The Wages of Human Trafficking

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This Article asks a deceptively straightforward question: what is the wrong of human trafficking? If the answer seems obvious, a closer look at anti-human trafficking law reveals a doctrinal crisis. Human trafficking law has traditionally concerned itself with movement and how compelled or chosen migration estranges vulnerable people from the locales, customs, and resources that might otherwise shield them from exploitation. According to the U.S. State Department, however, movement is no longer a central element of human trafficking. Instead, “many forms of enslavement” are thought to comprise the core of the crime. The revocation of the movement requirement and the equation of human trafficking with slavery have made an elusive target of human trafficking’s wrong, dissolving distinctions between slavery and forced labor, as well as less extreme exploitation prohibited by anti-trafficking law. Moreover, human trafficking is increasingly understood along a spectrum of migrant labor abuses—one that stresses how the cumulative impact of exploitative work conditions can amount to human trafficking.

With these reformulations in mind, this Article analyzes the wrong of human trafficking through what I call the new low wage/vulnerable labor paradigm. In this account, human trafficking is wrong because it exploits worker vulnerability—regardless of migrant status—by forcing, coercing, or deceiving people into performing work, including commercial sex acts, under intolerable, illicit, or degrading conditions. Conceptualizing the wrong of human trafficking through the new low wage/vulnerable labor paradigm captures the full range of offenses proscribed by human trafficking law. It also guards against the conceptual collapse of human trafficking and related legal terms by fostering principled discussion over where we now want to draw the line between exploitation of all stripes and ownership that amounts to slavery.

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INTRODUCTION

President Barack Obama has pledged a “zero tolerance” approach to human trafficking—a crime that, in his words, “ought to concern every person, because it is a debasement of our common humanity[,] every community, because it tears at our social fabric[,] every business, because it distorts markets [and] every nation, because it endangers public health and fuels violence and
Yet recent and conflicting reinterpretations of the elements of human trafficking have destabilized the definition of the crime and thus its scope and meaning.

The legal definition of human trafficking—which is remarkably consistent across U.S. federal and international law—has been subject to wide ranging interpretations. Pared to its core elements, the human trafficking requires 1) an

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3 Article 3, paragraph (a) of U.N. the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [U.N. Trafficking Protocol] instead sets minimums of what will comprise exploitation. The Protocol defines trafficking in persons as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplemening the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter U.N. Trafficking Protocol].
act (the movement, recruitment, receipt, or harboring of men, women, or children); 2) a means (by force, fraud, or coercion); and 3) a purpose (at a minimum, involuntary servitude, slavery, or sexual or labor exploitation, which may include the removal of organs). While human trafficking was once viewed as functionally equivalent to criminalized sexual gender violence, recent scholarly and legal efforts have broken with this interpretation of human trafficking law, refocusing legal efforts to target migrant labor exploitation. This nascent focus on labor exploitation, while a step in the right direction, is nonetheless insufficient to address the global problem of human trafficking, as recent changes in how the U.S. State Department interprets the federal anti-human trafficking statute, The Trafficking Victims Protection Act (TVPA), demonstrates.

In 2012, the U.S. State Department’s Trafficking in Persons Office (TIP Office) declared that “many forms of enslavement” lie at the heart of the phenomenon of human trafficking—human trafficking “can include but does not require movement.” This eschewal of any movement/recruitment requirement has resulted in the elimination of any distinction between human

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6 Supra note 2.

7 Article 1(1) of the 1926 Slavery Convention establishes the benchmark definition of slavery: “Slavery is the status or condition of a person over whom any or all of the powers attaching to ownership are exercised.” International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, Art. I [hereinafter 1926 Slavery Convention].

8 U.S. Dep’t of State, Trafficking in Persons Report 13-14 (2012). Until 2009, the U.S. TIP Office actively resisted substantive conflation of the concepts of human trafficking and slavery. See U.S. Dep’t of State, Trafficking in Persons Report (2009) (“The common denominator of trafficking scenarios is the use of force, fraud, or coercion to exploit a person for profit.”). By 2014, the conflation was all but complete. See, e.g., U.S. Dep’t of State, Trafficking in Persons Report 29 (2014) (“Human trafficking can include but does not require movement. People may be considered trafficking victims regardless of whether they were born into a state of servitude, were transported to the exploitative situation, previously consented to work for a trafficker, or participated in a crime as a direct result of being trafficked. At the heart of this phenomenon is the traffickers’ goal of exploiting and enslaving their victims and the myriad coercive and deceptive practices they use to do so.”).
trafficking and forced labor. This development, not to mention the simultaneous equation of human trafficking with slavery, has far reaching implications for human trafficking’s meaning. In essence, these interpretative shifts have pulled the legal conceptualization of human trafficking in two directions. In the first, human trafficking is a labor problem, as the elimination of distinctions between trafficked forced labor and non-trafficked forced labor suggests. In the second, it an ownership problem of a different sort: human trafficking is slavery.

These developments raise extremely pressing questions: how do we in the U.S. enforce a “zero tolerance” approach to human trafficking if we have no clear, conceptual understanding of what the act entails? What is human trafficking “more like”: a labor problem or a problem of slavery? The stakes of these questions become readily apparent when we recognize the revocation of the movement requirement and the equation of human trafficking with slavery as indicative of an early, emerging split between U.S. and international perspectives on human trafficking, which largely seek to preserve distinctions between the variety of acts encompassed by anti-human trafficking instruments, including slavery, forced labor, and an array of lesser labor exploitations.

9 *Infra* Part III. Forced labor is defined under international law as “work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” See, e.g., Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, opened for signature June 17, 1999, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000); Convention Concerning the Abolition of Forced Labour, opened for signature June 25, 1957, 320 U.N.T.S 291 (entered into force Jan. 17, 1959); Convention Concerning Forced or Compulsory Labour, opened for signature June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932). The U.S. Department of State definitely links forced labor to human trafficking in the following manner: “Also known as involuntary servitude, forced labor may result when unscrupulous employers exploit workers made more vulnerable by high rates of unemployment, poverty, crime, discrimination, corruption, political conflict, or even cultural acceptance of the practice. Immigrants are particularly vulnerable, but individuals also may be forced into labor in their own countries. Female victims of forced or bonded labor, especially women and girls in domestic servitude, are often sexually exploited as well.” *What is Modern Slavery?* U.S. Department of State, (June 3, 2014, 12:53pm), http://www.state.gov/j/tip/what/index.htm.

10 International law defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, Art. I.

11 See infra Part IV. See also Chuang supra note 5, at 6 (describing how the “U.S. TIP Office has used forced labor creep to justify expanding its bureaucratic turf to cover practices traditionally considered by the ILO [International Labor Organization] and the U.S. Department of Labor’s International Labor Affairs Bureau (ILAB) to be non-trafficked forced labor—i.e., forced labor not preceded
The urgency of the problem of human trafficking together with its doctrinal complexity demands a principled exploration of its limits. This Article takes up the challenge by asking a seemingly straightforward question: what is the wrong of human trafficking?

In the fourteen years since the advent of contemporary human trafficking law, this question has yet to be addressed by legal scholars. Now it is time to ask the question anew. For while we may intuitively believe that we will “know it when we see it,” the continuously transfiguring terrain of human trafficking law has only offered disparate examples of what human trafficking might be with no underlying theoretical account of why all acts prohibited by extant law are in fact actionable. While there are no fast and easy rules or tests to identify human trafficking, settling our conceptual approach helps ensure a more targeted, steady, and uniform forward course by establishing what we understand human trafficking to be, why we act against it, and in turn, what it means to be free. Accounting for the wrong of human trafficking is therefore no theoretical indulgence, but an operational imperative.

Accordingly, this Article analyzes human trafficking not from within the familiar frames of sexualized gender violence and human rights, nor as a transnational crime, a problem of slavery, or a problem faced largely by migrant workers, but as a labor and employment problem that fits under what I call the new low wage/vulnerable labor paradigm. In this account, human trafficking is wrong because it exploits worker vulnerability, regardless of migrant status, by forcing, coercing, or deceiving people into performing work, including commercial sex acts, under intolerable, illicit, or degrading conditions. I use the term “vulnerable labor” to denote a methodological commitment to Martha Albertson Fineman’s vulnerability theory, which emphasizes the structural and institutional arrangements that the state has or will create to manage human vulnerability. The Article thus asks that we approach human trafficking law not solely as a corrective to state failure to manage migrant workers, but as a lens through which to see the connections between human trafficking and the domestic low wage labor market.

In advocating a low wage/vulnerable labor approach to human trafficking, this Article argues that U.S. attempts to cast human trafficking as in essence a crime of enslavement is both descriptively and normatively incorrect. Additionally, this Article contends that the emerging labor approach, which uses migrant labor as a template for understanding human trafficking, is also descriptively and normatively incorrect. Current human trafficking debates that offer the separate, but overlapping paradigms of slavery and labor migration as palliatives to dominant criminal gender violence approaches are, I argue,

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conceptually caught between construing the wrong of human trafficking as a violation of equality (with a slavery paradigm positing a discriminatory dimension to a problem of ownership) or as a violation of labor rights (understood in the classic sense as collective rights that govern structural relationships between employers and employees and not solely as the provisioning of equal treatment for exploited migrant laborers).

Neither approach accounts for the full range of acts proscribed by the widely adopted U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [U.N. Trafficking Protocol] nor the TVPA. Simply put, the legal definition of human trafficking encompasses more than acts of slavery, be it sexual or otherwise, and applies to migrant and non-migrant workers. Less severe exploitation, including the accumulation of poor labor conditions that individually would not constitute actionable exploitation, are also prohibited—and largely overlooked. This discretionary oversight has left many migrant and non-migrant low wage and vulnerable workers whose conditions of work might cross the threshold of exploitation necessary for a charge of human trafficking beyond the scope of legal analysis or attention.

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

13 Supra note 3.
14 Supra note 2.
16 Crucially, understanding the wrong of human trafficking as a low wage/vulnerable labor wrong does not automatically put it at odds with human rights or even criminal frameworks, although a classic understanding of labor rights can mitigate against the excessive individualism of these two approaches. See Jonathan Todres, Human Rights, Labor, and the Prevention of Human Trafficking: A Response to A Labor Paradigm for Human Trafficking, 60 UCLA L. REV. DISCOURSE 142 (2013) (arguing that labor-based and human rights-based responses are not mutually exclusive). Additionally, in New York State, for example, violations of state labor laws are increasingly met with criminal prosecution. See Juan Gonzalez, State Attorney General Eric Schneiderman Says Those Who Knowingly Violate State Labor Laws Will Face Criminal Charges and Possible Jail Time,” THE NEW YORK DAILY NEWS, (July 13, 2012, 3:00 AM), http://www.nydailynews.com/new-york/state-attorney-general-eric-schneiderman-
that binds these offenses to be a collective wrong that 1) inheres in the inner workings of global labor markets, 2) manifests in specific employment conditions, and 3) affects migrant and non-migrant workers alike. Further, the new paradigm identifies how the existing labor paradigm—which focuses almost exclusively on the specific vulnerabilities of migrant labor—has analytically limited the would-be structural scope of a labor analysis of human trafficking by construing its wrong as functionally an equality or autonomy wrong. That view, what I call the labor migration paradigm, focuses on affording migrant workers the same protections as non-migrant workers in order to end exploitative working conditions—despite the fact that recent empirical research has thrown the general conditions of the U.S. low wage labor market—and the efficacy of existing labor and employment protections—into question. Given this context, I suggest a low wage/vulnerable labor paradigm best describes the wrong of human trafficking while avoiding the pitfalls of narrow analyses of equality.

While a labor migration paradigm helpfully emphasizes how cumulative labor conditions characterized by subtly coercive and deceptive employment practices can also cross the threshold into human trafficking, it cabins the full import of that claim by limiting its analysis to migrant workers and often identifying “sectors prone to human trafficking”—from agriculture, home health care, service, begging, domestic work, and manufacturing, to name a few—as the target of their interventions. In contrast, the new paradigm’s more general emphasis on the conditions of low wage and vulnerable work prevents a too narrow focus on job sectors or categories, whose susceptibility to human trafficking may change over time. Additionally, the low wage/vulnerable labor paradigm frames the structural problem of labor as one that explicitly traverses the categories of migrant and non-migrant workers to focus on employment conditions. In doing so, it eliminates the latent equality argument embedded in the heart of the labor migration paradigm, which splinters the full potential of a labor analysis by viewing migrant labor as the

**Footnotes**

17 Infra Part IV.
19 UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 73-74 (2009).
20 Id.
21 Infra Part IV. Low wage industries are generally defined as those whose median wage for front-line workers is less than 85 percent of a city’s median wage. See ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAW IN AMERICA’S CITIES, 60 (2009)(available at: http://www.unprotectedworkers.org/index.php/broken_laws/index).
template for understanding human trafficking.

