

# Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law

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*This Article examines from a postcolonial perspective a deep paradox in contemporary anti-trafficking law and discourse. The inordinate attention on trafficking in Western industrialized economies is disproportionate to the extent of the problem. Only 7% of the world's 20.9 million forced laborers are in developed economies and the EU while 56% are in Asia Pacific. Yet in BRIC countries like India with a substantial majority of the world's trafficked victims and where 90% of all trafficking is domestic, trafficking has little policy resonance. Trafficking was only recently criminalized as part of India's extensive rape law reforms. India, however, remains an active site for sexual humanitarianism as American evangelical groups and local police dramatically raid and rescue 'female sex slaves' from gritty big-city brothels. As developing countries increasingly shape international anti-trafficking law and policy, this Article proposes two ways whereby the postcolony could be far more than a site of sexual humanitarianism. First, I offer India's bonded, contract and migrant labor laws as a robust labor law model against trafficking that could inform international legal developments. This is in contrast to the criminal justice model propagated by the UN Trafficking Protocol worldwide. Second, through a case study of Indian sex workers' mobilization against trafficking through self-regulatory boards in a red-light area, I show how sex workers are not simply passive victims and that community-based initiatives that make sparing use of criminal law could prove more effective than conventional anti-trafficking strategies.*

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## INTRODUCTION

The third world sex worker enslaved in a big-city brothel has captured the imagination of many a crusader in the contemporary battle against human trafficking for sex work or “modern slavery.” Developing countries figure prominently in this landscape of sexual humanitarianism<sup>1</sup> during a period that some scholars label as fostering a global sex panic.<sup>2</sup> Journalists like Nicholas Kristof of the New York Times have published over forty-six op-eds in recent years on the subject of “sex trafficking.”<sup>3</sup> An indefatigable opponent of sex slavery, Kristof has gone so far as to purchase the freedom of sex workers from the brothels of third world countries, content that such sex workers found an alternate livelihood in running small shops of trinkets for tourists.<sup>4</sup> In 2011, he reported on his undercover raids along with a U.S. abolitionist<sup>5</sup> organization, the

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1. This term is coined by Nicola Mai. See Nick Mai, *Between Embodied Cosmopolitanism and Sexual Humanitarianism*, in *BORDERS, MOBILITIES AND MIGRATIONS: PERSPECTIVES FROM THE MEDITERRANEAN IN THE 21ST CENTURY* 175, 176–77 (Lisa Anteby-Yemini et al. eds., 2014).

2. See generally JO DOEZEMA, *SEX SLAVES AND DISCOURSE MASTERS* 124–27 (2010); Ronald Weitzer, *Moral Crusade Against Prostitution*, *SOCIETY*, Mar.–Apr. 2006, 33, 33–38.

3. This term is used to connote trafficking for the purposes of sex work. This terminology is not without problem; I will allude to the stakes in the terminology used to describe trafficking later in this Article.

4. See NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: HOW TO CHANGE THE WORLD*, at xviii–xix (2010); Nicholas D. Kristof, Op-Ed., *Leaving the Brothel Behind*, *N.Y. TIMES*, Jan. 19, 2005, at A19.

5. Many opponents of sex work invoke antislavery discourse to advocate for eliminating sex work altogether irrespective of the conditions under which women perform it. They have appropriated this term to invoke the moral charge of the term “slavery” to propose a neo-abolitionist

International Justice Mission, in Sonagachi, Kolkata's largest red-light area. There he claimed to have "transformed" the lives of five girls, two of whom were hours away from their first rape, part of a series of rapes.<sup>6</sup> Kristof's very insistence on a series of connotations between trafficking, trafficking for sex work, sex work and what he calls modern-day slavery in the developing world, and the moral urgency and raid and rescue strategies which sustain them, are paradigmatic of the state of most anti-trafficking interventions today. Journalists are not the only ones engaging in sexual humanitarianism. Gloria Steinem called on Indian policymakers to criminalize customers of sex workers.<sup>7</sup> Indian activists themselves also actively participate in cultivating this imagery of Indian women's victimhood and are key transnational players in their own right. In 2013, Sunitha Krishnan, the founder of an abolitionist Indian nongovernmental organization (NGO), Prajwala, traveled to New York to receive a lifetime achievement award from the New York based Diller-von Furstenberg Family Foundation for her work against "sex trafficking."<sup>8</sup>

Many postcolonial scholars have powerfully countered this abolitionist discourse by forefronting the agency of third world actors, especially sex workers.<sup>9</sup> This Article adds significantly to this critique by going beyond the assumption that developing countries are simply the fields on which deeply ideological positions over women's sexuality gets played out or are sources of migrant labor most likely to be affected by trafficking, which, according to international law, involves the recruitment or transportation of a person under threat of coercion for purposes of a variety of exploitative practices.<sup>10</sup> Instead, I consider the domestic legal response

position against prostitution by analogizing it to modern day slavery. See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 338–39 n.7 (2006).

6. See Nicholas D. Kristof, Op-Ed., *Raiding a Brothel in India*, N.Y. TIMES, May 25, 2011, at A35.

7. See *Prostitution Is Commercial Rape, Says Gloria Steinem*, THE FINANCIAL EXPRESS (Jan. 29, 2014, 19:43 IST), <http://www.financialexpress.com/news/prostitution-is-commercial-rape-says-gloria-steinem/1221602>.

8. See *Accolades*, PRAJWALA, <http://www.prajwalaindia.com/accolades.html>.

9. See RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 128–34 (2005); Kamala Kempadoo, *Introduction to TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS*, at vii, xxviii–xxx (Kamala Kempadoo et al. eds., 2d ed. 2012).

10. Although a social problem of considerable vintage, trafficking as a contemporary international problem has spilled over into the popular consciousness and assumed its potent charge only in the past decade. Given the scale of the problem of trafficking, hundreds of millions of dollars are spent annually on dealing with it. For instance, between 2001 and 2007, the U.S. government alone spent \$447 million in foreign assistance to NGOs, international organizations, and foreign governments. Gergana Danailova-Trainor & Frank Laczko, *Trafficking in Persons and Development: Towards Greater Policy Coherence*, 48 INT'L MIGRATION 38, 58 (2010). Some estimates suggest that 1.3 million people are trafficked worldwide, including those trafficked domestically. *Id.* at 57. The U.N. Population Fund estimates that between 700,000 and two million women are trafficked across international borders annually, and when internal trafficking is included, the number increases to four million. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2982 n.13 (2006). The U.S. government estimates that 600,000 to 800,000 persons are trafficked across international borders annually. Elizabeth M. Wheaton et al.,

to the problem of internal trafficking in one developing world context, namely India, with a view to substantively informing how we might conceptualize the contours of anti-trafficking law more broadly. I suggest that as the U.N. Protocol continues its diffusion internationally, such an exercise will become increasingly essential to a theory of anti-trafficking law that aspires to go beyond sexual humanitarianism.

## I. THE CONTEMPORARY ANTI-TRAFFICKING DISCOURSE

### A. *Anti-Trafficking Discourse: Need for a View from the Developing World*

So how did we get to a situation where a Facebook game inspired by Kristof's book *Half the Sky* today raises public awareness on child prostitution and female genital mutilation?<sup>11</sup> As documented extensively, almost ten years ago,

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*Economics of Human Trafficking*, 48 INT'L MIGRATION 114, 118 (2010). It further estimates that 80% of trafficked individuals are women and girls and 50% are minors. *Id.* Meanwhile, the International Labour Organization (ILO) estimates that the number of people working in forced labor due to trafficking is 2.45 million while there are 9.8 to 14.8 million people working as forced laborers. *See* Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 TUL. J. INT'L & COMP. L. 269, 284 (2006). The ILO projects that 43% of those trafficked for forced labor are forced into commercial sexual exploitation while only 11% of those in forced labor are in commercial sexual exploitation. *Id.* The U.S. Department of State once estimated that 50,000 women and children are trafficked into the United States each year, but current estimates have scaled the numbers down to a figure of between 14,500 and 17,500 victims. Denise Brennan, *Key Issues in the Resettlement of Formerly Trafficked Persons in the United States*, 158 U. PA. L. REV. 1581, 1589 n.25 (2010). Yet the meager use of the T-visas so far further puts these figures into question. *See id.* at 1589. For rejections of the data surrounding trafficking, see David A. Feingold, *Trafficking in Numbers: The Social Construction of Human Trafficking Data*, in *SEX, DRUGS AND BODY COUNTS: THE POLITICS OF NUMBERS IN GLOBAL CRIME AND CONFLICT* 47 (Peter Andreas & Kelly M. Greenhill eds., 2010) (characterizing the trafficking field as "one of numerical uncertainty and statistical doubt"); Ernesto U. Savona & Sonia Stefanizzi, *Introduction to MEASURING HUMAN TRAFFICKING* 2, 2 (Ernesto U. Savona & Sonia Stefanizzi eds., 2007) (compiling essays showing that available information on trafficking is "fragmentary, heterogeneous, difficult to acquire, uncorrelated and often outdated"). A report released in August 2010 by the British Association of Chief Police Officers similarly reported finding 2,600 women out of a total of 30,000 sex workers from the off-street prostitution sector being trafficked for sex work. KEITH JACKSON ET AL., *SETTING THE RECORD: THE TRAFFICKING OF MIGRANT WOMEN IN THE ENGLAND AND WALES OFF-STREET PROSTITUTION SECTOR* 5 (2010), available at <http://www.acpo.police.uk/documents/crime/2010/201008critmw01.pdf>. Underlying these highly varied estimates of the problem of trafficking, however, is the acknowledgment, even by the United Nations Office on Drugs and Crime (UNODC), the only U.N. entity focusing on the criminal justice aspects of trafficking, that the data on the extent of the problem is woefully inadequate. *See* UNITED NATIONS OFFICE ON DRUGS & CRIME, *GLOBAL REPORT ON TRAFFICKING IN PERSONS* 11–12 (2009), available at [http://www.unodc.org/documents/human-trafficking/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf). The UNODC attributes this inadequacy to the lack of international standardization of definitions along the lines of the U.N. Protocol, the failure of even countries with similar legal systems to count the same things, and countries' failures to include domestic crimes amounting to trafficking within their data. *Id.* at 11. For a different take on the very phenomenon of trafficking as a discrete empirical reality, see DOEZEMA, *supra* note 2, at 5–15 (detailing the discursive effects of anti-trafficking rhetoric and the myth of trafficking).

11. Elizabeth Jensen, *A Game Aims to Draw Attention to Women's Issues*, N.Y. TIMES, February 18, 2013, at B5.

governance feminists<sup>12</sup> within the Violence Against Women (VAW) movement were richly rewarded for their efforts in mainstreaming women's rights within human rights discourse when the U.N. General Assembly adopted the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking Against Persons, Especially Women and Children (U.N. Protocol)<sup>13</sup> supplementing the 2000 United Nations Convention Against Transnational Organized Crime,<sup>14</sup> on November 15, 2000.<sup>15</sup> The negotiations leading up to the Protocol and its immediate aftermath were characterized by an ideologically charged debate over what constitutes trafficking, especially in relation to prostitution. The U.S. legislature, meanwhile, passed the U.S. Victims of Trafficking and Violence Protection Act, 2000 (VTVPA).<sup>16</sup> Given the dominance of the United States in the international arena, the negotiation of the U.N. Protocol reflected largely American feminist debates on sex work, prostitution, and trafficking.<sup>17</sup> Compromises were brokered between abolitionist feminists on the one hand, and human rights activists (along with some sex worker advocates) on the other. Both camps cautiously welcomed the final Protocol as a success for their advocacy efforts.<sup>18</sup>

Even as the U.N. Protocol rapidly found signatories, it resulted in a substantial reallocation of state resources and punitive powers. A global panic around sex work and trafficking, fostered largely by U.S. foreign policy and indirectly through the naming and shaming techniques of U.S. anti-trafficking law, led to the constant conflation of trafficking with trafficking for sex work and of trafficking for sex work with sex work. Sex work was and continues to be presented, particularly by abolitionist feminists, not only as exploitative per se, but also as the most horrific form of modern-day slavery. Further, the initiative of radical feminists in speaking about women as uniquely harmed by sex morphed

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12. Janet Halley has explained the concept of governance feminism (GF):

GF is, I think, an underrecognized but important fact of governance more generally in the early twenty-first century. I mean the term to refer to the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power. It takes many forms, and some parts of feminism participate more effectively than others; some are not players at all. Feminists by no means have won everything they want—far from it—but neither are they helpless outsiders. Rather, as feminist legal activism comes of age, it accedes to a newly mature engagement with power.

Halley et al., *supra* note 5, at 340.

13. U.N. GAOR, 55th Sess., Supp. No. 49 at 60, U.N. Doc A/55/49 (Dec. 23, 2000).

14. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13, 127, 2225 U.N.T.S. 209.

15. For an elaboration of the relationship between the international treatment of sex trafficking and the international violence against women movement and human rights movement, see KAPUR, *supra* note 9, at 95; Halley et al., *supra* note 5, at 352.

16. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 106, 114 Stat. 1464, 1474 (2000) (codified at 22 U.S.C. § 7104 (2012)).

17. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1658 (2010).

18. For a delineation of these feminist positions, see PRABHA KOTISWARAN, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA 67–156 (2011).

into a primary concern of the U.S. government and the Christian Right internationally.<sup>19</sup> The emergence of a neoliberal sexual agenda meant that social problems are located in deviant individuals rather than mainstream institutions thus necessitating criminal justice interventions rather than redistributive reforms from the welfare state.<sup>20</sup> The abolitionist framing of trafficking as involving women and girls forced into sexual slavery by social deviants<sup>21</sup> has deflected attention from the migration patterns of low-income women and men who undertake risky migration for work in exploitative informal employment.<sup>22</sup> Consequently, the implementation of anti-trafficking law by many countries has been both overinclusive and underinclusive. It is overinclusive because it targets women engaged in voluntary sex work. It is underinclusive because trafficking for purposes other than sex work is effectively ignored and rendered less worthy of our attention. As such unintended consequences of feminist advocacy mount, feminists in the human rights movement have conceded the errors of their strategies.<sup>23</sup> Whether unwittingly or otherwise, it is now apparent that having let the genie out of the bottle, feminists are struggling to prevent issues of women's violence from being used to stage disputes between states such as border control, immigration, and the negative externalities of globalization even as conservative domestic alliances are consolidated. Thus, in the several years since the U.N. Protocol came into force, despite efforts to legislate against trafficking internationally, regionally, and domestically, anti-trafficking law seems to have set itself up for failure.

Indeed, human rights scholars like James Hathaway have questioned why the “pluralist nongovernmental voices around the international negotiating table were so preoccupied by internecine conflict with the abolitionists over the legitimacy of sex work” to the neglect of “serious negative human rights externalities” built into the trafficking and migrant smuggling protocols.<sup>24</sup> Feminists like Janie Chuang and Anne Gallagher have defended their positions in the Protocol negotiations by elaborating on the range of nonabolitionist perspectives at the negotiations and how human rights activists did their best to support the human rights of sex workers especially against state abuse.<sup>25</sup> Yet, they “became embroiled in [the]

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19. See Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH & HUM. RTS. 17, 36 (2004).

20. See Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 DIFFERENCES: J. FEMINIST CULTURAL STUD. 128, 137 (2007).

21. Chuang, *supra* note 17, at 1658.

22. *Id.* at 1659.

23. See Miller, *supra* note 19, at 36–37.

24. James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT'L L. 1, 46 (2008) (footnotes omitted).

25. See Chuang, *supra* note 17, at 1672–77; Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789, 789–91 (2009).

highly divisive battles” over prostitution reform<sup>26</sup> while being forced to “defend[] against partisan attacks.”<sup>27</sup>

One has to be cognizant of the constrained circumstances under which human rights and sex workers’ groups functioned during the U.N. Protocol negotiations, which Gallagher has alluded to in recent writing.<sup>28</sup> Indeed, it is no small feat to have fundamentally shifted states’ attitudes toward trafficking, which they viewed as involving “bad people,” to seeing it as a human rights problem, which affects not just women and children in prostitution.<sup>29</sup> Moreover, advocates were negotiating what was essentially a crime control treaty in the context of the U.N. Crime Commission’s division of the issues of trafficking and migration into two different protocols whereby trafficking was understood as nonconsensual and smuggling as consensual. Interestingly, even as some feminists continue to occupy and navigate the ideological fallout of the U.N. Protocol and the VTVPA,<sup>30</sup> others have assumed a more pragmatic stance towards these legal frameworks, which are here to stay and have therefore set about assessing how they can be made more effective.<sup>31</sup>

I suggest that although we cannot unwind what is essentially the criminal law architecture of the U.N. Protocol, and its diffusion of the U.N. Protocol worldwide,<sup>32</sup> its definitional ambivalence presents us with an interesting opportunity for intervention. International organizations such as the U.N. Office on Drugs and Crime (UNODC), the guardian of the Protocol, and the International Labour Organization (ILO) are returning to the drawing board once again to identify core aspects of the definition of trafficking under Article 3 of the U.N. Protocol. After all, the Open-ended Interim Working Group on the U.N. Protocol has observed that “important concepts contained in the Protocol are not clearly understood and, therefore, are not being consistently implemented and applied.”<sup>33</sup> Not surprisingly then, the UNODC has recently admitted its lack of

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26. Chuang, *supra* note 17, at 1672.

27. *Id.*

28. See Gallagher, *supra* note 25, at 789–91.

29. See *id.* at 825–26.

30. See PARDIS MAHDAMI, GRIDLOCK: LABOR, MIGRATION, AND HUMAN TRAFFICKING IN DUBAI 18, 27 (2011); RHACEL SALAZAR PARREÑAS, ILLICIT FLIRTATIONS: LABOR, MIGRATION AND SEX TRAFFICKING IN TOKYO 51–55 (2011).

