who was not recruited or moved to the United States for the job, but against whom the employer uses the threat of deportation to force him to work the same long hours at far below minimum wages?

Complicating the definitional ambiguity is a recent push by the U.S. government to conflate trafficking with two phenomena prohibited under well-established international treaty law and custom: forced labor and slavery. Specifically, these moves recast all forced labor as trafficking, and all trafficking as slavery, evince what I refer to as “exploitation creep,” or the labeling of abuses as more extreme than is legally accurate. Although these moves have U.S. origins, they are intended for export abroad, utilizing the U.S. government’s outsized influence on global anti-trafficking law and policy. This creep towards the extremes is partly strategic deployment of powerful rhetoric and imagery to galvanize support for eradicating the wrongful practices. But labeling forced labor as “trafficking” and trafficking as “slavery” potentially renders trafficking redundant, even obsolete, as a legal concept – more a political tool than a distinctive legal concept.

Now, one might question whether legal definitions in the “anti-trafficking” field even matter ultimately. After all, the modern anti-trafficking movement has grown exponentially since its inception, notwithstanding well-known ambiguities in legal definition. But expansion of the field is precisely why one should care about the definitional muddle. Definitional concerns bring with them vexing questions over competing competencies on the part of international institutions, governments, and grassroots advocacy organizations alike. Asserting an expansive interpretation of the trafficking definition, highly influential anti-trafficking agencies and institutions have begun to lay claim to mandates traditionally the province of labor officials, yielding counter-productive turf wars within and among government agencies and international institutions. At the grassroots level, labor rights advocates – long allergic to the anti-trafficking movement – have very recently begun to consider the advantages of utilizing anti-trafficking media attention, financial resources, and legal strategies to address a range of abusive labor practices, some arguably falling short of trafficking.

Regardless of where the fault-lines are drawn, the undeniable product of these moves is a gradual shift towards application of a labor paradigm for addressing trafficking. The entry of a labor perspective has broad implications for the anti-trafficking field – for legal doctrine, institutional competencies, and more fundamentally, the overarching paradigms used to frame anti-trafficking interventions on the ground.

Scholars and advocates are now increasingly calling for a labor approach to trafficking that arguably offers greater potential for reducing structural vulnerability to trafficking than the criminal justice and human rights approaches that currently dominate the field.¹² But whether and how a labor rights perspective might be incorporated into what are already fairly elaborate, established criminal justice-centered anti-trafficking regimes at the international and national levels require closer scrutiny. The shift towards a labor focus furthermore raises fraught law and policy questions regarding the treatment of migrant and/or low-wage workers. Recent cases involving the trafficking of teachers [and nurses??]¹³ into the United States not only unsettle common perceptions of trafficking as affecting only informal and low-wage sectors of the economy, but draw long-overdue scrutiny to the role of states and private recruitment agencies in promoting remittance-maximizing labor migration schemes that inadequately protect workers. In an era of highly contentious debates over comprehensive immigration reform, these are issues that whether under the banner of “trafficking” or lesser labor violations, demand greater attention.

Exploitation creep threatens to [undermine/redirect] this important trajectory, however. While animated by a well-intentioned desire to include a broader population within the embrace of anti-trafficking/“slavery” interventions, exploitation creep risks re-asserting criminal justice dominance in the field at the expense of a labor paradigm gaining a foothold. To illustrate how this is so, this Article closely maps and assesses the impact of exploitation creep on anti-trafficking doctrine and labor rights advocacy on the ground. Part I situates exploitation creep in historical context, tracing the history of the (belated) entry of labor institutions and advocates in the development of the global anti-trafficking law and policy regimes. Part II maps how exploitation creep has taken form through doctrinal and rhetorical conflation of the previously separate concepts of trafficking, forced labor, and slavery. It traces the key actors behind these moves to underscore how exploitation creep enables, if not promotes, as assertion of criminal justice paradigm dominance in the face of a potential paradigm shift towards a labor rights perspective. Parts III and IV explore the intended and unintended consequences of exploitation creep on anti-trafficking and broader labor rights advocacy and law and policy implementation. [REVISE INTRO to expand map of the article once I figure out better structure]

¹² See e.g., Shamir, *supra* note 7. [cite to beyond a snapshot]

¹³ insert citation to Filipino teachers case.

I. THE BELATED ENTRY OF A LABOR PERSPECTIVE IN THE DEVELOPMENT OF THE INTERNATIONAL ANTI-TRAFFICKING LEGAL REGIME

Since the first modern international anti-trafficking law was first adopted a dozen years ago, the field has experienced extraordinarily rapid development and proliferation of legal norms and programming at every level. Substantial resources have been dedicated to the anti-trafficking cause, incentivizing governments and advocacy groups to claim and/or develop anti-trafficking expertise to tap funding streams and garner mainstream public attention.

It was only quite belatedly, however, that labor institutions and labor rights advocates joined the fray. The International Labor Organisation was conspicuously absent from the drafting of the UN Trafficking Protocol, and until very recently, labor rights advocates maintained a wary distance from the anti-trafficking field. Their belated entry has positioned labor rights institutions and advocates as outsiders to a field that from its inception has been consistently dominated by criminal justice priorities. While, for example, human rights advocates have made important gains in the field, the dominance of the criminal justice paradigm has limited the scope of these hard-fought rights protections and rendered them invariably secondary to prosecutorial priorities. Efforts to inject a labor perspective into anti-trafficking law and policy represent a second attempt to shift field away from its criminal-justice-dominated frame. Exploitation creep can be seen as a response to that move, which is explored in detail below.

A. *Dominance of the Crime Control Paradigm*

During the 1990s, the international community began to realize that existing international anti-trafficking laws, developed during the early 1990s and focused entirely on women in the sex sector, were inadequate to address modern manifestations of the problem. Rights advocates were seeing increased incidence of men, women, and children being recruited and/or moved into exploitation in agriculture, domestic work, construction, begging, among many other sectors of the economy – in a process entailing a multiple rights abuses along the way, the sum of which exceeded their parts. Countries of origin, increasingly reliant on labor migration as a development strategy,¹⁴ voiced concerns about the well-being of their nationals abroad. Countries of destination were concerned about the security implications of increased clandestine migration, particularly the involvement of organized criminal syndicates in that process. The latter set

¹⁴ Insert citation to Rosser remittances article; MPI circular migration reports

of concerns quickly dominated and shaped the normative and institutional development of a new global anti-trafficking law and policy regime, as discussed below.

1. [Normative Development]

When the international community finally came together to develop a new international anti-trafficking treaty in the late 1990s, it did so in the form of a Trafficking Protocol to the U.N. Convention on Transnational Organised Crime then being drafted. Until that point, trafficking had been an “obscure but jealously guarded” and relatively inactive mandate of the UN human rights system.¹⁵ That it had been so “unceremoniously plucked” out the human rights realm and placed under the purview of the U.N. Office of Drugs and Crime (UNODC) was a rude awakening for human rights advocates.¹⁶ The shift meant that the first effort to draft a modern international anti-trafficking treaty would be undertaken by law enforcement officials who were unversed in human rights standards and interested in them only insofar as they served crime control goals.¹⁷ Instead of articulating a comprehensive human rights approach to addressing the trafficking phenomenon, human rights advocates were limited to arguing the instrumental value of infusing human rights standards into criminal-justice-prioritized frameworks.¹⁸

Crime control prerogatives have shaped and dominated the modern anti-trafficking movement from the UN Trafficking Protocol’s inception. Trafficking was framed as a crime perpetrated by criminal syndicates, unwittingly suffered primarily by innocent women and children, and best addressed by aggressive criminalization.¹⁹ Although the dominant rhetoric of the negotiations traded heavily in wrenching imagery of the iconic trafficking victim,²⁰ U.N. Protocol drafters were nonetheless deeply resistant to actually recognizing their victimhood as a matter of law. This is most aptly evidenced by the Protocol drafters’ categorical rejection of a provision prohibiting governments from imposing criminal penalties on

¹⁵ 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). As Gallagher further explains, the U.N. expert group that addressed the trafficking issue (and only sporadically so) – the U.N. Working Group on Contemporary Forms of Slavery – was a “marginal and marginalized body.” *Id.* at 792. **Note it was keeper of the 1949 convention; but WG was always on the brink of not being renewed – find UN citations.**

¹⁶ *Id.*

¹⁷ Gallagher HRQ article

¹⁸ Cite to radhika position paper

¹⁹ insert references from UNTP travaux

²⁰ insert citation to Jayashri’s piece

trafficked persons for crimes committed as a result of the trafficking (e.g., prostitution, undocumented migration).²¹ Moreover, the substance of States' obligations under the Protocol reflects the clear priority placed on criminal prosecution of traffickers, obliging States to pursue criminal prosecution of traffickers as a matter of hard obligation, but only to "consider" "in appropriate circumstances" providing protections to trafficked persons and undertaking measures to prevent trafficking in the first instance.²²

This is not to say, however, that human rights advocates have not made any gains in the field. In 2002, the UN human rights agency issued the UN Principles and Guidelines on Human Rights and Human Trafficking (UNPGs) to affirm the primacy of human rights and provide States with much-needed specific guidance for ensuring those rights, particularly in the context of law enforcement proceedings. Heightened attention to the human rights of trafficked persons has since led to incorporation of more substantive rights protections in subsequently adopted regional and domestic laws, including most notably the [European Trafficking Convention].²³ A number of the provisions human rights advocates unsuccessfully sought to include as hard obligations under the Trafficking Protocol found a home in this European treaty. States are not simply encouraged, but required, for example, to protect the private life and identity of victims, and to provide victims secure accommodation, psychological, legal, and material assistance, and a 30-day "recovery and reflection period," renewable temporary residence permit, and a bar against penalties on victims for any compelled involvement in unlawful activities.²⁴

Yet, inasmuch as human rights norms play a more significant role now than a decade ago, anti-trafficking laws and policies remain the consistent target of human rights advocacy.²⁵ Human rights gains have largely been limited to providing victims certain rights protections post-trafficking. Structural vulnerability to trafficking in the first instance remains under-addressed, if addressed at all. Given the criminal justice-dominated dynamics of the field, this is hardly surprising. The shift towards greater inclusion of rights protections resulted from governments'

²¹ Gallagher? Example of Saudi Arabia. Explain how thankfully we got Art 14 savings clause.

²² Insert examples from UN Protocol

²³ Insert cite to ETC and examples from US law.

²⁴ Compare U.N. Trafficking Protocol, arts. 6 (obliging States "to consider" implementing measures to provide for the physical, psychological and social recovery of victims of trafficking), and European Trafficking Convention, required measures found in arts. 11 (protection of private life), 12 (required assistance to victims), 13 (recovery and reflection period), and 26 (non-punishment of victims).

²⁵ Cite criticisms of system from human rights advocates

reluctant recognition of their instrumental value to facilitating prosecution of traffickers, not some deepened appreciation of the intrinsic value of human rights. Hence, the rights protections that governments do afford – e.g., residency status, access to housing, legal assistance, etc. – are typically contingent on criminal justice goals first being served.²⁶ Indeed, governments may subject trafficked persons to further rights incursions in the course of pursuing criminal justice priorities – for example, confining victims to trafficking “shelters” for months, even years, while awaiting trial, prohibiting them from working or even maintaining contact with the outside world.²⁷

2. [Institutional Roles]

Much as the structure and content of international anti-trafficking norms prioritize crime control concerns, so do the governments and international institutions assuming leadership of global anti-trafficking efforts. The official guardian of the U.N. Trafficking Protocol,²⁸ the UN Office of Drugs and Crimes (UNODC) provides technical and legislative guidance to countries regarding Protocol implementation,²⁹ conducts research and analysis on trafficking,³⁰ and coordinates the annual Conference of States Parties where governments meet to discuss implementation issues.³¹ Other segments of the United Nations may also address trafficking issues – most specifically the human rights-focused U.N.

²⁶ In the United States, for example, trafficked persons are entitled to residency status and the same social services (e.g., housing, counseling, etc.) as those that asylum-seekers receive. But whereas asylum seekers receive them upon identification as asylees, trafficked persons must pursue civil or criminal actions against their traffickers in order to qualify for these benefits -- even notwithstanding the fact that such measures may very well place trafficked persons at risk of possible trafficker retaliation against themselves and/or their family members. [consider citing Italy as a counter-example, noting it's a rare exception]

²⁷ Anne and Elaine's detention piece; Israeli detention study

²⁸ UNODC, Human Trafficking, available at <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menuaside>.

²⁹ See e.g., UNODC Model Law against Trafficking in Persons (2010), available at http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menuaside#Issue_Papers/

³⁰ See e.g., Issue Paper: Abuse of a Position of Vulnerability and other “Means” Within the Definition of Trafficking in Persons (2012), available at http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menuaside#Issue_Papers.

³¹ insert citations to UN Protocol provisions dealing with conference of parties, etc.

Special Rapporteur on Trafficking.³² But the UNODC retains ultimate authority over the trafficking mandate, and explicitly exercises this power through the lens of being “the only [UN] entity focusing on the criminal justice element of [trafficking crimes].”³³ The UNODC does not have the power to compel government compliance with UN Protocol norms, however. Because the U.N. Protocol treats the eradication of human trafficking as a transnational endeavor requiring close collaboration between government law enforcement agencies, this limitation is by design – measures to shame or sanction non-compliant governments would have been fundamentally at odds with the treaty structure and goals.³⁴

In the absence of an international anti-trafficking enforcement mechanism, the United States government has stepped into the breach, wielding its economic leverage to influence governments’ anti-trafficking responses.³⁵ The U.S. government had assumed the reigns of power in the global anti-trafficking field early on, having developed the Protocol’s underlying “3P’s” (focused on prosecution, protection, and prevention) policy framework and led negotiations over the U.N. Protocol’s substantive contents.³⁶ Within two months of Protocol adoption, the U.S. Congress passed the 2000 U.S. Trafficking Victims Protection Act (TVPA),³⁷ which among other measures, established a unilateral sanctions regime to compel other governments to abide by a set of “U.S. minimum standards for combating trafficking.”³⁸ Each year, the TVPA-created State Department Office to Monitor and Combat Trafficking in Persons (U.S. TIP Office) issues an annual Trafficking in Persons Report (TIP Report) ranking countries’ efforts to abide by these standards, with those countries receiving the lowest ranking then potentially subject to U.S. economic sanctions.³⁹

³² United Nations Human Rights, Office of the High Commissioner for Human Rights, Special Rapporteur on trafficking in persons, especially in women and children website, *available at* <http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx>.