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

The new low wage/vulnerable paradigm would, however, not understand all human trafficking as crimes of enslavement. The wrong of human trafficking lies less in its proximate relationship to slavery than it does in the systemic problems that inhere in low wage labor. Thus perhaps most importantly, understanding the wrong of human trafficking as a low wage/vulnerable labor one will help ward off the conceptual collapse of human trafficking and slavery by fostering principled discussion over where we now want to draw the line between exploitation of all stripes and what constitutes the impermissible ownership of persons as a jus cogen norm and a crime of universal jurisdiction. The specific relationship between slavery and forced

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22 Id.
23 Despite an increased interest in labor, prosecutions worldwide remain fixated on sex sector human trafficking. The U.S. 2014 Trafficking in Persons Report reports that in 2013, the 44,758 trafficked persons identified worldwide resulted in only 7909 prosecutions and 3969 convictions. Only 478 of these were related to labor trafficking while the rest were related to sex trafficking. Supra note 8 at 45.
24 See 1926 Slavery Convention supra note 7. Often thought to involve the destruction of a person’s juridical personality—the turning of a person with innate and assigned rights into a “thing”—slavery is an international crime and a peremptory or jus cogen norm. Jus cogen, or “compelling law,” norms outrank all other norms and principles, constituting obligatio erga omnes, which are inderogable. As such, legal obligations that arise pursuant to the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of “obedience to superior orders,” the universal application of these obligations in war and peace, there non-derogation under “states of emergency,” and universal jurisdiction over the
labor is, however, a subject that merits further inquiry and discussion, given slavery law’s own grappling over what acts constitute ownership and control sufficient to merit a charge of slavery.

Finally, in advocating a low wage/vulnerable labor approach to human trafficking, I do not mean to suggest that all low wage labor abuses should be found to constitute human trafficking, or that human trafficking law alone should be responsible for remediying widespread domestic workplace violations. Rather, I seek to establish a conceptual framework for human trafficking that locates the problems of domestic low wage labor at its very core. Acknowledging the continuities and overlap between human trafficking and domestic low wage labor violations is, I argue, not only necessary for a clear conceptual understanding of the wrong of human trafficking, but is also doctrinally supported by the expansive definition and remedies offered by our anti-human trafficking federal statute and international legal instruments. Crucially, since its 2003 reauthorization, the Trafficking Victim Protection Act provides not only criminal avenues of redress, but also an underutilized private right of action for persons whose exploitation crosses the threshold of human trafficking law.25 This private right of action provided by the TVPA was intended to provide more comprehensive relief to trafficked persons than that offered by civil suits brought solely under the Fair Labor Standards Act,26 analogous state employment laws, and state common law torts.27 Encouraging perpetrators of such crimes. See M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 LAW AND CONTEMP. PROBS. 63 (1996).

25 TVPRA 2003, supra note 2.
27 The U.N. Trafficking Protocol, the TVPA, and other anti-trafficking legal instruments provide remedies for trafficked persons beyond those offered by employment law. These include, for example, the TVPA’s “T-visa,” which enable some trafficked persons to remain in the country. See TVPA, supra note 2. The TVPA also allows trafficked persons to enforcement of payment of wages that exceed the federal minimum wage, which the FLSA does not provide. Id. Additionally, the FLSA does not cover all workers. Most relevant to this discussion, perhaps, the FLSA does not cover forced prostitution. For these reasons, a human trafficking legal framework has the potential to bridge migrant and non-migrant worker exploitation and provoke a broader discussion about labor, immigration, and general low wage and vulnerable labor exploitation in the U.S. and around the world. See also Kathleen Kim and Kusia Hreshchysyn, Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States, 16 HASTING WOMEN’S L. J. 1, 24 (2004) (assessing the benefits of civil litigation for trafficked persons as an alternative and in addition to criminal prosecution); Theodore R. Sangalis, Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act, 80 Fordham L. Rev. 403 (2011) (explaining why civil remedies under the TVPA have largely been
TVPA-based civil litigation of the lesser labor exploitation claims of migrant and non-migrant workers is one way to put the new low wage/vulnerable labor paradigm into practice and enable courts to establish the proper boundary between labor exploitation that amounts to human trafficking and other civil or regulatory labor exploitation.

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

Part II examines the emerging labor paradigm, which assumes its primary target to be migrant labor.

Part III looks at how a conceptual fusion between criminal acts of forced movement and economically motivated migration has fueled the vision of migrants as the paradigmatic subjects of human trafficking law.

Part IV critiques the labor migration paradigm by assessing the strengths and limitations of the new low/vulnerable paradigm for human trafficking. To do so, this section juxtaposes the labor migration paradigm with recent sociological, empirical work on U.S. low wage labor, which reveals widespread and systematic violations of the most basic workplace protections—the sort assumed to have been long addressed by U.S. labor law. From this perspective, it becomes clear that the labor migration paradigm is conceptually tethered to specific ideas about who is most vulnerable to exploitation that are neither descriptively nor normatively correct.

Part V then returns to the issue of slavery. Here, I analyze how a new low wage or vulnerable labor paradigm for human trafficking might interface with ongoing debates about which vision of slavery should be controlling: de facto or de jure. This discussion helps illuminate what’s at stake, in part, in naming the wrong of human trafficking: the legal distinction between exploitation and impermissible ownership—the conversion of people into property. The conclusion maintains that understanding the wrong of human trafficking as a low wage/vulnerable labor one best describes anti-trafficking law’s broad scope, while preserving the integrity of related legal concepts.

I.

THE PARAMETERS OF HUMAN TRAFFICKING LAW

unexplored by persons who have endured sex sector human trafficking). Notably, these authors also retain a focus on migrant labor.
The contemporary concept of human trafficking has entered the legal imaginary very recently, but has since taken a firm hold. In this Part I, I describe the current law of human trafficking. In doing so, I outline the fault lines in our primary anti-human trafficking legal instruments that, as I later argue, have given rise to conflicting legal approaches to human trafficking that do not capture the full range of proscribed acts due to an almost singular focus on severe migrant exploitation. I then evaluate the strengths and limitations of the three dominant approaches to interpreting human trafficking law: the transnational criminal paradigm, the human rights paradigm, and the gender violence paradigm.

A. The Elements of Human Trafficking

Contemporary human trafficking law begins at the turn of the millennium with the passage of two legal instruments: the U.N. Protocol to Prevent, Punish, and Suppress Trafficking in Persons, Especially Women and Children (hereinafter the U.N. Trafficking Protocol), and the U.S. Trafficking Victims Protection Act (hereinafter the TVPA). The U.N. Trafficking Protocol has since, and with notable consistency, served as the template for all subsequent anti-human trafficking law. In the intervening years, this law has mushroomed into an international legal system comprised of regional treaties, a range of policy instruments, and a canon of state practice. According to the United Nations Office on Drugs & Crime’s 2014 Global Report on Trafficking in Persons, the U.N. Human Trafficking Protocol has been ratified by 162 countries, and is nothing short of a “success story.”

The U.N. Trafficking Protocol and the TVPA detailed new definitions of human trafficking that ushered the issue to international prominence by virtue of their capaciousness and their calculated association with transnational organized crime. The TVPA and the U.N. Trafficking Protocol each provide

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28 Supra note 3.
29 Supra note 2.
32 The 1998 and 1999 intergovernmental meetings that resulted in the U.N. Human Trafficking Protocol were by all accounts a quick, multi-purpose affair, existing primarily to achieve an international cooperation agreement on its parent convention, the United Nations Convention Against Transnational Organized
a tripartite definition of human trafficking. To reiterate, the crime requires an act (the movement, recruitment, receipt, or harboring of men, women, or children) accomplished by a means (by force, fraud, or coercion) for a purpose (at a minimum, involuntary servitude, slavery, or sexual or labor exploitation, which may include the removal of organs).33

From the start, the definition of human trafficking has hardly been exact. For the sake of consensus, the elements of the emerging crime of human trafficking were left intentionally vague. The elements of the means component (force, fraud, and coercion) are not defined under international law. Under the U.N. Trafficking Protocol and the TVPA, the question of what degree of coercion or abuse of power satisfies this definitional prong remains an open one.34 These instruments also codify a distinction between sexual exploitation and labor exploitation—a framework that has contributed to the gendered, hyper-sexual focus of much human trafficking law, policy, and discourse.35 Moreover, the U.N. Trafficking Protocol and the TVPA each

Crime. That human trafficking was placed under the auspices of the U.N. Office on Drugs and Crime and not kept in its historical home within the U.N. human rights system was itself quite controversial. See Gallagher, supra note 30, at 790. 33 TVPA supra note 2; U.N. Trafficking Protocol, supra note 3. 34 See Kathleen Kim, The Coercion of Trafficked Workers, 6 IOWA L. REV. 411(2011) (noting how “the laws addressing human trafficking continue to struggle with delineating the dimensions of coercion” and calling for a theory of “‘situational coercion,’ [which] recognizes that instead of experiencing coercion through direct threats of harm from their traffickers, many trafficked workers comply with abusive working conditions due to circumstances that render them vulnerable to the exploitation.”). 35 No reputable research has ever demonstrated that women are more vulnerable to human trafficking than men, yet women’s sexual exploitation is the most commonly identified form of human trafficking. As a result, it appears that “a disproportionate number of women are involved in human trafficking.” See Michael T. Tien, Human Trafficking: The Missing Male Victim, 18 PUBLIC INTEREST LAW REPORTER 207, 208 (2013) (arguing that the 2013 Reauthorization of the Trafficking Victim Protection Act, which was added as an amendment to the Violence Against Women Act’s reauthorization, “ignores the prominence of male victims of human trafficking in the U.S. and abroad”). See also Laura María Agustín, Sex at the Margins: Migration, Labour Markets, and the Rescue Industry 39 (2007) (observing that in human trafficking discourse, “men are routinely expected to encounter and overcome trouble, but women may be irreparably damaged by it”); Mike Dottridge, Introduction, in COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 17 (Mike Dottridge, Global Alliance Against Traffic in Women ed., 2007) (arguing that human trafficking is perceived as a gendered issue and that countries overlook the possibility that men may be trafficked); Grace Chang & Kathleen Kim, Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s), 3 STAN. J. C.R. & C.L. 317, 320–21 (2007) (arguing
neglect to define the new term “exploitation” in a targeted way, fostering uncertainty as to the conditions under which exploitation amounts to trafficking. Importantly, as I discuss infra, exploitation is enumerated not as a separate offense, but as an element of the crime.

As a result, both the U.N. Human Trafficking Protocol and the TVPA as written are amenable to vast interpretative shifts. Anne T. Gallagher, who participated in drafting of the U.N. Trafficking Protocol, has lauded the broad scope of the trafficking definition as the main achievement of the U.N. Trafficking Protocol, particularly its gender neutral language and its inclusion of not only sex-sector human trafficking, but also various kinds of labor market exploitation. The strength of an expansive definition of exploitation is, however, also its downside in that it requires a continual recalibration of its focus and scope. The adjustments, which affect the legal recognition of human trafficking, also implicate a broader geopolitical landscape, given the specific enforcement mechanisms authorized by the TVPA.

While the TVPA and the U.N. Trafficking Protocol are compatible by letter of the law, the U.S. influence and ability to set the legal and policy terms of the global anti-trafficking debate are difficult to overstate. The TVPA is infamous for the reach of its unilateral global sanctions regime. TVPA’s congressional sponsors believed that the eradication of human trafficking into the United States depended upon other countries’ behavior—namely their explicit cooperation with U.S. anti-trafficking efforts. The resulting unilateral sanctions regime empowers the U.S. government to deny non-humanitarian, non-trade-related foreign assistance to any government perceived as noncompliant with U.S. defined anti-trafficking “minimum standards.” In applying the U.S. minimum standards, the State Department considers and classifies countries as either origin, transit, or destination countries, issuing an annual Trafficking in Persons Report (TIP Report) that details the state of human trafficking in countries across the world. Notably, the U.S. did not assess its own human trafficking issues and include them in the TIP Report until 2012. The identification of human trafficking is thus of real political, economic, and social consequence.

It is against this backdrop that efforts to move human trafficking beyond

that enforcement agencies’ focus on sex trafficking neglects the larger trafficking phenomenon).

36 See ILO Global Report 2009 supra note 15, at 6 (noting that “for the legal concept of exploitation, which underpins the definition of trafficking in the Palermo Protocol, there is almost no precedent in international law, nor is there much national legislation.”).
37 Gallagher supra note 30, at 791.
39 Supra note 2.
40 Supra note 1.
the criminal prostitution reform debates that characterized its infancy occur—a backdrop where countries’ prior classifications as origin, transit, or destination countries linger, even as new, expansive, non-sex sector labor inclusive interpretations of human trafficking are deployed—even as the operational parameters of what constitutes human trafficking shift. This landscape has complicated the recognition of lesser labor offenses that may constitute human trafficking while keeping, as we’ll see, legal efforts too tightly focused on migrant labor. These shortfalls in our approach to human trafficking have occurred due to shifting paradigmatic approaches to human trafficking that have, in turn, contributed to its shifting wrong.

B. The Dominant Paradigms of Human Trafficking

Contemporary human trafficking law rests at the intersection of three dominant paradigms: criminal, gender violence, and human rights paradigms. This conflation is in practice nearly impossible to prise apart, so steeped is the language of criminal justice in the wrenching image of the stereotypical trafficked person: a woman, stripped of all rights, spirited to a strange locale, and forced into “sexual slavery.” Subsequent sections will further explain how adopting a new low wage labor paradigm best addresses the challenges of human trafficking—including sex sector human trafficking—given our received doctrine. First, however, close and comparative attention to how various legal paradigms conceive of the wrong of human trafficking—what they reveal and what they obscure—can help us sift through the underlying visions of human freedom that motivate and animate human trafficking law, illuminating how these conceptions of freedom have produced inadequate legal outcomes by failing to address and describe the range of actions prohibited by anti-human trafficking instruments. To ground my analysis of the wrong of human trafficking, I ask: what kind of wrong is envisaged by the paradigms offered to explain it, who is at risk of suffering from it, and how this notion of wrong interacts and intersects with other innovations in the interpretative breadth of human trafficking law to secure what notion of freedom.