31. See Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627, 1639–41, 1649–56 (2010); Anne T. Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports*, 12 HUM. RTS. REV. 381, 390–97 (2011).

32. For a rather particularized view of this diffusion process, see generally PAULETTE LLOYD ET AL., THE GLOBAL DIFFUSION OF LAW: TRANSNATIONAL CRIME AND THE CASE OF HUMAN TRAFFICKING 3–5 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1910623](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910623) (using GPS data on road connectivity to argue that criminalization of human trafficking has diffused along tangible networks).

33. UNITED NATIONS OFFICE ON DRUGS & CRIME, ISSUE PAPER: ABUSE OF A POSITION OF VULNERABILITY AND OTHER “MEANS” WITHIN THE DEFINITION OF TRAFFICKING IN

data on the phenomenon of trafficking, the magnitude of the problem, and the uneven nature of domestic law reform undertaken to conform to states' obligations under the Trafficking Protocol.<sup>34</sup> This has led the UNODC to commission three Issue Papers on core concepts central to the definition of trafficking under Article 3, namely "the abuse of power or of a position of vulnerability," "consent," and "exploitation." Similarly, in 2013, the ILO organized a Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation<sup>35</sup> to advise the ILO on whether standard setting was essential to supplement the ILO's forced labor conventions to address trafficking for labor exploitation.<sup>36</sup> I will refer to their debates over the conceptual inter-relationship between forced labor and trafficking in a subsequent section. Given that only some of the central concepts in the definition of trafficking are of legal vintage in contexts other than trafficking (e.g., consent in rape law, fraud in contract law),<sup>37</sup> it is clear for the time being that the very parameters of the offence of trafficking and its scope<sup>38</sup> continue to be up for grabs.

It is precisely against this backdrop that I suggest taking seriously the perspective of developing countries in relation to anti-trafficking law. For one, we might recollect that the international legal response to trafficking and its default understanding of trafficking for purposes of sex work has a long history, which,

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PERSONS 6 (2012), available at [http://www.unodc.org/documents/human-trafficking/2012/UNODC\\_2012\\_Issue\\_Paper\\_-\\_Abuse\\_of\\_a\\_Position\\_of\\_Vulnerability.pdf](http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf).

34. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 10, at 6–7.

35. INT'L LABOUR OFFICE, INT'L LABOUR ORG., 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) ¶ 1 (2013), available at [www.ilo.org/wcmsp5/groups/public/---cd\\_norm/---normes/documents/meetingdocument/wcms\\_203982.pdf](http://www.ilo.org/wcmsp5/groups/public/---cd_norm/---normes/documents/meetingdocument/wcms_203982.pdf).

36. *Id.*

37. For a discussion of concepts central to rape law such as consent and coercion, see RETHINKING RAPE LAW INTERNATIONAL AND COMPARATIVE PERSPECTIVES 17–29 (Clare McGlynn & Vanessa Munro eds., 2010). For a dizzying array of ways in which the definition of trafficking is incorporated in the domestic legal jurisdictions of several countries, see UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 30–75. The paper categorizes countries into those whose domestic laws conform to the U.N. Protocol definition, those that contain fewer means than listed in the Protocol, those that do away with the means of trafficking, and those whose legal situation is unclear. *See id.* at 30.

38. Human rights lawyers further observe that despite the passage of the trafficking and migrant smuggling protocols, fundamental questions linger as to what trafficking is about, how it differs from migrant smuggling, how it relates to the criminalization of irregular migrants, whether asylum seekers can be smuggled or trafficked and whether trafficking and migrant smuggling should be treated as a human rights issue or an international criminal justice issue. *See* Anne Gallagher, *Human Rights and the New U.N. Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 977 (2001). Bridget Anderson alludes to early commentators who viewed the failure of the two Protocols to provide any guidance on identification to be a significant and deliberate weakness. Bridget Anderson, *Motherhood, Apple Pie and Slavery: Reflections on the Trafficking Debates* 4 (Ctr. on Migration, Policy and Soc'y, Working Paper No. 48, 2007), available at [http://www.compas.ox.ac.uk/fileadmin/files/Publications/working\\_papers/WP\\_2007/Bridget%20Anderson%20WP0748.pdf](http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2007/Bridget%20Anderson%20WP0748.pdf).



amongst other things, was negotiated and operationalized in the colonies of several Western countries.<sup>39</sup> Thus, the U.N. Protocol is the latest initiative in this long history of anti-trafficking law. Second, to the extent that the U.N. Protocol has been used as an instrument of border control by developed countries against migrants from developing countries, the voice of developing countries in reorienting trafficking in terms of a problem of labor migration has been limited. Many scholars have underlined the significance of immigration law reform and labor law reform in host states to strengthen the bargaining potential of migrant workers, especially undocumented workers. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990 seeks precisely to do this, but has only forty-six parties to date who are essentially states of origin. On the other hand, to the extent that the U.N. Protocol on Trafficking has been exceptionally popular with developed countries,<sup>40</sup> creatively redrawing the legal lines around the definition of trafficking may well benefit migrant workers.

Indications are that developing countries are increasingly playing a significant role in reimagining anti-trafficking law. In a major development that holds much promise, the Governing Body of the ILO placed the issue of supplementing the Forced Labour Convention, 1930 (No. 29) on the agenda of the 103rd session of the International Labour Conference.<sup>41</sup> Significantly, developing countries, particularly Brazil, played an important role in the discussions based on which the expert committee report recommended standard setting to the Governing Body.<sup>42</sup> Brazil's role in this context and its ability to generate best practices against trafficking over the years is hardly surprising given the sheer magnitude of the phenomenon of trafficking in developing countries, particularly the emerging economies. For instance, according to the ILO, forced labor, one of the forms of exploitation listed in Article 3, is to be found largely in Asia and the Pacific. Thus, in 2005, of the 8.1 million victims of forced labor (excluding sex work) the world over, nearly 6.2 million were in the Asia-Pacific region while the industrialized

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39. See ASHWINI TAMBE, *CODES OF MISCONDUCT: REGULATING PROSTITUTION IN LATE COLONIAL BOMBAY* 69 (2009) (describing how the League of Nations took on trafficking in women and children in 1920 as part of its mandate, necessitating reporting by thirty-three countries to the League of Nations).

40. By all means, the diffusion of the U.N. Protocol has been a rapid process. According to the UNODC, the Protocol has had a huge push effect on countries' formulation of anti-trafficking law. Between 2003 and 2008, the number of countries with a specific offence of trafficking in persons doubled. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 10, at 8. Similarly, the number of countries with national action plans on trafficking exploded from 5% to 53% between 2003 and 2008. *Id.* at 25.

41. Int'l Labour Org., *Decision on the Second Item on the Agenda: Agenda of the International Labour Conference*, INT'L LAB. ORG. (Mar. 25, 2013), [http://www.ilo.org/gb/decisions/GB317-decision/WCMS\\_208157/lang-en/index.htm](http://www.ilo.org/gb/decisions/GB317-decision/WCMS_208157/lang-en/index.htm).

42. INT'L LABOUR OFFICE, INT'L LABOUR ORG., *REPORT AND CONCLUSIONS OF THE TRIPARTITE MEETING OF EXPERTS ON FORCED LABOUR AND TRAFFICKING FOR LABOUR EXPLOITATION ¶¶ 92–102* (2013), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_207218.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_207218.pdf).

economies had only 113,000 victims of forced labor. Similarly, one million of these victims of forced labor were trafficked into it, of which 408,968 were trafficked in the Asia-Pacific region and 74,113 in the industrialized economies. Let us consider another form of exploitation covered by Article 3 of the U.N. Protocol, namely, practices similar to slavery, which include debt bondage. Here, roughly 84 to 88% of the world's 20.5 million bonded laborers are to be found in South Asia.<sup>43</sup>

Further, although trafficking is usually thought of as a cross-border phenomenon, in emerging economies such as Brazil, India, China, and Russia, much of the trafficking is domestic. Thus, reportedly 90% of all trafficking in India is domestic.<sup>44</sup> Indeed, it is the very visibility of long-standing labor problems in the context of the ratification and enforcement of the U.N. Protocol that has caused these emerging economies to adopt particularistic interpretations of trafficking in their criminal law as trafficking for sex work rather than for labor exploitation.<sup>45</sup> Notwithstanding such a reaction, to the extent that internal migration, and therefore trafficking, has traditionally been a major problem to which countries like India have responded, domestic legal responses to trafficking could well inform the ongoing operationalization of the U.N. Protocol. Domestic anti-trafficking law may also prove instructive in rethinking the enforcement mechanism for anti-trafficking law, with a predominant role for labor law over criminal law in targeting what is essentially a labor migration issue. In the intensely transnational setting of anti-trafficking law, this “feedback loop” from the domestic back to the international could well provide valuable insights.

In the rest of Part I, I will elaborate on the conceptual conundrums of the definition of trafficking in Article 3 of the U.N. Protocol. To the extent that much contemporary anti-trafficking law and its underlying discourse both produce and are in turn constituted by the global sex panic, the quest for an alternate legal imagination takes me to a domestic legal jurisdiction operating in “ordinary times.” With the understanding that trafficking as a social problem has long predated recent international law reform efforts, in Part II, I locate my critique in India, focusing particularly on the interlude between two moments of intense legislative activity around trafficking for sex work in the 1920s and in the past decade. Specifically, I examine how three social legislations of the 1970s, as interpreted by the Indian Supreme Court in the 1980s, targeted social practices of forced migration and labor, which we would today construe as trafficking. By

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43. SIDDHARTH KARA, BONDED LABOR TACKLING THE SYSTEM OF SLAVERY IN SOUTH ASIA 3 (2012).

44. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 184 (2012), available at <http://www.state.gov/documents/organization/192595.pdf> (third of seven PDFs comprising the report; all other PDFs available at <http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm>).

45. See INT'L LABOUR OFFICE, *supra* note 42, ¶ 120. Interestingly, trafficking is defined in these jurisdictions as referring to trafficking only for sexual exploitation rather than labor exploitation. For my discussion of the Indian context, see *infra* Part II.

delineating how these laws construed concepts central to the trafficking debates—namely, coercion, consent, and exploitation—in the context of the trafficking of men for labor, I de-exceptionalize trafficking as always implying trafficking for sex work. I then extend my discussion to exploitation, which is central to the alternate legal imaginary as well as to the U.N. Protocol. I de-exceptionalize the understanding amongst abolitionists of all sex work as amounting to trafficking by theorizing exploitation in the context of the political economy of sex work in India. Thus, I view the agency of third world sex workers as embedded in concrete institutional structures by delineating the variances in levels of exploitation within the sex industry.

I note here the tremendous disconnect between legal scholarship on human trafficking on the one hand, and labor and migration studies on the other. Labor and migration scholars continually delineate patterns of exploitation in labor markets barely ever using the term trafficking. Legal scholars, meanwhile, are keen to identify discrete instances of trafficking, but are somewhat frustrated with the unwillingness of labor scholars to draw relatively clear boundaries between trafficking and just “bad work,” which is amplified by the latter’s metaphorical use of the term exploitation. Legal ethnographers, I suggest, are well equipped to bridge this gap given their constant engagement with legal concepts used by lawyers, their empirical lives, and the translation back into renewed conceptual understandings. In the process, the interface between the law and economy is also revealed, especially the precise interaction between social norms driven by the economic logic of the market and the criminal law such that it becomes possible to predict the counterintuitive economic consequences of anti-trafficking regulatory options.

Finally, having examined labor law’s alternate regulatory framework for dealing with trafficking, I switch gears to contemplate the chronic enforcement gap that it entails. The enforcement of anti-trafficking law is impeded by problems of misrecognition of survivors of trafficking and competing prerogatives (e.g., between trafficking and border control). In developing countries, poor institutional resources pose an additional problem. Hence, I examine community-based attempts to address trafficking. This involves sex workers, a constituency mostly invisible, but also occasionally villainized, in anti-trafficking discourse. Based on my advocacy work for an Indian sex workers’ organization in Kolkata over the past several years as well as field work in the city’s biggest red-light area, I examine the role of sex workers themselves in combating trafficking through the constitution of self-regulatory boards. While this community-based initiative is unique given the highly spatialized concentration of brothels in red-light areas like Sonagachi, it generally points to the need for the active involvement of workers themselves in addressing trafficking within their respective labor markets.

*B. Ten Years of the U.N. Trafficking Protocol—The Prevailing Common Sense  
(Or the Unfolding of Collateral and Intended<sup>46</sup> Damage)*

*1. The Conceptual Scaffolding of Anti-Trafficking Law*

In this section, I will highlight some conceptual dynamics that animate anti-trafficking law and discourse so as to assess their interrelation and real-life effects. In particular, I will explore the dynamics between coercion/consent, legality/illegality, and exploitation. For this, consider the conceptual bare bones of the definition of trafficking in the U.N. Protocol. We can, for ease of use, disaggregate the definition in terms of the *mode* of or *action* required for trafficking (recruitment, transportation, transfer etc.), the *means* by which it is obtained (threat or use of force or other forms of coercion etc.) and the *purpose* for which it is obtained, namely, exploitation. In the case of people aged eighteen and over, all three elements must be involved for a case to be considered one of trafficking.<sup>47</sup> The definition of trafficking in the U.N. Protocol reads as follows:

Art. 3. (a): “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b): The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.<sup>48</sup>

The issue of *consent* was central to the negotiations of the U.N. Protocol, and was extraordinarily influenced by the sex work debates.<sup>49</sup> The radical feminist, abolitionist camp wanted prostitution listed as an end purpose for which recruitment or transportation would automatically amount to trafficking even if it was with the woman’s consent. In other words, they demanded that the purpose for which the means are used result in a finding of trafficking, irrespective of the

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46. At least one feminist lawyer who was a key player in the negotiations of the U.N. Protocol mentioned how what had appeared to be collateral damage now appears to be “intended” on the part of states that use anti-trafficking initiatives as a means to control migration and sex work.

47. Mike Dottridge, GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, *Introduction to COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD* 1, 4 (2007), available at [http://www.gaatw.org/Collateral%20Damage\\_Final/singlefile\\_CollateralDamagefinal.pdf](http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf); Gallagher, *supra* note 38, at 987.

48. U.N. GAOR, *supra* note 13, at 61.

49. See Chuang, *supra* note 17, at 1672–77.

consent of the victim. “‘Individualist’ NGOs”<sup>50</sup> on the other hand, wanted to carve out the possibility of migrant voluntary sex work by decoupling the means of recruitment from the end purpose. The compromise position indeed achieved this decoupling with the caveat that the existence of one or more of the stated means, such as coercion and deception, operated to render consent to exploitation irrelevant.<sup>51</sup> When it came to negotiations of the definition of the purpose, namely, *exploitation*, prostitution was once again ambiguously listed as “exploitation of the prostitution of others.”<sup>52</sup> Yet the *travaux préparatoires*,<sup>53</sup> or preparatory notes, to the Protocol made it clear that this inclusion did not compromise states’ domestic, legal treatment of prostitution.<sup>54</sup> Leaving aside the particularities of the sex work debates and stepping back to observe the Protocol’s definition of trafficking in its most general terms, we find that all three elements of the definition, the “actions,” the “means,” and the “purpose,” are relatively broad and open-ended.

## 2. Coercion, Consent, Abuse of Position of Vulnerability

Consider the *means* element in particular, namely, the “threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”<sup>55</sup> All the means other than the abuse of position of vulnerability appear to be relatively bounded concepts defined with some precision in domestic legal systems. Even then, there is “a high level of fluidity between the various ‘means’ stipulated in national laws, due, at least in part, to the absence of definitions” in the U.N. Protocol itself.<sup>56</sup>

The term “abuse of power or of a position of vulnerability” is rather broad, which although not defined in the Protocol itself, according to the *travaux*

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50. Halley et al., *supra* note 5, at 350.

51. One might of course argue that Explanation II is redundant since forms of exploitation such as slavery, forced labor, servitude and so on negate consent. However “sexual exploitation” or “the exploitation of the prostitution of others” do not necessarily imply the lack of consent. *See* U.N. GAOR, *supra* note 13, at 61.

52. Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 12, U.N. Doc. A/AC.254/4/Add.3/Rev.7 (Jul. 19, 2000).

53. Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Session—Addendum: Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, U.N. Doc. A/55/383/Add.1. (Nov. 3, 2000) [hereinafter Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime].

54. *Id.* ¶ 64.

55. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 5 n.1.

56. *Id.* at 8.

*préparatoires*,<sup>57</sup> it refers to “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”<sup>58</sup> In a world economy that is rife with precarious labor, this formulation offers little practical direction. Even otherwise, some legal practitioners find the concept “too vague to be effectively justiciable.”<sup>59</sup> Recently, the ILO in an attempt to identify working conditions that violate the ILO Forced Labor Convention, 1930 (No. 29) drew the line around this concept more narrowly. The ILO’s 2009 Report, *The Cost of Coercion*, illustrates the concept by offering the example of a worker who is economically so vulnerable that unless he complies with his employer’s demands, he is at risk of losing his job.<sup>60</sup>

The Secretariat to the Working Group on Trafficking in Persons<sup>61</sup> recently prepared a background paper analyzing how this term has been operationalized. A general overview of the sources they consider offers a traditional understanding of vulnerability as related to one’s status arising from age, gender, pregnancy, disability, and only occasionally economic condition.<sup>62</sup> This was followed by a rather detailed *Issue Paper on Abuse of a Position of Vulnerability and Other “Means” Within the Definition of Trafficking in Persons*, considered by the UNODC Expert Group Meeting in June 2012. Significantly, the issue paper found that many states construed “abuse of power or a position of vulnerability” in terms of a common sense understanding of vulnerability. This permeated notions of disposition to trafficking (rather than as a means of trafficking) and was also used to substantiate other means of trafficking as well as the purpose of trafficking, namely, exploitation.<sup>63</sup> The concept was invoked both at the point of substantively proving the offence of trafficking and also as a factor in determining penalties for trafficking. In all these instances, vulnerability was understood in terms of biological attributes (e.g., age, sex, disability), circumstances (e.g., isolation, dependency, irregular legal status) or poor economic status. Interestingly, the concept seems to have been added to the U.N. Protocol at the last minute, in an attempt to resolve differences over how prostitution ought to be dealt with by the

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57. Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, *supra* note 53, ¶ 63.