³³ UNODC on human trafficking and migrant smuggling, *available at* <http://www.unodc.org/unodc/en/human-trafficking/index.html?ref=menuaside>.

³⁴ *Cite to Anne G HRQ piece*

³⁵ *Cite to Global Sheriff, Indicators pieces.*

³⁶ *Insert citation to Global Sheriff article*

³⁷ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) [hereinafter TVPA], as supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 [hereinafter 2003 TVPRA], and the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) [hereinafter 2005 TVPRA], and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 [hereinafter 2008 TVPRA] (codified at 22 U.S.C. § 7101).

³⁸ TVPA, *supra* note 37, at §§ 108, 110.

³⁹ These sanctions are non-humanitarian-related and non-trade-related, and include

Wielding the sanctions threat has enabled the U.S. government to police the anti-trafficking efforts of governments worldwide. Whether motivated by reputational or economic risk, governments surprisingly have complied (however begrudgingly) with this mechanism.⁴⁰

In its role as “global sheriff” on trafficking, the U.S. TIP Office has played a crucial role in maintaining global dominance of the criminal justice approach to trafficking. The U.S. minimum standards themselves are infused with a strong crime control focus. The first three of the four minimum standards target governments’ efforts to punish traffickers, while the fourth standard utilizes a list of indicia the foremost of which is government’s efforts to “vigorously investigate[] and prosecute[]...trafficking.”⁴¹ Although the TIP Reports now more substantively consider government measures to prevent trafficking and protect its victims than previously, the TIP Report continues to showcase and systematically track governments’ efforts to prosecute and punish

withdrawal of both U.S. direct financial assistance and U.S. government support for multilateral aid packages (e.g., World Bank or IMF funds). TVPA, *supra* note 37, at §§ _____. Countries receiving the lowest ranking (Tier 3) in the annual TIP Report have a 90 day grace period during which to improve their performance before the sanctions determination is made. Moreover, the U.S. President can waive sanctions in the U.S. national interest or in the interest of promoting the goals of the TVPA, or in order to avoid significant adverse effects on vulnerable populations. *Id.*, at §110(d).

⁴⁰ cite to global sheriff and indicators chapter.

⁴¹ The four minimum standards are as follows:

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

See TVPA, *supra* note _____, § 108(a). Note that the criteria for the fourth minimum standard have been expanded and refined with each Reauthorization of the TVPA. *See insert citations to relevant TVPA sections.* The TIP Office exercises more discretion in articulating and applying the criteria underlying the minimum standards to government practices than is immediately apparent. Close review of the TIP Reports reveals, for example, the application of a set of “shadow indicators” that go well beyond the criteria enumerated in the TVPA. 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 332-33 (Kevin Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry, eds.) (2012).

trafficking.⁴²

With the UNODC as the guardian of the UN Protocol and the U.S. government as enforcer of a criminal justice-dominated paradigm, it can come as no surprise that international anti-trafficking laws and policies continue to prioritize crime control over all other goals. It is within this limited space that advocates continue to struggle to bring attention to the “lesser P’s” of protection of victims and prevention of trafficking. Of the two, prevention remains, by far, the most underdeveloped of global anti-trafficking law and policy. Rather than measures targeting structural vulnerability to trafficking, such interventions typically focus on public awareness campaigns of questionable effect on their target populations.⁴³

B. Belated Entry of a Labor Perspective

Against this backdrop of crime control dominance and limited infusion of human rights norms, a labor perspective was first brought to bear on the anti-trafficking field in 2005. While the link between the trafficking phenomenon and labor practices now seems fairly obvious, the early years of the modern anti-trafficking movement were almost entirely devoid of a labor perspective. As the standard-bearer for international labor rights norms since the time of the League of Nations, the International Labour Organization (ILO) ought to have been a key player during the U.N. Protocol negotiations. After all, many of the international treaties adopted and promulgated by the ILO codify rights that are violated in the course of a trafficking scheme – forced and child labor in particular.⁴⁴ Yet, despite its broad and deep expertise in promoting respect for these rights, the ILO maintained a conspicuously low profile throughout the Protocol negotiations and the first five years of the treaty regime. In similar vein, grassroots anti-trafficking advocacy efforts were largely devoid of workers’ rights organizations and unions, instead dominated by organizations operating under a human rights rubric. The last five years have born witness to a palpable shift, however, with more aggressive efforts by the ILO to stake a claim in the anti-trafficking field, and unions and workers’ rights organizations entering the field.

1. The ILO

⁴² Insert examples/description of TIP Report prosecution rate charts.

⁴³ [JAC discuss SEE Report; prevention analyses in TIP reports]

⁴⁴ Insert citation to 1930 convention. The few exceptions were eventually targeted for abolition in a subsequent treaty. Insert citation to later forced labor convention.

During the UN Protocol negotiations, the ILO consciously deferred to other international institutions to lead the charge for including the coercive elements of forced labor, debt bondage, and slavery-like practices in the trafficking definition.⁴⁵ The ILO's posture during the negotiations is at least partly attributable to the notoriously divisive politics surrounding the legal definition of trafficking in the treaty. Debates over whether all prostitution could be considered human trafficking on the theory – advanced by some prominent feminists – that all prostitution is inherently coerced⁴⁶ consumed negotiations over the trafficking definition.⁴⁷ The ILO [presaged/fueled] this debate when shortly before the Protocol negotiations began, it released a highly controversial report, entitled *The Sex Sector*, recommending that governments recognize the sex sector as an economic sector and develop laws and policies to protect those working within the sector from abuse.⁴⁸ Though it explicitly refused to take a stance on the question of whether prostitution ought to be legalized, the ILO report drew a firestorm of criticisms from governments and anti-prostitution feminists for allegedly offering “an economic anointment of the sex industry.”⁴⁹

Notwithstanding the ILO's self-consciously low profile during the Protocol negotiations, the ILO was well-aware of the opportunity that the strong international consensus around the Trafficking Protocol presented. The U.N. Protocol was developed on the heels of the ILO's adoption of its 1998 Declaration on Fundamental Principles and Rights at Work (“Declaration”).⁵⁰ The Declaration establishes a set of four “core labor standards” – including the prohibition of forced labor – that all ILO members are obliged to respect, promote and realize.⁵¹ The Declaration was partly an attempt to revitalize the ILO – an international organization that had long been viewed as “ineffective and weak”⁵² – by focusing on a core group of treaties with “the most compelling normative claim to

⁴⁵ INTERNATIONAL LABOUR OFFICE, STOPPING FORCED LABOUR 48, 100 (2001).

⁴⁶ Insert citations to mackinnon, dworkin, CATW, etc.

⁴⁷ Insert citations to protocol travaux; Gallagher HRQ; chuang; doezema.

⁴⁸ INTERNATIONAL LABOUR OFFICE, THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA (1998).

⁴⁹ See e.g., Janice G. Raymond, *Legitimizing Prostitution as Sex Work: UN Labour Organization (ILO) Calls for Recognition of the Sex Industry*, Coalition against Trafficking in Women (website), available at <http://action.web.ca/home/catw/readingroom.shtml?x=16741>. Insert citations to govt reactions to the report

⁵⁰ Describe debate over wisdom of ILO Declaration approach – cite EJIL articles – Helfer, Maupain, and Langille.

⁵¹ Insert citation to Declaration

⁵² Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VANDERBILT L. REV. 649, 704 (2006).

adherence” among its membership.⁵³ In truth, until the ILO Declaration’s adoption, the ILO’s work on forced labor had been quite limited, [consisting only of sporadic reporting and guidance to individual States regarding implementation of the forced labor treaties].

The advent of the modern anti-trafficking regime [enabled] the ILO to pursue eradication of forced labor with renewed vigor.⁵⁴ Inspired by the broad and deep international consensus surrounding the UN Trafficking Protocol’s adoption, 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.⁵⁵ The ILO SAP-FL did not, however, make its formal mark on the anti-trafficking movement until 2005, with the media-savvy release of its second quadrennial forced labor report.⁵⁶ The report drew a great deal of attention partly due to its release of “global estimates” of the numbers of victims of forced labor (12.3 million) and trafficking (roughly 2.5 million)⁵⁷ – at a time when policymakers and advocates were eager for new trafficking statistics to replace existing statistics that had been roundly criticized as inaccurate.⁵⁸ In addition to reporting the incidence of trafficking and forced labor in subsequent quadrennial forced labor reports, the ILO has also produced a set of “operational indicators of trafficking in human beings” used by governments worldwide to collect data regarding human trafficking in their countries.⁵⁹

Most recently, however, the ILO has made a concerted effort to infuse anti-trafficking discourse and policy-making with a labor perspective. Noting that the criminal justice focus of anti-trafficking

⁵³ Helfer, *supra* note 54, at 709. Explain how Declaration binds everyone; explain monitoring mechanism.

⁵⁴ Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VANDERBILT L. REV. 649, 704 (2006).

⁵⁵ INTERNATIONAL LABOUR OFFICE, FORCED LABOUR, CHILD LABOUR AND HUMAN TRAFFICKING IN EUROPE: AN ILO PERSPECTIVE (2002).

⁵⁶ INTERNATIONAL LABOUR ORGANIZATION, A GLOBAL ALLIANCE AGAINST FORCED LABOUR (2005) [hereinafter 2005 ILO FORCED LABOUR REPORT]. The launch of the report, which this author attended, was hosted by the BBC World Service Trust and the Massachusetts Institute of Technology, and featured on WBUR/NPR’s “On Point” radio program (hosted by Tom Ashbrook) and the BBC World’s “The World Debate” (hosted by Zeinab Badawi).

⁵⁷ 2005 ILO FORCED LABOUR REPORT, *supra* note 56, at 10-15.

⁵⁸ Cite as example US govt’s dramatic shift in statistics re: trafficking...GAO report

⁵⁹ INTERNATIONAL LABOUR ORGANIZATION, SAP-FL, OPERATIONAL INDICATORS OF TRAFFICKING IN HUMAN BEINGS (2009), http://www.ilo.org/sapfl/Informationresources/Factsheetsandbrochures/WCMS_105023/lang--en/index.htm.

Comentari [JC1]: JAC to review ILO records on this point.

initiatives continues to prioritize prosecution of traffickers over trafficking prevention and victim protection, the ILO is now considering adopting a new legal instrument intended to update its forced labour conventions and to address, specifically, “human trafficking for labour exploitation.”⁶⁰ In the ILO’s view, a “complementary labour approach that takes into account the role of labour administration and labour inspection in preventing and combating forced labour” could improve prevention and protection measures for victims.⁶¹ Indeed, according to the ILO, that non-sex-sector trafficking “remained significantly under-detected” compared to sex-sector trafficking is perhaps because “criminal justice approaches and prosecutions were pursued to the exclusion of other relevant areas of law, including labour law.” Hence, the ILO is considering developing a Protocol to its forced labour instruments to pursue complementary labour approaches to eradicating forced labor, including forced labor resulting from trafficking.⁶²

2. Grassroots Advocacy

Much as a labor perspective was only belatedly brought to bear on anti-trafficking work at the governmental/institutional level, grassroots advocacy was similarly missing a substantive labor perspective until very recently. The first decade of the anti-trafficking advocacy movement was dominated by organizations that promoted a human rights and/or gender approach to the problem of human trafficking, including, e.g., Human Rights Watch, International Human Rights Law Group (later renamed Global Rights), Global Alliance Against Trafficking in Women, and Coalition Against Trafficking in Women. While human rights and some feminist organizations encouraged the incorporation of labor rights into anti-trafficking policy platforms, workers’ rights organizations and labor unions were otherwise absent from anti-trafficking working groups and coalitions for most of the first decade of the modern anti-trafficking

⁶⁰ INTERNATIONAL LABOUR OFFICE, INTERNATIONAL LABOUR STANDARDS DEPARTMENT, *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), Geneva 11-15 February 2013*, ILO Doc. TMELE/2013 [hereinafter ILO Forced Labour and Trafficking Discussion Paper].

⁶¹ ILO Forced Labour and Trafficking Discussion Paper, *supra* note 60, at para. 15.

⁶² International Labour Office, Governing Body, *Report and conclusions of the Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation*, ILO Doc. GB.317/INS/INF/3, 317th Session, Geneva, 6-28 March 2013 [hereinafter ILO Forced Labour and Trafficking Tripartite Meeting Report].

movement.⁶³ Labor organizations instead continued to work on workers' rights issues, in parallel rather than in conjunction with the anti-trafficking movement. Organizations such as the Solidarity Center and the National Guestworkers Alliance were the rare exceptions to this dynamic, explicitly linking their work to improve labor standards for migrant workers to an anti-trafficking agenda.