1. Human Trafficking as a Transnational Crime

A criminal and law enforcement approach dominates human trafficking law and policy. This criminal paradigm deems the wrong of human trafficking a

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

The transnationality of the crime of human trafficking therefore dictates powerful and extensive state intervention. Because networks of bad individuals commit the crime, the state is empowered to flush them out from wherever they might be, its reach extending within erstwhile ostensibly private spheres. By this logic, almost all efforts to combat human trafficking in an individual state’s domestic or civil sphere are justified, including the surveillance of private financial data by search engines alert to suspicious expenditures; enhanced border control; and armed raids of residences rumored to participate in

30, at 1 (“[T]he priority for governments around the world in their efforts to stop human trafficking has been to arrest, prosecute and punish traffickers, rather than to protect the human rights of people who have been trafficked.”); ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 68 (2010) (arguing that the 1990s marked “an important shift in the international legal framework around trafficking” away from human rights approaches and toward a transnational organized crime model); Dina Francesca Haynes, (Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act, 21 GEO. IMMIGR. L.J. 337, 345-352 (2007); Jayne Huckerby, United States of America, in COLLATERAL DAMAGE, at 230, 247 (explaining how the U.S. government’s “prosecutorial focus often runs counter to the rights of trafficked persons”); Jonathan Todres, Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking, 33 MICH. J. INT’L L. 53, 57-67 (2011).


44 Article 11 of U.N. Trafficking Protocol and the Migrants Protocol each require the strengthening of border controls and enhanced cooperation between border control agencies. Additionally, Article 12 of those Protocols mandates that States ensure the integrity and security of their travel documents, while Article 13 of both Protocols requires State parties to verify at the request of another State party the legitimacy and validity of any travel documents purportedly released by them. See U.N. Trafficking Protocol, supra note 3; Protocol against the Smuggling of
The Wages of Human Trafficking

While the wisdom of encouraging states to engage in what Jonathan Simon calls “governing through crime” is debatable, the stamp of transnational criminality, its expressive function, is weighty one—one that demands intensive mobilization of state resources as well as moral condemnation to affect the eradication of the crime. From the sheer breadth of state participation, the enduring visibility of the issue, and the emphasis on global nature of the problem, the transnational criminal paradigm has certainly enjoyed some success, undoubtedly safeguarding the rights and lives of many who would otherwise have suffered without recognition or redress.

The harms that the transnational criminal paradigm obscures, however, are equally consequential, as a range of scholars have amply discussed. First, by framing the wrong of human trafficking as a public offense committed by outlying wrongdoers, the criminal paradigm ignores the structural conditions that facilitate human trafficking by diverting attention away from them. Such

46 Criminal law’s expressive function is significant. The transnational criminalization of human trafficking expresses an international consensus that such exploitation is beyond the pale. See Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779, 822 (1994) (describing how law affects social valuation).

47 See Melissa Ditmore and Juhu Thukral, Accountability and the Use of Raids to Fight Trafficking, 1 Anti-Trafficking Review 134 (2012) (arguing that “data from the United States suggests that raids conducted by law enforcement agencies are an ineffective means of locating and identifying trafficked persons.”).

48 For Jonathan Simon, “governing through crime” describes a remarkable and pronounced shift in the organization of late twentieth century civil society, which he distills to three key corollaries: 1) the rise of crime as a crucial strategic issue; 2) the ability of the “fight against crime” to legitimate actions that have other motivations; and 3) the seepage of crime and criminal justice metaphors into other social institutions, including schools. Simon uses this phrase to describe how, since the 1990s, the U.S. has structured a new civic and political order around the problem of violent crime. In Simon’s account, these attempts to govern through crime have been profoundly undemocratic. Whether, he argues, democracy is valued for its liberty or equality enhancing features, governing through crime has exacerbated U.S. class and race-based social striations, as “the vast reorienting of fiscal and administrative resources toward the criminal justice system at both the federal and state level, has resulted in a shift aptly described as a transformation from the ‘welfare state’ to the ‘penal state.’” The role of the state has shifted from providing for its populace to policing it. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR, 3-6 (2009).

49 Supra note 41. Shamir, supra note 18, at 79 (“Yet despite this worldwide mobilization against human trafficking, the academic literature on anti-trafficking efforts has been largely critical of the emerging [criminal] legal paradigm.”).
structural conditions that contribute to the occurrence of human trafficking include: the inner workings of global markets;\textsuperscript{50} the interplay between immigration law and securitized border control;\textsuperscript{51} weak or under-enforced labor law;\textsuperscript{52} the broader private law backdrops against which human trafficking and other relevant law operates;\textsuperscript{53} and the state’s role and interests in maintaining these orders.\textsuperscript{54} The transnational criminal paradigm’s problems, then, lie in its focus on the individual wrongdoer and not the economic motivations of migration. In this way, the criminal paradigm fails to appropriately consider the labor dimensions of human trafficking, casting trafficked persons as hapless victims forced into extreme, violent conditions, instead of agents who have made choices, however limited, that have led to exploitative outcomes.\textsuperscript{55} A human rights approach has sought to address these shortcomings of the transnational criminal paradigm with, as we will see, some success and some limitations. In the next section, I analyze this human rights perspective before returning to a particular—and particularly entrenched—criminal perspective that demands more concerted attention: the equation of human trafficking with sex sector human trafficking, which locates the wrong of human trafficking in gender violence.

2. Human Trafficking as a Human Rights Issue

In the wake of human trafficking’s criminalization, human rights advocates have struggled to infuse a human rights perspective within the dominant transnational criminal paradigm.\textsuperscript{56} Instead of targeting perpetrators


\textsuperscript{52} See, e.g., Shamir, \textit{supra} note 18.

\textsuperscript{53} See, e.g., TSACHI KEREN-PAZ, A PRIVATE LAW RESPONSE TO HUMAN TRAFFICKING (2013).

\textsuperscript{55} See, e.g., Hathaway, \textit{supra} note 51, at 5 (arguing that anti-human trafficking laws, as presently configured, are “often convenient for (if not essential to) the project of globalized investment and trade.”); Haynes \textit{supra} note 41, at 350 (arguing that practical and political issues and political and theoretical concerns hinder U.S. efforts to protect trafficked persons).

\textsuperscript{55} See Haynes, \textit{supra} note 41.

\textsuperscript{56} The early and vast gulf between the criminalization of human rights perspectives is practically a truism. Human rights provisions in the U.N. Trafficking Protocol, do not mirror the language of obligation found in the criminalization provisions. Instead, States are only required—in “appropriate cases” and “to the extent possible under domestic law”—to “consider” and “endeavor to provide” assistance for and protection for trafficked persons. \textit{See} U.N. Trafficking Protocol, \textit{supra} note 3, at Arts. 6-7, 9.
for punishment, human rights advocates seek a “victim friendly” global legal regime—one focused on and responsive to the needs and rights of trafficked persons themselves. Under a human rights paradigm, in the words of Allegra McLeod, “[a] human rights approach would emphasize prevention and care for those at risk of, or victim to, trafficking; it would not rely primarily on criminal law paradigms of innocent, ‘iconic’ victims, and individual, culpable trafficker defendants.”

Human trafficking victims would, for instance, be understood to possess an untrammeled right to assistance—not one conditioned upon their willingness or ability to cooperate with law enforcement in the prosecution of their traffickers. Forced repatriation would also be prohibited. McLeod’s argument illustrates the aspirational pull of human rights, where appeals in its name function as a kind of transcendental knife, cutting through the criminal paradigm’s emphasis on wrongdoing by placing the “human”—undifferentiated, equal to all others—at the analytic center of the legal problem.

If the aspirations of human rights law are laudable, critics argue that a human rights paradigm can nonetheless obscure the wrong of human trafficking. Like the transnational criminal perspective that it seeks to correct, human rights approaches foreground the individual harm and wrongdoing at the expense of broader, global analysis of the global market

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57 Allegra M. McLeod, Exporting U.S. Criminal Justice, 29 Yale L. & Pol’y Rev. 83, 112 (2010). In fact, only one human rights obligation, the duty to furnish those subjected to human trafficking with access to a system to seek compensation, is mandatory: “Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damages suffered.” U.N. Trafficking Protocol, supra note 3, at Art. 6(6).

58 See 22 U.S.C. § 7105(b)(1)(E)(i)(I) (2006) (requiring that prior to receiving assistance, a victim be certified that the trafficked person “is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons or is unable to cooperate with such a request due to physical or psychological trauma”); see also Haynes, supra note 41, at 345 (“The United States approaches its efforts to combat trafficking in human beings from a law enforcement perspective, with the justification for victim assistance emerging from the willingness and ability of victims to cooperate with law enforcement.”); see also Todres, supra note 16, at 151 (“In fact, the TVPA does not ensure victims’ rights to assistance but rather conditions assistance to certain victims on their willingness to cooperate with law enforcement in the prosecution of their traffickers. That is hardly a rights-based approach.”).

59 See Shamir supra note 18, at 80 (contending that “[f]ar from being marginalized, a human rights approach to trafficking constitutes an important element of the current global anti-trafficking campaign and has actually become part of the problem.”); Hathaway supra note 51, at 5 (arguing that “human trafficking is an alibi for enhanced border security—one in which countries that produce migrant workers (supply countries) are inveigled to help carry out destination countries’ (several European countries, backed by Australia and the US) anti-immigration policies in the name of anti-human trafficking law.”).
interactions that spawn human trafficking. As a result, human rights paradigms tend to provide a way of understanding human trafficking that may check individual states or groups of states power (targeting, for existence, the poor treatment of commercial sex workers by their traffickers), but may fail to reign in other arrangements of multi-state or corporate power (as when human rights violations are marshaled in the service of ulterior economic interests or used to mask or justify outright land grabs and predatory wars).

What such criticism also illustrates is the potential for collusion between human rights paradigms and transnational criminal/security ones—especially, as the next section details, ones that occur in the name of gender justice.

3. Human Trafficking As Gender Violence

U.S. federal and state prosecutors have reported that definitional—and actively evolving—ambiguities in legal interpretations of human trafficking have fostered tremendous degrees of discretionary differentiation between acts that could, for example, easily be classified as either human trafficking or routine prostitution. If sex sector human trafficking has suffered from an overzealous inclusionary impulse, less severe forms of labor sector human trafficking have been largely excluded from legal action or inquiry. The discretionary differentiation between human trafficking and non-sex sector forms of labor exploitation has yet to be fully appreciated, analyzed, or theorized. This gap persists despite efforts to reorder the relationship between human trafficking and forced labor, complicating the definitional boundaries that delimit not only human trafficking from slavery, but also lesser exploitation from slavery. This gap persists in part due to the early and

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


62 See, e.g. Brooke Grona-Robb, “Prosecuting human traffickers,” THE PROSECUTOR, 40 (September-October 2010) (explaining in part how some officers and prosecutors might see prostitution instead of human trafficking, and vice versa); Katy Steinmetz, Oakland Launches Pimp-Shaming Website, TIME MAGAZINE, (July 2, 2014), http://time.com/2946597/oakland-launches-pimp-shaming-website/, (describing an Oakland police campaign that all but equates human trafficking with prostitution, whether coerced, or chosen).
enduring framing of human trafficking as gender violence.63

A gender violence paradigm locates the wrong of human trafficking specifically in violence against women. Crucially, this conceptualization of human trafficking is amenable to criminal and human rights approaches and remedies, which tend to focus on punishing individual wrongdoers or enhancing individual rights, respectively. Each demands an enhanced state presence, if not the express involvement of an international governing order or transnational alliance of states, in curbing the occurrence of gendered sexual violence.

Further, a human rights approach does not threaten, but often encourages the recognition of sexual violence—if not human trafficking—as a crime across domestic and international registers.64 Under a human rights paradigm, “women’s human rights” are increasingly understood as gendered protections against violence, specifically sexual violence. The criminal paradigm shares this view of sexuality as a person’s—especially a woman’s—intimate, private, and personal province where she alone is sovereign.65 This common take on sexuality’s centrality to individual, private self-conceptualization underpins the moral ordering that animates both a criminal paradigm (wherein gendered human trafficking is an outrage to justice and an offense against the public) and a human rights paradigm (wherein gendered human trafficking is an affront to the rights of humanity, especially women).

Certainly, on questions of enforcement and remedy, human rights and criminal paradigms diverge, veering off on the question of how to best nurture and protect the private sexual self. The criminal paradigm would ex post recruit the state to punish threats to it. In some ways conversely, the human

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63 See, e.g., Grace Chang & Kathleen Kim, Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s), 3 STAN. J. C.R. & C.L. 317, 320–21 (2007) (arguing that enforcement agencies’ focus on sex trafficking neglects the larger trafficking phenomenon).