58. *Id.* ¶ 63.

59. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 9.

60. See INT’L LABOUR OFFICE, INTERNATIONAL LABOUR ORG., *THE COST OF COERCION: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* ¶ 35 (2009), available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_106230.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_106230.pdf).

61. Secretariat to the Working Group on Trafficking in Persons, *Analysis of Key Concepts: Focus on the Concept of “Abuse of Power or of a Position of Vulnerability”* in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, ¶ 4, U.N. Doc. CTOC/COP/WG.4/2011/3 (Aug. 4, 2011).

62. See *id.* ¶¶ 14–34.

63. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 8.

U.N. Protocol.<sup>64</sup> Indeed, the Swiss courts have interpreted voluntary sex work by foreign migrant women as necessarily devoid of consent given their presumed vulnerability.<sup>65</sup> The ideological differences between abolitionist feminists and sex work advocates have clearly left a lasting legacy. To add to existing complexities, states also interpret the relation between the means in the U.N. Protocol in rather varied ways. Sometimes, the abuse of position of vulnerability is juxtaposed to the other means of trafficking as involving subtle manipulation rather than force. At other times, it is viewed as indicative of coercion, and yet on other occasions, as equivalent to coercion.<sup>66</sup>

### 3. *Exploitation*

Similarly, let us consider the *purpose* of trafficking under the U.N. Protocol, namely, exploitation, which received a lot less attention in the Protocol negotiations when compared to the *means*. The U.N. Protocol defines exploitation to include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs. It is thus not an exhaustive definition.<sup>67</sup> None of these listed terms connoting exploitation is defined in the U.N. Protocol. The term “exploitation of the prostitution of others” is referred to in the 1949 U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention).<sup>68</sup> There is no definition of the term “sexual exploitation” in international law, and it was left undefined in the Protocol due to disagreement between countries on what it includes.<sup>69</sup> Pointing to the exceptionalist legal treatment of prostitution, Miller notes that only prostitution is described as an activity as opposed to other listed forms of exploitation where a threshold for exploitation is specified.<sup>70</sup>

There are definitions of the terms forced labor, slavery, practices similar to slavery, and servitude under international law. The ILO Convention No. 29 concerning Forced or Compulsory Labour (1930) defines forced labor as “all work

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64. *See id.* at 22.

65. *Id.* at 67.

66. *See id.* at 36, 41.

67. A United Nations report in fact suggests that it is a minimalist definition allowing for region-specific forms of trafficking to be included and lists such “other forms of trafficking” such as begging, illegal adoptions, and forced marriages. UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 35 (2012), available at [http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf).

68. United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271.

69. Miller, *supra* note 19, at 32. Although the 2012 United Nations *Global Report on Trafficking in Persons* does not define sexual exploitation, it encompasses “obtaining economic profit from the forced commercial sexual activity of another person: the exploitation of the prostitution of others.” It also includes cases that may be defined as sex slavery, although Member States have reported very few such cases. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 67, at 34.

70. *See* Miller, *supra* note 19, at 32.

or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>71</sup> Penalty is interpreted as involving a legal or economic sanction, or the application of physical or psychological force.<sup>72</sup> The ILO specifically clarifies that forced labor cannot be equated with low wages or poor working conditions, or situations of pure economic necessity where a worker feels “unable to leave a job because of the real or perceived absence of employment alternatives.”<sup>73</sup> The ILO has been recently engaged in revisiting the forced labor Convention to assess the need for additional standard setting. After all, the Convention was adopted at a time when governments were the principal users of forced labor,<sup>74</sup> while 90% of forced laborers are today exploited by private actors. In this context, the tripartite group of experts who looked into the Convention in detail themselves disagreed on the scope of forced labor in relation to trafficking. The Committee of Experts on the Application of Conventions and Recommendations, the supervisory body entrusted with technical supervision of the application of the ILO Conventions, viewed forced labor as encompassing trafficking.<sup>75</sup> Others proposed that both concepts were not identical, but shared some areas of overlap.<sup>76</sup> The U.N. Protocol itself conceptualizes trafficking as covering a range of exploitative labor forms of which forced labor is only one form. As this Article goes to print, standard setting on forced labor has been placed on the agenda of the 2014 International Labour Conference, rendering it a likely reform. Given that the moral leadership of the ILO on an issue such as trafficking is at stake, clarifying the relationship between trafficking and forced labor will become essential as many countries seek to conform their domestic legislation on trafficking to the Protocol definition.

Meanwhile, Article 1 of the 1926 Slavery Convention<sup>77</sup> defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised.”<sup>78</sup> The *travaux préparatoires* to the Convention reveal “that the phrase ‘slavery in all its forms’ was not intended to, and does not operate to, expand the definition beyond those practices involving the demonstrable exercise of powers attached to the right of ownership.”<sup>79</sup> Thus, states explicitly rejected attempts to expand the notion of slavery to what they

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71. INT’L LABOUR OFFICE, *supra* note 35, ¶ 25.

72. *See id.* ¶ 24–25, 27.

73. INT’L LABOUR OFFICE, A GLOBAL ALLIANCE AGAINST FORCED LABOUR ¶ 13 (2005), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_081882.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081882.pdf).

74. INT’L LABOUR OFFICE, *supra* note 42, ¶ 17.

75. INT’L LABOUR OFFICE, *supra* note 35, ¶ 57.

76. INT’L LABOUR OFFICE, *supra* note 42, ¶ 51.

77. Slavery Convention art. 1, Sept. 25, 1926, 60 L.N.T.S. 253.

78. *Id.* at 263.

79. Gallagher, *supra* note 25, at 800–01.



considered to be lesser forms of severe exploitation such as servitude.<sup>80</sup> The conceptual distinctness of slavery is also evident in international human rights law and international criminal law.<sup>81</sup> The 1956 Supplementary Convention on the Elaboration of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery<sup>82</sup> distinguishes between slavery and slavery-like practices such as debt bondage,<sup>83</sup> serfdom, servile forms of marriage, and the exploitation of children. Interestingly, in a recent representation to the ILO, the UNODC viewed bonded labor as being outside the ambit of the Article 3 definition of trafficking.<sup>84</sup> Finally, servitude is separate and broader than slavery. Although the final version of the Protocol does not define servitude, the seventh revised draft of the Protocol<sup>85</sup> defines it as “the condition of a person who is unlawfully compelled or coerced by another to render any service to the same person or to others and who has no reasonable alternative but to perform the service, and shall include domestic service and debt bondage.”<sup>86</sup>

#### 4. *The Interplay Between Coercion and Exploitation*

In a nutshell, the U.N. Protocol offers an expansive understanding of both the means of trafficking as well as the purpose for which one is trafficked, namely, exploitation. Despite the centrality of the concepts of coercion and exploitation to the U.N. Protocol, the U.N. Protocol does not define them and their meaning under international law is far from definitive even when clear. Indeed, even according to the ILO, discussions amongst jurists and lawmakers on the definitional aspects of trafficking continue without clear resolution.<sup>87</sup> A survey of the laws relating to trafficking in twelve jurisdictions found a widespread lack of clarity around the definition of trafficking.<sup>88</sup> The UNODC further admits that the lack of clarity over the parameters of trafficking hinders detection of trafficked victims and overall enforcement efforts.<sup>89</sup> Each of these two central legal concepts

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80. *Id.* at 801.

81. *See id.* at 802–03, 805–08.

82. United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18.3 U.S.T. 3201, 266 U.N.T.S. 3, 41–43.

83. The Supplementary Convention defines debt bondage as “the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.” *Id.* art. 1(a).

84. INT’L LABOUR OFFICE, *supra* note 42, ¶ 23.

85. Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, *supra* note 53.

86. *Id.* art. 2 bis(c). Chuang notes that servitude refers to the concept of servile status found in the Supplementary Slavery Convention and thus would include debt bondage, servile marriage, and trafficking in children. Chuang, *supra* note 17, at 1708 n.215.

87. INT’L LABOUR OFFICE, *supra* note 35, ¶¶ 17.

88. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 5.

89. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 67, at 89.

in the law of trafficking, namely, the means and purpose, both span a continuum of possibilities. The means of coercion can range from legally recognizable and fairly narrowly construed notions of coercion, deception, fraud, and abduction (termed as “strong coercion” for ease of reference<sup>90</sup>) to the capacious, outlier concept of the abuse of a position of vulnerability (weak coercion). Similarly, while Article 3 points to specific labor conditions that constitute exploitation and are recognized and understood under international law (strong exploitation), this list of labor conditions is not exhaustive and could well include a range of working conditions that are best described as precarious, exploitative, and normatively reprehensible (weak exploitation).

A narrow construction of the offence of trafficking might entail means of entry such as coercion understood in terms of violence, deception or fraud (strong coercion) resulting in slavery (strong exploitation). A paradigmatic example would be the trafficking episode etched in our minds through repeated iterations by the media, namely, of the young woman who is offered a well-paying job as a nanny but is duped into doing sex work in a foreign country against her will and under threat of physical and sexual violence for no pay. In contrast, a broader construction of the offence of trafficking may penalize the recruitment of a victim by abuse of the position of vulnerability (weak coercion) resulting in precarious work with less than minimum-wage pay (weak exploitation). An example would be of a Netherlands case where anti-trafficking law was invoked against a restaurant owner who employed undocumented migrant workers (who begged him for a job) working for far less than the Dutch minimum wage.<sup>91</sup> This incredible malleability of the definition of trafficking, although frustrating for lawyers, also suggests the ability of states to tailor the offence according to their need and political, ethical, and normative desire.

The offence of trafficking (at least in adults) requires both the means and exploitative purpose to be proved although states are known to dispense with the one or the other.<sup>92</sup> As countries increasingly ratify the U.N. Protocol, their domestic legal mediations of the coercion-exploitation balance vary quite dramatically. Some countries are focused on coercive entry into labor markets (United States), others on degrading conditions (e.g., Belgium, France, Germany), with countries like Brazil targeting both.<sup>93</sup> States that dispense with the means element rather than the purpose element may assume that an exploitative labor form must necessarily involve some form of coercion. Where means are dispensed with, the scope of anti-trafficking law depends on the interpretive breadth of the

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90. The terms “strong” and “weak” are not used to qualify the quality or quantity of the means of trafficking but simply to indicate the levels of relative legal certainty or legal malleability around them.

91. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 38–39.

92. *See id.* at 5, 48–55.

93. *See* INT’L LABOUR OFFICE, *supra* note 35, ¶¶ 118–20.

term “exploitation.”<sup>94</sup> However, there is no necessary correlation between a coercive means of entry and an exploitative purpose.<sup>95</sup> In other words, coerced entry into a labor sector can exist without exploitation, while exploitation can occur without coerced entry. To illustrate, a domestic worker entering the United Kingdom legally could well be paid far less than the minimum wage in a household that she works in and thus be exploited. A female migrant duped into sex work on the other hand, may well earn a lot more than she would have ever earned in her previous employment and therefore not be exploited; exploitation being understood here in purely economic terms.<sup>96</sup>

Some states may grade offences along a continuum with slavery at one end and exploitation at the other, and with forced labor somewhere in between.<sup>97</sup> Where states incorporate both the means and purpose into their definition of trafficking, they may still dispense with certain elements of the means. In all of these instances, apart from the ambiguity of the legal concept at hand, the criminal law jurisprudence of the state can have a significant impact on the breadth of the anti-trafficking offence. Crimes typically require both the conduct element (*actus reus*) and the mental element (*mens rea*) to be satisfied. The *mens rea* element for the offence of trafficking can purportedly range from ulterior intent (the strongest version of the *mens rea* of intention), recklessness (knowingly taking an unjustifiable risk), and negligence (failure to discharge a duty) to mere knowledge.<sup>98</sup> It is not clear whether the standard of *mens rea* varies according to the means of entry, yet they are highly likely to correspond. Hence, the culpability required for a means of trafficking through fraud or deception is likely to be greater than that required for an abuse of position of vulnerability, where being reckless as to the possibility of a person being exploited may suffice. These doctrinal legal implications of anti-trafficking law have received little academic attention, although some scholars have justified imposing strict liability on purchasers of sex on the grounds of criminal law ideas of complicity and endangerment.<sup>99</sup>

In assessing the architecture of anti-trafficking law, the ILO’s Operational Indicators of Trafficking in Human Beings are instructive.<sup>100</sup> These are merely

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94. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 51, 54–55.

95. See Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, MIGRATION INFO. SOURCE (Mar. 2005), <http://www.migrationinformation.org/feature/display.cfm?ID=294>.

96. For my discussion on theorizing exploitation, see *infra* Part II.D.

97. INT’L LABOUR OFFICE, *supra* note 35, ¶ 118–20.

98. See UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 20 n.24, 86.

99. See Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1756–57 (2010). For a different view, see David Archard, *Criminalising the Use of Trafficked Prostitutes: Some Philosophical Issues*, in DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION 149, 156–59 (Vanesse E. Munro & Marina Della Giusta eds., 2008).

100. See INT’L LABOUR OFFICE, INT’L LABOUR ORG., OPERATIONAL INDICATORS OF TRAFFICKING IN HUMAN BEINGS: RESULTS FROM A DELPHI SURVEY IMPLEMENTED BY THE ILO

indicators to help collect data and assist practitioners and labor inspectors in identifying incidents of trafficking and do not set out substantive legal requirements. Yet, they elaborate in great detail the myriad aspects of trafficking and offer a window into the factors that a state might consider in fashioning an offence of trafficking. The ILO delineates four sets of indicators for adults and children who are victims in sex work or in other forms of labor exploitation. Each victim must cumulatively satisfy six dimensions of the trafficking definition measured through the presence of two strong indicators, three medium indicators, or a combination of strong, medium, and weak indicators for each of the dimensions. The six dimensions include recruitment by deception, coercion and abuse of vulnerability, exploitative work, and coercion and abuse of vulnerability at the destination. These criteria clearly exceed the formal legal requirements of the definition of trafficking under the U.N. Protocol, which requires only one of the several means of trafficking to be present along with exploitation with no reference to coercion or abuse of vulnerability at the destination.<sup>101</sup> Further still, the ILO Indicators treat trafficking for sex work differentially from trafficking for other labor so that the presence of certain medium level indicators in labor trafficking would constitute strong indicators when present in the context of trafficking for sex work. The general effect of this elaboration is to delineate a small category of trafficked victims who are deceived, exploited, and coerced, as distinct from (a) successful migrants, (b) exploited migrants who are not deceived or coerced, and (c) victims who are deceived and exploited but not coerced (at the point of recruitment and destination). The ILO thus places a premium on being coerced so a migrant could be exploited, but in order to be trafficked, coercion is required. Interestingly, a review of the indicators suggests that coercion is indicated predominantly by force, threat, and violence. This predilection towards coercion rather than exploitation is mirrored in domestic legal regimes such as the VTVPA.<sup>102</sup> While some commentators attribute the narrow formulation of the means of entry within the VTVPA to “force, fraud, or coercion” to the need for the law to pass constitutional muster given the vagueness of terms such as the

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AND THE EUROPEAN COMMISSION (2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_105023.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf).

101. For a similar critique of the ILO Indicators, see UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 26.

102. See Section 8 of the VTVPA’s definitions, which defines severe forms of trafficking as requiring force, fraud or coercion into the exploitative forms of labor listed therein. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 103(8), 114 Stat. 1464, 1474 (2000) (codified at 22 U.S.C. § 7104 (2012)). This limited interpretation of coercion is particularly seen in the process of identifying victims of trafficking. Given the priority of the UK government to crack down on illegal migration, NGOs have pointed to how the UK Border Agency is permeated with a culture of disbelief where officials are less likely to believe that persons with illegal or irregular immigration status are credible. In these circumstances, victims who can prove their coercion are privileged over those who cannot. See Juliane Heider, *Un-Defining “Trafficking”: A Proposal to Re-Align Migration, Labour and “Exploitation”* 12 (2012) (unpublished manuscript) (on file with author).

abuse of position of vulnerability,<sup>103</sup> others argue that this is a deliberate way to discourage unlawful migration. In other words, the U.S. government prefers to treat smuggled migrants subject to exploitation as ineligible for the protections available to trafficked victims who have entered the country by means of force, fraud, or coercion.<sup>104</sup>

Based on this analysis, we could conceptualize anti-trafficking law in terms of a pyramid of trafficking offences with trafficking episodes involving strong coercion and strong exploitation forming a narrow sliver at the top of the pyramid, while the base is occupied by instances characterized by weak coercion in relation to the means and weak exploitation in relation to the purpose.<sup>105</sup> In the context of transnational labor markets, intermediate categories of trafficking might include scenarios characterized by strong coercion (e.g., deception into a certain line of work) and weak exploitation (e.g., pay below minimum wage) and weak coercion (e.g., abuse of position of vulnerability) and strong exploitation (e.g., debt bondage). There are two additional dimensions along which anti-trafficking law operates. The first is the legality of the means of entry, and the second is the legality of the sector in which trafficked labor is carried out. One can thus visualize at least sixteen scenarios based on these four factors that would implicate anti-trafficking law, only a minute fraction of which anti-trafficking law targets in reality.