The increased focus on non-sex-sector trafficking over the last few years, labor unions and workers' rights organizations have assumed a more substantive and visible role in anti-trafficking law and policy-making, and vice versa. Two issues in particular have provided fruitful opportunities for anti-trafficking and labor rights advocates to collaborate: (1) domestic workers' rights advocacy, and (2) efforts to target abusive labor recruitment practices. For example, the development of the ILO Domestic Workers Convention during 2010-2011 – the ILO's first instrument to target an informal sector of the economy – drew the attention of anti-trafficking advocates who had long been concerned with domestic worker trafficking by diplomats.⁶⁴ Meanwhile, growing concern over the inadequacy of existing international laws to address abuses by third-party recruitment agencies has also prompted much deliberation at the ILO and among international and domestic labor rights advocates. Recognizing the role of foreign labor contractors in [creating conditions of servitude] through, for example, exorbitant recruitment fees, non-disclosure of fees and working conditions, and retaliation against worker complaints and efforts to organize, the International Organization for Migration (IOM) and Verite International have developed voluntary ethical frameworks to govern recruiter activity. Legal reforms are also being pursued – in the United States, for example, the Alliance to End Slavery and Trafficking (ATEST), a coalition of anti-trafficking organizations,⁶⁵ together with the International Labor Recruitment Working Group, a coalition of labor groups interested in addressing foreign labor recruitment abuses,⁶⁶ developed and successfully

⁶³ JAC to discuss how sex workers' groups attempted to have a say too – but prostitution reform debates proved too controversial so they were sidelined... see Doezema, now you see her now you don't article.

⁶⁴ Insert citations to ILO prep documents re: trafficking bits...

⁶⁵ ATEST stands for the Alliance to End Slavery & Trafficking. As described on its website, ATEST "is a coalition of U.S.-based human rights organizations working to end modern-day slavery and human trafficking in the United States and around the world." Its members include the Coalition of Immokalee Workers (CIW), Coalition to Abolish Slavery & Trafficking (CAST), End Child Prostitution and Trafficking-USA (ECPAT-USA), Free the Slaves, International Justice Mission (IJM), Not for Sale Campaign, Polaris Project, Safe Horizon, Solidarity Center, Verité, Vital Voices Global Partnership, and World Vision. See ATEST website, <http://www.endslaveryandtrafficking.org/about-atest>.

⁶⁶ See THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR

lobbied for draft legislation, entitled “Prevention of Trafficking in Persons and Abuses Involving Workers Recruited Abroad,” to be incorporated into the comprehensive immigration reform bill introduced in April 2013.⁶⁷

These combined efforts have helped shine a spotlight on a spectrum of labor abuses, ranging from wage and hour violations to far more extreme forced labour situations. Although “trafficking” technically occupies only one end of the continuum, labor and anti-trafficking advocates have capitalized on the political will behind the anti-trafficking/“slavery” cause to push for argue for more robust labor protections as a vehicle for preventing trafficking in the first instance.

II. EXPLOITATION CREEP

In one sense, the U.S. TIP Office appears to have welcomed the infusion of a labor perspective into global anti-trafficking efforts, incorporating more labor analyses into each successive TIP Report, for example. But closer examination of U.S. TIP Office activities reveals a set of moves that, intentionally or not, risk limiting the reach and impact of a labor approach to human trafficking. I characterize these moves as engaging in “exploitation creep,” or the framing of a phenomenon as arguably more extreme than the label’s underlying legal concept would support. The first of these moves is an effort to recast all forced labor as trafficking – in direct contrast to the ILO’s position that trafficking is but a subset of forced labor. The second move is a concerted push to reframe all trafficking as “slavery”. These moves manifest themselves in doctrinal interpretation of the U.N. Protocol and other international legal instruments, and also in the rhetoric used to characterize the problem and frame solutions thereto.

What might otherwise be viewed as a rather promiscuous conflation of these legal concepts is possible here because of the notoriously rigor-free nature of the anti-trafficking field. This partly results from the fact that, unlike other fields where an advocacy movement spurs creation of a new legal regime – in the trafficking field, the reverse occurred.⁶⁸ Catching rights advocates flat-footed, governments created and adopted the UN Trafficking Protocol in record time, fueled largely by security concerns over

RECRUITMENT ABUSE (2013), <http://www.cdmigrante.org/wp-content/uploads/2013/02/Final-E-version-ILRWG-report2.pdf>.

⁶⁷ Border Security, Economic Opportunity, and Immigration Modernization Act, S. _____ (introduced by Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet, and Flake), 113th Congress, 1st sess. (April 17, 2013).

⁶⁸ I owe this insight to Luis CDeBaca, the U.S. Ambassador-at-Large for Trafficking in Persons (2009 to present).

increasingly porous borders. For the sake of quickly achieving international consensus over the treaty, the UN Protocol drafters adopted a definition of trafficking that included chronically vague elements that remain both undefined under international law and subject to vast differences in interpretation. The vagaries of the trafficking definition have since enabled advocates of different stripes to pursue their (sometimes conflicting) causes under the “trafficking” banner. Indeed, widespread government and foundation support for anti-trafficking programs has created a veritable “trafficking industrial complex” boasting lucrative funding opportunities, incentivizing public interest organizations to frame their work as anti-trafficking projects in order to tap otherwise shrinking public interest funding possibilities. Consequently, “trafficking” in the eye of different beholders has alternately meant combating all (even “voluntary”) prostitution, international marriage brokering, the labor rights abuse of low-wage migrant workers or, indeed, of any worker (alien or not) trapped at the bottom of the global economy.

The rapid population of the trafficking field by such diverse actors and agendas has further muddied the already murky doctrinal waters. Much of the modern anti-trafficking movement’s first decade was consumed, for example, by debates over whether the scope of the trafficking definition encompasses non-coerced adult prostitution. Indeed, Whether the U.N. Protocol definition’s inclusion of such phrases as “exploitation of the prostitution of others or other forms of sexual exploitation” and “abuse of a position of vulnerability” consumed the first decade of the modern anti-trafficking movement, and continues to fuel the (often morally-charged) positions of sex workers’ rights advocates and anti-prostitution neo-abolitionists alike.⁶⁹ The recasting of forced labor as trafficking, and trafficking as slavery heralds a second generation of definitional debates, this time waged between government bureaucracies seeking – and resisting – a more capacious role for the trafficking regime. This dynamic has placed up for grabs the power to fundamentally reconceptualize the problem of trafficking and the appropriate paradigm and actors to address it, as discussed below.

A. *Creep #1: Trafficking Subsumes Forced Labor*

Although the ILO’s 2005 statistical data on the global incidence of trafficking and forced labor was widely welcomed and subsequently cited as authoritative, the ILO’s characterization of trafficking as but a small

⁶⁹ [Cite to penn piece, maryan wijers, the trafficking protocol guides; recent article by michelle dempsey et al.](#)

subset of forced labor posed a serious problem for the U.S. government. By 2005, the U.S. TIP Office had adopted the view that trafficking encompasses *all* forced labor – hence, the reverse of the ILO’s position. Moreover, having settled into the role of “global sheriff” over other governments’ anti-trafficking efforts,⁷⁰ the TIP Office was intent on exporting this view abroad. For the ILO to offer a directly contrary interpretation of “trafficking” was a jarring challenge to the U.S. government’s efforts to exert authority in the anti-trafficking field. Other governments already viewed the U.S. government’s anti-trafficking sanctions regime as a bald, illegitimate exercise of U.S. hegemonic power, particularly on the heels of the internationally-backed UN Protocol. By contrast, the ILO enjoyed international support and stature as the standard-bearer in labor law. Moreover, by subsuming trafficking under its forced labor portfolio, the ILO could claim international expertise dating back to 1930, when the ILO’s Forced Labour Convention was adopted.⁷¹

The U.S. TIP Office initially bore the differences of opinion without much public protest. But enter the Obama Administration and its efforts to spotlight non-sector trafficking, and the definitional disagreement came to a head. The following discussion maps the doctrinal disagreement and the ensuing bureaucratic turf wars.

1. Interpreting the UN Protocol Trafficking Definition

The U.N. Protocol defines “[t]rafficking in persons” as:

... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, or fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs....⁷²

Roughly summarized, the Protocol trafficking definition can be broken down into three elements: (1) an *act* (“recruitment, transportation...receipt”), (2) by *means* (“of the threat or use of force...control over another person”), (3) for the *purpose of exploitation* (“exploitation of the prostitution of others...forced labour, slavery...”).

Under the UN Protocol definition, therefore, forced labor is one

⁷⁰ See discussion accompanying *supra* note ____.

⁷¹ Insert citations to and discussion of the forced labour treaties – i.e., what follow-up treaty did.

⁷² UN Protocol, *supra* note ____, art. 3.

form of exploitation to which trafficked persons may be subjected. The subject of ILO treaties since 1930, forced labor is defined 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.”⁷³ While the ILO has been less than forthcoming as to where precisely it draws the line, the ILO distinguishes trafficked forced labor from non-trafficked forced labor,⁷⁴ viewing the former as requiring an additional element of movement or recruitment.⁷⁵ In other words, trafficking entails a process element: only a person recruited or moved by a third party into a forced labor situation would be considered “trafficked.” The absence of that process element – for example, situations of intergenerational bonded labor, where individuals are born into bondage⁷⁶ – would be considered non-trafficked forced labor.

The U.S. TIP Office, on the other hand, argues that inclusion of “harbouring” and “receipt” in the action element of the UN Protocol definition justifies interpreting trafficking as encompassing all forced labor. Although undefined under international law, “harbouring,” according to the TIP Office, brings practices traditionally viewed as “non-trafficked forced labor” within the ambit of the trafficking definition.⁷⁷ Taking the intergenerational bonded labor example, the TIP Office would argue that the party to whom the family is indebted engages in “harbouring” by exerting control over the family through the debt. Indeed, under this broad reading, trafficking definition potentially covers not just recruiters and brokers, but also owners, managers, or anyone in control of any place of exploitation (e.g., household, brothel, factory, field, etc.).⁷⁸

2. Turf battles

When first confronted with the ILO’s contrary view of the relationship between trafficking and forced labor in 2005, the U.S. TIP Office did not publicly object. Instead, the 2006 TIP Report includes an explicit statement that trafficking does not require movement as a matter of law.⁷⁹ The 2006 and subsequent TIP Reports simply selectively reproduce the ILO statistics, carefully referring only to the ILO’s global estimate for

⁷³ Insert citation to FL Treaties

⁷⁴ cite to annoyingly wishy-washy ILO reports.

⁷⁵ Cite to Beate Andreas piece

⁷⁶ insert a footnote explaining this practice

⁷⁷ JAC to see if this argument is written down anywhere– otherwise, cite to author conversations with Lou?

⁷⁸ *Id.*

⁷⁹ Cite to 2006 TIP report

“forced labor” and not the smaller “trafficking” statistic.⁸⁰

The TIP Office’s relatively muted response to this disagreement is likely attributable to at least two key factors. First is the fact that this difference of opinion arose during the years of the Bush Administration, which pursued trafficking through a lens that pushed the trafficking versus forced labor definitional debate to the periphery. The Bush Administration TIP Office had focused its efforts on eradicating trafficking of women and girls into the sex sector, and from a policy perspective that equated all prostitution (including “voluntary” adult prostitution) with trafficking. The consequent refusal to equate prostitution with “labor” prevented trafficking from being connected to “forced labor” as a conceptual matter. This position, combined with the then-TIP Office’s relatively scant attention to non-sex-sector trafficking, together rendered concerns over the relationship between trafficking and forced labor largely irrelevant to its day-to-day functioning.

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

The political landscape changed, however, with the entry of the Obama Administration. The Obama TIP Office made a concerted effort to broaden the spotlight to non-sex sector trafficking, making the link between trafficking and “labor” much more visible and explicit.⁸¹ Increasingly, however, the TIP Office came to view DRL and ILAB’s adherence to the ILO’s trafficked versus non-trafficked forced labor distinction a stumbling block to the TIP Office’s efforts to pull focus to a broader range of abusive labor practices, including intergenerational debt bondage. The TIP Office therefore sought a unified U.S. government position that the legal concept of trafficking encompasses all forced labor. But continued resistance from ILAB caused the dispute to be brought to the National Security Council (NSC) for resolution. The NSC ultimately decided in the TIP Office’s favor – requiring all U.S. government agencies to hew to the definitional

⁸⁰ Cite to examples in 2006+ TIP Reports

⁸¹ JAC to insert examples from TIP reports

boundaries drawn by the TIP Office.

The TIP Office's interventions were not limited to domestic fora, however. Seeing itself as having a role in developing international labor standards, the U.S. TIP Office sent a delegation to the 2010-2011 negotiations over the ILO Domestic Workers Convention – notwithstanding ILAB's role and presence there as lead U.S. government negotiator for international labor treaties. During the negotiations, the U.S. TIP Office delegation unsuccessfully attempted to include treaty language that [implicitly?] deemed as “trafficking” practices that the ILO would consider non-trafficked forced labor.

Behind the scenes, the TIP Office has continued to pressure the ILO to adopt its interpretation of the trafficking definition, prompting embattled responses from the ILO. Apparently temporarily swayed, in 2011, the ILO circulated a draft of its survey guidelines for estimating forced labour, entitled *Hard to see, harder to count*, which offered both a “narrow definition” and a “broad definition” of trafficking. While the “narrow” version retained the trafficked versus non-trafficked distinction, the “broad” definition reflected the U.S. TIP Office's perspective such that: “[i]rrespective of movement...any adult or child worker engaged in forced labour is classified also as a victim of human trafficking.”⁸² The final (2012) version of the report deleted this language, however, offering the following guidance regarding the relationship between trafficking and forced labor:

In the context of determining an operational definition of trafficking for forced labour, for the purpose of data collection, it is necessary to raise two issues: first, whether movement of the victim either within or across national borders is a necessary condition for trafficking, and second, whether the involvement of an intermediary or other third party is required. While neither of these criteria has to be present in order to prosecute a case of human trafficking, national policy-makers may nonetheless decide to distinguish between “trafficked” and “non-trafficked” (or other forms of) forced labour. This may help them to devise differentiated policy responses that are best adapted to the national context and specific target groups. The present guidelines, which are designed for the purpose of statistical data collection, do not adopt a position on this issue.⁸³

Moreover, in the ILO's 2012 release of a new “global estimate of forced labor” (updating its 2005 statistic), the ILO copiously avoids the trafficking issue altogether.⁸⁴ In that report, the ILO reports a total of 20.9 million

⁸² INTERNATIONAL LABOUR OFFICE, *HARD TO SEE, HARDER TO COUNT: SURVEY GUIDELINES TO ESTIMATE FORCED LABOUR OF ADULTS AND CHILDREN 20* (2011) (on file with author).