65 This autonomy/bodily integrity/equality fusion is supported throughout constitutional case law, and ties into how we understand slavery. See infra Part V. See Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism, 29 Harv. J. L. & Gender 349, 335 (2004). (describing how abolitionists argued “that prostitution necessarily constitutes a form of trafficking because it necessarily reproduces and enforces subordination of women by men”); Melissa Farley, Preface to PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS xi, xiv (Melissa Farley ed., 2003); Kathleen Barry, THE PROSTITUTION OF SEXUALITY (1995); Dorchen Leidholdt, Prostitution: A Violation of Women’s Human Rights, in 1 CARDOZO WOMEN’S L.J. 133 (1993); Catherine MacKinnon, Prostitution and Civil Rights, 1 MICH. J. GENDER & L. 13, 28 (1993).
rights paradigm would ex ante seek to augment the conditions that would allow for the private sexual self’s flourishing, urging an international order of states to adopt specific duties and obligations designed to foster those ends. But this divergence rests simply on how we understand the relationship between the law and the private sexual self. It does not deny the existence or primacy of a private sexual self; query the cultivation of a private sexual self as a key element of freedom; nor question how or why “women’s human rights” as an abstract category became largely synonymous with efforts to protect a private, sexual self instead of, for example, a public, economic one.

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

These questions have persisted since the earliest human trafficking jurisprudence, which concerned the 20th century obsession with “white slavery,” or the movement of women across borders for sexually exploitative purposes. In 1904, the International Agreement for the Suppression of White Slave Traffic was adopted, with additional conventions signed in 1910, 1921, 1933, and in 1950. Each of these anti-human trafficking/anti-slavery initiatives were passed at historical moments when labor—particularly women’s labor and therefore also their social roles—were in great upheaval.

At the beginning of the 20th Century, industrialization and the movement of unsupervised working class girls into city factory work prompted anxieties about sexual propriety. The 1920s, 1930s, and also the 1950s, saw shifting labor demographics following economic turmoil and world war. The 1990s, which kicked off our current human trafficking legal regime, witnessed a new phase of global labor migration and economic interdependency at the end of the Cold War.

I mention these previous instruments to suggest that human trafficking laws have always attempted to mediate social concerns (particularly in the U.S. context) about what separates legitimate labor from acts of slavery—and have done so through the social category of gender. This millennium’s early U.S. prostitution reform debates, which dominated early human trafficking legal efforts, are no exception. At issue: would prostitution, including non-coerced or chosen prostitution, be understood as sexual slavery and subsequently abolished, or as sex work subject to labor regulations and protections? Beneath the prostitution reform controversy lurk legal feminist controversies on the broader relationships between gender, sex, labor, race, and the meaning of freedom, not to mention the scope and aptness of theorizing gender justice through violence.

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

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

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73 See, e.g., Chuang, supra note 4.
74 See TVPA, supra note 2, and the U.N. Trafficking Protocol, supra note 3.
75 See supra note 35.
76 See generally MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 276–85 (1999) (arguing that taking money in exchange for sexual services is analogous to other types of work).
77 See Tien, supra note 33.
slavery.

Sex work advocates, whether they champion prostitution and other commercial sex practices as viable career paths or ultimately strive to reduce or eradicate their occurrence, contend that such activities are work. In this view, those who perform such work deserve the full spectrum of labor protections that would accompany any other employment. A sex work approach to human trafficking understands its wrong in the language of labor—as unprotected, dangerous work often suffered by women who may find themselves unable to find other gainful employment.\

Crucially, understanding the core wrong of human trafficking’s sexual exploitation element as materially similar to its labor exploitation element helps right the imbalance that pulls the lion’s share of legal attention towards sex sector trafficking, rendering human trafficking all but synonymous with sexual exploitation. It can also correct for the gendered imbalance and moral judgment that often attends discussions of prostitution and other commercial sex acts by shifting attention away from the sexual self (whose alleged private nature is imminently debatable) and towards the structural economic realities faced by global workers.

The continuities between a sex work approach and a broader labor migration paradigm are worth emphasizing, particularly in our current historical moment when labor and slavery paradigms are each paradoxically each on the ascent. What the early human trafficking paradigms let us see is the continuous give and take between punishing wrongdoers whose actions injure humanity (the transnational criminal paradigm); shaping a clearer notion of what protections humanity by birthright deserve (the human rights and gender justice paradigm); and acknowledging the material conditions and

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79 It is important to see how human rights ambitions to “preserve the visibility of the person as an individual” and emphasize freedom of choice can dovetail with labor perspectives. See Halley et al., supra note 65, at 335. After all, labor rights are human rights. See Gallagher supra note 30, 847 (“From its earliest days to the present, human rights law has loudly proclaimed the fundamental immorality and unlawfulness of one person appropriating the legal personality, labor, or humanity of another.”). However, a traditional labor paradigm does not place individual rights holders at the center of the legal problem. See Shamir supra note 18, at 80 (“Individual and collective labor and employment rights emerged in the attempt to bring about structural changes to labor markets that would strengthen workers’ bargaining positions and, eventually, lead to the redistribution of wealth between capital and labor. They are, therefore, better suited than the traditional human rights tools for addressing the institutional aspects of the labor market exploitation on which trafficking is structured.”).

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

81 See Katherine Franke, Putting Sex To Work, 75 U. DENVER L. REV. 108 (1998) (arguing for an understanding of how the concept of sexuality functions socially that is not overly focused on private sexual identity or private sexual acts).
economic frailties of workers (via a sex work/labor paradigm). From each vantage, the meaningfulness and role of consent as a marker of individual freedom assumes greater or lesser importance, depending on how each paradigm values individual choice versus structural or collective rights within its analysis of freedom. Unlike the transnational criminal, human rights, and gender violence paradigms, the labor migration paradigm and the new low wage/vulnerable labor paradigm each understand labor market structures and poor employment conditions to underlie the wrong of human trafficking, thus moving us further away from an emphasis on individual choice or individual wrongdoing. I discuss the implications of their commonalities and their differences in next two parts.

II. THE LABOR MIGRATION PARADIGM OF HUMAN TRAFFICKING

Individual harms of equality and autonomy figure prominently in each of the dominant approaches to human trafficking, namely the transnational criminal, gender violence, and human rights perspectives. While human trafficking does undoubtedly cause individual people individual damage, centering the individual at the heart of an analysis of human trafficking commits a grave error. An overt focus on individual harms obscures the structural conditions that drive human trafficking—the inner-workings of global labor markets and poor and/or unregulated employment conditions.

In recognition of the shortcomings of the dominant paradigmatic approaches to human trafficking, however, a labor perspective has recently emerged. This labor approach frames human trafficking as an issue of power, focusing ex ante on the structural imbalances that characterize work relations in “labor sectors susceptible to [human] trafficking.”82 To address the labor wrong of human trafficking, a full labor paradigm would promote collective action and collective bargaining, protective employment legislation, and context specific standard setting in sectors vulnerable to human trafficking. Such an approach would empower states and their appropriate international orders to assume a strong and active role in regulating the legal backdrop against which global markets function. These may include the background rules of private law, immigration regimes, trade policies, criminal law, border policing, and social welfare policies to the extent that these elements contribute to unequal negotiating positions vis-à-vis the labor contract in relevant labor sectors.83 The emerging labor paradigm, however, has retained a focus on extreme migrant exploitation, splintering the full potential of human trafficking law. This Part demonstrates how the “labor migration paradigm,” premised on migrant labor, may miss legally actionable instances of human trafficking.

82 Shamir supra note 18, at 81-82.
83 Id.
SUSPENDING the question of whether prostitution should be abolished, decriminalized, or regulated like any other kind of work, a groundswell of noted human trafficking legal scholars nonetheless agree: the early overemphasis on gendered sexual exploitation—be it through criminal, human rights, gender violence, or gender equality paradigms—has overshadowed others forms of exploitation expressly targeted by anti-human trafficking law, namely non-sex sector labor exploitation.\footnote{See Anne T. Gallagher, \textit{Counteracting the Bias: The Department of Labor's Unique Opportunity to Combat Human Trafficking} 126 HARV. L. REV. 1012 (2013) (arguing that human trafficking is increasingly understood as falling along a spectrum of abusive labor practices and detailing the Department of Labor's mandate and renewed efforts to address human trafficking); Chuang \textit{supra} note 5, at 4 (noting that "we are beginning to see the makings of a shift towards an alternative: a labor paradigm.").} Recent U.S. and international human trafficking law and policy have mirrored this scholarly consensus, quietly steering anti-human trafficking efforts beyond prostitution reform debates. In 2010, for example, the Obama Administration effectively reversed the Bush Administration’s equation of voluntary prostitution with human trafficking. As the State Department’s 2010 Trafficking in Persons Report states, “[p]rostitution by willing adults is not human trafficking regardless of whether it is legalized, decriminalized, or criminalized.”\footnote{U.S. DEP’T OF STATE, \textit{TRAFFICKING IN PERSONS REPORT} 8 (2010). In contrast, see the 2004 U.S. Department of State Fact Sheet, which views prostitution, voluntary or otherwise, as a correlate if not a cause of human trafficking, stating that “where prostitution has been legalized or tolerated, there is an increase in the demand for sex slaves.” Bureau of Public Affairs, \textit{U.S. Dep’t of State, Fact Sheet: The Link Between Prostitution and Sex Trafficking} (2004).} Meanwhile, on other fronts, the International Labor Organization (ILO) has attempted to exert new authority within human trafficking law through its close association with forced labor, a bailiwick of the ILO. In recognition of the prevalence of human trafficking and other “modern forms of slavery,”\footnote{INTERNATIONAL LABOUR ORGANIZATION, \textit{TEXT OF THE PROTOCOL TO THE FORCED LABOUR CONVENTION, 1930} (2014), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_246615.pdf.} the ILO has recently adopted a new and legally binding Protocol to ILO Convention No. 29, the 1930 Forced Labor Convention.\footnote{International Labour Organization, \textit{ILO Develops New Protocol to Tackle Modern Forms of Forced Labour}, (June 11, 2014),} Touting the Protocol as “bring[ing] the existing ILO Convention No. 29 Concerning Forced Labour […] into the modern era,” to address practices such as human trafficking, the Protocol establishes a common framework for the 177 ILO member states that have ratified Convention No. 29.\footnote{87}
Specifically, the Protocol strengthens the international legal framework by creating new obligations to prevent forced labor, to protect victims, and to provide access to remedies—including compensation—regardless of legal status.\textsuperscript{88} The Protocol encourages intergovernmental cooperation to eradicate forced labor and human trafficking for the purposes of forced or compulsory labor, including bilateral and multi-lateral agreements.\textsuperscript{89} Crucially, the Protocol requires governments to take measures to better protect workers, in particular migrant low skilled workers, from fraudulent and abusive recruitment practices.\textsuperscript{90}

The ILO’s interest human trafficking as a form of forced labor serves as a corrective to its notable absence in the discussions that culminated in the drafting and adoption of the U.N. Trafficking Protocol,\textsuperscript{91} while also changing the tenor of the legal debates over what human trafficking essentially is. It moves the wrong of human trafficking towards a labor paradigm and away from the Bush Administration’s interpretive lens of gendered morality, but does so by building on the legal architecture of extant human trafficking law whose original transnational criminal paradigm understood human trafficking in ways that, as I subsequently discuss, collapsed distinctions between consensual economic migration and the act of movement thought necessary to support a charge of human trafficking. While the Obama Administration and the ILO thus recognize a labor wrong (among a muddle of others) at the heart of human trafficking, they adopt a specific species of labor as the object of their best efforts: migrant labor.

\section*{B. The Construal of Labor as Migrant Labor}

The turn to migrant labor (beyond sex sector labor) is also reflected in an

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\item \textsuperscript{88} Supra note 86.
\item \textsuperscript{89} Id. The ILO does not assume that all forced labor is human trafficking, noting that “[f]orced labour, contemporary forms of slavery, debt bondage and human trafficking are closely related terms though not identical in a legal sense. Most situations of slavery or human trafficking are however covered by ILO’s definition of forced labour.” International Labour Organization, \textit{The Meaning of Forced Labour}, (March 10, 2014), http://www.ilo.org/global/topics/forced-labour/news/WCMS_237569/lang--en/index.htm.
\item \textsuperscript{90} Supra note 86.
\end{itemize}}
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emerging consensus among labor and human trafficking legal scholars, who contend that a labor paradigm attuned to the vulnerabilities of migrant labor best recognizes and addresses the harms of human trafficking. This paradigm casts human trafficking as largely the lot of the poor and the foreign who find themselves funneled into commercial sex work, construction, food service, home health care, agricultural work, or other forms of low wage, poorly regulated, labor with little recourse to the labor and employment protections enjoyed by native born or citizen workers.

To stem the tide of human trafficking, some human trafficking and labor some scholars advocate a general, broad-based strengthening of the complex of laws (both labor, criminal, and private) that affect structural relationships between employers and employees. Others, like James Gray Pope, suggest that the prohibition against “modern slavery,” typically understood as extreme, often collectivized migrant labor abuse, should incorporate support for “selected labor rights” that would afford migrant workers the same protections provided to citizen ones, including the right to change employers, the right to bargain collectively, and the right to freedom of association, among others.

Yet the conceptual meaning and operational parameters of human trafficking law are not assessed or explained in these works. Nor do the actual conditions of low wage work, generally, often enter into the calculus of ending exploitation; the focus lies instead on extending or correcting relevant law without any corresponding analysis of the effectiveness of existing legal

92 See, e.g., Bravo, supra note 50; Shamir supra note 18; Gallagher supra note 84; Chuang supra note 5, at 5 (arguing that “trafficking is now increasingly (and accurately) recognized as a phenomenon falling somewhere along a spectrum of abusive labor practices”).
93 The emphasis on migrant labor is due in part to a conflation between categories of work and migrant labor. For example, the National Labor Relations Act (NLRA) is often cited as a law that fails migrant workers because it defines the term “employee” to exclude in part “any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home” Pub. L. No. 74-198, § 2(3), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 152(3) (2006). Yet agricultural and domestic workers categorically do not enjoy the protections of the NLRA—the Act makes no distinction between migrant and non-migrant workers.
94 See, e.g., Shamir, supra note 18.
96 Id.
protections. No matter the proposed solutions, these labor-centric approaches suggest that understanding human trafficking as a labor issue—or even as “modern slavery”—need not confuse “lesser” forms of labor exploitation with the kinds of exploitation that merit a charge of human trafficking.