Further, over the life of a trafficking episode, there is considerable fluidity between statuses. A migrant may start out by migrating legally, but given the complete lack of protection within the formal sector and high levels of abuse, deploy the strategy of “absconding” to shift into an undocumented immigration status. This is illustrated by the case of an Indian migrant worker in the United Arab Emirates who enters the country legally to work in the construction industry, is not paid his wages for five months, and suffers a work-related accident yet has to continue working. Hence he “abscond[s].”<sup>106</sup> Here the “structural violence”<sup>107</sup> of the *kefala* system<sup>108</sup> leads many migrants to work in the informal economy due to workers’ inability to resolve work-related issues with their sponsor employers.<sup>109</sup> Alternatively, migrants could move from a lawful sector like domestic work where levels of abuse are so high that migrant women prefer to

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103. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 45.

104. See Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1635 (2010).

105. The clarity and certainty around a narrow definition of trafficking might result in a higher rate of prosecution. Alternatively, a broader definition of trafficking might result in greater prosecutorial discretion thus bringing down the rate of prosecution.

106. MAHDAVI, *supra* note 30, at 94.

107. See *id.* at 95–97.

108. This is where the law of the host state requires migrant workers to be tied to their employers such that they are prevented from switching employers. This system undermines migrants’ bargaining power and forces them to work and live in poor conditions.

109. See MAHDAVI, *supra* note 30, at 130–34.

resort to an illegal employment sector like sex work. This is true for both undocumented migrants as well as those with legal status in the destination state.<sup>110</sup> Thus, we find Bangladeshi women and men who migrate to the Middle East on a company visa to work as janitors, but are not informed about their conditions of work, especially pay levels. They reach the host state and discover that they can barely make ends meet on their meager salary, which is not paid on time. Female migrants under tremendous pressure not to return home with an empty hand then have no choice but to resort to sex work. Thus, 89.2% of returnees who went on a company visa to do domestic work had to voluntarily take up sex work.<sup>111</sup> Mahdavi similarly writes of domestic workers in the United Arab Emirates who routinely turn to sex work in search of increased autonomy and higher wages,<sup>112</sup> their reasoning being that “if we don’t have rights as maids or prostitutes, then we might as well be prostitutes so we can make more money.”<sup>113</sup>

Viewed this way, it is not hard to understand why some states have focused unduly on targeting prostitution through anti-trafficking law. Given the highly stigmatized nature of sex work, it ticks the boxes of both coercion and exploitation per se, the reasoning being that who but a coerced person would want to do sex work, and how can sex work be anything other than exploitative? I will elaborate on this particularistic interpretation of anti-trafficking law in the next section. Yet it is not entirely certain that anti-trafficking law will always take seriously instances of trafficking at the top of the pyramid of anti-trafficking offences involving strong coercion and strong exploitation. The preoccupation of many Western states with border control means that there is an inordinate emphasis on the legality of the means of entry. The focus is on preventing those migrating without proper documents while turning a blind eye to someone who is crossing borders legally. Similarly, where the labor sector at the destination is lawful under domestic law, states may turn a blind eye to exploitation. Thus, we have a victim of trafficking recruited by means of strong coercion for purposes of strong exploitation, but who falls off the radar screen of anti-trafficking law in the host state. This is illustrated by the case of a migrant worker from the Philippines who is recruited by deception to do factory work in the United Arab Emirates, but finds himself illegally deployed to clean septic tanks on an American army base in Iraq, which he is not allowed to leave.<sup>114</sup>

Migrants legally entering labor markets through the spectrum of strong or weak means of coercion for varied levels of exploitation do not fare better either. Thus, we find no legal protection for an Ethiopian migrant who believes she is travelling to Dubai on a hotel maid visa, but is instead made to work in a hospital

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110. *See id.* at 135.

111. THÉRÈSE BLANCHET, BEYOND BOUNDARIES: A CRITICAL LOOK AT WOMEN LABOUR MIGRATION AND THE TRAFFICKING WITHIN 58 (2002).

112. MAHDAVI, *supra* note 30, at 126.

113. *Id.* at 125.

114. *See id.* at 97–101.

(strong coercion) under extremely poor conditions (weak exploitation).<sup>115</sup> Conversely, Filipina hostesses in Tokyo's nightlife industry enter into several contracts with intermediaries in the Philippines in order to work in Japan on an entertainer visa knowing fully well that some level of sexualized interaction is essential (weak coercion). Several of these contracts give rise to debt bondage and indentured labor (strong exploitation), but are rendered invisible through the legitimating language of the written contract and the employment visa, which makes migration possible. The buffer of Filipino managers and promotion agencies meant to safeguard the interests of migrant workers in fact creates the very conditions for the trafficking of these women whose sexualized work renders them trafficked in the popular imagination, not the matrix of exploitative contracts.<sup>116</sup>

*5. Ambiguity, Conflation, and Diffusion: Mapping the Intended and Unintended Consequences of Anti-Trafficking Law*

In the previous section, I set out the conceptual scaffolding of anti-trafficking law as exemplified by the U.N. Protocol. Confirming the highly restrictive reach of anti-trafficking law is the preliminary assessment of its impact by a range of nongovernmental actors almost ten years after the adoption of the U.N. Protocol. Critics may rightly ask how we can definitively assess the impact of the U.N. Protocol, much less the collateral damage<sup>117</sup> that it has generated, given the conceptual ambiguity at its heart and the lack of reliable data tracking the phenomenon. Even for an international legal instrument that has been immensely successful in terms of its ratification status,<sup>118</sup> the operationalization of international law into domestic legal norms can be a lengthy process spanning several years.<sup>119</sup> However, the preliminary assessment as to the impact of the U.N. Protocol for sex workers,<sup>120</sup> migrants<sup>121</sup> and trafficked victims themselves<sup>122</sup> is

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115. See *id.* at 106–09.

116. Rhacel Salazar Parreñas, *Trafficked? Filipino Hostesses in Tokyo's Nightlife Industry*, 18 *YALE J.L. & FEMINISM* 145, 168 (2006).

117. See Dottridge, *supra* note 47, at 20.

118. As of December 2013, 159 countries are party to the U.N. Protocol. INT'L LABOUR OFFICE, *supra* note 35, ¶ 64. Moreover, within five years of the coming into force of the U.N. Protocol, 63% of the 155 countries surveyed by the U.N. Office of Drugs and Crime in 2008 had passed laws against major forms of trafficking. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 10, at 8. Similarly, there have been an incredible number of action plans against trafficking unlike against forced labor. INT'L LABOUR OFFICE, *supra* note 35, ¶ 90.

119. Indeed this was the case with the 1949 U.N. Convention. To illustrate, India was a signatory to the Convention, but domestic law conforming to international legal obligations was not passed by the Indian Parliament until 1956. See Ratna Kapur, *India*, in *GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN*, *supra* note 47, at 114, 115–16.

120. Sixteen percent of the 155 countries surveyed by UNODC in 2009 had passed anti-trafficking laws that were limited to sexual exploitation or covered only women and children. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 10, at 8. According to the UNODC, the most commonly identified form of human trafficking is sexual exploitation, although it admits that this high percentage is likely to be a result of statistical bias of much of the data it relied on which came

from European countries; these are more likely to detect victims compared to other regions. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 67, at 11. In the 2009 Report, this was explained in terms of the greater visibility of sexual exploitation when compared to exploitation in other labor sectors. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 10, at 11. At the regional level, as with the 2002 South Asia Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, trafficking was explicitly identified with trafficking for sex work, while the definition of trafficking is based on the 1949 U.N. Suppression of Traffic Convention, not the 2000 U.N. Protocol. South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan. 5, 2002, <http://www.saarc-sec.org/userfiles/conv-trafficking.pdf>. Even in countries that have ratified the U.N. Protocol, law enforcement officials imply that entry into sex work amounts to trafficking. *See* Dottridge, *supra* note 47, at 15. Interestingly, despite the focus on prostitution itself, very little has been done to promote the human or labor rights of those who prostitute. If anything, anti-prostitution funding restrictions effectuated by the Bush administration in the name of combating sex trafficking undermined HIV prevention efforts amongst sex workers when basic social services to certain sex worker populations were withdrawn. Chuang, *supra* note 17, at 1713. Undocumented migrant brothel workers, for instance, have no protection under the VTVPA because they have not been coerced or duped into sex work, even if they find themselves in slave-like conditions. *See* April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 249 (2007). Technically, these women should also have the benefit of the law if their working conditions are poor, but the prosecution officers are unlikely to make this nuanced distinction. *See id.* at 249–50. This can be attributed to the underlying distinction between the good victim and bad prostitute, not unfamiliar to lawyers in other areas of sexual violence. *See* Vanessa E. Munro, *Of Rights and Rhetoric: Discourses of Degradation and Exploitation in the Context of Sex Trafficking*, 35 J.L. & SOC'Y 240, 243 (2008). Further enhancing the distinction between deserving and undeserving victims is the fact that sex trafficking victims are granted assistance in some countries only on the condition that they assist the prosecution machinery. In the case of the VTVPA for instance, only victims of “severe” forms of trafficking are eligible for benefits. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 103(8), 114 Stat. 1464, 1474 (2000) (codified at 22 U.S.C. § 7104 (2012)). This involves a cumbersome, long drawn-out certification program, which is inordinately tied to requirements to assist in the trafficker’s prosecution. *See* Rieger, *supra*, at 247–52. Such distinctions have implications for prostitution law reform in domestic legal jurisdictions as well. At the national level, the South Korean statute, the Sex Trade Prevention Act, 2004, whose passage managed to place the country in Tier 1 of the U.S. TIP Report, mandated that only victim sex workers were to be decriminalized and not sex workers who worked voluntarily. *See* U.S. DEP’T OF STATE, *supra* note 44, at 210–11. Abolitionists lay the blame for this on sex work advocates who they say insisted on “sex workers’ agency and the forced/free distinction,” which was deployed in domestic contexts to “promote a conservative male sexual ethic.” KOTISWARAN, *supra* note 18, at 37 (citing SHEILA JEFFREYS, *THE INDUSTRIAL VAGINA: THE POLITICAL ECONOMY OF THE GLOBAL SEX TRADE* 206 (2009)). “Similarly, in India a report commissioned by the National Human Rights Commission recommended an interpretation of existing law to decriminalize soliciting by survivors of ‘commercial sexual exploitation’ but not by victims who continued to do sex work.” *Id.* (citing SANKAR SEN & P. M. NAIR, *INST. OF SOC. SCIS., TRAFFICKING IN WOMEN AND CHILDREN IN INDIA* 231 (2005)). Sadly, where the U.N. Protocol encourages states to pursue demand reduction strategies under Article 9, it is not unforeseeable for states to selectively apply this to the sex industry. The popularity of the Swedish model criminalizing customers is testament to this. From then on, states could embark on a slippery slope to also target the supply of sex workers.

121. From the time of the passage of the U.N. Protocol, border control is said to have been at the heart of the Protocol as the very passage of the U.N. Convention against Transnational Organized Crime was motivated by sovereignty and security concerns rather than the human rights of migrant and trafficked groups. Gallagher, *supra* note 38, at 994, 976; Halley et al., *supra* note 5, at 389; Hathaway, *supra* note 24, at 6. The Protocol has prevented migration, including of those migrants who cross borders illegally or earn money illicitly rather than addressing the various forms of exploitation



sobering. The negative fallout of contemporary anti-trafficking law can be attributed to the inherent ambiguity of legal concepts that are central to the U.N. Protocol, the international upstaging of the U.N. Protocol by the VTVPA and its annual TIP reports, and the special ideological status that sex work has enjoyed in the anti-trafficking debates, which have detracted from a sophisticated understanding of the interrelation between coercion and exploitation.

As has been well documented, much of the momentum relating to anti-trafficking law emerged from the international reach of the U.S. domestic law, the VTVPA, and its mechanism of the TIP Report released every year. What really cemented the influence of the TIP reports is its normative condemnation of sex work. A range of U.S. foreign policy initiatives unleashed by the Bush administration detailed elsewhere further contributed to this impact.<sup>123</sup> Significantly, the TIP reports have been known to conflate sex work and trafficking from the very beginning while advancing the U.S. government's campaign against sex work internationally.<sup>124</sup> The TIP reports have only delineated sex work from trafficking since 2009.<sup>125</sup> In the meantime, the TIP Report mechanism has upstaged the U.N. Protocol such that the "performance of governments with respect to trafficking is currently being assessed, not with reference to the international rules that states (including the United States) have collectively developed and freely accepted, but against criteria drawn up and imposed by U.S. bureaucrats and politicians."<sup>126</sup> Due to the influence of the VTVPA, the sex sector has been "the primary focus of most countries' 'anti-

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listed in the U.N. Protocol or protecting the human rights of trafficked persons. Dottridge, *supra* note 47, at 1, 12, 15. The denial by both the U.N. Protocol and the Migrant Smuggling Protocol of the complexity of real world migration scenarios means that developed countries have policed the line between smuggling and trafficking vigilantly so that unlawful immigration is discouraged. Chacón, *supra* note 104, at 1627. Meanwhile, the criminalization of smuggling also fosters trafficking, Hathaway, *supra* note 24, at 5, at 34; *see also* Chacón, *supra* note 104, at 1640–41, and increases exploitative conditions in destination countries while preventing refugees from exercising their rights under international law. Hathaway, *supra* note 24, at 35–36; *see also* Satvinder S. Juss, *Human Trafficking, Asylum and the Problem of Protection*, in *THE ASHGATE RESEARCH COMPANION TO MIGRATION LAW, THEORY AND POLICY* 281, 294 (Satvinder S. Juss ed., 2013). Thus, both countries of origin and of transit Hathaway claims have been "effectively conscripted as agents of first world states of destination," Hathaway, *supra* note 24, at 27, so as to control migration at a minimal cost resulting in significant damage to human rights concerns. *Id.* at 30. Perversely, trafficking has been invoked as the driving force behind immigration enforcement thus putting a "human rights gloss on a border-enforcement model." Chacón, *supra* note 104, at 1642. Similar rhetoric is seen emerging from the UK government. *See* Anderson, *supra* note 38, at 5.

122. Less than two thousand people had availed themselves of the T visa since 2000 in the United States. Chacón, *supra* note 104, at 1614. Thus, in the case of the United States, the VTVPA has proved to be a law that is too narrow to reach a significant portion of the domestic trafficking problem. Chacón, *supra* note 10, at 2987.

123. *See* Chuang, *supra* note 17, at 1680–82.

124. Gallagher, *supra* note 31, at 386.

125. *See id.*

126. *Id.* at 382.

trafficking' efforts."<sup>127</sup> Hence, the efforts of human rights anti-trafficking NGOs at the U.N. Protocol negotiations to decouple trafficking from prostitution and thus shake off the legacy of the 1949 U.N. Convention have been far from successful. Not only was trafficking being comprehended by states in terms of trafficking for sex work, but sex work has also been conflated with trafficking.

There are indications that this trend may be becoming less strong.<sup>128</sup> Thus, the UNODC's latest report on global trafficking suggests that more countries now have comprehensive definitions of trafficking than before.<sup>129</sup> The ILO points to how trafficking for labor exploitation is receiving increased attention after an initial focus on trafficking for sexual exploitation.<sup>130</sup> Further, the definition of trafficking in many countries covers trafficking for both labor and sexual exploitation.<sup>131</sup> That the critique of sex workers' organizations against the conflation of trafficking with sex work is gaining ground was evident most recently in India. Here, in the context of rape law reform, a Presidential Ordinance defined trafficking by conflating it with prostitution. This was so strongly protested by sex workers' groups that a Parliamentary statute replacing the Ordinance modified the trafficking offence to define exploitation in terms of physical and sexual exploitation instead of prostitution. Yet the moral charge that prostitution produces means that it is likely to continue to have traction amongst governments in their anti-trafficking policy. Indeed, the new trafficking offences under the Indian Penal Code, 1860 (IPC)<sup>132</sup> also criminalize the use of a trafficked person for sexual exploitation but not other forms of exploitation. Thus, the ILO notes that prosecution rates for trafficking for labor exploitation continues to be low, rather than for trafficking for commercial sexual exploitation.<sup>133</sup>

In conclusion, the discussion in Part I suggests that trafficking is a complex international problem involving men and women implicated in varying degrees of coercion and exploitation whose movement and conditions of work are further legal or undocumented. Against this backdrop, domestic criminal law mechanisms

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127. Julia O'Connell Davidson, *Will the Real Sex Slave Please Stand Up?*, FEMINIST REV., Aug. 2006, at 4, 11; see also Chuang, *supra* note 17, at 1657; Dottridge, *supra* note 47, at 12. This is particularly true of the United States. See Chacón, *supra* note 104, at 1623 n.59 (pointing to the overwhelming enforcement of trafficking for sex work rather than other labor sectors); Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 318, 320–28 (2007).

128. INT'L LABOUR OFFICE, *supra* note 35, ¶ 15.

129. The percentage of countries criminalizing only some aspects of trafficking decreased from 17% in 2008 to 11% in 2012. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 67, at 83.

130. INT'L LABOUR OFFICE, *supra* note 35, ¶ 120.

131. *Id.*

132. The Criminal Code (Amendment) Act, 2013, No. 13 of 2013 (India), available at <http://indiacode.nic.in/acts-in-pdf/132013.pdf>.

133. INT'L LABOUR OFFICE, *supra* note 35, ¶ 131. Similarly, the interpretation of certain means of trafficking such as the abuse of position of vulnerability is likely to be influenced by whether it is for purposes of sexual exploitation. See UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 33, at 81.

are an ineffective yet sharp instrument that includes and excludes legal subjects arbitrarily. Given this situation, in the next Part, I offer a critique of anti-trafficking law by delineating alternate legal imaginings of coercion and exploitation and institutional mechanisms in order to target trafficking.