⁸³ INTERNATIONAL LABOUR OFFICE, *HARD TO SEE, HARDER TO COUNT: SURVEY GUIDELINES TO ESTIMATE FORCED LABOUR OF ADULTS AND CHILDREN 19* (2012).

⁸⁴ INTERNATIONAL LABOUR OFFICE, *ILO 2012 GLOBAL ESTIMATE OF FORCED*

Comentari [JC2]: JAC to check ILO prep documents for this language...

forced labourers, but unlike in 2005, does not include a separate “trafficking” statistic. In its 2012 TIP Report, the U.S. TIP Office underscores the omission, noting that “[t]his recognizes that human trafficking is defined by exploitation, not by movement.”⁸⁵ But what the TIP Office interprets as a concession is perhaps more aptly characterized as avoidance -- the term “trafficking” is nowhere to be found in the 2012 global estimate or its accompanying report detailing the methodology used.⁸⁶ Instead, the ILO implies a distinction between trafficking and forced labor, stating:

The estimates also allow an assessment of how many people *end up being trapped in forced labour following migration*. There are 9.1 million victims (44% of the total) who have moved either internally or internationally, while the majority, 11.8 million (56%), are subjected to forced labour in their place of origin or residence. Cross-border movement is strongly associated with forced sexual exploitation. By contrast, a majority of forced labourers in economic activities, and almost all those in state-imposed forced labour, have not moved away from their home areas. These figures indicate that movement can be an important vulnerability factor for certain groups of workers, but not for others.⁸⁷

Moreover, in response to the question “[i]s [forced labour] the same as trafficking and slavery?” posted on its website releasing the new estimate, the ILO answers only that human trafficking “can also be regarded as forced labour.”⁸⁸ Tellingly, it does not consider the harder question of whether forced labour can be considered trafficking, or slavery for that matter.

The ILO continues to struggle with whether and how to address the relationship between trafficking and forced labour, particularly as it proceeds to develop a Protocol to the ILO Forced Labour Conventions.⁸⁹ First among the discussion points to be addressed by a February 2013 Tripartite Meeting of Experts on the proposed instrument was whether and how to define the relationship between forced labour and trafficking, and

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

⁸⁵ U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT (2012).

⁸⁶ INTERNATIONAL LABOUR OFFICE, ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY (2012).

⁸⁷ ILO 2012 GLOBAL ESTIMATE, *supra* note 84, at 2 (emphasis added).

⁸⁸ International Labour Organization, Questions and answers on forced labour, Analysis, 01 June 2012 (website), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_181922/lang--en/index.htm.

⁸⁹ See discussion accompanying *supra* notes 60-62.

what regulatory gaps exist regarding trafficking and whether the ILO should address them through the proposed instrument.⁹⁰ Ultimately, due to deeply divergent views expressed at the expert meeting,⁹¹ the conclusions adopted by the expert group only imply a distinction between trafficking and forced labor, leaving its precise contours unaddressed.⁹²

B. Creep #2: Calling All Trafficking “Slavery”

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

I’m talking about the injustice, the outrage, or human trafficking, which must be called by its true name – modern slavery.... Now, I do not use that word, “slavery” lightly. It evokes obviously one of the most painful chapters in our nation’s history. But around the world, there’s no denying that awful reality....Now, as a nation, we’ve long rejected such cruelty. Just a few days ago, we marked the 150th anniversary of ...the Emancipation Proclamation....

-- President Barack Obama⁹³

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

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

⁹⁰ ILO Forced Labour and Trafficking Discussion Paper, *supra* note 60, at para 144 (Discussion point 1: Trafficking in persons).

⁹¹ ILO Forced Labour and Trafficking Tripartite Meeting Report, Appendix, *supra* note 62, at paras 37-59.

⁹² ILO Forced Labour and Trafficking Tripartite Meeting Report, Appendix, *supra* note 62, at 39 para 2 (noting that “the ILO should pursue complementary approaches in accordance with its mandate and expertise with a view to ensuring effective eradication of forced labour, including forced labour exacted as a result of trafficking.”)

⁹³ The White House, Office of the Press Secretary, Remarks by the President to the Clinton Global Initiative, New York, New York, September 25, 2012, *available at* <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>.

(laughter) – what we needed to do to improve transportation systems. But slavery, there is no mistaking what it is, what it means, what it does....
– U.S. Secretary of State Hilary Rodham Clinton⁹⁴

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

But what is novel about the Obama/Clinton statements is the shift from invoking slavery imagery for rhetorical flare to explicitly suggesting that “slavery” should replace “trafficking” because the latter is a passé, if not inaccurate, descriptor. This move is a far more intentioned use of the “slavery” than has ever been used before – rather than simply a tool to incentivize action, “slavery” is now being used to actively re-frame the problem. Yet, as discussed below, use of the slavery analogy in the trafficking field comes with a long, fraught history, and efforts to equate trafficking with slavery as a matter of U.S. law failed as little as five years ago. What accounts for the sudden embrace of “slavery” as conceptual frame? And at a time when we are also witnessing growing demands for a labor paradigm to be applied to the problem of human trafficking? These questions are explored below.

1. Slavery Rhetoric and the Anti-Trafficking Movement(s)

Efforts to equate trafficking with slavery have had a long and contested history. The earliest anti-trafficking treaties, passed in the early 1900s, targeted what was then referred to as “white slave traffic,” specifically the forcible or fraudulent recruitment into prostitution.⁹⁵ The use of “white slavery” was intended to both distinguish “female sexual slavery” from African enslavement and to draw a moral comparison between the two practices.⁹⁶ References to slavery were soon abandoned,

⁹⁴ U.S. Department of State, Release of the 2012 Trafficking in Persons Report, Remarks by Secretary of State Hillary Rodham Clinton, June 19, 2012, video and transcript available at <http://www.state.gov/secretary/rm/2012/06/193368.htm>.

⁹⁵ International Agreement for the Suppression of the White Slave Traffic, 1 LNTS 83, May 4, 1904, entered into force July 18, 1905; International Convention for the Suppression of the White Slave Traffic, 3 LNTS 278, May 4, 1910, entered into force Aug 8, 2012.

⁹⁶ GALLAGHER, *supra* note 98, at 55.

however, as “not reflecting the nature and scope of the problem.”⁹⁷ Moreover, the many international agreements adopted in the late nineteenth and early twentieth century to address enslavement of Africans “did not purport and were never considered to cover the practices now associated with trafficking, including sexual exploitation, forced labor, debt bondage, and child labor.”⁹⁸

Despite its contested use in the past, some activists resurrected the rhetoric of “sexual slavery” during the U.N. Protocol negotiations to garner support for using the treaty to abolish prostitution writ large. Invocation of “slavery” was largely rhetorical, intended to heighten outrage and galvanize support for legislation to address a range of abusive practices. Few, if any, legal advocates would have suggested that, but for the most extreme cases, trafficking met the legal threshold for slavery under international law. Defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,”⁹⁹ slavery has typically been associated with extreme situations, like chattel slavery, that involve the destruction of a person’s juridical personality. (Hence, unlike trafficked persons, who once they escape are free, slaves are not free by operation of the law.) Moreover, the prohibition of slavery being a *jus cogens* norm, international lawyers are loathe to expand its application for fear of diluting the norm.

In the U.S. context, the link between trafficking and slavery has clearer doctrinal underpinnings. Structurally, the then-new crimes of forced labor and trafficking the U.S. Trafficking Victims Protection Act (TVPA) established are incorporated into the peonage and slavery chapter of the U.S. Code.¹⁰⁰ Subsequent reauthorizations of the TVPA have reaffirmed

⁹⁷ GALLAGHER, *supra* note 98, at 13-14. *See e.g.*, International Convention for the Suppression of Traffic in Women and Children, 9 LNTS 415, September 30, 1921, entered into force June 15, 1922; International Convention for the Suppression of the Traffic in Women of Full Age, 150 LNTS 431, Oct 11, 1933, entered into force Aug. 24, 1934; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 UNTS 271, Dec 2, 1949, entered into force July 25, 1951.

⁹⁸ GALLAGHER, *supra* note 135, at 55.

⁹⁹ Convention to Suppress the Slave Trade and Slavery, 60 LNTS 253, Sept, 25, 1926, entered into force Mar. 9, 1927 [hereinafter Slavery Convention]. Later, the United Nations elaborated a new legal instrument to address certain institutions and practices similar to slavery, specifically debt bondage, serfdom, servile forms of marriage, and exploitation of children. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, 226 UNTS 3, Apr. 1, 1957, entered into force Apr. 30, 1957 [hereinafter Supplementary slavery Convention]. The Supplementary Slavery Convention retained the 1926 definition of slavery and created a new concept of “servile status” as attaching to a victim of slavery-like practices (as opposed to slavery).

¹⁰⁰ *See* 18 U.S.C. §§ 1589-1596.

and capitalized on trafficking's connection to slavery. The 2008 Reauthorization of the TVPA was named the William Wilberforce Trafficking Victims Protection Reauthorization Act to coincide with the 200th anniversary of the British Parliament's anti-slave trade legislation and named in honor of the famed British abolitionist. President Obama's and then-Secretary Clinton's above-quoted remarks were made to marshal support for the most recent reauthorization of the TVPA,¹⁰¹ timed to coincide with the 150th anniversary of the Emancipation Proclamation.

Yet, while the law recognized a conceptual link between trafficking and slavery, until 2009, U.S. government resisted conflation of the concepts. The birth of the modern anti-trafficking regime (international and U.S.) coincided with a then-nascent grassroots effort to abolish "modern-day slavery," led by sociologist Kevin Bales, author of the highly publicized book, *Disposable People*, in which Bales claimed that 27 million people were "enslaved" around the world.¹⁰² That statistic was roundly criticized by academics and policymakers as unsound, based as it was on Bales' own [made-up] definition of slavery, which was far broader than any found in actual law:

the control of one person (the slave) by another (the slaveholder or slaveholders). This control transfers agency, freedom of movement, access to the body, and labor and its products and benefits, to the slaveholder. The control is supported and exercised through violence and its threat. The aim of this control is primarily economic exploitation, but may include sexual use or psychological benefit.¹⁰³

The U.S. TIP Office did not even consider reproducing that statistic in its annual TIP Report as it was busy confronting its own demons, having itself produced and recycled faulty statistics. At one point, the TIP Office had even hired a private consulting company to develop a new statistic to improve upon the then-presumed-inflated U.N. estimate of 2.5 million people trafficked worldwide.¹⁰⁴

Notwithstanding the criticism, widespread attention to *Disposable People* inspired Bales to create the U.S.-based non-profit Free the Slaves in 2001, with the goal of "liberat[ing] slaves around the world & chang[ing] the systems that allow slavery to exist."¹⁰⁵ Free the Slaves consistently

¹⁰¹ The Trafficking Victims Protection Reauthorization Act of 2013 (P.L. 113-4) (March 7, 2013).

¹⁰² KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (1999).

¹⁰³ BALES, *supra* note 102, at ____.

¹⁰⁴ JAC to insert discussion of bad stats in the field. Figure out whether/how to disclose conversation with Lou re: how they'd hired Booz Allen Hamilton to come up with a better statistic, but with the estimate coming in at 1 million or thereabouts, TIP Office deemed the new estimate unreliable.

¹⁰⁵ Free the Slaves (website), <https://www.freetheslaves.net/SSLPage.aspx>.

framed its advocacy efforts as targeting “modern-day slavery.” Notwithstanding the objections of anti-trafficking organizations with which it partnered in advocacy efforts, Free the Slaves sought to codify the concept of “modern-day slavery” and create a congressional Commission on Abolition of Modern-Day Slavery to track and address the problem – both within the United States and abroad.¹⁰⁶ Free the Slaves successfully lobbied to have legislation introduced to that effect. Had the bills become enacted, the new law would have redefined as “modern-day slavery” practices encompassed by the trafficking definition under both U.S. law and the U.S. TIP Office’s interpretation of the U.N. Trafficking Protocol;¹⁰⁷ and it would have created a new government bureaucracy that would have engaged in activities that mirrored much of what the U.S. TIP Office was already doing under the rubric of “trafficking.”¹⁰⁸ While the bills failed, their [ghosts loom ever more present] in current anti-trafficking law and policy-making and grassroots advocacy.

2. From Slavery Rhetoric to Slavery Framing

Under the Obama Administration, the U.S. TIP Office has come to fully embrace the slavery paradigm, increasingly using the concept of “slavery” in place of “trafficking” in its TIP Report and outreach materials. The 2012 TIP Report amply reflects the shift. Bales’s “27 million enslaved” statistic, once quietly denounced, is now reproduced on the first

¹⁰⁶ Congressional Commission on the Abolition of Modern-Day Slavery Act, 109th Congress, 2nd Session, 2006 S. 3787; 109 S. 3787 (sponsored by Santorum, Pryor, and Dole), January 3, 2006) and 2006 H.R. 6328; 109 H.R. 6328 (sponsored by Christopher Smith (R-NJ) and John H. Lewis (D-GA), Nov. 15, 2006); Congressional Commission on the Abolition of Modern-Day Slavery Act, 110th Congress, 1st Sess., 2007 H.R. 2522; 110 H.R. 2522 (sponsored by John H. Lewis (D-Ga), May 24, 2007).