But is this assurance in fact a legally accurate reading of contemporary interpretations of human trafficking law? Where human trafficking begins and lesser exploitation ends “remains highly debatable”98—especially with the absence of any movement requirement and the simultaneous reordering of all human trafficking as slavery.

As the prior analysis of the dominant paradigms makes clear, the act of movement or recruitment was at the onset considered uniquely critical in isolating and recognizing a specific population thought to be particularly vulnerable to exploitation: namely migrants or internally displaced persons. From the first, anti-human trafficking laws targeted the harms and vulnerabilities associated with migration, aiming to protect the least protected persons for whom migrants served as the model: those people without or unable to access home state protections, people in flux. Debates about the movement requirement remained debates about how to best protect, first and foremost, if not exclusively, this at-risk population. As the International Labor Organization explained its early adherence to the movement requirement, “trafficked forced laborers are “probably worse off” than non-trafficked victims, who were thought to exercise greater degrees of agency and control over work conditions.99

Recognizing how labor paradigm advocates have focused on migrant labor—for legal, strategic, and ideological reasons—illuminates how this position has not kept pace with transformations in how we interpret the elements necessary for a criminal or even civil charge of human trafficking. Other scholars have understood these developments as an “unmaking” of human trafficking law—as the destruction of the legal integrity of the crime of human trafficking.100 Instead, I view these shifts instead as indicative of the tension at the heart of the definition of human trafficking, inscribed within the codified split between labor and sexual exploitation, between economic and equality (nondiscrimination) interests, whose meanings are themselves susceptible to the paradigms adopted for their interpretation.

98 Chuang, supra note 5, at 3.
100 See Chuang supra note 5; Gallagher supra note 84.
In this way, a labor migration paradigm—while undoubtedly promoting the collective rights of workers—nevertheless carries within it an embedded equality argument rooted in group identity; it understands the rights of migrant workers as uniquely diminished within the global market. Migrant workers are not treated as equals to citizen workers, who are understood as largely protected by domestic law and enjoying access to shared socio-cultural resources. This dichotomized view of labor exploitation—whether freely entered in by the worker or not—casts migrant worker treatment as an affront to a liberal notion of freedom premised on equality, while the low wage/vulnerable work conditions that engender their exploitation remain outside legal attention.

Understanding the wrong of human trafficking as a labor wrong that predominantly befalls migrant workers allows us to see several significant harms that criminal, human rights, and assorted gender paradigms obscure. By framing human trafficking as a migrant labor issue, the labor migration paradigms foregrounds the movement of workers of all genders and persuasions across borders or to otherwise non-native locales. Doing so reveals the vulnerabilities and interdependencies that inhere to the human condition—particularly human working conditions—while retaining a focus on the unique vulnerabilities of those who work beyond the borders of their homelands or place of origin. A labor migration paradigm thus offers a particular portrait of the inner workings of power—one where the struggle lies in perfecting the balance of power in citizen and non-citizen labor arrangements, in sectors thought to be vulnerable to human trafficking.

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

Before we turn to an exploration of the new low wage/vulnerable labor paradigm, it is worth noting how the increasing willingness to recognize and

\[101 \text{ Supra note 12.} \]
address non-sex sector labor exploitation as legally actionable human trafficking has been accompanied by a tendency to deemphasize any movement requirement and instead spotlight exploitation as its core harm.\textsuperscript{102} This would, one would think, push against the notion that anti-human trafficking efforts should focus almost exclusively on migrant exploitation. Yet the assumption that trafficked labor is largely, if not exclusively, migrant labor lingers within legal descriptions of human trafficking, even though the scope of anti-human trafficking law is less than ever limited to migrants—even as, in other words, the abuse that constitutes actionable exploitation has been legally sundered from its foundational motivation: the vulnerability of migrant workers to various forms of organized exploitation perpetrated by international criminal syndicates.

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

III. FUSING MOVEMENT AND MIGRATION

The focus on migrant labor has occurred even as the TIP Office has eliminated the movement requirement, demonstrating, as I will show, that the kind of isolation and lack of access to resources or remedies that characterizes human trafficking is not solely achieved by being physically moved, either across a border or within a state. This Part discusses how a fusion of movement and migration as equivalent bad acts that befall human trafficking victims has resulted in case law that has been unable to capture the less severe

\textsuperscript{102} See, e.g., US DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 359–60 (2012); Gallagher \textit{supra} note 84, at 1014 (“The core of human trafficking is exploitation; trafficking does not necessarily involve movement of individuals across borders. Nevertheless, noncitizens working in the United States are especially vulnerable: Undocumented workers may labor under conditions in which ‘employers take advantage of their status and fail to pay adequate (or any) wages, discriminate openly in the workplace, and violate labor and safety laws with impunity because of weak laws and weak employer enforcement efforts.’”) (quoting Leticia M. Saucedo, A New “U”: Organizing Victims and Protecting Immigrant Workers, 42 U. RICH. L. REV. 891, 893 (2008)).
forms of labor exploitation otherwise included in anti-trafficking law. In other words, this Part argues that understanding movement as a prerequisite for a charge of human trafficking relies on an inaccurate understanding of both the conditions of migrancy and the conditions of low wage work, generally.

A. Eliminating the Movement Requirement Makes Ending Exploitation the Goal of Anti-Human Trafficking Law

The TIP Office’s disavowal of any movement requirement is noteworthy because it is an explicit step towards integrating a labor perspective within the U.S. legal approach to human trafficking. To satisfy the act element in the absence of a movement requirement, the TIP Office has adopted expansive interpretations of the enumerated act elements, including “harboring,” “receipt,” and “obtaining.” The Obama Administration understands these acts alone as sufficient to support a charge of human trafficking—no movement or recruitment by a third party is required. In this way, prior distinctions between trafficked forced labor and non-trafficked forced labor have conceptually crumbled, allowing the Obama Administration to subsume all forced labor within the ambit of human trafficking.

Moreover, in the absence of a movement requirement, the exploitation element takes on new significance in ways that transform the relationship between the three elements (act, means, purpose) of the crime. With “exploitation” an element, early interpretations of the TVPA and the U.N. Human Trafficking Protocol were not understood to contain an explicit mandate to end human sexual or labor exploitation. They were thought of instead, as James C. Hathaway has noted, as “process orient[ed]” proscriptions.103 These instruments were construed as singling out certain acts that engender exploitation for legal action, but not others. In other words, they only prohibit specific forms of dealing (the “recruitment, transportation, transfer, harboring or receipt of persons” per the U.N. Trafficking Protocol104 and the “the recruitment, harboring, transportation, provision, or obtaining of a person” per the TVPA) by which people are exploited through force, fraud, or coercion.105

Now that exploitation and not movement, however, has become central to the TIP Office’s interpretation of human trafficking,106 the relationship between the act and purpose elements of human trafficking has changed. With the act of movement that once underpinned the meaning of “recruitment, harboring, transportation, provision, or obtaining of a person” removed, exploitation itself takes center stage. In New York City, for instance, where state laws are not

103 See Hathaway, supra note 51.
104 Supra note 3.
105 Supra note 2.
106 Supra note 102.
interpreted to require movement,\(^{107}\) this has resulted in prosecutions of employers who exploit migrant workers who have already been in the country for some time—a fact pattern that, as I discuss in the next section, was not always thought to indicate human trafficking.\(^{108}\)

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

A closer analysis of the relevance of movement to the recognition of human trafficking is illustrative in this regard. In what follows, I demonstrate how human trafficking law has understood migration in relation to the movement requirement, and how this has led to problems in how the law identifies acts of human trafficking for both migrant and non-migrant workers. This in turn shows us how the meaning and significance of migration, and therefore movement, shift with the paradigms we apply to interpret human trafficking law—even if these shifts in meaning have been largely unacknowledged.

### B. A Critique of the Movement Requirement

#### 1. Mistaking Migration as the Harm

The wisdom of requiring movement—not to mention what sort of movement counts, transborder or intra-state, and when the movement had to occur in order to count—has long been a site of periodic debate. Paradigmatic shifts in the legal approach to human trafficking have driven, among other things, the debates over the significance of the movement to human trafficking. The debates over movement are in essence debates about what causes the underlying conditions that create and foster exploitation, and what those underlying conditions actually are. I argue that the early transnational criminal understanding of human trafficking has led to notion that migration is and of itself a harmful act in ways that have inhibited the law’s ability to recognize the full range of acts prohibited by our primary anti-human trafficking instruments.

In the view of the early, transnational criminal paradigm, migration and

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victimhood were deeply entwined. The U.N. Human Trafficking Protocol and the TVPA conceive of human trafficking as a critical security issue deeply tied to transnational organized crime syndicates that facilitate clandestine, often illicit, migration and primarily target women and children. For U.S. courts, trafficked persons’ vulnerability was tied to their assumed status as unwitting victims far from home.

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

Assurances and clarifications in the legal meaning of human trafficking shortly followed. Intra-state movement debates were ultimately quelled by subsequent regional and state laws that explicitly included intra-state movement within the auspices of human trafficking. Yet the issue of the

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109 I discuss the significance and overlap of a gender violence paradigm with the criminal paradigm infra Part I.

110 A representative survey of early U.S. human trafficking case law supports this claim. See, e.g., United States v. Nantawat Naovasaisri, 150 Fed. Appx. 170 (3d Cir. 2005) (involving the trafficking of impoverished Thai women to the United States, where they were forced them to pay off their smuggling debts through prostitution at brothels, massage parlors, and tanning salons, some located in Atlantic City, New Jersey); United States v. Gasanova, 332 F.3d 297 (5th Cir. 2003) (involving J-1 visa fraud in which migrant women did not conduct university research, but were compelled to become topless dancers); United States v. Armando Soto-Huarto (citation needed) (involving sex slavery and involuntary servitude charges in a migrant labor smuggling ring turned human trafficking case); United States v. Zheng et al., 538 F.3d 1078 (N.D. Marianas Isld. 2006) (involving the recruitment of Chinese women to work in a tea house who were then forced into prostitution).

111 Chuang, supra note 5.

112 Hathaway supra note 51, at 4.

113 The European Convention against Trafficking in Persons prohibits internal trafficking and extends the rights and obligations contained in that instrument to trafficking taking place within as well as across national borders. Council of Europe, Convention on Action against Trafficking in Human Beings art. 2, May 16,
relationship between movement and human trafficking is not put to rest, even with the express inclusion of intra-state movement as an act that can trigger human trafficking law. This enduring tension is attributable, I argue, to the worry that migration, often equated with forced movement—and not the labor structures and employment conditions into which migrants relocate—is itself the core harm. Early debates on the scope of human trafficking law and the meaning of human trafficking demonstrate this slippage between migration, movement, and the core harm of human trafficking.

For instance, on January 29, 1998, a Roundtable on “The Meaning of ‘Trafficking in Persons’: A Human Rights Perspective” was held in Washington, D.C by the International Human Rights Law Group. Convened by the Women’s Rights Advocacy Program (WRAP) of the International Human Rights Law Group with the assistance of the Harvard Law School Human Rights Program, participants included human rights activists, scholars and professionals actively working to end the human rights abuses of human trafficking, while simultaneously seeking to define what precisely, “human trafficking” could be. All present roundly rejected any crossing the border requirement, be it international, national, state, or intra-state, noting that “the harm to victims can be the same whether they are moved two miles across a national border or 1,000 miles within national boundaries.” For those present, certain “factors” associated with border crossing—not an actual border crossing—lay at the heart of human trafficking. These factors include: “movement to a foreign or unfamiliar milieu; victims having illegal or non-national status; language, cultural or other barriers; and separation from family and community.” Nonetheless, roundtable participants deemed it “unfitting and inappropriate that a change in status or conditions without any physical transport, movement or travel should qualify as [human] trafficking.”

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


115 Id. at 14.
116 Id.
117 Id. at 15.
This slippage between the movement requirement, migration, and harm are made even more visible in early efforts to distinguish human trafficking from human smuggling.\(^\text{118}\) While the definition of human trafficking turns on the existence of forceful, coercive, or fraudulent dealings leading to sexual or labor exploitation, human smuggling has been historically understood as “a consensual and relatively benign market-based response to the existence of laws that seek artificially to constrain the marriage of surplus labor supply on one side of a border with unmet demand for certain forms of labor on the other side of that border.”\(^\text{119}\) The transnational criminalization of human trafficking, however, revivified and entrenched aggressive state border securitization and policing strategies, resulting in the attendant criminalization of human smuggling. The U.N. Trafficking Protocol and its parent convention on Organized Crime\(^\text{120}\) sought to facilitate inter-state cooperation to stamp out human trafficking, intercept traffickers, and control borders through standardized practices that include information exchange, mutual legal assistance, and repatriation procedures.\(^\text{121}\)

By ignoring the market dynamics that put workers’ bodies in migratory motion, and framing those efforts to work and survive as illicit criminal enterprise, the transnational criminalization of human smuggling is in essence the transnational criminalization of a market responsive labor practice. Economic migration and the act of movement necessary for a charge of human trafficking thus became conceptually fused and, as such, became the subjects or targets of anti-human trafficking law. As a result, subsequent paradigmatic attempts to correct for the excesses of the transnational criminal paradigm retained a heavy, if not exclusive, focus on migrant labor.