## II. REORIENTING ANTI-TRAFFICKING DISCOURSE

A substantial amount of scholarship seeks to reorient contemporary anti-trafficking discourse and overwhelmingly refers to issues of poverty, structural adjustment policies, gender inequality, wide domestic socio-economic disparities, transitional economies, immigration laws, and migration policies as factors that influence trafficking. As Chuang observes, the current anti-trafficking discourse has

embedded in the public consciousness a reductive narrative of trafficking. . . . from a complex human rights problem rooted in the failure of migration and labor frameworks to respond to globalizing trends, to a moral problem and crime of sexual violence against women and girls best addressed through an aggressive criminal justice response.<sup>134</sup>

Thus, several scholars have put forth the migration frame for making sense of trafficking,<sup>135</sup> even suggesting that “the mainstream discourse on trafficking is nothing more than a campaign to stop the international migration of women.”<sup>136</sup> They have also highlighted the significance of the labor rights approach in critiquing the current trajectory of anti-trafficking law.<sup>137</sup> I both draw on and build upon such research.

As I have demonstrated so far, the two significant drawbacks of anti-trafficking legal discourse are as follows. Anti-trafficking discourse exceptionalizes *trafficking* in terms of trafficking for sex work and *sex work* as an exceptional form of female labor that must be cordoned off from other female labor markets and eliminated through the use of prohibitionist criminal law. Here, I attempt to de-exceptionalize both. Needless to say, the project of de-exceptionalizing trafficking as being solely for sex work is better developed than the project of de-exceptionalizing sex work. Many scholars have highlighted the vast range of labor sectors into which workers are trafficked, labeling this “labor trafficking” in contrast to “sex trafficking.” For some, the very term “sex trafficking” and its

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134. Chuang, *supra* note 17, at 1694.

135. Jacqueline Berman, *Biopolitical Management, Economic Calculation and “Trafficked Women,”* 48 INT’L MIGRATION 85, 89 (2010).

136. Parreñas, *supra* note 116, at 147 (citing Laura M. Agustín, *Challenging Place: Leaving Home for Sex*, 45 DEV. 110 (2002)).

137. See generally James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849, 1871–74 (2010) (applying a “free labor” perspective to the problem of sex trafficking); Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 105–19 (2012) (arguing that a labor rights approach would provide more effective strategies to combat trafficking than the human rights approach).

privileged position as a major form of trafficking<sup>138</sup> alongside “labor trafficking” exceptionalizes the harm that those trafficked into sex work suffer from. Indeed, the denial of sex work as a form of labor within which some trafficking occurs is remarkable, suggesting the abolitionist subtext of the use of the term. Others have argued that this distinction is misleading because labor trafficking is a gendered phenomenon<sup>139</sup> and is often accompanied by sexual abuse.<sup>140</sup> While acknowledging these feminist insights, for the time being, I will de-exceptionalize trafficking by drawing on alternate legal imaginaries surrounding coerced migration in ordinary times, as distinguished from moments of moral panic. Since these responses were meant to deal with the trafficking of men for labor, they are therefore drained of the abolitionist energy fostered by a global sex panic that repeatedly puts anti-trafficking law at risk of misuse.

#### A. Domestic “Anti-Trafficking Law”: The Case of India

The contemporary legal regime on trafficking, especially the annual TIP reports released by the U.S. State Department under the VTVPA and the various antiprostitution policies of the erstwhile Bush administration<sup>141</sup> have had an enormous influence on the Indian state’s disposition towards regulating trafficking. India figured in Tier 2 of the TIP report for the first three years (2001,<sup>142</sup> 2002,<sup>143</sup> and 2003<sup>144</sup>) of the TIP reporting before being placed on the Tier Two Watch List between 2004<sup>145</sup> and 2010.<sup>146</sup> It was only in 2011 that India was moved back to the normal Tier Two List.<sup>147</sup> That year, India also ratified the U.N. Protocol, which it had signed back in December 2002. Since 2006 however, the Indian government, keen to be upgraded in the TIP rankings, attempted to strengthen Indian anti-trafficking law in the form of a proposed amendment to the Indian anti-sex work criminal law, the Immoral Traffic Prevention Act, 1986 (ITPA).<sup>148</sup> The proposed amendment followed the Swedish model, where

138. Twenty-two percent of the world’s forced laborers are in forced sexual exploitation as opposed to sixty-eight percent in forced labor exploitation according to the ILO. INT’L LABOUR OFFICE, *supra* note 35, ¶ 2.

139. Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 93–94 (2009). However, Barnhart ultimately recommends that trafficking for sex work and for other labor should not be bifurcated given that they are interrelated systems of abuse and oppression; she calls for a single definition of human trafficking. *Id.* at 131.

140. *Id.* at 91.

141. See Chuang, *supra* note 17, at 1683–93; Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 474–81 (2006); Halley et al., *supra* note 5, 359–60.

142. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 12 (2001).

143. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 17 (2002).

144. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 21 (2003).

145. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 39 (2004).

146. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 53 (2010).

147. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 52 (2011).

148. See Prabha Kotiswaran, *Introduction to SEX WORK*, at xi (Prabha Kotiswaran ed., 2011).

authorities seek criminalization for the customers of trafficked sex workers. The proposed amendment lapsed in Parliament in March 2009 due to governmental dissonance, fostered largely by the countervailing influence of the public health complex, which has for years undertaken HIV prevention work in sex worker communities with international donor funding. The HIV prevention complex—and indeed the Indian health ministry—viewed the proposed amendment to the ITPA as significantly detrimental to these efforts, as it would have the effect of driving the sex industry underground.<sup>149</sup> However, the preliminary impulse of the Indian state, like other states, was to offer a reactive response to the U.N. Protocol by limiting trafficking to trafficking for sex work.<sup>150</sup>

That this impulse is a powerful one was evident once again in recent months. In response to the gang rape and death of a twenty-three-year-old woman, the President of India promulgated an ordinance on violence against women in February 2013, which contained two provisions criminalizing trafficking and employing a trafficked person.<sup>151</sup> Although the ordinance substantially mirrored the Article 3 definition of trafficking, it defined exploitation as including prostitution, in effect conflating trafficking with sex work. As a result of the forceful lobbying of the Law Ministry by Indian sex workers' groups, the two anti-trafficking provisions of the Criminal Law (Amendment) Bill, 2013, recently passed by Parliament and signed into law as of April 3, 2013, sought to define exploitation for purposes of the offence of trafficking as including any act of physical exploitation and any form of sexual exploitation.<sup>152</sup> In this circular definition of trafficking, Section 370, which criminalizes trafficking, dropped one of the means of trafficking listed under Article 3, namely, abuse of a position of vulnerability. The litany of the forms of exploitation under Section 370 also omitted reference to forced labor, the significance of which will emerge in my discussion of the relevant case law. Recognizing the role of targeting the demand for trafficked labor, Section 370A criminalizes anyone who engages a trafficked minor or adult, but only for purposes of sexual exploitation. So sexual exploitation, which is not defined in the Bill, continues to occupy a privileged

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149. *See id.*

150. *See* Ratna Kapur, GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, *India, in* COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD, *supra* note 47, at 114, 128. The increased presence of the UNODC in India has meant the setting up of anti-human trafficking units in certain states with the aim of targeting sex work and rescuing victims of “commercial sexual exploitation.” *See id.* at 114–16. The National and State Crime Records Bureaus, which have for decades produced annual reports on crime statistics, introduced a new chapter on trafficking in 2006. NAT'L CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA 2006 (2006), *available at* <http://ncrb.nic.in/ciiprevious/Data/CD-CII2006/cii-2006/CHAP6star.pdf>. Fantastic public service announcements showing policemen placing large padlocks on brothels and Bollywood actors urging the populace to combat human trafficking are not uncommon. *See, e.g.*, ONE LIFE, NO PRICE (UNODC public service announcement) *available at* <https://www.youtube.com/watch?v=Ggy5ZKQpww0>.

151. The Criminal Law (Amendment) Ordinance, 2013, No. 3 of 2013 (India).

152. *See id.*

position over trafficking in the myriad labor sectors of the Indian economy, including brick kilns, rice mills, farms, embroidery factories, mines, stone quarries, homes, and carpet factories.

Historically speaking, Indian law has been attuned to the precarious labor conditions of millions of Indians. The Indian Constitution, as a self-styled radical legal document reflecting postcolonial aspirations for modern nationhood, is concerned with indigenous forms of servitude. Under Part III of the Indian Constitution dealing with fundamental rights, Article 23 prohibits the traffic in human beings and *begar*<sup>153</sup> and other similar forms of forced labor, making the contravention of this provision an offence punishable in accordance with law. Article 23 does not however define these terms. Several provisions of the Indian Penal Code, 1860 (IPC), deal with aspects of trafficking such as kidnapping or abduction (Sections 365, 367), procuring, buying and selling minors for prostitution (Sections 366A, 366B, 372, 373), slavery (Section 371), and unlawful compulsory labor (Section 374).<sup>154</sup> Yet the Indian Penal Code does not define the terms slavery, bondage, forced labor, or *begary*. Many of the labor-related provisions in the IPC were a product of colonial law making. The exigencies of colonial rule in general did not permit the framing of a comprehensive policy to deal with forced labor in all its forms so that any policy or legislative changes were purely reactive.<sup>155</sup> Indeed, the state compulsorily acquired labor for public works, the refusal of which was even visited by fine or imprisonment. It was thus left to the postcolonial Indian state to address the social realities of bonded labor, forced migration, and the deplorable conditions of migrant labor. These labor conditions are recounted memorably in a short story written by the famous Bengali novelist, Mahaswetha Devi, which is remarkably true to social reality. Over the decades, Devi's work has painted for us a very detailed picture of the condition of tribal populations in postcolonial India. Although legible to the state through the constitutional legal category of "scheduled tribes," these tribal groups are severely disadvantaged in socioeconomic terms, and are certainly absent from the popular consciousness of the Indian public.

Devi's *The Fairytale of Rajbhasba* is about a couple from the Kol tribe in the present-day Indian state of Jharkhand who are recruited by Nandlal, a moneylender to migrate to the prosperous farms of Punjab from their home

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153. Indian courts find "begar" requires showing "that the person has been forced to work against his will and without payment." *See Ram Khelwan Pathak v. State Of U.P.*, (1998) 2 A.W.C. 1171 (India); *see also* KARA, *supra* note 43, at 284 n.12.

154. The Indian Penal Code, No. 45 of 1860, INDIA CODE §§ 365–74, *available at* <http://indiacode.nic.in>.

155. *See* Michael R. Anderson, *Work Construed: Ideological Origins of Labour Law in British India to 1918*, in DALIT MOVEMENTS AND THE MEANINGS OF LABOUR IN INDIA 87, 119–20 (Peter Robb ed., 1993). They either sought to undermine the competitive advantage of Indian industry, to meet the labor needs of European employers or the colonial state, or were proposed (as with the abolition of slavery) in response to the social reform preferences of the British middle classes. *See id.* at 101–03, 113–18.

village. Sarjom, a bonded laborer working for free on Nandlal's farm to pay off his debt and Josmina, his wife, are promised a salary of four hundred rupees a month. Nandlal entices Sarjom as follows:

An excellent job. Big farmers. Plenty to eat. Work for a short period. The two of you will get, say, about four hundred a month. Enough clothes. Work for a year and at the end of it—*baap re baap [oh my]!* You'll come back with almost five thousand bucks! Sit at home and enjoy!<sup>156</sup>

They accompany the moneylender little knowing that the plight that awaits them is a familiar one experienced by thousands of migrant laborers and contract workers travelling across the country. Sarjom and Josmina are sold for four hundred rupees to a wealthy farmer who is willing to pay them only 120 rupees (80 rupees for Sarjom and 40 for Josmina) for sixteen to 18 hours of work a day. At the end of each day, they are kept under lock and key. Worse, the employer repeatedly rapes Josmina. As they escape from him, forsaking their pay, they are re trafficked from one farmer to the next, until a benevolent farmer, whose son rapes Josmina, sends them back home with pay. Josmina discovers she is pregnant, and fearing that her family will be ostracized, commits suicide. This is the life story of Sarjom and Josmina, which Devi claims, like a fairy tale, has a beginning but no end.

Sarjom and Josmina today would be considered victims of trafficking. After all, they are recruited and transported by the abuse of position of vulnerability (at the very least); if not for deception for the purpose of exploitation, including servitude and, in the case of Josmina, sexual exploitation. This form of domestic trafficking is comparable to cross-border trafficking in many respects. The tribals consider themselves to be different from the non-tribals, or *dikus*, and this includes Nandlal as well as the prosperous farmers of Punjab. Labor for the farms in Punjab is routinely hired from the tribal belt through a contractor, also called a *Sardar*, who subcontracts the job out to agents like Nandlal. The moneylender typically approaches tribals every year in September before the harvest season when they are on the verge of starvation and are therefore vulnerable to promises of a well-paying job. These tribals travel far and do not speak the language of the destination state, namely Hindi, and therefore experience their new environs as foreign. With their movement being restricted, they are unable to communicate with locals and hence unable to escape. Both local and migrant workers are paid well below the minimum wage, and women are paid half of what male laborers are paid. Yet, employers prefer migrant tribals to local workers as they are less expensive despite which local workers are sympathetic to the migrants' plight. Often, as in the case of Sarjom, migrants are already bonded laborers, paying off old debts by working for free. However, these laborers are not naïve victims.

When Nandlal for instance comes to Josmina's house looking for Sarjom to

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156. MAHASWETA DEVI, *The Fairytale of Rajabasha*, in *OUTCAST: FOUR STORIES* 57, 62 (Sarmistha Dutta Gupta trans., 2002).

propose migration to Punjab, she confronts him about his loan that they are paying off. Made aware of the moneylender's exploitative practices by a local activist who is campaigning for the tribals' right to the forest, Josmina asks the moneylender if their debt has not been almost paid off. She taunts him for making use of her husband's labor for free, citing their debt to him as the only worry they face in life. Mahaswetha Devi further offers an insight into the decision making of the couple as they decide to migrate to Punjab. Even when Sarjom is enticed by Nandlal's offer to earn several thousand rupees and return home to a life of luxury, Josmina is more discerning. She counsels him that the tribals have always stuck it out before the harvest season and suggests that they discuss Nandlal's offer with the local activist. Several times during their stay in Punjab as well, Josmina and Sarjom plot their escape from their employers, trying to demand their dues ahead of time but with little success.

*B. De-Exceptionalizing Trafficking: Revisiting the Means*

It was precisely to deal with the labor conditions described by Devi that the Indian Parliament passed three statutes in the 1970s. I suggest that Sections 370 and 370A of the IPC need to be read in conjunction with these three domestic anti-trafficking laws.<sup>157</sup> To keep true to the tone of the statutes and court decisions that I consider, I will use the terms they employ rather than "trafficking," suggesting that they offer the possibility of an alternate legal imagination of trafficking. Specifically, they are the Bonded Labour System (Abolition) Act, 1976, as amended by the Bonded Labour System (Abolition) Amendment Act, 1985 (BLSAA), the Contract Labour (Regulation & Abolition) Act, 1970, as amended by the Contract Labour (Regulation & Abolition) Amendment Act No.14 of 1986 (CLRAA), and the Inter-State Migrant Workmen Act (Regulation of Employment and Conditions of Service) Act, 1979 (ISMWA). The BLSAA is a social legislation aimed at abolishing intergenerational bondage<sup>158</sup> backed up by the force of the

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157. *Cf.* Kapur, *supra* note 150, at 128 (stating that Indian laws did not provide a comprehensive approach to trafficking through the broader framework of migration). The need to read these provisions in a complementary manner once again highlights the complexity of the phenomenon of trafficking requiring intervention at varied scales from different areas of the law. Note here the recommendation of the Inter-Agency Coordination Group against Trafficking in Persons:

[T]he Trafficking in Persons Protocol is not sufficient to ensure a comprehensive and effective response to human trafficking. Instead, efforts must be made to ensure better understanding of the coherence between human rights law, refugee law, labour law and other relevant bodies of law, and the need to bring diverse but complementary instruments to bear on the trafficking challenge . . . .

INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, THE INTERNATIONAL LEGAL FRAMEWORKS CONCERNING TRAFFICKING IN PERSONS 14 (2012), available at [http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/ICAT\\_Policy\\_Paper\\_1\\_The\\_International\\_Legal\\_Instruments.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf).

158. The statement of objects and reasons to the legislation clearly indicates that it is aimed towards the abolition of a system existent in many parts of the country where "several generations work under bondage for the repayment of a small sum which had been taken by some remote



criminal law, whereas the other two statutes fall within the province of labor law. Together, they form an interlocking system consisting of both criminal and labor laws aimed at targeting trafficking. I will detail the broad framework of each of these statutes before examining their interpretation by the Indian courts.

The BLSAA essentially abolishes the “bonded labor system,” which is defined as a system of forced/partly forced labor whereby a debtor enters, or is presumed to have entered, into an agreement with a creditor under which, in exchange for economic consideration, or in pursuance of any customary or social obligation or obligation devolving upon him by succession or by reason of his birth into any caste or community, he is required to work under certain conditions. As such, bonded labor would amount to “a practice similar to slavery” for purposes of Article 3 of the U.N. Protocol. Under the BLSAA, the terms “forced labor” and “partly forced labor” are not defined but the working conditions that they entail are listed under Section 2(g)(v). These include where the debtor renders his own labor or that of his family without wages or with the payment of nominal wages, gives up his freedom to sell his labor or the products of his labor, gives up his right to sell his property and gives up his freedom to move. “Nominal wages” are defined as a wage below the minimum wage or what is normally paid for the same or similar labor in that locality. It thus incorporates both the legal wage floor as well as the market wage floor. The term “agreement” provides both for an agreement voluntarily entered into by the debtor with the creditor but also presumes the existence of an agreement for forced labor under any social custom prevailing in a locality. These customs are listed in the legislation. Thus, the statute not only deals with bonded labor as a customary practice facilitated by the caste system, but also with supposedly voluntary agreements made under the force of circumstance whereby a debtor agrees to extremely harsh and ordinarily unacceptable working conditions amounting to forced labor. Note, however, that the movement or transportation of a laborer is not essential for him or her to be considered bonded.