¹⁰⁷ The legislation introduced in 2006 defined “modern-day slavery” as:

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

The legislation introduced in 2007 changed the proposed definition to the following:

the status or condition of a person who is under the control of another person, where that control is enforced by violence, or psychological coercion, and who is exploited through involuntary servitude, forced labor, debt bondage or bonded labor, serfdom, peonage, trafficking in persons for forced labor or for sexual exploitation (including child sex tourism), forced marriage, or other similar means.

See references cited in *supra* note 106.

¹⁰⁸ See references cited in *supra* note 106.

page of the introduction.¹⁰⁹ As if preemptively defending the analogy to transatlantic slavery, the introduction also features a graphic, entitled “Then and Now: Fleeing Slavery” depicting 19th century ads offering rewards for runaway slaves alongside a recent ad offering a reward for information regarding the whereabouts of an escaped Indonesian fisherman.¹¹⁰ Moreover, laying the groundwork for “individuals to understand their connection to modern-day slavery,” the TIP Office has commissioned the development of the Slavery Footprint website, on which one can take an online survey to determine the number of slaves needed to maintain one’s lifestyle.¹¹¹ Hence, what was once a [peripheral tool] to garner popular support for the anti-trafficking cause is now the central framing device: recasting trafficking as nothing short of slavery.

Some attribute the shift towards the slavery paradigm to personnel changes and the particular mindset of the Obama-appointed Ambassador-at-Large Luis CDeBaca, who as a former federal trafficking prosecutor, had worked under a legal regime that situated trafficking within the scope of U.S. slavery and peonage laws. One might assume that relevant *international* legal norms might more prominently factor into the work of a State Department agency. But the reality is that the U.S. TIP Office has always at its core functioned as more an exporter of U.S. norms abroad than an arbiter of international standards.¹¹² Just as the U.S. TIP Office has aggressively sought international uptake of its view of trafficking as subsuming forced labor, reframing trafficking as slavery appears teed up for export as well.

The U.S. TIP Office is not alone in succumbing to the seductive power of the slavery paradigm. Free the Slaves is now one among many organizations that frame their work as modern abolitionism – indeed, it seems now the rule rather than the exception for an organization working on trafficking issues to frame its work as targeting “slavery.”¹¹³ This is likely in part due to the dynamics of what can only be characterized as the

¹⁰⁹ U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 2012 7 (2012) [hereinafter 2012 TIP REPORT].

¹¹⁰ 2012 TIP REPORT, *supra* note 109, at 19.

¹¹¹ Slavery Footprint (website), <http://slaveryfootprint.org>. The website now features a video entitled “I’m With Lincoln,” “a dramatic commercial depicting modern slavery” as part of a new campaign by the same name, “asking Congress to make ending slavery a priority.”

¹¹² [However hegemonic], this role is in a sense statutorily mandated, the TIP Office created largely to ensure, through the TIP report and attached sanctions, that other governments abide by “U.S. minimum standards” for eliminating trafficking. *See supra* discussion accompanying notes 35-42.

¹¹³ **Insert citations to examples.**

“trafficking industrial complex.”¹¹⁴ In a world of funding scarcity for public interest organizations, abolishing “modern-day slavery” has become a cause célèbre and target of major donor foundations.¹¹⁵ Humanity United, for example, founded in 2005 by eBay founder Pierre Omidyar and his wife, both funds and directly coordinates anti-trafficking advocacy, playing a major role in anti-trafficking U.S. legislative reform efforts.¹¹⁶ Most recently taking the anti-trafficking advocacy world by storm is the new non-profit, Walk Free – founded by Australian billionaire Andrew Forrest with the support of fellow billionaires Richard Branson and Bill Gates -- to end “modern slavery.”¹¹⁷ Notwithstanding the organization’s infancy, Walk Free has managed to garner the support of governments and international institutions¹¹⁸ -- officially launching only in December 2012, in Myanmar, with the nation’s first open-air, mass concert, co-hosted by U.S. TIP Ambassador CDeBaca and Kevin Bales.¹¹⁹ Recently hired to develop and

¹¹⁴ This phrase was coined by leading anti-trafficking litigator and advocate, Martina Vandenberg, formerly the trafficking researcher for Human Rights Watch, and now founder and director The Human Trafficking Pro Bono Legal Center, <http://www.tahirih.org/hprobono/>.

¹¹⁵ For an incisive discussion of the “celebrification of trafficking,” see Dina Haynes, [insert forthcoming article in ANNALS]; Dina Hayes, Celebrities in Human Trafficking, Parts I and II (blogposts), Interdisciplinary Project on Human Trafficking (website), <http://traffickingroundtable.org>.

¹¹⁶ Among other projects, Humanity United convenes and supports the Alliance to End Slavery and Trafficking (ATEST), a coalition of nonprofit organizations working on trafficking, in order to “strengthen and foster coordination among the U.S.-based anti-slavery movement.” Humanity United, Modern-Day Slavery: Learn About Our Approach (website), <http://www.humanityunited.org/learn#>; Alliance to End Slavery & Trafficking: A Project of Humanity United (website), <http://www.endslaveryandtrafficking.org>. Most recently, ATEST successfully lobbied for inclusion into the comprehensive immigration reform senate bill a set of provisions aimed at preventing trafficking and abuses involving workers recruited abroad. See Border Security, Economic Opportunity, and Immigration Modernization Act, Subtitle F: Prevention of Trafficking in Persons and Abuses Involving Workers Recruited Abroad, 113th Congress, 1st Session, sponsored by Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet, and Flake (April 17, 2013).

¹¹⁷ Walk Free (website), <http://www.walkfree.org>. The website homepage explains that “Walk Free is a movement of people everywhere, fighting to end one of the world’s greatest evils: modern slavery.” Under the “learn” tab, the website reproduces the ILO’s 2012 forced labor statistics, but substitutes slavery terminology in place of “forced labor” – claiming that, e.g., “20.9 million people are forced to live in slavery around the world today” and “modern slavery generates profit of over US \$32 billion for slaveholders. Under the “take action,” visitors to the website can sign a pledge committing to a belief that “our generation can build a world without slavery” and committing to “mobilize governments, businesses and communities to end modern slavery.” *Id.*

¹¹⁸ JAC to figure out if it’s possible to tell the story re: Walk Free convening major UN meeting within days’ notice, and on a Saturday afternoon.

¹¹⁹ Elisabeth Behrmann, *Gates Helps Australia’s Richest Man in Bid to End Slavery*, Bloomberg news, April 14, 2013, <http://www.bloomberg.com/news/2013-04->

run Walk Free's "Global Index on Modern Slavery,"¹²⁰ Bales is now positioned to accomplish the aims of Free the Slaves' failed proposal for a slavery commission proposal, but now from a perch with far greater resources at his disposal.¹²¹

In symbiotic relationship with these anti-slavery organizations and, indeed, the U.S. government, major media outlets have provided a significant platform for publicizing the problem of "modern-day" slavery and profiling the work of anti-slavery organizations. Examples include CNN's Freedom Project: Ending Modern-Day Slavery,¹²² the Guardian's "Modern-day slavery hub" (in partnership with Humanity United),¹²³ and MTV Exit (which broadcast the Walk Free launch worldwide).¹²⁴ The 150th anniversary of the Emancipation Proclamation has provided a particularly powerful hook for journalists, who, for example, in an article published in the Atlantic Monthly (and funded by MTV Exit) are now pronouncing "slavery's global comeback."¹²⁵ In an effort to engage students to "challenge slavery," USAID has partnered with MTV Exit, Free the Slaves, and Slavery Footprint.org in a challenge to students worldwide "to develop creative technology solutions to prevent human trafficking, rescue victims, and provide assistance to survivors" to combat traffickers' use of technology to "ensnare their victims."¹²⁶

Even in academic articles, analyses of anti-trafficking laws and policies that have long used the concept of "slavery" for descriptive effect, are now increasingly focused on "slavery" as legal category and frame. Curiously, some even cite to Bales' broad definition of slavery in lieu of the legal definitions of slavery and slavery-like practices long found in treaty and customary international law.¹²⁷ Indeed, implicitly acknowledging the

10/gates-helps-australia-s-richest-man-in-bid-to-end-slavery.html.

¹²⁰ *Id.*

¹²¹ See discussion accompanying *supra* notes 105-108.

¹²² The CNN Freedom Project: Ending Modern-Day Slavery (website), <http://thecnnfreedomproject.blogs.cnn.com>.

¹²³ The Guardian, Modern-Day Slavery (website), <http://www.guardian.co.uk/global-development/series/modern-day-slavery-in-focus>.

¹²⁴ MTV Exit: End Exploitation and Trafficking (website), <http://mtvexit.org>. The website highlights the Walk Free launch concert – 'MTV Worldstage: Live in Myanmar' – "a one-of-kind [sic] concert that will go down in history where 70,000 people gathered in Yangon, Myanmar on December 17, 2012 to raise awareness to end human trafficking and exploitation."

¹²⁵ J.J. Gould, *Slavery's Global Comeback*, THE ATLANTIC MONTHLY (December 2012). **JAC to supplement footnotes with cites to other such pieces.**

¹²⁶ Challenge Slavery, <https://www.challengeslavery.org>.

¹²⁷ See e.g., [insert citation to Pope] James Hathaway, *The Human Rights Quagmire of "Human Trafficking"*, 49 VA. J. INT'L L. 1, 15-25 (2008) (describing a wide range of practices as "slavery" and quoting Bales' statement that modern slavery "is not

difference between practices now referred to as “modern slavery” and practices traditionally considered “slavery” or “institutions and practices similar to slavery” under treaty law, a group of social science and legal academics, including Bales, are now undertaking to expand legal understandings of slavery to help bridge the gap.¹²⁸

Hence, as one journalist has described it, “[slavery] is an emotive term whose time has come,”¹²⁹ “modern-day slavery” now part of the public imagination. As US TIP Ambassador CDeBaca has explained, “more than a decade of governmental and trans-governmental initiatives have seeded the social conversation,” fostering “an emerging consensus around the language of slavery.”¹³⁰ Through exploitation creep, the concept of “slavery” is now fully conflated and interchangeable with the concepts of forced labor and trafficking. But, as explored further below, serious questions remain as to whether this creep towards rhetorical and legal extremes yields desirable consequences. What are the implications of the collapse of previously distinct legal categories? While the push towards extremes has resulted in a powerful call to action – particularly as deployed by the United States’ first President descended from slaves—has it actually created more capacity to address the full continuum of forced labor and trafficking practices?

III. DOCTRINAL IMPLICATIONS: CREEPING TOWARDS [OBSCURITY/REDUNDANCY?]

Excerpts from the 2012 TIP report underscore how exploitation creep has resulted in [fluid? extreme?] slippage in the U.S. government’s treatment of the previously distinct legal concepts of forced labor, trafficking, and slavery:

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

about owning people in the traditional sense of old slavery, but about controlling them completely”). For a powerful critique of Hathaway’s arguments, see Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789 (2008).

¹²⁸ See, e.g., THE LEGAL UNDERSTANDING OF SLAVERY: FROM HISTORICAL TO CONTEMPORARY (Jean Allain, ed.) (2012). [Describe Harvard-Bellagio project](#)

¹²⁹ Gould, *supra* note 125.

¹³⁰ Gould, *supra* note 125.

and the freedom for survivors to carry on with their lives....¹³¹

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.¹³²

If, according to TIP Office reasoning, all forced labor is trafficking, and all trafficking is slavery, then all forced labor is slavery. In one fell swoop, the ILO’s statistic of 20.9 million in forced labor becomes 20.9 million “enslaved.”

Granted, exploitation creep certainly has visceral appeal. From a worker organizing perspective, the rhetoric of slavery has proven instrumental in bringing African-American and migrant low-wage workers together in a common struggle against systemic workers’ rights abuses. Moreover, calling the targeted practices “slavery” creates a simple moral imperative and ready political consensus around governmental and grassroots action. Some proponents even argue that characterizing the targeted practices as anything less emotive than “slavery” is to deploy euphemisms that justify lesser responses.¹³³ The creep towards slavery thus marshals crucial and rare political will in the service of trafficked and forced laborers who have too-long suffered from inadequate protections under the law. The modern anti-slavery movement might actually succeed where forced labor treaties dating back to the 1930s have thus far failed—for example, in eradicating inter-generational bonded labor.

But, as this Part seeks to illustrate, however laudable the underlying intentions, the push towards extremes also has its drawbacks. Not only are these moves legally inaccurate, but they also render established legal concepts redundant. Perhaps more importantly, this doctrinal slippage in may operate, in practice, to limit rather than expand the range of abuses covered by the law. Much as the concept of “slavery” incentivizes action, it also risks inadvertently raising legal thresholds for prosecutions and victim protection.

1. Forced labour = trafficking?

Is there a legal basis for the TIP Office’s claim that all forced labor can be considered trafficking? Recall the tripartite nature of the trafficking

¹³¹ 2012 TIP REPORT, *supra* note 109, at 7 (emphasis added).

¹³² *Id.* at 44 (emphasis added).

¹³³ Gould, *supra* note 125.

definition: (1) an *act* (e.g., movement, recruitment, harbouring, receipt), (2) by *means* of some form of force, fraud, or coercion, (3) for the *purpose of exploitation* (including forced labor, servitude, slavery). As mentioned above, the TIP Office bases its expansionist view on the U.N. Protocol definition's inclusion of "harbouring" in the act element. For example, intergenerational bonded laborers born (rather than recruited or moved) into debt bondage – thus considered non-trafficked forced labor by the ILO – are nonetheless are "harboured" by the owner of the debt and, therefore, trafficked.