This emphasis in turn all but removed the non-migrant workers whose conditions of work might trigger a charge of human trafficking from legal attention and analysis. The weighty charge of transnational criminality also kept a focus on more extreme forms of exploitation, keeping lesser exploitations prohibited by anti-human trafficking law beyond legal purview. These tendencies are exemplified by the current labor analysis of human trafficking—the labor migration paradigm.

2. Rethinking the relationship Between Movement, Migration, and Harm

When, however, migration is recognized as value neutral, as potentially...
chosen and compelled by a desire to find work, even “bad” work, the legal significance of movement changes. Movement becomes a cipher for a social or structural lack of access to resources or options instead of something imposed or instigated by bad actors on unwitting victims. Movement becomes a proxy, in other words, for isolation, not simply forced migration. Indeed, when confronted with the choice to seek protection as victims of human trafficking or portray themselves as workers fighting for their rights, RESPECT, a network of European migrant domestic workers, rejected the human trafficking framework, which they felt compromised their efforts to overcome “the feeling of powerlessness among the migrants” and failed to promote “the regularization of undocumented migrants as workers.”

In understanding irregular or illegal labor migration as integral to the global economy, they further alleged that the mainstream legal fight against human trafficking “delegitimize[s] and even destroy[s] safer mechanisms of irregular migration.”

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

Thinking through what differentiates trafficked forced labor from forced labor evinces this point. For example, the International Labor Organization (ILO) relied on the notion that “trafficked forced laborers are “probably worse off” than non-trafficked victims, who were thought to exercise greater degrees of agency and control over work conditions, to explain its early adherence to the movement requirement.” This distinction, however, fails to persuade on closer examination.

First, there is a temporal issue with the way that trafficked and non-trafficked forced labor has been differentiated. It is fairly noncontroversial that a migrant worker who is smuggled across a border and/or recruited by an agency or other intermediary into a textbook forced labor situation, where the worker’s wages are withheld and the worker is compelled to labor under threat of violence, would be considered a victim of human trafficking. Indeed,

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123 Id.
124 See Andrees & van der Linden supra note 99.
second only to sex sector human trafficking, this is the classic human trafficking scenario. If, however, a migrant worker is recruited by an agency, works for a period of months without incident, changes employees, and is then subject to the same sort of exploitation, should this count as human trafficking? Is the worker’s migrant status the source of vulnerability? Or is it the working conditions that are at issue?

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

As the next Part details, however, the new low wage/vulnerable labor

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126 Supra note 108.

127 See Andrees & van der Linden, supra note 99, at 64 (arguing that “since both those who are subject to coercion at the outset of the migration project as well as those subject to coercion at a later stage are victims of severe exploitation, the academically interesting distinction between trafficked versus non-trafficking victims of forced labour becomes obsolete at a policy and legislation level. The conception of trafficking as a cross-border phenomenon, maintained by many actors in the field of trafficking, is not conducive to concerted action that encompasses all victims. Indeed, it should not matter when or where the coercion started, but that a person was subjected to it.”).
paradigm begins a conversation to remedy these issues. In recognizing human trafficking’s wrong as a new low wage/vulnerable labor one, the intuitive meaning of the movement requirement is preserved—namely, the vulnerability of living dislocated from institutional or social redress. Instead of rigorously inhering in the act of movement, however, isolation might also be achieved through the accumulation of poor working conditions and lack of meaningful avenues of redress, which, as U.S. context shows, affects migrant and non-migrant workers alike, albeit to varying degrees.

This is not to suggest that forced labor should be simply equated with low wages, poor working conditions, or situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives.\(^\text{128}\) What I would like to emphasize, however, is the unacknowledged breadth of our contemporary anti-human trafficking instruments, and how new interpretations of the elements of human trafficking suggest that legal attention should be paid to labor exploitation and working conditions through the new low wage/vulnerable labor paradigm. This provides us, as the next two parts will argue, with a means of differentiating human trafficking from slavery, while also acknowledging and addressing exploitation that does not amount to slavery proper.

IV. A Thin Line: Human Trafficking and The New Low Wage/Vulnerable Labor Paradigm

In the preceding sections, I have aspired to provide two fundamental insights about the current legal approach to human trafficking: 1) dominant paradigms fail to capture the full range of acts prohibited by its primary legal instruments, and 2) even the emerging labor approach, which does a better job of describing the wrong of human trafficking than the criminal gender violence or human rights paradigms, hamstring the full potential of human trafficking law through the unacknowledged use of migrant labor as a template for understanding human trafficking. In this Part, I offer an alternative lens for locating the wrong of human trafficking, namely the new low wage/vulnerable labor paradigm. In what follows, I will show how this new paradigm not only addresses the shortcomings of prior efforts to interpret human trafficking law, but is also consistent with attempts to construe human trafficking law as mandating the end of exploitation, as the prior discussion on the elimination of the movement requirement avers.

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

I turn now to an exploration of what I call the low wage labor/vulnerable

paradigm. This new paradigm proposes that the wrong of human trafficking may lie in the nature of low wage work itself, depending upon how we choose to configure the relationship between equality, labor, and freedom. In this spirit, I use the word “vulnerable” in an effort to encompass work that is not paid a wage or recognized as work (including forced prostitution), and to emphasize how a worker’s susceptibility to exploitation is context specific, but also inherent in the human condition. By this I mean that, as new sociological scholarship reveals, “workplace violations are not limited to immigrant workers or other vulnerable groups in the labor force—everyone is at risk, although to different degrees.” 129 With this understanding, I reference vulnerability, following Martha Albertson Fineman, as a methodological commitment to analyzing structural and institutional distributions of advantage and disadvantage that exceed a discrimination-based model’s narrow focus on individual identity. 130

Vulnerability theory fits well within currents of labor law scholarship that reconceptualize the foundations of labor law by basing the extension of social protections on labor force membership status—not the employment relationship. Alain Supiot takes this position, locating labor force membership status in work, which differs from activity in that work “results from an obligation, whether voluntarily undertaken or compulsorily imposed.” 131 Foregrounding the wrong of human trafficking in this way captures the full range of offenses proscribed by human trafficking law, from labor performed pursuant to enslavement to deceptive or coercive exploitation—all while understanding the wrong that binds them to be a collective wrong that inheres in the inner workings of global labor markets, manifested in employment conditions.

To flesh out these potentials, the following section contrasts a recent report describing low wage work conditions in the United States with a 2009 ILO Global report authored in conjunction with the European Union. The ILO Global report is an attempt to capture more legally actionable incidents of human trafficking—albeit with a specific focus on migrant labor. In the same spirit, 2009 also witnessed the release of a Delphi method survey implemented by the ILO and the European Commission identifying operational indicators used to diagnosis the presence of human trafficking. As we will see, the report departs from a definition of human trafficking as tantamount solely to slavery. It instead focuses on how to recognize less extreme versions of human trafficking, listing combinations of acts or violations that alone would not suggest its occurrence, but that together, offer a vision of human trafficking as a cumulative accretion of workplace violations. Here, the trafficked person at

129 Supra note 21, at 5.
130 See Fineman, supra note 12.
issue belies the iconic image of the shackled sex slave or other worker trapped and forced to labor in slave-like conditions. Instead, the trafficked person more closely resembles someone trapped in the low wage labor market.

Read in tandem, these two reports bring the stakes of how we interpret human trafficking law into relief, demonstrating the need for a thorough conceptualization of the wrong of human trafficking as a baseline for developing targeted and effective action against it. The following section will conceptualize what labor wrong lies between a labor migration paradigm and the new low wage/vulnerable labor paradigm. This perspective will prove necessary to better evaluate the Obama Administration’s move to classify all human trafficking as slavery, as I’ll discuss infra.

But first, the following section takes a closer look at what theory of wrong separates trafficked work that qualifies as legally actionable exploitation from work that is simply deemed non-trafficked, exploitative low wage labor. This is the place where equality arguments embedded within a labor migration paradigm—ones that ask that vulnerable migrant workers be offered the workplace protections enjoyed by domestic workers—may draw a false distinction between work under conditions that meet the legal definition of human trafficking, and other low wage work. This division, while preserving the legal integrity of a vision of human trafficking defined by force, violence, and slavery, may in fact generate anti-human trafficking efforts that fail to address “less extreme,” but equally proscribed forms of human trafficking—or worse, actively contribute to their flourishing.

### B. Cumulative Labor Violations As Human Trafficking

In “A Labor Paradigm for Human Trafficking,” Hila Shamir writes that the majority of scholars and activists agree that a certain “seriousness” threshold must be reached before a detrimental employment practice may be deemed human trafficking. And yet the threshold requirements are anything but clear: “uncertainty remains as to what exactly constitutes [human] trafficking.” Anne T. Gallagher, a preeminent human trafficking scholar and activist (and one of the drafters of the U.N. Trafficking Protocol), concurs, noting that beyond this seriousness threshold, “the lines [delineating human trafficking] remain blurred.” As previously discussed, the ambiguity surrounding what constitutes exploitation as well as the porosity of the means element of the definition have contributed to the definitional imprecisions of human trafficking.

Nevertheless, Shamir and others understand the means elements to have accrued certain content by experience and application in international and

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132 Shamir supra note 18, at 86.
133 Id.
134 Gallagher supra note 30.
national contexts. In other words, the meaning of human trafficking has been determined by practice and experience—not necessarily through recourse to the plain language of the U.N. Trafficking Protocol or in accordance with its drafters’ intention. Accordingly, physical coercion is decidedly not a threshold requirement for a practice to constitute human trafficking—other, less robust forms of intimidation have proven sufficient. Withholding wages or identification papers, threats to expose worker’s undocumented status to authorities, bonded labor,\(^{135}\) and indentured labor, may all satisfy the means element.\(^{136}\)

Relatedly and quite crucially, human trafficking may also arise in situations where workers have consented to travel for work—abduction and deception over the kind and conditions of work are not the sole actions proscribed by anti-human trafficking law.\(^{137}\) Instead, human trafficking can occur not only when the type of work one is compelled to engage in differs from what one was promised, but also when the worker has not consented to the working conditions themselves. Long working hours, illicit or excessive wage deductions, delayed payment, low wages, restrictions on freedom of movement may support a charge of human trafficking.\(^{138}\) In other words, deceptive recruitment is not perceived as essential to the violative essence of human trafficking; instead, human trafficking emerges as “a combination of labor rights violations, where each one alone might not amount to [human] trafficking.”\(^{139}\) Under this configuration, a worker’s migrant status may contribute to her vulnerability, but does it describe the core wrong of human trafficking? Or is the wrong rooted in the employment conditions themselves?

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

The 2009 *Operational Indicators of Trafficking in Human Beings* report, discussed fully in the ILP 2009 Global Report, originated in a joint ILO and European Commission project to reach consensus among European experts on what indicators should be used to characterize the various elements of the

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\(^{135}\) Debt bondage is “the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.” Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1(a), Sept. 7, 1956, 266 UN.T.S. 3.

\(^{136}\) Shamir, *supra* note 18.

\(^{137}\) See, e.g., Kathy Richards, *The Trafficking of Migrant Workers: What Are the Links Between Labour Trafficking and Corruption?*, 42 INT’L MIGRATION 147, 154 (2004); Shamir *supra* note 18; Gallagher *supra* note 84.

\(^{138}\) Shamir, *supra* note 18.

definition of human trafficking for data collection purposes. The project employed the Delphi Method. Developed in the 1950s and widely adopted throughout the social, medical, and political sciences, this methodology produces results based on the consensus of a wide-ranging group of experts. In the present case, experts surveyed hailed from 27 European Union states and included representatives of the judiciary, the police, the government, academic and research institutes, NGOs, international organizations, labor inspectorates, and trade unions. Each expert completed two successive surveys. The first identified indicators of human trafficking; the second rated the strength of those indicators.

This report was not only an attempt to standardize human trafficking definitions and the meaning of relevant labor exploitation across Europe, but also part of a broader effort to “strengthen freedom, justice, and security in the EU” by: “(i) establishing cooperation between Member States and others in the implementation of the EU strategy to measure crime and criminal justice; (ii) identifying the policy needs for data on crime and criminal justice; and iii) identifying the needs for—and/or developing—common indicators and tools designed to measure crime and criminal justice.” In fact, the ILO-European Commission project was itself a sub-group housed within an expert group requested by the European Council’s Hague Program and convened by the European Commission to assess the European Union’s policy needs for data on crime and criminal justice. In this way, the enduring transnational criminal paradigm subtly structures what labor perspective may most readily graft onto human trafficking law: one focused on migrant labor, one that commandeers labor issues and wraps them in the veil of state security, one that sees migrant labor (abuse) as a threat to state sovereignty. And yet the operational indicators describing trafficked work that emerge from the joint report do not only characterize the kinds of work conditions suffered by migrant workers. In the U.S., as the subsequent section details, they depict large swaths of the landscape of low wage work.