The broad ambit of the legislation as extending beyond customary intergenerational bonded labor was reiterated by an amendment in 1985, which declared that any contract laborer or interstate migrant laborer who performed labor under the conditions listed in Section 2(g)(v) would be assumed to be working under a bonded labor system, which ought to be abolished. Chapter II of the BLSAA outlaws bonded labor and prohibits and penalizes both existing and future bonded labor. All bonded laborers are set free and, by law, their obligation to pay back the debt is extinguished. The Act has several elaborate deeming provisions in relation to existing and future legal action arising from the debt. These provisions give us some inkling for what a victim centered anti-trafficking

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ancestor.” The Bonded Labour System (Abolition) Act, No. 19 of 1976, INDIA CODE (1976), *available at* <http://www.childlineindia.org.in/CP-CR-Downloads/Bonded%20Labour%20System%20%28Abolition%29%20Act%201976%20and%20Rules.pdf>.

law organized through the criminal justice system might look like. Creditors accepting any repayment for an extinguished debt can face imprisonment and fines. Offenses are cognizable and bailable, while civil courts have no jurisdiction under the Act. Local district magistrates and subordinate officers have to ensure the Act's implementation, the eradication of bonded labor, and the rehabilitation of bonded laborers so as to prevent their becoming bonded again. Vigilance committees with representatives of the state, the affected community, social workers, rural development institutions, and credit institutions are to assist the executive in this, while also defending suits against freed bonded laborers. Where the committee or laborer asserts the existence of a debt, bonded labor is presumed and the creditor has to prove otherwise.

The next two statutes that I discuss, the CLRAA and the ISMWA, deal with contract labor and migrant labor respectively. One could map all three labor forms along a choice-coercion spectrum, with bonded labor at one end, ostensibly "free" labor at the other with contract labor and migrant labor falling somewhere in between. Indeed, the interpretive materials surrounding the laws do not draw out differences between these labor forms too sharply. Especially salient is the role of intermediaries in all three labor forms confirming the insights of Indian historians that in the Indian context, "the key opposition is not clearly between capital and labour; rather the line is once again blurred by the use of intermediaries."<sup>159</sup> The influence of intermediaries has historically been evident even within the supposedly formal labor sector, where laborers were recruited through caste or village ties, managed by jobbers, subject to debt-bondage and paid only nominally in cash, "thus in many ways replicating the features of agrestic servitude rather than a labour market."<sup>160</sup> This persistent role of intermediaries may well explain the pragmatic imposition of obligations on them rather than their criminalization under the statutes I am about to consider.

The CLRAA originally passed in 1970 and amended in 1986 seeks to ensure that formal sector employers do not evade their obligations to their regular workforce by routinely employing contract laborers for short periods of time, making them ineligible for benefits under labor laws.<sup>161</sup> Although the legislation targets labor practices in the formal sector, courts have very much viewed the CLRAA as a social legislation for the welfare of laborers. Empirical studies of contract labor further suggest high levels of informality with the largest proportion of contract laborers working in the construction industry where contractors themselves are small operators and are not conversant with the requirements of

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159. Peter Robb, *Introduction to DALIT MOVEMENTS AND THE MEANINGS OF LABOUR IN INDIA*, *supra* note 155, at 1, 17.

160. *Id.* at 61.

161. The Contract Labour (Regulation and Abolition) Act, No. 37 of 1970, INDIA CODE (1986).

the CLRAA.<sup>162</sup> The government can, under the CLRAA, prohibit contract labor by assessing the working conditions of contract laborers, their indispensability, and whether regular workmen cannot take their place in the production process. Where abolition is warranted, a contract laborer becomes a regular employee.<sup>163</sup> Recognizing, however, that pending the abolition of contract labor, minimum working conditions need to be ensured, the CLRAA imposes obligations on recruiters of contract laborers and intermediaries in the employer-employee relationship. Only registered principal employers and contractors can employ contract labor. A contractor in turn could be a mere recruiter or subcontractor rather than involved in the production process. Contractors are responsible for ensuring proper working conditions (such as canteens, drinking water, latrines and urinals, and first aid) with a backstop to the principal employer. They must promptly pay full wages in the presence of the principal employer's representative. Central and state level advisory boards and inspectors enforce the law, which penalizes offending parties. Despite these enforcement mechanisms, however, the CLRAA has proved ineffective against recruiters.<sup>164</sup>

The statement of objects and reasons of the ISMWA notes that in several Indian states, contractors or agents called *sardars* or *khatadars* recruited laborers for out-of-state work in large construction projects. The worker was taken to a far-off place on payment of railway fare only and worked seven days per week without fixed hours under extremely poor conditions. Agents promised, but eventually renege on, the monthly settlement of piece-rate wages. Given the inadequacy of the CLRAA to deal with such abuse, the ISMWA was passed to protect the interests of this illiterate and unorganized migrant labor force.

The ISMWA applies to any establishment or contractor who employs five or more interstate migrant workers (ISMW) and therefore covers even small operations.<sup>165</sup> A "contractor" could be an independent contractor, agent, or employee, who undertakes to produce a given result for an establishment by employing or supplying workmen, and includes a subcontractor, a *sardar*, or *khatadar*. The Indian Supreme Court in *Bandhua Mukti Morcha v. Union of India* held that even workmen recruited through "old hands" would be ISMW as the "old hands" were the recruiters' agents.<sup>166</sup> The ISMWA is similar to the CLRAA in many respects. Both principal employers and contractors must be registered, the latter needing to be registered with both home and host governments without which they cannot employ an ISMW. The issuing authority can build into the license conditions relating to the provision of appropriate wages, hours of work,

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162. Bagaram Tulpule, *ILO Initiative on Contract Labour*, ECON. & POL. WKLY., Aug. 30, 1997, at L-21, L-22.

163. Sec'y, Haryana State Elec. Bd. v. Suresh, A.I.R. 1999 S.C. 1160, 1165-66 (India).

164. Tulpule, *supra* note 162, at L-22.

165. The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, No. 30 of 1979, INDIA CODE.

166. *Bandhua Mukti Morcha v. Union of India*, (1984) 2 S.C.R. 67, 67 (India).

and essential amenities. Contractors are required to issue to the ISMW a passbook with a photo and contractual terms in a language that he understands. Contractors are required to pay minimum wages on time and in the presence of the principal employer's representative. ISMW are also entitled to a displacement and round-trip journey allowance, suitable conditions of work, housing, medical facilities, and protective clothing as well as the labor law protections of the host state. Where these requisite payments are not made or facilities not provided under the ISMWA, the principal employer is liable for these. Upon the job's completion, the contractor must issue a statement that all wages and money for the return journey have been paid. No loan to the worker is to be outstanding or else it will now be extinguished. Inspectors are appointed to enforce the ISMWA, but workers can submit disputes to their home states to be passed on to an authority appointed under the Industrial Disputes Act, 1947.

The Indian Supreme Court interpreted the three legislations in landmark judgments issued by activist judges at the height of the public interest litigation movement of the 1980s. In at least two of the cases, the state undertook large-scale projects, which were operationalized by private party contractors who, in turn, employed subcontractors to recruit workers for these projects. In *PUDR v. Union of India*,<sup>167</sup> also referred to as the Asiad Games case, the government was engaged in numerous construction projects in preparation for hosting the Games in 1982. They hired contractors who in turn hired *jamadars*/subcontractors. These subcontractors brought workers from other parts of the country and paid them less than the minimum wage after deducting a commission for themselves from the payment due to the workers. Their working conditions did not conform to the requirements under labor laws either. Critical for our purposes is the elaboration that the Supreme Court offered on Article 23 of the Constitution, which prohibits “*begar* and other similar forms of forced labour.”<sup>168</sup> Viewing bonded labor and forced labor as a relic of a feudal, exploitative society that was exacerbated by two centuries of foreign rule, Justice Bhagwati denounced them as “totally incompatible with the new egalitarian socio-economic order which ‘We the people of India’ were determined to build . . . .”<sup>169</sup>

In the process of clarifying the parameters of force in the context of forced labor, the Court specifically pointed to the low relevance of the freedom of contract in a country like India:

[W]here there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract, the employee, by reason of his economically helpless

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167. *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473, 1473 (India).

168. INDIA CONST. art. 23.

169. *People's Union for Democratic Rights*, A.I.R. 1982 S.C. at 1486.

condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer.<sup>170</sup>

Elaborating on what constituted force, Justice Bhagwati further observed:

'[F]orced labour' may arise in several ways. It may be physical force . . . or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. *Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would be 'forced labour'.* Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back. . . and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. . . . And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly 'forced labour'. There is no reason why the word 'forced' should be read in a narrow and restricted manner so as to be confined only to physical or legal 'force'. . . .<sup>171</sup>

Under the circumstances, the court held that any labor remunerated at a level less than the minimum wage would be considered to be forced labor under Article 23 of the Indian Constitution. The Supreme Court's rejection of the contractarian argument was reinforced in another case involving the ISMWA,<sup>172</sup> where the federal government argued that the large number of migrant workmen who were recruited by contractors to work on a major state-sponsored hydroelectric project were not migrant workmen under the ISMWA because they had come to work voluntarily. Further, in the case of *Bandhua Mukti Morcha*, the Supreme Court held that given that it was likely for a forced laborer to have received an advance on his earnings to live off, "whenever it is shown that a labourer is made to provide forced labour, the Court would raise a presumption that he is required to do so in consideration of an advance . . . and he is therefore a bonded labourer."<sup>173</sup> In response to these Supreme Court decisions, the Indian Parliament passed an amendment to the BLSAA in 1985 declaring that where any contract laborer or ISMW worked in a system of forced labor under the conditions listed in Section 2(g)(v) (which includes being paid below the minimum wage), it would amount to bonded labor.

170. *Id.* at 1489.

171. *Id.* at 1490 (emphasis added).

172. *Labourers Working on Salal Hydroelectric Project v. Jammu and Kashmir*, (1983) 2 S.C.C. 181, 186–88 (India).

173. *Bandhua Mukti Morcha v. Union of India*, (1984) 2 S.C.R. 67, 78 (India).

I consider the three Indian statutes detailed above as a version of domestic anti-trafficking law. Interpretive materials surrounding the statutes describe conditions in labor markets where laborers were routinely recruited and often transported under false promises to distant places within the country for purposes of work-related exploitation—in other words, trafficking. The term “trafficking” is however not mentioned in these statutes, affirming the historical association of the concept with prostitution. This iteration of anti-trafficking law is instructive for the contemporary trafficking debates on several counts. First, it construes force not merely in terms of physical and legal force but in structural terms, that is, background economic conditions including of poverty, in other words, “weak coercion.” The court also decisively denounced on normative grounds any labor that is paid less than the minimum wage, targeting “weak exploitation” among other things. Further, in line with the court’s cognizance of the rampant social practice (affirmed by a fact-finding inquiry commissioned by the court) of the payment of advances to vulnerable laborers, the Court presumed a relation of debt bondage, unseating the common understanding of bonded labor as only involving intergenerational bondage.

Legal relations under all three statutes are triggered by contractual agreements between the contractor and laborers. This is true even of the BLSAA, which provides both for customary intergenerational bonded labor where the caste system effectively “traffics” laborers as well as for contractual arrangements that result in bonded labor. The CLRAA and ISMWA make no mention of the *means* of recruitment into exploitative working conditions, while the BLSAA lists certain social customs as involving force per se. There is instead an assumption that the means necessarily involve high levels of economic and social compulsion, which is only reinforced by the Indian Supreme Court, whose conception of force goes beyond physical and legal force to cover even background conditions of poverty. Economic vulnerability, ignorance, and poverty all become indicators that the recruitment for migration was indeed coerced. We find here an expression of what Article 3(a) of the U.N. Protocol lists as the “abuse of a position of vulnerability.” Recollect that the *travaux préparatoires*<sup>174</sup> defines this as “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”<sup>175</sup>

The determinative factor then is whether the recruitment results in exploitation. Section 2(g)(v) of the BLSAA sets an objective threshold for such exploitation including the payment of anything less than the minimum wage. Where working conditions are poor, irrespective of the means of recruitment, intermediaries, namely the recruiters and contractors, are held liable for providing appropriate pay and working conditions with a backstop to the primary employer.

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174. Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, *supra* note 53.

175. Gallagher, *supra* note 38, at 986 n.71 (citing Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, *supra* note 53, ¶ 63).

Thus, instead of being bogged down by apparently bright-line concepts like force and coercion, the BLSAA, CLRAA, and ISMWA concentrate on the labor conditions that avail at the other end. Thus, the *means* of trafficking are deemphasized and the *purpose* of trafficking, namely, exploitation, privileged. Unlike the IPC's new anti-trafficking provisions, the CLRAA and ISMWA seek to ameliorate such working conditions by imposing obligations on the intermediaries, especially the recruiters who supplied these laborers to the principal employers. Apart from these interpretations of the means and purposes of trafficking, the statutes that I have discussed also deploy a combination of criminal law and labor law mechanisms to target trafficking instead of solely relying on criminal law, which is a fraught option considering the abuse-generating role of the Indian police.

### *C. Potential Objections to a Critique of Anti-Trafficking Law*

Four objections are possible to my analysis of Indian anti-trafficking law. These pertain to (a) the transportability of a domestic legal model to cross-border trafficking; (b) the arguably unique nature of Indian labor conditions; (c) whether an emphasis on exploitation might not further entrench a politics of abolition; and (d) whether rendering visible the exploitation of men might not obscure the specific harms that women suffer in the course of migration.

The first line of critique relates to whether obligations of the kind envisaged by Indian labor laws could be easily imposed on intermediaries in the international setting. The significance of intermediaries in cross-border migration suggests that the Indian law on interstate migration can offer a viable model. Indeed, for countries whose citizens migrate outwards in substantial numbers like the Philippines or Sri Lanka, regulating intermediaries such as employment recruiters under domestic law is a fairly standard legal strategy. States of origin also typically require certification and skills training, the signing of written contracts, and consular support in the host state. Indeed, even India passed the Emigration Act in 1983, which prohibits the emigration of Indian citizens for work abroad unless they obtain emigration clearance, which can be refused where the terms and conditions of employment are discriminatory or exploitative, where working and living conditions are substandard, or where the work is against Indian law, public policy, or human dignity and decency. Recruiters and employers are sought to be regulated. Drawing on the ISMWA, one might go further to hold intermediaries liable for the employer's obligations with a backstop to the employer. This might include mandating employers in the host state to pay minimum wages. However, protective measures can end up having perverse consequences in that the number of jobs available in the host state might reduce as a result.<sup>176</sup> More generally, as the

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176. See DAVID MCKENZIE ET AL., DISTORTIONS IN THE INTERNATIONAL MIGRANT LABOR MARKET: EVIDENCE FROM FILIPINO MIGRATION AND WAGE RESPONSES TO

work of Rhacel Parreñas on Filipina migrant hostesses in Japan demonstrates, an elaborate labyrinth of obligations imposed both in the Philippines and in Japan on recruiters, agencies, and employers has only resulted in hostesses being indentured. Her work also illustrates that these labor sectors are quite sensitive to any regulatory changes. Thus, when the Japanese government introduced more stringent requirements for entertainer visas,<sup>177</sup> ostensibly to professionalize hosting by increasing the training period (but really to improve its Tier 2 Watch List categorization in the TIP rankings), the numbers of Filipina migrant hostesses fell from eighty thousand in 2004 to eight thousand in 2005.<sup>178</sup> This translated into more debt for the migrant workers, increasing their conditions of trafficking.<sup>179</sup> If, on the other hand, one were to reduce their qualifications to reduce debt levels amongst Filipina hostesses through their reduced dependency on talent managers,<sup>180</sup> the resultant increased supply of hostesses may well lower wages in the host state. Still, an assessment of such unintended consequences should not dissuade us from improving the bargaining power of workers.

Some may object that Indian anti-trafficking law addresses the peculiar conditions of Indian labor. This may explain the anecdotal reports from negotiators of the U.N. Protocol of India's resistance to anti-trafficking law given national embarrassment over the problem of bonded labor. While these claims as to the exceptionalism of Indian labor conditions continue to be the matter of much debate amongst postcolonial scholars, the category of the free wage laborer has unraveled in the West with significant transformations in the political economy and the rise of the precariat,<sup>181</sup> suggesting that the free wage laborer was probably always somewhat of a mythical figure. Also, while intergenerational bonded labor may appear unique to South Asia, recent sociologies of bonded labor map the rise of neo-bondage involving seasonal migrant labor where entry is not due to deception.<sup>182</sup> Arranged through jobbers and contractors, laborers here are tied in through loans/advances prior to the start of employment,<sup>183</sup> are paid minimal allowances during employment, with overall payment being settled at the end, which may leave the laborer in debt, to be repaid through next year's seasonal work.

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DESTINATION COUNTRY ECONOMIC SHOCKS 26 (2012), available at [http://www.cream-migration.org/publ\\_uploads/CDP\\_09\\_12.pdf](http://www.cream-migration.org/publ_uploads/CDP_09_12.pdf).

177. Parreñas, *supra* note 116, at 172–73.

178. *Id.* at 147.

179. *Id.* at 173.

180. *Id.* at 177.

181. GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 27 (2011).

182. See, e.g., Jens Lerche, *A Global Alliance Against Forced Labour? Unfree Labour, Neo-liberal Globalization, and the International Labour Organization*, in INDIA'S UNFREE WORKFORCE: OF BONDAGE OLD AND NEW 352, 368 (Jan Breman et al. eds., 2009); see also INT'L LABOUR ORG., BURIED IN BRICKS: A RAPID ASSESSMENT OF BONDED LABOUR IN BRICK KILNS IN AFGHANISTAN 34 (2011), [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_172671.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_172671.pdf) (providing a similar analysis in another South Asian context); KARA, *supra* note 43, at 28.