The Vienna Convention on the Law of Treaties instructs, however, that "[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."¹³⁴ The TIP Office's use of "harbouring" (an undefined term under international law) is perhaps a plausible reading of the term's ordinary meaning – but only if taken out of context and irrespective of the treaty's object and purpose. Nothing in the treaty's structure, the context in which it was developed, or its *travaux préparatoires* supports the TIP Office's expansionist interpretation of the trafficking definition.¹³⁵

To the contrary, context and the treaty's structure and substantive provisions echo the ILO's focus on movement as a distinguishing feature of trafficking. The treaty was developed alongside a Migrant Smuggling Protocol to the U.N. Transnational Organized Crime Convention largely in response to concerns over the role of organized crime syndicates in the clandestine migration. The treaty has at its heart a border (and crime) control agenda. The treaty preamble thus declares the need for a "comprehensive approach in the countries of origin, transit, and destination," and its substantive provisions explicitly address, for example, immigration status and victim repatriation.¹³⁶ That the "act" element includes a range of actions – i.e., "recruitment, transportation, transfer, harbouring or receipt of persons" – simply reflects how the drafters envisioned trafficking as a process carried out by multiple actors working in concert. Pinpointing each act in the process was born of States' desire to criminalize all actors involved in that process – not only the recruiters and transporters but also owners and supervisors of any place of exploitation (e.g., brothel, farm, factory, or household). Moreover, those concerned

¹³⁴ Vienna Convention on the Law of Treaties, adopted May 23, 1969, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980, art. 31.

¹³⁵ ANNE GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 30-31 (2010).

¹³⁶ U.N. Trafficking Protocol, preamble, arts. 7 (status of victims of trafficking in persons in receiving States) and 8 (repatriation of victims of trafficking in persons).

primarily with the welfare of the trafficked viewed the element of movement a key vulnerability factor – to wit, that migrants in particular were vulnerable to [coercive exploitation] by virtue of having to work in an unfamiliar environment with limited language and cultural proficiency for that context, hence likely less able to access assistance from law enforcement or service providers.¹³⁷ As the ILO later characterized their predicament, trafficked forced laborers thus are “probably worse off” than non-trafficked victims, who exercise more agency in exiting forced labor.¹³⁸

Moreover, as a structural matter, such a broad reading of “harbouring” renders redundant the drafters’ carefully crafted three-part definition. It enables the trafficking threshold to be met simply by demonstrating the purpose element, the means element arguably satisfied by the inherently coercive nature of the end purposes (e.g., forced labor, slavery-like practices). But if trafficking could so easily be conflated with forced labor, slavery-like practices, or any other listed exploitative purposes, it is hard to see why States would have invested resources to create a new treaty regime when the target phenomena are already addressed by well-established treaty and customary international laws. Surely, if the U.N. Protocol was intended to be an updated forced labour treaty, the ILO would have been much more aggressive in defending its turf as keeper of the international forced labor treaties.

2. Trafficking = Slavery?

However skeptical one might be about the TIP Office’s equating forced labor and trafficking as a matter of international law, the claim that trafficking is slavery is all the more specious. The TIP Office uses trafficking and slavery interchangeably, but it has yet to offer a legal argument in support of this particular manifestation of exploitation creep.

Even if it were to try, the TIP Office would be hard-pressed to find a legal justification for equating trafficking with slavery under international law. Nothing in the U.N. Protocol suggests that trafficking itself is a form of slavery.¹³⁹ Like forced labor, slavery is listed as one of several end purposes for which a person may be trafficked, alongside “practices similar to slavery,” servitude, and sexual exploitation. The notion that the treaty

¹³⁷ The author’s own work vis-à-vis the Protocol reflected this sense. [Cite to radhika position paper re: different “milieu;” Stewart report](#)

¹³⁸ Beate Andrees and Mariska N.J. van der Linden, *Designing Trafficking Research from a Labour Market Perspective: The ILO Experience*, in INT’L MIGRATION, Jan. 2005, at 55, 64 (special issue entitled “Data and Research on Human Trafficking: A Global Survey) [hereinafter Data and Research on Human Trafficking].

¹³⁹ GALLAGHER, *supra* note 135, at 189. [Supplement citations to include Allain...](#)

drafters intended to permit collapsing the three-part definition into a singular requirement of satisfying the end purpose element is even less plausible in the slavery context than with forced labor, as discussed above. Given that as a *jus cogens* norm, the prohibition against slavery has a special, rarefied, status under international law, any intent to expand the slavery concept would certainly have been made explicit.

Moreover, although the substantive content of the customary international law prohibition against slavery is “in a state of flux,” custom offers little support for the TIP Office’s position.¹⁴⁰ There are indications that legal conceptions of slavery have expanded to include practices beyond chattel slavery.¹⁴¹ But, as Gallagher explains, “it is difficult to sustain an absolute claim that trafficking, in all its modern manifestations, is included in the customary and *jus cogens* norm prohibiting slavery.”¹⁴² Only the egregious cases involving the “clear exercise of powers attached to the right of ownership”¹⁴³ would likely qualify as slavery.

3. Diluting the Slavery Norm and Raising the Trafficking Threshold

But is legal redundancy – or inaccuracy, for that matter – really a problem for anyone apart from the legal purist? After all, the push towards the slavery extreme has had the undeniable effect of motivating governments to pass legislation, foundations to donate funds, and the broader populace to take up the “anti-slavery” cause. Moreover, equating all forced labor with trafficking potentially expands the reach of anti-trafficking laws to embrace a larger population of abused workers. Indeed, one might even go so far as to argue that maintaining the trafficked versus non-trafficked forced labor distinction unjustifiably privileges one class of abused workers over another. After all, the unfortunate reality is that

¹⁴⁰ GALLAGHER, *supra* note 135, at 190.

¹⁴¹ Insert citations to Allain, *Rantsev, Kunarac*, language from CRC, European Convention, etc.; and Gallagher.

¹⁴² GALLAGHER, *supra* note 135, at 190.

¹⁴³ As Gallagher explains, of the scarce interpretative guidance on this point, is one UN Secretariat report identifying six characteristics of the various “powers attaching to the right of ownership” that when exercised give rise to a situation of slavery. These include (1) the individual may be made an object of purchase; (2) the master may use the individual, in particular his or her capacity to work, in an absolute manner; (3) the products of the individual’s labor become the property of the master without any compensation commensurate to the value of the labor; (4) the ownership of the individual can be transferred to another person; (5) the status/condition of the individual is permanent in the sense that it cannot be terminated at the will of the individual; and (6) the status/condition is inherited/inheritable. GALLAGHER, *supra* note 135, at 184, citing UN Economic and Social Council, *Slavery, the Slave Trade and Other Forms of Servitude: Report of the Secretary-General*, UN Doc. E/2357, Jan. 27, 1953, at 40.

“trafficked” forced laborers are often laboring alongside “non-trafficked” forced laborers, enduring the same abusive working conditions on a day-to-day basis. Should the fact that one set of workers went through a process of recruitment/movement justify access to benefits denied to the other? And if the “slavery” label helps make their plight more visible, then why not make use of it?

Herien lies the problem: equating trafficking with slavery both dilutes the force of the *jus cogens* prohibition on slavery and heightens the threshold for trafficking. Both dynamics significantly contract the reach of crucial rights protections for those suffering extreme human rights abuses. As a *jus cogens* norm, the prohibition against slavery has a status superior to those of all other rules of the international community.¹⁴⁴ This norm cannot be derogated from by treaty – contrary treaty or customary rules are null and void *ab initio* – and can only be modified by another *jus cogens* norm.¹⁴⁵ Their extraordinary status derives from these particular norms being viewed as “laying down international obligations so essential for the protection of fundamental interests of the international community that their breach is recognized as a crime by that community as a whole.”¹⁴⁶ As such, *jus cogens* norms have granted States courts the power to exercise universal jurisdiction over alleged perpetrators of the prohibited acts,¹⁴⁷ and have removed State immunity from the jurisdiction of foreign States.¹⁴⁸ Dilution of the slavery norm could compromise the ability of the international community to bring to justice alleged perpetrators of actual slavery,¹⁴⁹ not to mention undermine the right of those accused to be informed in detail of the nature of the charges against them.¹⁵⁰ Dilution of the slavery norm also risks [minimizing?] the experiences of men, women, and children subjected to chattel slavery, for example, which were undoubtedly markedly worse than many victims of trafficking. Much like in the genocide context, the gravity of one of the most extreme human rights abuses in a sense demands judicious use “slavery” label.¹⁵¹

Conversely, equating trafficking with slavery risks

¹⁴⁴ ANTONIO CASSESE, INTERNATIONAL LAW 199 (2005).

¹⁴⁵ Vienna Convention on the Law of Treaties, *supra* note ____, art. 53.

¹⁴⁶ CASSESE, *supra* note 144, at 202, citing former Article 19 of the ILC Draft Articles on State Responsibility.

¹⁴⁷ Insert case examples: Pinochet, Furundzija...

¹⁴⁸ insert case examples: Wald dissent in *Princz*?

¹⁴⁹ Mention how slavery still exists in some parts of the world...

¹⁵⁰ Gallagher, *supra* note 15, at 799, citing Jean Allain, The Definition of “Slavery” in General International Law and the Crime of Enslavement within the Rome statute.

¹⁵¹ Do more research re: this idea – have there been any objections to use of slavery label from descendants of slavery, for example?

[inadvertently/implicitly] raising the legal threshold for trafficking by creating expectations of more extreme harms than is required under anti-trafficking law. Particularly in the U.S. context, invoking slavery dredges up a tragic and shameful past and its attendant imagery of people in chains, [violently treated]. But that imagined scenario comprises but one extreme and exceptionally small fraction of what is actually 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 slavery and what technically counts as trafficking is substantial, and in an era of scarce public resources, there is a risk that prosecutions and victim identification will be limited to only those cases that fall at the very end of the abuse spectrum.

Indeed, U.S. prosecutorial trends reveal that increasingly, only those [non-sex-sector?] trafficking cases involving overt violence or confinement are being pursued. By contrast, those cases involving complex psychological coercion are often dropped, apparently too difficult to win in jury trials.¹⁵² But the U.S.TVPA was heralded specifically for expanding prosecutorial tools to cover servitude situations involving psychological coercion.¹⁵³ Previous servitude laws required either physical confinement or violence, rendering it difficult to bring cases where, for example, workers remained in extremely abusive jobs as a result of psychological threats, e.g., of harm to family members back home.¹⁵⁴ Current prosecutorial trends obviate this important legal development towards recognizing the role of psychological coercion in creating conditions of [inescapable?] servitude, and signify a marked setback in U.S. efforts to “combat trafficking.”

IV. IMPACT ON THE MOVEMENT: UNDERMINING A (NECESSARY) PARADIGM SHIFT

Around the [time the modern anti-trafficking movement started], a movement started against sweatshop labor that developed its focus not broadly on the issue of forced labor but narrowly on the conditions of the sweatshops themselves, sometimes even just on safety issues within them. Luis CDeBaca, the U.S. ambassador at large to monitor and combat trafficking in persons, sees [this framework] as inhibiting and, intentionally or not, ways to feel too comfortable about addressing the issues in question. “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

¹⁵² Cite to case examples – review suggestions/materials from Susan Franck. Research publicly available info re: why Global Horizons case was dropped.

¹⁵³ Cite to §§ 1589 language (forced labor definition); articles re: TVPA passage.

¹⁵⁴ Cite to involuntary servitude definition

around the world, we get to ignore, for example, the fact that domestic servants are being locked in and raped. It's not a wage issue; it's a crime issue...."

– *Slavery's Global Comeback*, Atlantic Monthly

This quote reflects a deep paradigm conflict that is both cause and consequence of exploitation creep. Much as conflating forced labor with trafficking and trafficking with slavery renders redundant the legal concept of trafficking, the notion that forced labor then equals slavery similarly [leaves up for grabs?] the concept of – and institutions developed to address – that phenomenon. With the exception of its criminalization under anti-trafficking law, forced labor has long been the province of labor institutions to address, typically employing measures that target structural vulnerability to forced labor practices. Subsuming forced labor under slavery, as advocated by the TIP Office, elevates the law enforcement approach above all others. And it does so at a time when, as described above in Part I, the current trajectory of the anti-trafficking movement is towards long-overdue involvement of labor institutions and advocates, and conceptualization of trafficking as a labor (migration) issue.

Whether intentionally or not, exploitation creep squashes the transformative potential of the crucial shift towards a labor paradigm in the anti-trafficking field. It further entrenches– and insulates from criticism – the criminal justice paradigm currently dominating the anti-trafficking field. Crying “slavery,” in particular, intensifies the focus on the individual perpetrators of the abuses. It also provides a convenient diversion, absolving the State of its role in enabling labor and migration structures to so readily subject workers to coercive exploitation. For the TIP Office to exercise authority over the forced labor portfolio held by ILAB and DRL – only reinforces this dynamic. Together these effects squander an important opportunity to better identify, understand, and target structural vulnerability to trafficking and forced labor, tethering the anti-trafficking movement to a focus on addressing the symptoms rather than the causes of [coercive exploitation?] today.