The Delphi method yielded four sets of operational indicators for adult and child victims of labor and sexual exploitation, respectively. Each set is a structured list of indicators that together reveal six dimensions of human trafficking: 1) deceptive recruitment, or deception during recruitment, transfer, and transportation (ten indicators); 2) coercive recruitment, or coercion

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140 Supra note 15.
142 The sole strong indicator of deceptive recruitment for adult labor exploitation is being deceived about the nature of the job, location, or employer. Medium indicators include: deceived about the conditions of work; deceived about content or legality of work; deceived about family reunification; deceived about housing and living conditions; deceived about legal documentation or obtaining legal migration status; deceived about travel ad recruitment conditions; deceived about wages/earnings; and deceived through promises of marriage or adoption. The lone
during recruitment, transfer, and transportation (ten indicators);\textsuperscript{143} 3) recruitment by abuse of vulnerability (sixteen indicators);\textsuperscript{144} 4) exploitative conditions of work (nine indicators);\textsuperscript{145} and 5) coercion at destination (fifteen indicators);\textsuperscript{146} and 6) abuse of vulnerability at destination (seven indicators).\textsuperscript{147}

For each of the identified six dimensions of human trafficking, a combination of strong, medium, or weak indicators can indicate a positive assessment, meaning that the dimension is present for the victim. A positive assessment can include: two strong indicators; or one strong indicator and one medium or weak indicator; or three medium indicators; or two medium indicators and one weak indicator. The final analysis involves combining all six elements to identify victims of human trafficking. Based on the results, migrants are classified as successful migrants (no deception, no coercion, no

weak indicator of deceptive recruitment is being deceived about access to educational opportunities. \textit{Supra} note 15.\textsuperscript{143} The sole strong indicator of coercive recruitment for adult labor exploitation is violence on victims. Medium indicators include: abduction, forced marriage; forced adoption or selling of victim; confiscation of documents; debt bondage; isolation, confinement, or surveillance; threat of denunciation to the authorities; threats of violence against the victim; threats to inform family, community, or public; violence on family (threats or effective); and the withholding of money.\textsuperscript{144} There are no strong indicators of recruitment by abuse of vulnerability for adult labor exploitation. Medium indicators include: abuse of difficult family situation; abuse of illegal status; abuse of lack of education (language); abuse of lack of information; control of exploiters; economic reasons; false information about law, attitudes of authorities; false information about successful migration; family situation; personal situation; psychological and emotional dependency; and relationships with authorities/legal status. Weak indicators number the abuse of cultural/religious beliefs and general context among their ranks. \textit{Id.} \textsuperscript{144} For adult labor exploitation, the strong indicator of exploitative conditions of work is excessive working days or hours. Medium indicators include: bad living conditions; hazardous work; low or no salary; no respect of labor laws or contract signed; no social protection (contract, social insurance, etc.); very bad working conditions; wage manipulation. No access to education is considered a weak indicator. \textit{Id.} \textsuperscript{146} For adult labor exploitation, strong indicators of coercion at destination include: confiscation of documents; debt bondage; isolation, confinement, or surveillance; and violence on the victims. Medium indicators include: being forced into illicit/criminal activities; being forced to perform tasks or take clients; being forced to act against one’s peers; being forced to lie to authorities, family, etc.; the threat of denunciation to authorities; the threat to impose even worse working conditions; threats of violence against victim; being under strong influence; violence on the family (threats or effective); and the withholding of wages. Threats to inform family, community, or public are considered weak indicators. \textit{Id.} \textsuperscript{146} For adult labor exploitation, medium indicators of the abuse of vulnerability at destination include: dependency on exploiters; difficulty to live in an unknown area; economic reasons; family situation; and relationship with authorities/legal status. Weak indicators are difficulties in the past and personal characteristics. \textit{Id.} \textsuperscript{147}
exploitation); exploited migrants (exploitation without deception or coercion); victims of exploitation and deception (without coercion); and victims of trafficking for forced labor (deception, exploitation, and coercion).

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

Interestingly, although the report understands migrant workers to be the paradigmatic face of human trafficking, the acts and harms that give rise to the charge of human trafficking need not result from a worker’s migrant status. In the above example, the abuse suffered by the worker—the conditions of work that merit a charge of trafficked work—could be inflicted upon either a non-migrant worker, an erstwhile legal low wage workers. Where then, is the labor wrong of human trafficking?

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

In the landmark 2009 report Broken Laws, Unprotected Workers: Violations of Employment and Labor Law in America’s Cities, a team of expert policy analysts, researchers, and professors surveyed 4,387 low wage workers in the three largest U.S. cities—Chicago, Los Angeles, and New York City.\footnote{Supra note 21.} By opting for a broad analysis of work conditions across low wage industries and including vulnerable workers often missed in standard surveys, such as unauthorized immigrants and those paid in cash, this report departed from the majority of prior studies in significant ways.

The report found widespread and systematic violations of the most basic workplace protections—the sort assumed to have been long addressed by U.S.
labor law. Among the core labor protections routinely denied U.S. low wage workers are: the right to be paid at least the minimum wage, the right to be paid for overtime hours, the right to take meal breaks, access to workers’ compensation when injured, and the right to advocate for better working conditions.\textsuperscript{149} Wage violations were exceedingly common. Of those surveyed, twenty six percent had been paid below minimum wage the week before; sixty percent of these were underpaid by more than $1 an hour.\textsuperscript{150} One quarter worked more than forty hours per week in “off the clock” unpaid labor; seventy six percent were not paid the legally required overtime rate.\textsuperscript{151} Workers with violations had put in an average of eleven hours underpaid or unpaid overtime.\textsuperscript{152} Moreover, of the tipped workers surveyed, thirty percent were not paid the tipped worker minimum wage, which is lower than the minimum wage in Illinois and New York.\textsuperscript{153}

Workers were also subjected to long working hours, at times without pay.\textsuperscript{154} One quarter of surveyed workers exceeded their work shift.\textsuperscript{155} Seventy percent of these received no pay for extra work.\textsuperscript{156} In California, Illinois and New York, workers are required to receive documentation of their earnings and deductions, regardless of whether they are paid in cash or by check. Fifty seven percent of workers in the sample did not receive this mandatory documentation; forty one percent of those surveyed also reported illegal employer deductions for damage or loss of work-related tools or materials or transportation.\textsuperscript{157}

When low wage workers attempted to assert their labor rights, legal processes failed them. One in five workers surveyed reported either filing a complaint or attempting to form a union in the last year.\textsuperscript{158} Of those, forty three percent experienced one or more forms of retaliation, including termination or suspension, threats to cut hours or pay, and threats to call immigration authorities.\textsuperscript{159} Another twenty percent did not make a complaint even after suffering a serious workplace problem (e.g., no minimum wage, dangerous working conditions).\textsuperscript{160} Fifty percent refrained due to fear of termination.\textsuperscript{161} Ten percent feared hour and wage cuts, while thirty six percent

\textsuperscript{149} Id.
\textsuperscript{150} Id. at 21.
\textsuperscript{151} Id. at 21-22.
\textsuperscript{152} Id. at 22.
\textsuperscript{153} Id. at 3.
\textsuperscript{154} Id. at 2-3.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 3.
\textsuperscript{158} Id. at 24-35.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
thought it would make no difference.\footnote{Id.}

This brief account of U.S. low wage work conditions evinces the continuities between erstwhile legal low wage work and the kind of exploitative work that meets the legal definition of trafficked work. In this way, the new low wage labor/vulnerable paradigm demonstrates how, depending on the context, anti-human trafficking law may cast a net wide enough to include a significant portion of workers within the U.S. low wage labor market. This is significant because it taps into the crisis inherent to human trafficking law itself: the crisis between envisioning the act of human trafficking as befalling certain individuals and understanding human trafficking as rooted in collective labor exploitation that does not discriminate by citizenship status.

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

V.
RETHINKING SLAVERY, FORCED LABOR, AND EXPLOITATION

This Part argues against the conflation of human trafficking with slavery. At the same time, it recognizes how, and in response to the global expansion of capitalism in the 1990s, new interpretations of slavery and human trafficking law have upturned prior distinctions between owning and exploiting a person. While a full assessment of slavery law is beyond the focus of this Article, the following sections track flashpoints in the legal trajectory of enslavement in the 21st century. In particular, this Part describes how, in an age with little de facto slavery, contemporary international slavery judgments have reconfigured the meaning of “ownership” by incorporating acts under the rubric of slavery that
more closely resemble force or coercion—hallmarks of forced labor. This reformulation suggests, as I discuss below, that the low wage/vulnerable labor paradigm is conceptually consistent with debates ongoing in slavery law proper. In other words, the new paradigm’s placement of working conditions, not movement/recruitment, at the heart of the offense does not introduce new difficulties in debates about how to distinguish severe instances forced labor from slavery. Instead, by distancing human trafficking from a slavery paradigm, the new low wage/vulnerable labor paradigm preserves the legal integrity of slavery by expressly locating the wrong of human trafficking in the exploitation of worker vulnerability through the imposition of poor labor and employment conditions, and thus clearly differentiating lesser exploitation from slavery proper.

A. The Relationships Between Slavery and Human Trafficking

Human trafficking’s definitional problems first necessitate the establishment of its wrong, and then an analysis of how the proffered wrong impacts debates within slavery law that concern the boundaries between slavery and forced labor. Control and ownership lie at the heart of internationally accepted definitions of slavery. Article 1(1) of 1926 the Slavery Convention establishes the benchmark definition of slavery: “Slavery is the status or condition of a person over whom any or all of the powers attaching to ownership are exercised.”

Generally speaking, the wrong of slavery lies in treating a person as one would treat property, like a thing—of exerting ownership when no legal right to

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163 See Holly Cullen, Contemporary International Legal Norms on Slavery, in THE LEGAL UNDERSTANDING OF SLAVERY (ed. Jean Allain, 2012) (arguing that contemporary slavery is largely de jure slavery and that control that amounts to ownership—not coercion—should be the criteria by which slavery is determined).

164 The classic understanding of ownership holds that it is not a single, unified thing, but rather a collection of severable incidents (or powers) that can be divided between and amongst multiple owners. See A.M. Honoré, Ownership, in OXFORD ESSAYS IN JURISPRUDENCE 107, 112–28 (A. G. Guest ed., 1961) (describing eleven incidents of ownership: the right to possess, the right to use; the right to manage; the right to income; the right to capital; the right to security; transmissibility; absence of term; prohibition of harmful use; liability to execution; and residuary character.).

165 Supra note 7. See also The Rome Treaty of the International Criminal Court, Article 7(2)(c)., Rome Statute of the International Criminal Court, UN. Doc. A/CONF.183/9, 17 July 1998 (defining enslavement to mean “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, particularly women and children.”).
ownership exists.\(^{166}\) This understanding of slavery, coupled with the Thirteenth Amendment’s prohibitions against slavery and involuntary servitude,\(^{167}\) established the initial operational and conceptual parameters of 2000’s Trafficking Victims Protection Act (TVPA).\(^{168}\) How we have defined the wrong of human trafficking, however, contributes to the question of what acts constitute slavery by bearing of what comprises “any or all of the powers attaching to ownership.”

Initially, human trafficking was construed through a criminal gender violence paradigm—one that emphasized sex sector human trafficking. In this view, even consensual commercial sex acts could be deemed “sexual slavery” because the sexual self, in this view, could neither be owned nor alienated.\(^{169}\) In contrast, the Obama Administration explicitly understands human trafficking as embedded in the historical trajectory of U.S. slavery as a social institution. Louis CdeBaca, the current U.S. Ambassador-at-Large to Monitor and Combat Human Trafficking in Persons, explains the trajectory of slavery and human trafficking as follows:

> In the wake of the Civil Rights Movement, there was a perception that the problem of slavery, of sharecropping, was a thing of the past. And, quietly, the abusers were bringing in immigrants to replace the African American community [...] The involuntary

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\(^{166}\) See R.M. Hare, *What is Wrong with Slavery?* 8 PHIL. & PUB. AFFAIRS 103 (1979) (arguing that even if slavery can be justified through a utilitarian calculus in an imaginary case, it is still wrong because it almost always causes misery in the actual world).

\(^{167}\) “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” *U.S. Const. art. XIII, § 1.*

\(^{168}\) Additionally, if the 1926 Slavery Convention rendered the suppression of slavery a standard of civilization that no state may abrogate, the presence of forced labor has historically had less bearing on the international assessment of a state’s civility. As Viscount Cecil of Chelwood, the British Delegate to the League of Nations and the primary drafter of the 1926 Slavery Convention noted, “I do not think that there is any nation, civilized or uncivilized, which does not possess powers enabling the Government, for certain purposes and under certain restrictions, to require forced or compulsory labor on the part of its citizens.” While the instant examples of mandatory military service and prison labor come to mind, the 1926 Slavery Convention’s demarcation between the absolute proscription of slavery and the more flexible approach to forced labor has resonated far beyond these practices, shaping our understanding and approach to human exploitation to this day. League of Nations, *Question of Slavery: Report of the Sixth Committee: Resolution, League of Nations Official Journal* (Special Supplement 33) Records of the Sixth Assembly: Text of Debates, Nineteenth Plenary Meeting, 26 September 1925, 156-157.