183. Lerche, *supra* note 182, at 367.



A more substantive objection to my analysis is that by rendering visible the endemic nature of coercion, it opens itself up to an abolitionist agenda with its favored solutions of rescue and rehabilitation. Indeed, MacKinnon inaugurated the radical feminist project thirty years ago when she claimed, in the context of rape, that where force and desire were not mutually exclusive, it was debatable whether consent was a meaningful concept.<sup>184</sup> Despite these beginnings, radical feminists are today content with pursuing simplistic strategies of rescue and rehabilitation in anti-trafficking initiatives. Notably, however, the Indian Supreme Court has expressed ambivalence about the rehabilitation of bonded laborers. In *Bandhua Mukti Morcha v. Union of India*,<sup>185</sup> 99% of the laborers found by an NGO to be working in stone quarries in the state of Haryana were from various parts of India. They were working under unsafe working conditions and living in inhumane conditions without shelter, food, or clean drinking water. A large number of them were bonded laborers. The court noted that where rehabilitation was not forthcoming, improved conditions of labor might be preferable at the current site of work. It observed:

We may point out that the problem of bonded labourers is a difficult problem because unless, on being freed from bondage, they are provided proper and adequate rehabilitation, it would not help to merely secure their release. Rather in such cases it would be more in their interest to ensure proper working conditions with full enjoyment of the benefits of social welfare and labour laws so that they can live a healthy decent life. But of course this would only be the next best substitute for release and rehabilitation which must receive the highest priority.<sup>186</sup>

Even setting aside the lack of political commitment on the part of the Indian state to eradicating bonded labor,<sup>187</sup> bonded laborers themselves are known to mock the rescue efforts of NGOs<sup>188</sup> who erroneously assume that bondage was imposed through “extra-economic coercion,” namely, trickery. Some laborers prefer not to be released since they have no alternative.<sup>189</sup> In countries like Nepal, bonded laborers who had been freed often slipped back into debt bondage given

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184. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 635, 650 (1983).

185. *Bandhua Mukti Morcha v. Union of India*, (1984) 2 S.C.R. 67, 67 (India).

186. *Id.* at 136.

187. KARA, *supra* note 43, at 39, 42 (stating that prosecutions are rare, and that rehabilitation is virtually nonexistent or withheld for unreasonably long periods of time). Also, Kara gives reasons for the lack of enforcement. *Id.* at 201. Furthermore, of the 231 prosecutions that were launched under the BLSAA since 1996–1997, only six had been decided and even those cases had resulted in acquittal. *Id.* at 205.

188. See Jan Breman & Isabelle Guérin, *Introduction to INDIA'S UNFREE WORKFORCE: OF BONDAGE OLD AND NEW*, *supra* note 182, at 1, 12.

189. Isabelle Guérin & G. Venkatasubramanian, *Corridors of Migration and Chains of Dependence: Brick Kiln Moulders in Tamil Nadu*, in *INDIA'S UNFREE WORKFORCE: OF BONDAGE OLD AND NEW*, *supra* note 182, at 170, 188; see also KARA, *supra* note 43, at 202 (highlighting an interview of one bonded laborer who did not even bother with rehabilitation as these schemes were fraught with corruption).

the lack of access to credit or sufficient income for survival, with evidence to suggest that they were worse off than before their rescue.<sup>190</sup> This suggests that closer attention should be paid to the politics of abolitionism, and that there is a need to formulate a robust, redistributive agenda focused on workers' rights, instead of relying on victim rhetoric, weak rescue, and rehabilitation schemes. This is a theme that is increasingly becoming salient as trafficked victims who have benefited from anti-trafficking laws such as the VTVPA find that they are increasingly prone not just to "unsafe and dangerous working conditions but also to reexploitation."<sup>191</sup> Hence the call for a "realignment of our solutions from one of 'rescue' to one of 'harm reduction.'"<sup>192</sup>

Finally, if contemporary anti-trafficking discourse was to be reoriented towards grasping the exploitation of both men and women in labor sectors other than sex work, we could be at risk of ignoring the gendered harms of migration and trafficked labor. After all, migration outcomes for women and men can differ starkly. The sexual harassment of migrant women and the codes of honor in the community they migrate from can often mean that they can never really return "home." Josmina's suicide upon finding out that she is pregnant is an example. Indeed, feminist scholars have problematized the distinction between "labor trafficking" and "sex trafficking" in this context.<sup>193</sup> Interestingly, the sole amendment recently proposed to the ISMWA seeks to make the law gender-neutral so that it can be made applicable to migrant women and children.<sup>194</sup> While the critique in relation to the invisibility of gender is essential, I argue that gendered harm is today hyper-visible, which in turn can produce regressive outcomes for women.<sup>195</sup> To illustrate, the Indian National Commission for Women recently suggested that the ISMWA be amended to allow for a family member to accompany a female migrant at the employer's expense. In fact, even what appears to be an unequivocal sexual harm may reveal gains for women. For example, in Blanchet's study of Bangladeshi women who migrated for domestic work or for bar dancing, and resorted to sex work, women in fact found that they experienced greater control over working conditions, obtained higher pay, felt valued, enjoyed male attention,<sup>196</sup> and even found pleasure in sex work.<sup>197</sup> Yet,

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190. KARA, *supra* note 43, at 53, 61–62.

191. Brennan, *supra* note 10, at 1600, 1602. Brennan concludes that anti-trafficking activities are "at their core, also pro-migrants' rights." *Id.* at 1608. In the domestic context, this would translate into workers' rights. For a similar argument framed as a critique of the rescue and rehabilitation model, see Pope, *supra* note 137, at 1854–58.

192. PARREÑAS, *supra* note 30, at 24, 175.

193. See Barnhart, *supra* note 139, at 90–96.

194. See *Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Amendment Bill, 2011 (Bill No. XXXIV of 2011)*, PRS LEGISLATIVE RESEARCH, <http://www.prsindia.org/billtrack/the-inter-state-migrant-workmen-regulation-of-employment-and-conditions-of-service-bill-2011-1912> (last visited Aug. 8, 2013).

195. See RATNA KAPUR, *MAKESHIFT MIGRANTS AND LAW: GENDER, BELONGING, AND POSTCOLONIAL ANXIETIES* 131–33 (2010).

196. BLANCHET, *supra* note 111, at 63–64.

other women found that the reversal of gender roles, with the husband performing household chores and bringing up the children while the wife earned outside the home,<sup>198</sup> enabled them to question their husbands' authority. Thus, a reduced focus on the gendered harms of migration may in fact render visible the benefits of female migration.

*D. De-Exceptionalizing Sex Work; Theorizing Exploitation*

In the previous section, I de-exceptionalized trafficking and its routine conflation with trafficking for sex work by offering an insight into a legal regime that deals with the trafficking of both men and women into sectors other than sex work. In this section, I draw on a specific ethnographic account of two Indian sex markets to de-exceptionalize sex work as always inherently harmful in order to pursue a theory of exploitation within this sector. As I stated earlier, there has been far less discussion in the trafficking debates of the concept of exploitation than the coercion/consent dynamic, despite its centrality to the U.N. Protocol's definition of trafficking and its mention as far back as the 1949 U.N. Convention. Indeed, despite extensive feminist inputs into Protocol negotiations, the definition of the term "exploitation" did not reflect the sophistication of either feminist or non-feminist theorizing on exploitation.<sup>199</sup> This lack of attention to the term "exploitation" could well be because, since 1949, sex has been a key aspect of international legal activity directed towards exploitation<sup>200</sup> based on the likely assumption that sex work is per se exploitative. Thus, the U.N. Protocol and the TVPA both list the minimum standard of exploitation by reference to slavery, practices similar to slavery, and so on for labor markets other than sex work, but offer no such minimum in the case of sex work. The U.N. Protocol, therefore, betrays traces of the earlier legal imagination on trafficking in the context of the moral panics of white slavery.<sup>201</sup>

For a de-exceptionalist account of sex work that seeks to identify exploitative practices within the sex sector, O'Connell Davidson cautions:

[P]olicy debate on forced labour in the sex sector cannot be bracketed off from debate on the more general regulation of that sector, any more than the issue of "trafficking" can be treated in isolation from the more general phenomenon of migration.

In the absence of debate on the specificity of sex work, the details of labour regulation, and the minimum standards that should be applied to the work of prostitutes, and on what constitutes an unacceptable level of

197. *Id.* Mahdavi also echoes many of these insights. See MAHDAVI, *supra* note 30, at 125–47.

198. See BLANCHET, *supra* note 111, at 145–46.

199. See Vanessa E. Munro, *Exploring Exploitation: Trafficking in Sex, Work and Sex Work*, in DEMANDING SEX, *supra* note 99, at 83, 87.

200. Susan Marks, *Exploitation as an International Legal Concept*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 281, 294–95 (Susan Marks ed., 2008).

201. See *id.* at 299.

“*exploitation*” within prostitution . . . it is dangerous to talk about forced prostitution and sex slaves.<sup>202</sup>

It is precisely with a view towards identifying such exploitation within sex work that I reflect briefly on the political economy of two sex markets that I have studied in the past. More generally, in theorizing the parameters of exploitation, Munro suggests two important components: (1) *wrongful use* involving instrumentalization for achieving one’s ends; and (2) the *disparity of value* where the beneficiary gains disproportionately at the cost of the exploited person.<sup>203</sup> At least three of the critical concepts of a theory of exploitation—instrumentalization, coercion, and harm—figure prominently in the feminist sex work debates. The radical feminist theory of sexual exploitation itself implicates all three in its account of women’s sexual subordination and the constitutive harm of commodification. Thus, it goes to the heart of the wrongful use aspect of the theory of exploitation. Materialist feminists on the other hand, like Marxists, are equally interested in the wrongful use and disparity of value involved in exploitation.<sup>204</sup> Much of this feminist scholarship, however, focuses far less on the disparity of value at the transactional level within sex markets or the sex industry. Without this analysis, though, it is difficult to contextualize and measure exploitation, and this in turn produces generic regulatory proposals untailored to specific economic scenarios. Feminists who do delineate the disparity of value across a range of sex work transactions do so primarily in terms of the class processes that mediate sex work. These typically include enslavement, directly and indirectly employed, and self-employed or independent sex work.<sup>205</sup> Elsewhere, I have sought to build on this feminist analysis by suggesting that class processes offer only a partial account of exploitation in the sex industry. I instead propose the phrase “mode of organization” to convey the range of sociocultural meanings that sex work assumes in its concrete institutional settings. In my study of the political economy of sex work in Sonagachi, a Kolkata red-light area, and Tirupati, described elsewhere,<sup>206</sup> three modes of organization of sex work were featured in both markets. In Sonagachi, these were the *chhukeri* system (akin to bonded labor), the *adhiya* system where the sex worker and the brothel-keeper split half the income per sex work transaction (less costs payable to an agent, if any) and finally, the self-employed mode. In Tirupati, on the other hand, sex workers predominantly worked in the contractor mode or the self-employed mode. Rarely did I hear of debt bondage there in recent years.

In addition to the mode of organization, the institutional setting in which sex work is performed (e.g., the household, brothel, street, hospitality economy) is

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202. O’Connell Davidson, *supra* note 127, at 19 (emphasis added).

203. Munro, *supra* note 199, at 84 (citing STEPHEN WILKINSON, BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE 38 (2003)).

204. KOTISWARAN, *supra* note 18, at 242.

205. JULIA O’CONNELL DAVIDSON, PROSTITUTION, POWER AND FREEDOM 10 (1998).

206. KOTISWARAN, *supra* note 18, at 88–91.

critical for assessing whether a sex worker is exploited. For one, the range of internal and external stakeholders and the relational dynamics amongst them differ dramatically in varied institutional settings. Other factors that determine the extent of exploitation include the spatial concentration of sex work businesses and the scale of the sex business, although in both Sonagachi and Tirupati the scale of the sex business tended to be small. In other words, when compared to a sauna establishment in the Philippines, which has between sixty and five hundred employees,<sup>207</sup> or a massage parlor in Bangkok with an average of under a hundred employees,<sup>208</sup> even large brothels in Sonagachi do not approach the lower end of that number.

The self-employed mode of organization was evident in several institutional settings where I studied sex work. This does not mean that these sex workers are not exploited, only that the disparity in value when compared to sex workers in the other two modes is lower, and that the sex workers themselves are notionally in charge of the rate of exploitation. Similarly, the *chbukeri* mode in Sonagachi involves debt bondage and is, therefore, a “practice similar to slavery” in U.N. Protocol terms. It does not, however, amount to slavery given sex workers’ mobility, especially compared to other modes within the sex industry.<sup>209</sup> If one were to consider the intermediate category of relations between slavery-like practices and self-employed sex work, things get complicated. The terms used to identify the intermediate class process—direct or indirect employment, enterprise labor, the contractor mode, and the capitalist class process—do not translate easily in the sex markets I studied. Instead, the boundaries between unfree labor, self-employment, and wage labor were not absolute<sup>210</sup> and may well have harbored intermediate forms between wage labor and bonded labor.<sup>211</sup>

This leads me to conclude that an overarching theory of exploitation in sex work is not possible given the heterogeneity of sex markets and the varied modes of organization that mediate it.<sup>212</sup> How then may one detect, measure, and respond to exploitation appropriately? Exploitation could be measured in terms of the three alternate situations to being exploited. According to Wilkinson,<sup>213</sup> these include (1) the pre-interactive baseline (the outcome had the parties to the

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207. Rene E. Ofreneo & Rosalinda Pineda Ofreneo, *Prostitution in the Philippines*, in *THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA* 100, 113 (Lin Lean Lim ed., 1998).

208. Wathinee Boonchalaski & Philip Guest, *Prostitution in Thailand*, in *THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA*, *supra* note 207, at 130, 145.

209. See Heather S. Dell, *Hierarchies of Femininity: Sex Workers, Feminists and the Nation* 270 (Apr. 22, 1999) (unpublished Ph.D. dissertation, Duke University) (on file with author).

210. Marcel Van der Linden, *Globalising the Working-Class Concept*, INTERNATIONAL INSTITUTE OF SOCIAL HISTORY 1, <http://www.iisg.nl/labouragain/documents/vanderlinden.pdf> (last visited Aug. 8, 2013).

211. See *id.* at 5.

212. See Anderson, *supra* note 38, at 10–11 (expounding on the difficulties of coming up with a “neutral, universal yardstick” for exploitation more generally).

213. Munro, *supra* note 199, at 85.

transaction never met); (2) the closest possible world baseline (the outcome had the exploited person entered into the same kind of transaction with someone other than the exploiter); and (3) the normative baseline (the outcome that is normatively desired for the exploited person). Doing sex work will invariably put the sex worker above the pre-interactive baseline whether she resorts to it out of dire poverty or “dull economic compulsion.”<sup>214</sup> This is because the remuneration in sex work is often a high multiple of the income from traditionally female sectors of employment. This is a baseline that feminists would rightly argue justifies the status quo, and therefore, is not one on which to base redistributive efforts. Feminists, meanwhile, vehemently disagree over the normative baseline, as some would seek to abolish sex work altogether while other pro-sex work advocates would probably conform to the legal baseline of the U.N. Protocol and work towards abolishing *chhukri* as a form of trafficking. However, a pro-sex work feminist view of sex work might desire an expanded notion of exploitation. In this case, feminists may endeavor to improve the closest possible world baseline for all sex workers by ensuring that sex workers work under safe working conditions, as well as produce, appropriate, and distribute as much of the surplus from sex work amongst themselves as possible rather than to other stakeholders in the business. For this, some basic understanding of the political economy of sex markets is necessary, as is an appreciation of the unintended consequences of any form of regulatory intervention, even if ostensibly beneficial.

*E. Community-Based Anti-Trafficking Initiatives:  
The Case of Self-Regulatory Boards in Sonagachi*

A significant challenge for the future success of reformulating anti-trafficking law lies in its implementation. As it is, even ten years since the adoption of the U.N. Protocol, the UNODC has reported on the abysmally low conviction rates for the offense of trafficking.<sup>215</sup> I have argued, so far, that labor law is preferable to criminal law in targeting trafficking.<sup>216</sup> The ILO, in fact, notes that the labor machinery increasingly has a more significant role to play in implementing anti-trafficking law<sup>217</sup> and recognizes the role of social partners such as employers and

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214. Julia O’Connell Davidson, *The Rights and Wrongs of Prostitution*, 17 HYPATIA 84, 94 (2002).

215. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 67, at 85.

216. An advocate for the continued use of criminal law may however suggest that it is the mode of criminal law enforcement that needs reform. Criminal law enforcement does not always need to occur in a confrontational mode. The UK, for instance, adopts a multi-agency model to regulate sex work involving coordination between the community police, service delivery agencies and sex workers’ groups. Tracey Sagar, *Tackling On-Street Sex Work: Anti-Social Behaviour Orders, Sex Workers and Inclusive Inter-Agency Initiatives*, 7 CRIMINOLOGY & CRIMINAL JUSTICE 153, 156 (2007). Similarly, one might propose the use of specialized courts such as drug courts to counter trafficking. A Trafficking Court was recently set up in Mumbai, which deals with cases under the anti-sex work criminal law. *US Officials Impressed by Mumbai Anti-Trafficking Court: Wikileaks*, TIMES OF INDIA (Sept. 6, 2011), [http://articles.timesofindia.indiatimes.com/2011-09-06/india/30118103\\_1\\_anti-trafficking-trafficking-cases-conviction-rate](http://articles.timesofindia.indiatimes.com/2011-09-06/india/30118103_1_anti-trafficking-trafficking-cases-conviction-rate).

217. INT’L LABOUR OFFICE, *supra* note 73, ¶ 350.

workers in combating forced labor and trafficking.<sup>218</sup> Indeed, trade unions have played a major role in countries like Australia in identifying exploitative labor practices.<sup>219</sup> Further, workers' representatives were forceful in their recent call to the ILO to supplement the Convention on Forced Labour through standard setting with a view to targeting trafficking. In the Indian context, however, where 85% of the Indian working population is in the informal economy, conventional forms of trade union mobilization are not necessarily effective. Even substantively speaking, Indian labor laws geared towards the informal economy tend to have been initiated by provincial state legislatures, and emphasize wages, social security, and welfare for workers rather than, say, industrial relations, which is a preoccupation of conventional labor laws.