A. The Need for a Paradigm Shift

[Insert intro]

1. Limited Potential of Criminal Justice Approaches

While anti-trafficking laws and policies have improved significantly over the last dozen years, critics are right to be concerned about the overall

effectiveness of anti-trafficking regimes. Even by the U.S. government's own metric – prioritizing prosecutorial efforts above all others – the global picture reflects dismal failure. The U.S. State Department reports that in the year 2011, *globally* there were 42,291 victims identified, 7,909 prosecutions, and 3,969 convictions; of those, 15,205 were identified as “labor trafficking” victims, 456 labor traffickers were prosecuted, 278 of whom were convicted.¹⁵⁵ As to U.S. activities, the Department of Justice reports that a total of 118 defendants were “charged” (hence, not necessarily prosecuted) for “forced labor and adult sex trafficking cases,” of which 70 were convicted.¹⁵⁶ The global statistic of 42,291 victims identified pales in comparison to the purported 20.9 million “enslaved.”

Yet, the stark disparity could not be less surprising to anyone who has worked directly with trafficked persons. Prior to the U.N. Protocol's inception, advocates and scholars warned against – and ever since, have decried – the dominance of the criminal justice paradigm in the trafficking field.¹⁵⁷ The clandestine nature of this crime means that victim identification typically comes as a result of victims coming forward to report the abuse. But the substantial risk of retaliation by traffickers against victims and/or their family members, as well as potential re-traumatization by the criminal justice process, provide strong disincentives against doing so, at least in the absence of substantive rights protections.¹⁵⁸ Moreover, given that many trafficked persons are undocumented migrants and some have committed crimes in the course of the trafficking, there is understandable concern that coming forward could result in their deportation, if not prosecution.¹⁵⁹ Yet, even when trafficked persons are recognized as victims and afforded rights protections (including residency status), access to those benefits is almost always contingent upon potentially

¹⁵⁵ 2012 TIP REPORT, *supra* note 109, at 44; 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 2011 65 (2011) [hereinafter 2011 DOJ/AG TIP REPORT].

¹⁵⁶ 2012 TIP REPORT, *supra* note 109, at 361; 2011 DOJ/AG TIP REPORT, *supra* note 155, at 65. Of those convictions, “35 were predominantly sex trafficking and 35 were predominantly labor trafficking, although multiple cases involved both.” *Id.* **Insert discussion of how these statistics are highly suspect...**

¹⁵⁷ **Insert citation to Alison Stewart 1999 HR Reporter article; my HRJ article from 1998, (check Farrior 1996/7 piece), and articles by Haynes, Chuang (Global Sheriff, Snapshot articles), Srikantiah, Chacon, Kim, Brennan, Bernstein's carceral feminism pieces, etc.**

¹⁵⁸

¹⁵⁹ Dina Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J. LAW, ETHICS & PUB. POL'Y 1, 91-92 (2009).

risky victim cooperation in the prosecution of their traffickers.¹⁶⁰ In the United States, for example, trafficked persons may apply for a T-visa, which provides them temporary and potentially permanent residency status, but only if they cooperate in efforts to pursue their traffickers.¹⁶¹ Tellingly, however, of the estimated 14,500-17,500 people trafficked into the United States *each year*, during FY2002 through 2011, only a total of 4935 victims even applied for a T-visa (of which 2635 were granted).¹⁶²

As grim as the prospects are for trafficked persons writ large, they are particularly so for those trafficked outside the sex sector. Sex trafficking cases comprise the vast majority of prosecutions worldwide. Some countries do not even criminalize labor trafficking, and even for those that do, labor trafficking prosecutions are exceedingly rare. In the U.S. context, for example, anti-trafficking advocates have become resigned to the unfortunate reality that, as described by one advocate, “the DOJ is where forced labor cases go to die.”¹⁶³ Labor trafficking cases referred to prosecutors typically remain in “monitoring” status, with no action taken for years, while the statute of limitations runs out. Some seemingly clear cases of trafficking are inexplicably dropped. The reasons for the disparate treatment are many, but accounts from advocates and prosecutors suggest that in the absence of overt violence or confinement, these cases are simply harder to prosecute. An agricultural worker in debt bondage – i.e., laboring under an enormous recruitment debt for which repayments are not reasonably assessed against the debt – is harder to conceive of as having suffered “enslavement” than the woman forced into prostitution under the same debt structure.¹⁶⁴ As an initial matter, that someone would remain in an extremely abusive work situation because of a debt is apparently difficult to comprehend – for prosecutors even, much less jurors. Forced sex, on the other hand, helps overcome the [disconnect] and, moreover, taps into deeper public outrage and political support than forced farm labor.¹⁶⁵

Despite billions of dollars and over a decade’s worth of targeted

¹⁶⁰ Identify the rare exceptions -- Italy?

¹⁶¹ Explain T-visa requirement.

¹⁶² 2011 DOJ/AG TIP REPORT, *supra* note 155, at 56. Note that trafficking victims can apply for visas for their immediate family members as well. The total number of such “derivative” T-visa applications for FY2002-2011 was 2282, 2163 of which were granted. *Id.* Fearing that creation of the T-visa would open the floodgates to fraudulent visa applications, Congress capped the visas at 5000 per year. Insert TVPA cite.

¹⁶³ Telephone Interview with Martina Vandenberg, Founder and Executive Director, The Human Trafficking Pro Bono Legal Center, May 15, 2013.

¹⁶⁴ Insert citation to Jayashri Srikantiah iconic victim, Kathleen Kim’s coercion piece.

¹⁶⁵ Insert info – see HLR – re: funding for sex trafficking vs. non-sex sector trafficking...

anti-trafficking interventions, the presumed deterrent effect of aggressive prosecution has not come to pass. The rise in the global statistic of forced labor from 12.3 million in 2005 to 20.9 million in 2012 – suggests that, regardless of how you define its relationship to forced labor, trafficking is on the rise. Even assuming away the challenges to effective and comprehensive prosecution described above, a criminal justice approach has inherent limitations as a preferred vehicle for eradicating the trafficking phenomenon. While a criminal justice approach might account for the consequences of trafficking, it is chronically unable to address its causes. Nuance and context get lost in a system constructed around identifying trafficked persons as victims of crime and finding and punishing the perpetrators. That most trafficking abuses occur in the context of individuals – often migrant, and undocumented – seeking their livelihood, during the process of recruitment or in the workplace, fades into the background. Yet it is these very factors that may hold the key to preventing trafficking in the first instance, as discussed below.

2. The Transformative Potential of a Labor Approach?

In a pathbreaking article, labor scholar Hila Shamir makes a compelling argument for applying a labor paradigm to the trafficking field.¹⁶⁶ Shamir offers a labor paradigm as salvo for one of the key problems with the current anti-trafficking regime: the failure to address structural vulnerability to trafficking. Current approaches, which Shamir characterizes as dominated by a human rights approach, have served very few trafficked persons and do nothing to address the structure of labor markets that are prone to exploitative practices. A strategy of ground-up worker empowerment to address those points of vulnerability, on the other hand, is a far more promising vehicle for preventing and addressing trafficking than existing approaches.

Shamir is right about the potential benefits of a labor paradigm being brought to bear on the anti-trafficking field. A labor approach shines a much-needed spotlight on “power disparities between victims and traffickers and the economic and social conditions that make individuals vulnerable to trafficking.”¹⁶⁷ Framing anti-trafficking interventions in the discourse of labor paradigms holds tremendous potential for fostering a nuanced understanding of “coercion” that better captures the sociological realities of the trafficking experience. Coercion in the trafficking context is, as Professor Kathleen Kim aptly demonstrates, “situational” – rather than taking the form of direct threats of harm, coercion results from a

¹⁶⁶ Shamir, *supra* note 7.

¹⁶⁷ Shamir, *supra* note note 7, at 81.

combination of factors (immigration status, poverty) that create conditions under which workers cannot escape even the most abusive of working conditions.¹⁶⁸ Addressing “structural labor market conditions and practices that shape workers’ vulnerability and inferior bargaining power in the workplace,” as Shamir proposes,¹⁶⁹ rightly draws attention to these factors currently overlooked – if not dismissed – by dominant anti-trafficking approaches.

The question is, however, *how* a labor paradigm might be brought to bear on anti-trafficking field as a matter both theory and practice. Assessing this question requires a nuanced understanding of how and why prior efforts to redirect attention towards structural vulnerability failed. As Professor Jonathon Todres incisively argues in his response to Shamir,¹⁷⁰ and as demonstrated in detail, above in Part I,¹⁷¹ criminal justice – not human rights – has provided the dominant framework in the trafficking field since inception. Shamir correctly points out that current anti-trafficking approaches evince a savior complex that disempowers the very population it aims to help by one-dimensional treatment of them as “victims” deprived of agency.¹⁷² In addition to largely being limited to providing ex post aid,

¹⁶⁸ Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011).

¹⁶⁹ Shamir, *supra* note ____, at 99.

¹⁷⁰ Jonathon 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 (2013).

¹⁷¹ See *supra* discussion accompanying notes ____.

¹⁷² Shamir, for example, criticizes the “human rights approach” to anti-trafficking, which she views as the “dominant” paradigm in the field, for having become “part of the problem.” Not only does a human rights approach focus on individual cases rather than structural vulnerability, Shamir argues, but it achieves its narrow goals through a frame that encourages victimization of trafficked persons rather than their empowerment. Shamir, *supra* note ____, at 107. This critique echoes the trenchant internal critiques of the human rights system made by Makau Mutua and David Kennedy. [\[insert citations and briefly describe\]](#). Shamir is not alone in criticizing human rights advocates’ involvement in the anti-trafficking regime. Refugee law scholar James Hathaway launched the first blow in 2008, arguing that the fight against human trafficking is fundamentally in tension with human rights goals. James Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1 (2008). Specifically, Hathaway posited, the anti-trafficking movement marginali[zes] the majority of the world’s slaves, and, moreover, undercuts refugee protection by promoting criminalization of migrant smuggling. These rights incursions being predictable, Hathaway argues, human rights advocates [essentially sold out in even engaging in the negotiations over] the draft Trafficking Protocol. Hathaway’s critique fails to appreciate the dynamics of the U.N. Protocol negotiations, however, as powerfully demonstrated in a response from Anne Gallagher. Gallagher was intimately involved in the drafting of the U.N. Trafficking Protocol and the U.N. Recommended Principles and Guidelines on Human Rights and Human Trafficking. For a close recounting of the negotiations over the U.N. Trafficking Protocol, see Anne

current approaches also focus on only the most extreme cases of exploitation, thus “normaliz[ing] the harsh realities of exploitation experienced by many migrant and nonmigrant workers in labor sectors prone to trafficking.”¹⁷³ But to attribute these characteristics to a human rights paradigm and its purported “dominance” fails to recognize the breadth of human rights advocacy in the field and the depth of the human rights corpus, and it dangerously underestimates the dominance of criminal justice prerogatives in this field.

The history of anti-trafficking human rights advocacy is riddled with advocates’ (unsuccessful) efforts to demonstrate how eradicating the trafficking phenomenon requires that we target first and foremost the underlying economic and social rights violations that create vulnerability to trafficking.¹⁷⁴ These include, for example, unequal access of women to employment, social benefits, and educational opportunities; remittance and labor export policies that encourage women to work abroad and grant them few protections; and the failure to afford rights to those, particularly informal, sectors that serve destination countries’ unrelenting demand for cheap, unprotected labor.¹⁷⁵ Moreover, mindful of the consequences of characterizing certain situations as falling within the rubric and protections of any anti-trafficking scheme, human rights advocates active during the

Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975 (2001).

¹⁷³ Shamir, *supra* note ___, at 103.

¹⁷⁴ The right of opportunity to gain a living by work one freely chooses or accepts, the right to just and favorable conditions of work, the right to an adequate standard of living, and the right to education, for example, are all rights contained in the International Covenant on Economic, Social, and Cultural Rights. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 321st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (Dec. 16, 1966), arts. 6, 7, 11, 13. The chronic challenge advocates face in advocating for realization of the economic, social, and cultural rights portion of the international human rights corpus, however, is the standard objection (by governments) that such rights are resource intensive and therefore only aspirational in nature. A growing body of jurisprudence and scholarship has helped unsettle these assumptions, demonstrating how, for example, there are non-resource-intensive steps towards economic and social rights realization – e.g., upholding race and gender-based non-discrimination norms with respect to *access to work and educational opportunities*. *See generally* ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Asbjorn Eide et al. eds., 2d. rev. ed. 2001) [insert updated citations] Anticipating such objections, women’s rights advocates in particular have argued for a focus on anti-discrimination measures as a first, immediately realizable, non-resource-intensive measure towards fulfillment of these rights – for example, to the extent educational or employment opportunities exist, States should take measures to prevent gender and racial discrimination in accessing those opportunities. *Cite to Diariam; Janie Beyond a Snapshot*.

¹⁷⁵ Insert citations to work of dina, martina, rhacel, me. Nisha Varia/HRW’s domestic worker reports...

Protocol negotiations explicitly agreed that “human rights principles demand that any remedies directed toward trafficked persons must be crafted with a view toward also promoting the rights of persons found not to have been trafficked, yet still exploited.”¹⁷⁶ Human rights advocates demanded such protections prior to and during the U.N. Protocol negotiations,¹⁷⁷ and have continued to sound the alarm ever since. Rights advocates – and scholars, including this author – have both criticized the dominant “repressive strategies” that focus on suppressing (perceived) negative phenomena related to trafficking (e.g., illegal migration, labour migration, illegal and forced labour); and demanded “empowering strategies” that focus on enabling potential victims to protect themselves from trafficking by addressing the root causes of trafficking.¹⁷⁸

It is true, however, that advocacy targeting the root causes of trafficking has taken lesser priority to victim protections. But this derives from the continued over-prioritization of aggressive criminal justice imperatives that continue to render the welfare of trafficked persons an entirely secondary, if not irrelevant, concern. Rather than being able to build a substantive positive rights corpus in this context,¹⁷⁹ human rights

¹⁷⁶ See e.g., Ali Miller & Alison N. Stewart, *Report from the Roundtable on the Meaning of “Trafficking in Persons”: A Human Rights Perspective*, 20 WOMEN’S RTS. L. REP. 11, 12 (1998) (principle number 4 of the Roundtable on “The Meaning of ‘Trafficking in Persons’: A Human Rights Perspective”).