\(^{169}\) *Supra* note 65.
servitude and slavery program had been a little bit on the back burner during the '70s and '80s because of the gains of the Civil Rights Movement. And, then, by the '80s and '90s, we were starting to see—whether it was Guatemalans, or Mexicans or others—suffering often in the same farms in the American South picking tomatoes, cucumbers, onions.¹⁷⁰

The Obama Administration’s embrace of “modern slavery” is thus presented as a corrective to the prior administration’s overwhelming emphasis on sex sector human trafficking, one capable of addressing the egregious abuses that continue to afflict vulnerable workers in the post-Civil Rights U.S.—one that takes up the mantle against new iterations of slavery. Proponents of this line of thinking applaud not only its renewed attention to non-sex sector exploitation, but also the subject of that exploitation: migrant workers. Even those who are skeptical of the turn towards the explanatory power of slavery embrace efforts to assuage and address the plight of migrant workers, albeit through a labor paradigm.¹⁷¹

While a slavery paradigm is not the best or most accurate approach to establishing the wrong of human trafficking, it would be a mistake to see “new abolitionism” arising in necessary opposition to a broader low wage/vulnerable labor approach. The impulse to do so derives from an understanding of slavery as an antiquated legally sanctioned practice that is no longer reflected by the inner workings of our contemporary globalized economy. Instead, contemporary international judgments on slavery suggest that the lines between slavery, force labor, and exploitation, generally are much more porous.

The impulse to resurrect not merely slavery, but in particular the U.S. historical and legal experience of slavery as a leitmotif for human trafficking is a real, if at times inchoate, attempt to grapple with the new realities of global labor exploitation—to revisit and push back against one of the central tensions of slavery law: its tendency to “equate collective forms of oppression (political repression, racial discrimination and exclusion, etc.) with an individual relationship between a master and a slave.”¹⁷² “Modern slavery” is a push towards recognition of the routinized, systemic face of modern labor exploitation. For legal scholars, the persistence of the term modern slavery in


¹⁷¹ See, e.g., Chuang *supra* note 5.

the context of human trafficking should urge a revisiting of what acts convey ownership tantamount to slavery.\textsuperscript{173}

What slavery signifies—what the ownership of another entails—has, I argue, been retooled by contemporary human trafficking law for a 21\textsuperscript{st} century global economy, driven by vulnerable and low wage labor. By setting human trafficking, slavery, and labor together through the TIP Office’s equation of forced labor with human trafficking and all human trafficking with slavery, the Obama Administration has resurfaced longstanding debates regarding the relationships between labor, contract principles, ownership and property, and the meaning of freedom.

For example, recent Equal Employment Opportunity Commission cases that prosecute labor sector human trafficking as Title VII race and national origin discrimination are indicative of this point, while as of yet too few in number to be truly significant.\textsuperscript{174} In four cases, of which two have been successful, the EEOC has adopted the language of human trafficking as slavery and used it to construe human trafficking as Title VII race, national origin, and sex employment discrimination in a series of class action suits geared towards addressing the systemic abuse of vulnerable workers’ civil rights at U.S. worksites. This emerging case law illustrates some of the conceptual risks of understanding human trafficking within the U.S. model of slavery. In these cases, the severe racial and discriminatory core of slavery as a crime and

\textsuperscript{173} In another project, I explore this complex of issues.

\textsuperscript{174} These EEOC human trafficking cases, some of which were initially filed during the Bush administration, have gained traction as a crucial component of the EEOC’s Strategic Enforcement Plan (SEP) for 2013-2016. The SEP sets the direction of the EEOC, establishing EEOC priorities and identifying where it will invest the bulk of its resources and efforts to combat workplace discrimination, inequality, and injustice, of which human trafficking is but one component of a range of abuses that trouble low wage workers. The 2013-2016 SEP in part “target[s] disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers,” demonstrating that large class discrimination suits that include workers who have been trafficked may be no flash in the pan, but a sign of litigation to come. See EEOC, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, FY 2013-2016, http://www.eeoc.gov/eeoc/plan/sep.cfm. See also Chellen et al. v. John Pickle, Inc. 334 F. Supp.2d 1278 (N.D Okla. 2004) and 446 F. Supp.2d 1247 (N.D. Okla. 2006) ((involving Title VII race and national origin discrimination claims for the hiring of East Indian migrant workers for employment in a joint venture between John Pickle Co. and a Kuwaiti company); EEOC v. Trans Bay Steel, 06-cv-07766 (C.D. Cal. filed Dec. 8, 2006) (involving Title VII race and national origin discrimination claims for 48 Thai welders on H-2B visas); EEOC v. Global Horizons, 860 F.Supp.2d 1172 (2012) (involving Title VII race and national origin discrimination claims for 300-600 Thai workers on H2-A visas); EEOC v. Signal International (involving Title VII race and national origin discrimination claims for 400 Indian nationals on HB-2 visas).
experience pull attention, again, towards migrant workers, who are racialized as the “new slaves.” This contributes, again, to a hyper-focus on the most extreme forms of migrant exploitation, failing to capture the more mundane, yet equally prohibited exploitation that affects migrant and non-migrant workers.

The new low wage/vulnerable labor approach can be understood as a correction to the excesses of the TIP Offices approach—as a necessary recalibration of legal norms in the wake of post-1990s globalization and technological change. Much as the concept of labor law itself emerged from the failure of traditional contract principles to produce a desirable balance between individual autonomy and economic distributive results in the aftermath of the industrial revolution, the new low wage/vulnerable labor paradigm may be viewed as another turn of the wheel.

Recent slavery case law bears out this claim, illuminating how ambiguities that now inhere within slavery law itself complicate its meaning and scope in ways that precede, presage, but also implicate human trafficking legal discourse. As I’ll discuss, recent international judgments have undermined the boundary between slavery and forced labor. Further, as human rights courts have begun to hear slavery disputes, the framing of the issue has shifted from the traditional calculus of whether an individual engaged in the proscribed act of owning or controlling another person, in favor of an approach that evaluates whether the individual right to be free of slavery has been compromised due to failures of state.\(^\text{175}\) In other words, while human rights approaches to slavery still focus on the individual harm, they have also enhanced the political profile of slavery by holding states accountable for its occurrence in highly public ways—and they have done so at a time when the line demarcating slavery from forced labor has weakened.

A new low wage/vulnerable labor paradigm will help make sense of these shifts. What the new low wage/vulnerable labor paradigm offers is another angle on the slavery debates—one where the notion of control or ownership moves beyond individual bad actors, individual freedoms, or identity-based equality frames. From the start, this Article has argued that the sum of anti-human trafficking efforts amount to an unacknowledged and under-theorized account of human trafficking’s wrong as rooted in the vagaries of low wage and vulnerable labor. Recognizing human trafficking’s wrong as a low wage/vulnerable labor wrong feeds calls by labor law scholars to broaden the scope of the discipline beyond employee/employer relationships and the work enterprise to labor markets more generally.\(^\text{176}\) This approach shows promise

\(^{175}\) See Siliadin v. France, App. 73316/01, 26 (ECtHR, July 2005); Rantsev v. Cyprus and Russia, App. 25965/04 (ECtHR, 7 January 2010); Case of the Ituango Massacres v. Colombia, judgment of July 15, 2005; Case of Montero-Araguren v. Venezuela, judgment of July 5, 2006.

\(^{176}\) New conceptualizations of labor law integrate its historical mission to protect and regulate economies with the contemporary realities of global markets and
for moving human trafficking debates beyond the individualistic lens of human rights and discrimination approaches that currently characterize the slavery approach.

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

If one were of the opinion that slavery was largely a relic of the past, a survey of twentieth century international judgments on slavery would do little to dispel that notion. The twentieth century witnessed only one international judgment that touched on slavery—the 1905 *Muscat Dhows* case.\(^{177}\) Renewed popular and legal interest in the subject only converged in the first decade of the 21st century, when “sex slavery” in the former Yugoslavia and the wave of global labor migrations spurred by the ascent of global capitalism in the aftermath of the Cold War led to the passage of the first anti-human trafficking instruments in roughly 60 years.\(^{178}\) Subsequently, a spurt of slavery cases appeared on the international scene, resulting in decisions by the International Criminal Tribunal for the Former Yugoslavia,\(^{179}\) the European Court of Human Rights,\(^{180}\) the ECOWAS Community Court of Justice,\(^{181}\) and the Special Court for Sierra Leone.\(^{182}\)

The creation of our contemporary anti-human trafficking legal regime accompanied and abetted this surge in international legal attention to slavery. Anti-human trafficking provisions not only kept international interest in slavery alive, but enabled the public interrogation of the meaning and scope of slavery

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\(^{178}\) See infra. See also Siddarth Kara, *Sex Trafficking: Insider the Business of Modern Slavery* (2008); *Interview with Siddarth Kara, Author of Sex Trafficking*, COLUMBIA UNIVERSITY PRESS, http://cup.columbia.edu/static/siddartha-kara-interview ("Abolitionists must also not forget that powerful macroeconomic forces unleashed during the process of economic globalization in the post–Cold War era have been more responsible than any other force for the unforgivable rise in contemporary slavery.").


\(^{180}\) *Siliadin v. France*, supra note 159; *Rantsev v. Cyprus and Russia*, supra note 159.


\(^{182}\) Brima et. al case, Special Court for Sierra Leone, Appeals Chamber, Judgment, SCSL-2004-16-A, 22 February 2008.
and other types of exploitation to occur not only internationally, but domestically. Jean Allain has called these developments the “renaissance of the legal definition of slavery.”

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

The 2002 International Criminal Tribunal for the Former Yugoslavia (ICTY) case, the Prosecutor v. Kunarac et. al, confirmed on appeal, was the first contemporary international decision on slavery. At this time, the early dominance of “sex trafficking” as the primary descriptor of human trafficking, aided in ushering slavery proper into the juridical spotlight. Simultaneously, the equations between sex sector human trafficking and slavery were fed by the new slavery international judgments. In Kunarac, Serbian militia members were charged with enslavement as a crime against humanity under Article 5(c) of the ICTY statute, pursuant to their roles in the infamous “rape camps” of

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185 *Supra* note 179.


187 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the
Foca. Kunarac set the standard for subsequent tribunal and international legal treatments of slavery in ways that muddied the boundaries between slavery and forced labor. With no definition of slavery provided by the ICTY charter, the Trial Chamber II judgment lists acts that might constitute enslavement. The listed acts, however, contained language reflecting both ownership (slavery) and coercion (forced labor). The Kunarac decision’s indications of enslavement include, it states, “elements of control and ownership.”

This ambiguity is mirrored in the more recent International Criminal Court case regarding sexual slavery, Prosecutor v. Katanga. In this instance, the ICC Pre-Trial Chamber declared that sexual slavery, consistent with the Rome Statute and UN Rapporteur McDougall’s characterization, could be regarded as a particular form of enslavement, yet still referenced forced labor and servile status. Although the Pre-Trial Chamber’s judgment contains language concerning rights of ownership, the primary focus is on deprivation of liberty, sexual and otherwise. This brief survey of some relevant slavery law demonstrates how the slipperiness between slavery and forced labor does not

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188 “Under this definition, indications of enslavement include elements of control and ownership: the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labor or service, often without remuneration and often, although not necessarily, involving physical hardship; sex; prostitution; and human trafficking...The ‘acquisition’ or ‘disposal’ of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of the case, usually not constitute enslavement.” Case No.IT-96-23 T and IT-96-23/1, Judgment of the Trial Chamber II, 22 February 2001.

189 Id.


191 Supra note 186.

192 Supra note 190, at (n 29) 430.

193 For a more in depth discussion, please see Cullen supra note 163.
result solely from difficulties within human trafficking legal discourse, but from shifting perspectives of the wrong of slavery and who or what should be held responsible for providing redress.

C. Differentiating Slavery, Forced Labor, and Other Exploitation: The Potential of the New Low Wage/Vulnerable Labor Paradigm

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

CONCLUSION

Contra the standards adopted by international agencies and other federal departments, the U.S. TIP Office has attempted to 1) absorb forced labor beneath the banner of human trafficking via an abandonment of any movement/recruitment requirement for a charge of human trafficking, and 2) simultaneously reconceptualize all human trafficking as slavery. These transformations in law have occurred as an international push to incorporate a labor perspective in human trafficking law has taken root. This emergent labor perspective, which uses migrant labor as a template, understands that the accumulation of poor labor conditions, which individually might simply constitute discrete labor violations, can cross the threshold into human trafficking.

The naming of human trafficking as modern slavery, while signaling the gravity of the act, fails to provide a full account of why all acts proscribed by anti-human trafficking law, at the center and at the margins, are wrong. Moreover, the emerging labor migration paradigm, while usefully identifying human trafficking as a labor issue, analytically limits the would-be structural scope of a labor analysis of human trafficking by construing its wrong as an equality or autonomy wrong suffered by migrant workers. This labor migration perspective focuses on affording migrant workers the same protections as non-migrant workers in order to end exploitation.
However, neither the slavery nor the labor migration approach describes the full range of exploitative acts prohibited by primary anti-human trafficking instruments. Less severe exploitation, including the accumulation of poor labor conditions that individually would not constitute actionable exploitation, are also proscribed—and largely neglected. This discretionary oversight has left many migrant \textit{and} non-migrant low wage and vulnerable workers whose conditions of work might meet the requirements for a charge of human trafficking outside of legal analysis or attention.

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

Approaching human trafficking law through the new low wage/vulnerable labor paradigm not only provides a coherent theory of \textit{why} all acts able to be prosecuted as human trafficking are wrong, it also helps preserve the legal integrity of one of the most serious violations recognized by law: slavery. For these reasons, a theoretical exploration of the wrong of human trafficking is necessary to halt the continuously shifting interpretations of its legal definition. Settling the wrong of human trafficking will help establish a more cohesive understanding of the problem. Doing so will provide us with firm ground to oppose human trafficking and forestall the misery exploitation brings to workers at home and around the world.