It is in the context of localized sector-specific labor law reform on the one hand, and the failure of the state to enforce laws relating to bonded, contract, and migrant labor on the other, that attempts at self-regulation by workers assume significance. Interestingly, in the case of sex workers, it is the very lack of the recognition of sex work as a form of legitimate labor by the state, and the uneven enforcement of the ITPA, that has produced a regulatory vacuum within which novel attempts at self-regulation have taken root. I use the example of the self-regulatory boards that the Durbar Mahila Samanwaya Committee (DMSC), an organization of sixty thousand sex workers in the Indian state of West Bengal, have set up to combat the trafficking of women and girls into Sonagachi. The role of sex workers in anti-trafficking initiatives is counterintuitive,<sup>220</sup> and is indeed thought to extend the anti-trafficking agenda of the state through local surveillance.<sup>221</sup> Yet it warrants attention especially as governments are being called upon to treat migrants not as victims or objects of government policies but as partners in the formulation of relevant anti-trafficking policies and in finding an alternative to slavery.<sup>222</sup> Note here that anti-trafficking initiatives in relation to sex workers in India are typically initiated by American Christian groups like IJM, which undertake stealth raids in red-light areas to rescue and rehabilitate sex workers. An extensive critique of such initiatives, which have been largely ineffective, has emerged over the years.<sup>223</sup>

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218. *Id.* ¶¶ 352, 377.

219. Elaine Pearson, GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, *Australia, in COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD*, *supra* note 47, at 43–44; *see also* Pope, *supra* note 137, at 1863–64.

220. Kristof, for example, quotes activists who denounce the DMSC as a front for brothel-keepers and traffickers. KRISTOF & WUDUNN, *supra* note 4, at 31.

221. Swati Ghosh, *Surveillance in Decolonized Social Space: The Case of Sex-Workers in Bengal*, SOC. TEXT, Summer 2005, at 60–62.

222. *See* Dr. Jyoti Sanghera, GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, *Preface to COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD*, *supra* note 47, at ix–x; *see also* Pope, *supra* note 137, at 1859 (identifying the need for worker self-activity in finding an alternative to slavery).

223. *See, e.g.*, Aziza Ahmed & Meena Seshu, "We Have the Right Not to be 'Rescued' . . .": *When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers*, ANTI-TRAFFICKING

DMSC has worked in Sonagachi for over fifteen years having initially emerged from a highly successful HIV prevention project. DMSC has undertaken welfare activities for its members ranging from providing health care and education to sex workers and their children, to managing a credit cooperative, and to actively lobbying the state and federal government to repeal the extant anti-sex work criminal law, the Immoral Traffic Prevention Act, 1986, and recognize sex work as legitimate work. In consonance with its aspirations to self-regulation, perhaps as a nod to the high visibility of trafficking as an international policy issue,<sup>224</sup> and as a move towards securing its own legitimacy as a sex workers' group, DMSC has set up self-regulatory boards (SRBs) in most of the red-light areas that it works in. As of 2006, SRBs were operational in twenty-seven red-light areas of Kolkata alone. The driving principles of this effort were opposition to the buying and selling of girls/women, tricking them into sex work, forced prostitution, and child prostitution, and the desire to treat women who wanted to do sex work with respect. Consequently, trafficked, forced, and minor sex workers were sent back to their families or provided with vocational training for alternate means of employment, although their families often played a major role in their trafficking. By the same token, sex workers who were found not to have been trafficked were counseled about what to expect in sex work, typical rules of brothels, the health hazards involved in sex work, the need to practice safe sex, and the harassment that a sex worker might expect from the police, local hooligans, and customers. The SRB mechanism largely depends on its locality for its effectiveness. Once a victim is spotted in a red-light area, an emergency meeting of the SRB is called where board members extensively interview the girl or woman to ascertain the circumstances leading to her taking up sex work.

The SRBs are anchored in the sex worker community. Sex workers account for 60% of the SRBs' membership (including sex workers in the community as well as DMSC peer educators and supervisors), while 40% of its members are drawn from local government and include experts such as a local lawyer, doctor, and social worker. At the state level, the steering committee of the SRBs oversees the activities of SRBs in the red-light areas and includes, in addition to representatives of local SRBs, a representative from the State Women's Commission, the State Human Rights Commission, and the Labor Commission. The authority of the SRB is coalesced through the holding of monthly meetings, and maintenance of records of its proceedings—monthly records of the number of trafficked cases for each SRB, case histories of trafficked girls and women, and handover papers in case the trafficked person chooses to stay in a government

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REV., June 2012, at 161–64; Padma Govindan, *Rethinking Emancipation: The Rhetorics of Slavery and Politics of Freedom in Anti-Trafficking Work in India*, 15 INTERVENTIONS INT'L J. POSTCOLONIAL STUD. 511, 511–29 (2013); Veronica Magar, *Rescue and Rehabilitation: A Critical Analysis of Sex Workers' Antitrafficking Response in India*, 37 SIGNS 619, 621–23 (2012).

224. Magar, *supra* note 223, at 626–27.



home. Apart from dealing with trafficked sex workers, the SRBs also have a social welfare function, which ensures their acceptance in the community.

DMSC hopes that SRBs will regulate conditions within the sex industry in the future. They claim sex workers are on par with professionals like doctors and lawyers who self-regulate through the Indian Medical Association and the Bar Council of India, respectively. This claim to expertise is particularly resonant in the case of the SRBs' anti-trafficking mandate, for it is the resident sex workers in a red-light area who are most likely to know of new entrants to the business.<sup>225</sup> SRBs formulate norms of self-governance to reflect sex workers' experiences. For an SRB, only a sex worker who is compelled into sex work by another person is trafficked, not a woman entering it out of force of circumstance. Similarly, DMSC claims that sex workers empathize with trafficked women and girls such that they will go to any lengths to prevent a trafficked sex worker from being apprehended by the police and sent to a state home where she will be subject to physical and sexual abuse. Also, when there is a difference of opinion (say as to the age of the trafficked person) within the Board, a sex worker's opinion is considered to be more valuable due to her experience in the industry.

Support for SRBs in the red-light areas has come slowly. Predictably, brothel keepers were initially against the idea, believing that DMSC passed on information about trafficked sex workers and minors to the police, thereby instigating raids. They also suspected DMSC of trying to abolish sex work altogether. However, over the years, given that trafficking is one of the few reasons for police raids at least in Sonagachi,<sup>226</sup> DMSC claims that brothel-keepers have, in their own interest, refrained from trafficking sex workers. Landlords also put pressure on brothel-keepers who harbored minors or trafficked women for fear of arrest and prosecution. Brothel keepers worry that their competitors may tip off the SRB.<sup>227</sup> Thus, it is clear that the state's enforcement practices, in combination with community-based mechanisms, can shift social norms within sex markets fairly significantly. Threats of police involvement and legal interventions are highly persuasive in community-based anti-trafficking efforts.<sup>228</sup> Given the local anchoring of the SRB in a red-light area, traffickers are also sometimes apprehended by sex workers in the community. When quizzed about the possibility of maintaining a trafficker database and other forms of public shaming which are currently in vogue, the DMSC peer educator I spoke to confirmed that this was not necessary because traffickers often panic when apprehended by DMSC and beg to be pardoned. This suggests that traffickers are not part of an organized crime network, but rather, operate on an individual basis.

Any assessment of the SRB mechanism initiated by DMSC partly depends

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225. See *id.* at 627.

226. See KOTISWARAN, *supra* note 18, at 177.

227. This is confirmed by Magar, *supra* note 223, at 628.

228. See *id.* at 630.

on what preceded it. Earlier, police raids in red-light areas were instigated by the need to locate minors in sex work. The police would typically send away the better-looking sex workers to corrective institutions under the ITPA whether they were minors or not. There, women were tortured and sexually harassed to provide sexual favors for personnel.<sup>229</sup> Brothel-keepers and agents would pose as relatives and pay bribes to secure their release, which was used to further indebted the sex worker to the brothel. The remaining women, who sought to assist with their trafficker's prosecution, were often threatened by the police with physical violence if they did not reveal the trafficker's identity.<sup>230</sup> Moreover, women feared the police, for if they were to repatriate the woman to her village or hometown, her trafficked status would become public knowledge for which she would be ostracized. Police raids earlier also reduced the customer footfall in red light areas and undermined HIV prevention efforts by pushing sex workers desperate for income to engage in risky sexual practices. It is for these reasons that DMSC continues to be highly hesitant to hand over trafficked women and girls to the police. Thus, it is plausible that SRBs, in preventing the trafficking of minor and forced sex workers, are minimizing the incidence of police raids, and are hence having an impact in their respective red-light areas.

DMSC is keen to register the SRBs and its steering committee with the state and set up its own rehabilitation/short stay home to step up its anti-trafficking efforts, rather than submit to the unpredictable outcomes of a police-driven process. Yet, on a day-to-day basis, the police are respectful and sometimes even direct sex workers to approach their local SRB first with their dispute. Similarly, some state officials have expressed support for this highly efficient, low cost method of stepping up anti-trafficking efforts. International organizations such as the UNDP and Action Aid have aided this innovative method of anti-trafficking.

When evaluating the potential for success of DMSC's anti-trafficking efforts, we need to bear in mind the limited resources at their disposal. Monetary resources are obvious impediments that affect the repatriation of victims from both within India and neighboring countries. The other inbuilt limitation of SRBs is that they are likely to be more effective in spatially concentrated sex markets such as red-light areas, rather than the dispersed sex markets found in Southern India. Even in red-light areas, some boards are more effective than others. In a highly differentiated market like Sonagachi, DMSC has faced obstacles to its SRBs from high-end brothels in affluent parts of Sonagachi where brothel-keepers routinely groom young girls to do sex work, paying little attention to DMSC, which is viewed as representing poorer sex workers. Also, despite the claim that

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229. This continues elsewhere in India. See Sujata Gothoskar, *Women's Work, Stigma, Shelter Homes and the State*, ECON. & POL. WKLY., Jan. 26, 2013, at L-21, L-22.

230. For example, women are known to "engineer[] spectacular escapes, including using knotted bedsheets to climb out of windows and setting fire to the building." Govindan, *supra* note 223, at 518 (citing Noy Thrupkaew, *The Crusade Against Sex Trafficking*, THE NATION (Sept. 16, 2009), <http://www.thenation.com/article/crusade-against-sex-trafficking>).

DMSC controls Sonagachi,<sup>231</sup> in reality, they are not always able to counter the deep-rooted nexus between the local clubs, political parties, agents, brothel keepers, and hooligans.

Moreover, DMSC is an organization that is run by sex workers, some of who maintain sex workers on an *adhya* basis (where income is split between the brothel keeper and the sex worker).<sup>232</sup> Hence, it is not surprising that these institutions of self-governance reflect the logic of the market. To illustrate, DMSC had rescued a trafficked minor from a brothel in Sonagachi who was sent home to her family. A few years later, the brothel-keeper approached DMSC seeking permission to re-employ the same girl, who was no longer a minor, under pressure from her parents who needed her income. DMSC has thus found itself in the position of a gate-keeper to the industry. It has responded to such requests so far on an ad-hoc basis.<sup>233</sup> On the other hand, SRBs' zero tolerance for child prostitution in the red-light area could be viewed as reflecting sex workers' opposition to competition from younger sex workers. In conclusion, while the effectiveness of the SRB mechanism is yet to be determined, it would be premature to dismiss it out of hand as a front for traffickers. This is especially true because an anti-trafficking strategy that is deeply familiar with the local dynamics of a labor market and that selectively uses the force of state law to shift norms within the market is more likely to be successful. Perhaps, as the Network of Sex Work Projects reminds us: "Sex workers: [are] part of the solution."<sup>234</sup>

#### CONCLUSION

The problem of human trafficking has received unprecedented attention in recent years. As images of modern day slavery proliferate the news media at a rapid pace, repeatedly inscribing the typical trafficking episode in the popular consciousness, states and civil society organizations have been hard at work in pushing international law to take notice. Feminists in particular succeeded in this respect when the U.N. General Assembly adopted the U.N. Protocol in 2000. Feminists have, however, become victims of our own success. Over the past decade, powerful Western states invested in a project of border control have acted along with a conservative U.S. administration interested in opposing prostitution worldwide to crack down on a very selective form of trafficking, namely, trafficking for sex work. The use of a prohibitionist international law, or what Kristof calls the big-stick approach,<sup>235</sup> to target a highly complex and fluid

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231. KRISTOF & WUDUNN, *supra* note 4, at 32.

232. See Prabha Kotiswaran, *Born unto Brothels: Toward a Legal Ethnography of Sex Work in an Indian Red-light Area*, 33 LAW & SOC. INQUIRY 579, 585 (2008).

233. See also Magar, *supra* note 223, at 628 (discussing peer educators who are sometimes reluctant to antagonize brothel-keepers, preferring instead to counsel continuously until "they understand [the law and what is ethical]").

234. DOEZEMA, *supra* note 2, at 174.

235. KRISTOF & WUDUNN, *supra* note 4, at 34–37.

phenomenon like trafficking, which is itself embedded in global flows of migrants, refugees, and women in search of better life prospects, has produced significant negative human rights externalities on the ground. The benefits of the anti-trafficking regime for trafficked persons are not clear either. Moreover, prospects for discussing these deleterious effects, much less taking action to stem them, appear low given that abolitionist rhetoric is backed by powerful political actors and funding sanctions, and because there is a lack of mechanisms to objectively assess the evidence as to the effects of these initiatives.<sup>236</sup> Thus, although the increased state attention to contemporary forms of exploitation is “reason for reflection, not rejection or denial,”<sup>237</sup> it is an inescapable fact that despite our best efforts, the U.N. Protocol and most of the domestic legal initiatives following from it have been hostage to both ideological as well as institutional priorities, few of which reflect the interests of women.

The central predicament now facing us is whether we should work towards reforming the U.N. Protocol framework, or if we are better off training our energies elsewhere, say for instance, towards international labor law mechanisms? The response to the U.N. Protocol after all has been tremendous according to human rights activists like Gallagher who have justified its benefits<sup>238</sup> despite its drawbacks.<sup>239</sup> Gallagher insists that the U.N. Protocol is only the first step in the development of “a comprehensive international legal framework comprising regional treaties, abundant interpretive guidance, a range of policy instruments and a canon of state practice.”<sup>240</sup> While it is debatable whether this emerging body of anti-trafficking law demonstrates a “relatively high level of consistency with international standards,”<sup>241</sup> its relatively fluid form does offer possibilities for intervention. It is precisely with a view to such intervention that I have elaborated on domestic anti-trafficking law already on the books in a developing country like India, with its large-scale internal migration profile. The proposed standard setting by the ILO to the Forced Labor Convention offers much hope in this respect.

As domestic legal regimes consider trafficking law reform, I propose actively

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236. See Chuang, *supra* note 17, at 1710.

237. Gallagher, *supra* note 25, at 828.

238. For instance, Gallagher points to the legislative attention that trafficking has garnered in the aftermath of the U.N. Protocol. She cites a recent UNODC report, which reports that 125 countries in the survey had anti-trafficking legislation. *Id.* at 813 n.100 (citing UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 10, at 22). Forty-five percent of the surveyed countries adopted these laws only after the U.N. Protocol entered into force in December 2003. *Id.* In 2003, only five percent of the 155 countries surveyed by UNODC had a national plan to deal with trafficking. By 2008, this increased to fifty-three percent. *Id.* at 830 n.172. Fifty-two percent of the 155 countries had established a specialist law enforcement response to trafficking in persons. *Id.* at 830 n.173. Prosecution for trafficking-related offenses however continued to remain extremely low. *Id.* at 830 n.174. For a view that is less sanguine about the viability of the human rights approach to trafficking, see Juss, *supra* note 121, at 294–95 (arguing that there is nothing in the U.N. Protocol that guides courts on how to respond to protect victims of trafficking).

239. Gallagher, *supra* note 25, at 831.

240. *Id.* at 791.

241. *Id.*

expanding the narrow focus of current anti-trafficking efforts away from the top of the pyramid of anti-trafficking law, targeting scenarios involving strong coercion and strong exploitation, and instead pushing downwards towards the range of other trafficking scenarios. The momentum around trafficking issues will not only help re-envision international anti-trafficking law, but will also offer the perfect opportunity to invigorate the enforcement of domestic labor laws against trafficking, which have been rendered dormant with the onslaught of neoliberal economic reforms. There has been some concern about such an expansive interpretation of the definition of trafficking,<sup>242</sup> yet it is a chance worth taking for purposes of locating and assessing the normative desires of anti-trafficking law. After all, domestic legal mediations of notions of coercion and exploitation in the trafficking context vary widely, as I have demonstrated in the Indian case, and there is no reason to constrain these unduly as the jurisprudence of anti-trafficking law emerges. Similarly, fostering plurality in the regulatory mechanism such that labor law is at the center, coupled with the highly selective use of criminal law penalties, informed in turn by a granular understanding of the political economy and legal topography of labor markets is likely to be more effective. A deeper understanding of the economics driving labor markets and the highly counterintuitive effects of legal responses to forced migration and exploitative working conditions in labor markets<sup>243</sup> is crucial to developing effective anti-trafficking law. Ultimately, the recognition of the varied stakes that developing and developed countries have in anti-trafficking law, and the reorientation of anti-trafficking law away from a criminalization model to a labor model, may indeed prove to be a crucial axis around which the success of the U.N. Protocol hinges.

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242. See Gallagher, *supra* note 31, at 385.

243. For an excellent example of such analysis of the brick markets in Afghanistan, which employ bonded labor, see INT'L LABOUR ORG., *supra* note 182, at 16.