¹⁷⁷ Stewart, *supra* note 176, at 18. **Insert citation/discussion of GAATW platform; Radhika reports**

¹⁷⁸ Such strategies include, for example, measures to overcome poverty, to address discrimination in the process of seeking employment/labor migration, and to protect the rights of migrant workers including strengthening labor protections in countries of destination. **Insert citations to SEE Report, UNESCAP Report; snapshot article.**

¹⁷⁹ This is not to say that the human rights approach is not without its weaknesses, however. Core international human rights bodies have been disappointingly superficial, if not completely inactive, with regard to linking States’ responsibilities to address human trafficking under the UN Protocol to their specific obligations under international human rights treaties. A case in point is the work of the expert treaty-monitoring body established under the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) – one of only two international human rights treaties that explicitly prohibit trafficking. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979). The only specific guidance the CEDAW Committee has provided to States regarding their Article 6 obligation to suppress trafficking has been to ratify the UN Trafficking Protocol. It has generally called upon States to take measures aimed at poverty alleviation and women’s economic empowerment, and to address the discrimination that feeds trafficking, such as unequal access to food, education, and alternative livelihoods; but the Committee has not linked States Parties’ Article 6 obligations to specific economic, social and cultural rights provisions of CEDAW and the jurisprudence developed in these contexts. The Committee missed a prime opportunity to do so in CEDAW General Recommendation 26 on women migrant workers, instead choosing to cordon off trafficking

advocates have had to devote their limited resources to preventing the rights floor from falling out of the system entirely. Hence, human rights advocates continue to struggle to ensure that the limited rights protections available under the law are actually applied in practice, and to *all* trafficked persons, including not only to the iconic victims (women and children in the sex sector) but also men, women, and children trafficked outside the sex sector, into agriculture, construction, domestic work, among many other sectors.¹⁸⁰ They have also had to stave off rights incursions perpetrated in the name of criminal justice priorities – for example, the placement of victims in trafficking “shelters” in conditions that violate freedom of movement and can amount to arbitrary detention.¹⁸¹ Human rights advocates have had to do all of this while also having to deflect and cabin the distracting and potentially harmful influence of prostitution reform battles on anti-trafficking law and policy.¹⁸²

But as discussed above in Part I, the anti-trafficking movement has expanded and shifted such that we are seeing increased collaboration between human rights and labor advocacy communities. The product of that collaboration can already be seen, for example, in the increased scrutiny on the rampant labor and human rights abuses in, for example, recruitment practices for guestworker programs in the United States and abroad,¹⁸³ the vast supply chains that wrap around the world and back in the course of producing goods for daily consumption,¹⁸⁴ and the subcontracting chains that undergird government contracts for services, to name a few examples.¹⁸⁵ As Todres rightly concludes, labor-based and human rights-based responses are not mutually exclusive, but rather are overlapping and potentially mutually reinforcing.¹⁸⁶ If anything, as recent collaborations

as an issue to be addressed separately in the future. For in-depth discussion of these and other issues regarding CEDAW’s work on trafficking, see Janie Chuang, *Article 6*, in *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* 169, 173-74 (Marsha A. Freeman, Christine Chinkin & Beate Rudolf, eds., 2011).

¹⁸⁰ Maybe cite work of the freedom network and others???

¹⁸¹ See for example, Gallagher/Pearson, Israeli report on detention/shelters. Figure out some concrete examples of this – perhaps battles over resources.

¹⁸² cite to JAC Penn article; Anti-Trafficking Review – include in footnote a brief description/examples of current challenges (e.g., NY condom law – cite to Florrie’s HuffPo article).

¹⁸³ Insert citations to Visas Inc., CDM reports, Southern Poverty Law Center reports, OSCE trafficking of domestic workers reports, au pair program critiques (Irish, Dutch, U.S. in particular).

¹⁸⁴ Insert citation to California Transparency in Supply Chains Act & Todres article re: same.

¹⁸⁵ Insert citation to govt contracting clauses – Obama executive order from fall 2012.

¹⁸⁶ Todres, *supra* note ____, at 144.

among human rights-focused-anti-trafficking advocates and labor advocates demonstrate, transformative potential lies in a broad-based, interdisciplinary approach.

B. Exploitation Creep: Absolving the State

Exploitation creep threatens to undermine this promising trajectory, however. As discussed below, its reframing of forced labor and trafficking as slavery enables the State to focus attention and resources on individual bad actors, and away from state-constructed labor and migration structures that promote vulnerability to trafficking. Exploitation creep reasserts dominance of the criminal justice paradigm not only with respect to framing of the problem, but also in identifying which institutions and methods are best positioned to address it.

1. A Convenient Diversion

Proponents of exploitation creep claim that calling trafficking practices anything less than “slavery” is to deploy “euphemisms” that justify inaction. But using slavery rhetoric carries the greater risk of undermining efforts to bring about structural change crucial to trafficking prevention. Focusing attention on individuals as bad actors to be brought to justice through aggressive prosecution, conveniently diverts attention from the broader economic, political, and social context within which trafficking is occurring. As sociologists Julia O’Connell Davidson and Bridget Anderson explain, slavery rhetoric is discourse of depoliticization.¹⁸⁷ It creates a simple moral imperative with enormous popular appeal, while it depoliticizes and absolves – behind a humanitarian agenda – the State for its role creating structures that permit, if not encourage [coercive exploitation] of workers, particularly migrants.¹⁸⁸ Conflating forced labor with trafficking does similar work – in deemphasizing the migration aspects of trafficking, it enables States to avoid addressing thorny issues concerning the vulnerabilities created by restrictive migration policies.¹⁸⁹

Exploitation creep achieves absolution through misuse of the slavery

¹⁸⁷ Julia O’Connell Davidson, *Absolving the State: The Trafficking-Slavery Metaphor*, 14 GLOBAL DIALOGUE 31 (2012) [hereinafter *Absolving the State*]; Julia O’Connell Davidson, *New slavery, old binaries: human trafficking and the borders of ‘freedom,’* 10 GLOBAL NETWORKS 244 (2010) [hereinafter *New slavery, old binaries*]; Bridget Anderson and Rutvica Andrijasevic, *Sex, slaves and citizens: the politics of anti-trafficking*, 40 SOUNDINGS 135 (2008) [hereinafter *Sex, slaves and citizens*].

¹⁸⁸ *Absolving the State*, supra note 187, at 31.

¹⁸⁹ *Beyond a Snapshot*, supra note _____, at 153.

analogy. In truth, there are significant differences between the situations of those subjected to transatlantic slavery a century ago and those purportedly “enslaved” today. Historically, “slave” was a specific, bounded group that was legally recognized and regulated as a judicial category. An escaped slave was still a slave in the eyes of the law. Trafficked persons today, at least as a matter of law, lack such permanence of status. Nor are they so discrete a category, but instead straddle a diverse set of categories: alien/national, documented/undocumented, formal/informal worker, among others. Reducing those identities and experiences to a narrow category of “slave” overlooks important context and nuance.

Perhaps most significantly, “slave” recasts trafficked persons as perennial victims. But contrary to transatlantic slaves, who were kidnapped and brought to the New World against their will, the vast majority of trafficked persons acted with agency in searching for a livelihood. For those who migrated, they invariably intended to do so, whether as survival migrants in response to acute insecurity at home, or as opportunity-seeking migrants.¹⁹⁰ The slavery makeover thus recasts trafficked persons not as political subjects, but as objects of intervention; it “obliterates any idea of struggle and works to stabilize the political and social transformations brought about by migration, as it confines migrants to victimhood.”¹⁹¹ As O’Connell Davidson points out, as objects and eternal victims, one can pity slaves more unreservedly than we can those whom we see as authoring and controlling their own destiny.”¹⁹² But glossing over the element of agency not only is fundamentally at odds with how trafficked persons view themselves, but it also enables the State to avoid responsibility for constructing vulnerability to trafficking in the first instance. This conveniently obscures the crucial truth that trafficking is more often than not labor migration gone horribly wrong – at least in part due to tightened border controls that have created a growing market for clandestine migration services and lax labor laws that permit employers and recruiters to [coercively exploit?] their workers with impunity.

Instead, modern anti-slavery campaigns to mobilize public outrage identify solutions that miss these underlying structures entirely. They claim to focus on the “dark side of globalization,”¹⁹³ but this largely amounts to having individual and corporate consumers consume more ethically (rather than at all) – “an act of moral agency that can be encouraged by, exercised in alliance with capitalist enterprises.”¹⁹⁴ Slavery Footprint and the Walk

¹⁹⁰ [Insert citation to Bhimal Ghosh book.](#)

¹⁹¹ *Sex, slaves, and citizens*, *supra* note 187, at 143.

¹⁹² *New slavery, old binaries*, , *supra* note 187, at 256.

¹⁹³ [Check reference—Slavery’s Global Comeback?](#)

¹⁹⁴ *Absolving the State*, *supra* note 187, at 38. [[perhaps say something about Walk](#)

Free campaigns are apt illustrations of this. As O’Connell-Davidson notes, anti-slavery crusaders are not, for example, demanding a transformation of attitudes adopted by the privileged towards the death or suffering of irregular migrants...[p]assivity in the face of their misery remains entirely conscionable.”¹⁹⁵ Slavery rhetoric does nothing to challenge the idea that inequality and poverty are providential.¹⁹⁶

As to U.S. government measures, its latest efforts to address “modern-day slavery” (outside the sex sector) target individual abusive recruiters and employers. The chronic underfunding of labor inspectorates makes it difficult, however, for abused workers to avail themselves of the few ex post remedies technically available to them. Moreover, even if such individual bad actors are criminalized, fined, or blacklisted, the basic structures that equip employers with potentially coercive and abusive labor control and retention mechanisms – e.g., exorbitant recruitment fees, tying a worker’s immigration status to individual employers – remain undisturbed.¹⁹⁷

2. [Undermining Institutional Competencies]

U.S. government efforts to operationalize its conflation of forced labor and trafficking has potentially harmful consequences for both worker populations. The effects of expanding the TIP Office mandate to cover forced labor is not limited to [bureaucratic conflict], but implicates fundamental differences in approach to the problem. As discussed in Part I, governmental and non-governmental institutions devoted to anti-trafficking issues have, for the most part, developed separately from (and more recently than) labor institutions long responsible for addressing forced labor issues. This compartmentalization tracks the separation of legal regimes – forced labor matters traditionally falling under labor (or industrial relations) law, with trafficking as a separate regime unto itself (and usually focused on criminal prosecution). Not only have the forced labor and trafficking mandates evolved under separate [bureaucracies?] and legal regimes, but they have done so utilizing quite different approaches on the ground.

Thus, until recently, bureaucratic turf was relatively clearly defined. The TIP Office took charge of the U.S. government’s international anti-trafficking efforts, and ILAB’s Office of Child Labor, Forced Labor, and

Free founder being at the helm of australia’s extractive industry;] [point out Bales’s role in allegedly keeping cocoa off the DoL child labor list.]

¹⁹⁵ *Absolving the State*, *supra* note 187, at 39.

¹⁹⁶

¹⁹⁷ Insert examples: Hong Kong, kafala system in MidEast, U.S. guestworker programs.

Human Trafficking and the DRL's Office of International Labor Affairs assuming the lead regarding the forced labor portfolio.¹⁹⁸ The approaches taken by these agencies to address their respective areas of focus have different valences. ILAB and DRL focus on diplomatic engagement and technical cooperation to promote internationally-recognized workers' rights, generally, and to eliminate forced labor, specifically. These efforts involve close collaboration with NGOs, trade unions, companies, and international organizations. While both offices engage in naming and shaming of non-compliant governments through, for example, the annual State Department Country Human Rights Practices Report and Labor Department List of Goods Produced by Child Labor or Forced Labor, the bulk of these offices' programmatic activity lies in working closely with governments to identify structural factors that facilitate forced labor, and develop alternative solutions. This approach stands in stark contrast to TIP Office efforts in the trafficking arena, which while also involving a measure of diplomacy and technical cooperation, is best known for using the "stick" of shaming via TIP Report rankings and sanctions to encourage foreign government compliance with U.S. criminal justice-focused anti-trafficking standards.

These fundamental differences in approach present serious challenges when it comes to operationalizing the conflation of forced labor and trafficking. For the TIP Office to assume a role in forced labor programming introduces the "stick" of shaming and sanctions, potentially disrupting if not negating gains by the DRL and ILAB using the "carrot" approach of diplomatic engagement with governments. More to the point, TIP Office influence could redirect attention and resources to aggressive prosecutorial strategies, rather than approaches that address the root causes of the problem currently be pursued by ILAB and DRL. Moreover, expanding the TIP Office's mandate to cover all forced labor raises questions concerning resource allocation: would funds be diverted from ILAB to the TIP Office? Or would the TIP Office more thinly spread its resources to accommodate the approximately twenty-fold increase in its target population?

Other issues to be addressed (suggestions for others welcome!)

- (1) ILO's plan to develop a trafficking protocol. Human rights people see this as an opportunity for a re-do of

¹⁹⁸ Discuss how child labour is one small area of overlap.

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the UN Protocol – to get as a matter of hard obligation those protections that were framed in aspirational language. Site of potential collaboration btw advocacy communities?

- (2) Making slavery framing work? (horse out the barn -- doubtful that there's any prospect of turning back.) Is there a more nuanced way of linking slavery to trafficking to underscore how wealthy economies like that of the U.S. are built on the backs of migrant workers?

CONCLUSION

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